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22nd June, 2020

ENGLISH COURT'S INTERPRETATION WITH REGARD TO SEAT AND VENUE OF ARBITRATION

1. Naveira Amazonica Peruana S.A. vs. Compania Internacional De Seguros Del Peru, 10.11.1987, 1988 (1) Lloyds Rep 116, Relevant Pages 7 to 8

- The law of private arbitration is concerned with the relationship between the courts and the arbitral process.
- The question raised in the case was whether there was only one place of arbitration.
- The Court held International commercial arbitration often involves people of many different nationalities, from many different countries.
- In these circumstances, it is by no means unusual for an arbitral tribunal to hold meetings or even hearings in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses.
- In such circumstances each move of the arbitral tribunal does not of itself mean that the seat of the arbitration changes.
- The seat of the arbitration remains the place initially agreed by or on behalf of the parties.
- In this case, as per the arbitration agreement Courts in London had jurisdiction.
- However exclusive jurisdiction as per contract was Peru.
- The Court held that the seat of arbitration was London as per the arbitration agreement. Therefore the Courts in London will have jurisdiction.

A copy of the judgment attached hereto at **page no. 2 to 9.**

2. Union of India v McDonnell Douglas Corp, 22.12.1992, [1993] 2 Lloyd's Rep. 48, Relevant Page 10

- In the present case the contract was to be governed by the Indian Arbitration Act, 1940.
- However it was decided the seat of arbitration was to be London.
- A dispute arose whether Indian law, under the 1940 Act, or English law, as the place of the seat, was to govern the proceedings.
- The Court held by usage of the word 'seat' the parties had chosen English law to govern the arbitration proceedings and the reference to "conducted" had the effect of contractually importing from the Indian Arbitration and Conciliation Act, 1940 those provisions which were concerned with the internal conduct of their arbitration and which were not inconsistent with the choice of English arbitral procedural law.

A copy of the judgment attached hereto at **page no. 10.**

3. Braes of Doune Wind Farm (Scotland) Ltd. v Alfred McAlpine Business Services Ltd., 13.02.2008, [2008] EWHC 426 (TCC), Relevant Pages 15 to 16

- In the present case the arbitration agreement was subject to English Law and the agreement stated that the seat of the arbitration shall be Glasgow, Scotland.
- The Contractor argued that the seat of the arbitration was Scotland whilst the Employer argued that it was England.
- The Court held that the parties' by express agreement decided the "seat" of arbitration was to be Glasgow, Scotland which must relate to the place in which the parties agreed that the hearings should take place.
- However, by all the other references the parties were agreeing that the curial law or law which governed the arbitral proceedings was that of England and Wales.
- The Court held the seat of the arbitration would be England.

A copy of the judgment attached hereto at **page no. 11 to 20.**

4. Enercon GmbH v Enercon (India) Limited, 23.03.2012, 2012 EWHC 689 (Comm), Relevant Pages 45 to 46

- The dispute in the present case was between German and Indian parties.
- The venue of the arbitration proceedings was in London.
- The parties were governed by the Indian Arbitration and Conciliation Act, 1996.
- The Court held although the word "venue" was not necessarily synonymous with seat.
- It appeared to the Court that in the context of this particular clause, the parties' agreement that the venue shall be London was and could properly only be a reference to London as the "seat".
- It was also stated that London was chosen simply as a convenient geographical venue for the parties cannot be believed.
- London was chosen because it was a neutral venue.
- The parties were anchoring the whole arbitration process in London right up to and including the making of an award.
- The place designated for the making of an award was a designation of seat.
- The Court therefore held that London shall be the seat of the arbitration.
- However, the Indian Supreme Court, in Enercon India, on the same facts and pertaining to the same contract, found that the seat was in Delhi, since the contract provided that the (Indian) Arbitration and Conciliation Act, 1996 applied to the proceedings.

A copy of the judgment attached hereto at **page no. 21 to 51.**

5. Process & Industrial Developments Limited v The Federal Republic of Nigeria, 16.08.2019, [2019] EWHC 2241 (Comm), Relevant Pages 71 to 72

- In the present case it was decided that the Agreement shall be governed by, and construed in accordance with the laws of the Federal Republic of Nigeria.
- The venue of the arbitration proceedings was in London or otherwise as agreed by the parties.
- The Court held that if the reference to venue was simply to where the hearings should take place, this would be an inconvenient provision and one which the parties would unlikely to have intended.
- The reference to the "venue" as being London or otherwise as agreed between the parties, was to be better read as providing that the seat of the arbitration to be England, unless the parties had agreed to change it.
- The Court held that the seat of arbitration was London.

A copy of the judgment attached hereto at **page no. 52 to 76.**

Naviera Amazonica Peruana S.A. v Compania Internacional De Seguros Del Peru

1985 N No. 2260

In the Supreme Court of Judicature

Court of Appeal (Civil Division)

On Appeal from the High Court of Justice

Queen's Bench Division

Commercial Court

10 November 1987

1988 WL 622500

Lord Justice Kerr Lord Justice Russell and Sir Denys Buckley

Tuesday 10th November 1987

Representation

MR. PETER GROSS (instructed by Messrs. Ince & Co., Solicitors, London EC3R 5EN) appeared on behalf of the Plaintiffs (Appellants).

MR. IAIN MILLIGAN (instructed by Messrs. Hill Dickinson & Co., Solicitors, London EC3A 7LP) appeared on behalf of the Defendants (Respondents).

JUDGMENT

LORD JUSTICE KERR:

This is an appeal from a judgment of Mr. A.E. Diamond, Q.C., sitting as a deputy judge of the Queen's Bench Division, delivered on 4th August 1986. The case arises out of a dispute between a Peruvian insurance company (the insurers) and a Peruvian shipowning company (the shipowners) under a hull policy covering four vessels classed with different Classification Societies in America, Europe and Japan. The policy was dated 20th September 1982 and insured the vessels against marine risks under various American and other Institute Clauses and certain printed General Conditions. The premiums were stated in US dollars. The terms of the cover were varied by an indorsement dated 18th October 1982. This contained an arbitration clause which has given rise to these proceedings. When the policy expired on 31st August 1983 a disagreement arose as to what the renewal premiums should be. The shipowners considered the quoted rates too high, but the insurers said that they were reasonable and in any event governed by the rates obtainable from their reinsurers. It was then agreed that the vessels should be held covered on a monthly basis on the same terms save as to premium, and this arrangement remained in force until the

end of February 1984. The substantive dispute between the parties is simply: what was a reasonable rate of premium for each of these four vessels during this period of six months?

The present proceedings are however solely concerned with a procedural dispute arising out of the arbitration clause in the indorsement. The issue is whether its effect, in the context of the policy as a whole, is to provide for disputes under the policy – including the present substantive dispute – to be resolved by arbitration in London or Lima. Or, to put the same point in forensic jargon, does this policy contain a London or a Lima arbitration clause? Or, to state the issue as formally as the present appeal requires: was the agreed "seat" or "forum" or "locus arbitri" (to use the main terms commonly found in the literature on this topic) of any arbitration under this policy to be London or Lima? However, the problem about all these formulations, including the third, is that they elide the distinction between the legal localisation of an arbitration on the one hand and the appropriate or convenient geographical locality for hearings of the arbitration on the other hand. In the present case it is clear that the failure to draw this distinction caused confusion below, and it must be stressed at the outset that the submissions on this appeal were different. That is apparent from the fact that this highly experienced deputy judge rightly held that this was a London arbitration clause, in the sense that any arbitration under the policy was to be governed by English law in every respect, but nevertheless concluded that any arbitration under the policy was to be held in Lima.

Such a situation appears to have no precedent in any reported case. The possible consequences of an agreement to arbitrate in country X subject to the laws and procedures in force in country Y have been discussed by a number of writers, and some of the relevant material is mentioned below. But the judge was evidently not referred to the implications of this conclusion. In the result, while rightly holding that the parties had agreed that any arbitration under the policy was to be governed by English law, he refused an application for the appointment of an arbitrator pursuant to the Arbitration Act 1950 , because in his view the parties had also agreed that any arbitration under the policy was to be held in Lima. In effect, he held that Lima was the agreed forum, but that the agreed lex fori was English. This conclusion was challenged as untenable by Mr. Gross on behalf of the appellant shipowners, who had not appeared below. On behalf of the insurers Mr. Milligan valiantly sought to support it, although he obviously had great difficulty in explaining how a Lima arbitration governed by English law would work out in practice. We reserved judgment because the implications of a possible split between the procedural or "curial" law of an arbitration on the one hand, and its "seat" on the other, are of general interest and have been much discussed in the literature.

I then turn to the facts and issues.

The policy, the General Conditions incorporated in it and the subsequent typed indorsement were all in Spanish. But both parties and the court sensibly worked on the basis of agreed rough translations of the few provisions which matter. These are no doubt imperfect and in one instance uncertain, but they cannot affect the conclusion.

There is no need to refer to the terms of the policy. Apart from identifying and describing the four ships and stating the original premiums, the policy merely incorporated the text of the American and other Institute clauses by reference. Of the printed "General Conditions" it is only necessary to refer to the following. First, Article 1 provided that in the event of any conflict between the printed and typed stipulations, the latter were to prevail. Secondly, Article 31 provided:

> "Whatever the domicile of the Insured, in the event of judicial dispute he accepts, from now on, the jurisdiction and competence of the City of Lima, without any reservation of any nature."

One then comes to the terms of the typed indorsement. Paragraph 1(1) provided that "the English clauses shall prevail over the General Conditions printed in the policy" . This must have been a reference to the English text of the American and other Institute clauses incorporated in the cover and is of no direct relevance for present purposes. Paragraph 2 provided that certain parts of the General Conditions (which did not include Articles 1 and 31) should be without effect and is equally irrelevant. The Spanish wording of paragraph 3 was: "Las Liquidaciones de Averia se realizaran en Londres" . The judge thought that this meant that general average settlements were to take place in London. I think that it may refer to the settlement of claims under the policy. However, for present purposes the correct translation is again irrelevant. One then comes to the crucial words:

> "Arbitraje bajo las Condiciones y Leyes de Londres".

The working translation was "Arbitration under the conditions and laws of London" .

"Conditions" is obviously not an idiomatic translation. But in the context of "laws" it must have been intended to refer to the procedural rules in force in London. Indeed, as explained hereafter, there is a sound legal distinction between substance and procedure even in this context. The judge interpreted this provision as follows:

> "The clause, in my view, provides that the obligation to arbitrate shall be governed by English law; also, probably, that the procedural law of any arbitration shall be English law."

Subject to omitting the word "probably" I entirely agree. This was plainly, and perhaps unusually explicitly, a London arbitration clause. Mr. Milligan challenged this on behalf of the insurers by the ingenious submission that the clause did not apply to the law and procedure governing the arbitration, but that it was directed to English insurance law and practice. He read it as though it had stated, in effect: "Any dispute is to be settled by arbitration on the basis of English insurance law and practice" . This was rightly rejected by the judge and does not appear to be a construction which had occurred to either of the parties.

When it became clear that their disagreement about the appropriate rates of premium during the period in question would have to be resolved by arbitration, it also emerged that the parties were in dispute as to whether – in the lay sense – the arbitration should be held in London or Lima and – in the legal sense – whether the courts in London or Lima were the competent courts in relation to the arbitration. So both parties instituted legal proceedings. On 11th September 1985 the shipowners issued an originating summons claiming (i) a declaration that the insurance policy provided for disputes to be referred to arbitration in London, and (ii) an order for the appointment of an arbitrator pursuant to section 10 of the Arbitration Act 1950 . The judge refused to grant the declaration under (i) and therefore concluded that (ii) did not arise. The shipowners now appeal against both these conclusions. In the interim, however, the insurers had issued proceedings in the court of first instance in Lima on 13th December 1985 for an order seeking to compel the shipowners to submit the substantive dispute to arbitration in Lima. We have not seen any documents relating to these proceedings and they have not so far led to any decision.

Before coming to the crux of the issues which arise on this appeal I must digress for a moment to mention a further procedural dispute which logically precedes the present issue. In order to bring the insurers before the English courts, for the purposes of claiming the declaration and the order for the appointment of an arbitrator, the shipowners had to obtain leave to serve the insurers out of the jurisdiction under O.11 . Their only basis for doing so was the contention that the agreement to arbitrate was governed by English law, and

accordingly within Rule 1(i)(f) of this Order. Leave to serve the proceedings on the insurers in Lima was duly granted ex parte by Bingham J. (as he then was). However, the insurers then countered by the issue of a summons pursuant to O.12 r.8 to set aside the ex parte order or to stay the proceedings pursuant to the court's inherent jurisdiction. Their contention was that all aspects concerning the agreement to arbitrate were governed by the law of Peru. But the judge rightly rejected this preliminary contention in the light of the provision in the indorsement “arbitration under the conditions and laws of London” . I have already cited what he said in this connection. He therefore dismissed the insurers' counter-summons, and Mr. Milligan ultimately accepted – in my view rightly and inevitably – that there was no point in seeking to cross-appeal against that part of the judge's decision.

Before considering the correct construction of this particular contract on the question whether the “seat” (or whatever term one uses) of any arbitration thereunder was agreed to be London or Lima, or – to put it colloquially – whether this contract provided for arbitration in London or Lima, I must summarise the state of the jurisprudence on this topic and deal with the general submissions which were debated on this appeal. In that connection we were referred to Oppenheim & Co. v. Mahomed Haneef (1922) 1 Appeal Cases 482 at p.487 ; James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd. (1970) Appeal Cases 583 , in particular per Lord Wilberforce at pp.616, 617; Black Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G. (1981) 2 Lloyd's Reports 446 per Mustill J. (as he then was) at p.453 ; Dicey & Morris on The Conflict of Laws (11th ed.) vol. 1, Rule 58 at pp.539 to 542; Mustill & Boyd on Commercial Arbitration, passim; D. Rhidian Thomas “The Curial Law of Arbitration Proceedings” , Lloyd's Maritime and Commercial Law Quarterly (1984) 491; and Redfern and Hunter “The Law and Practice of International Commercial Arbitration” (1986) at pp. 52 to 70. In addition, among many other publications one should mention the two important earliest and most recent discussions of this topic; first Dr. F.A. Mann's “Lex facit arbitrium” in 1967, reprinted in Arbitration International, 1986, vol.2 p.241, and now “The new lex mercatoria” by Lord Justice Mustill in Bos and Brownlie's “Liber Amicorum for Lord Wilberforce” (1987) at p.149.

Without analysing any of this material in detail, the conclusions which emerge from it can be summarised as follows:

> A. All contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law. (1) The law governing the substantive contract. (2) The law governing the agreement to arbitrate and the performance of that agreement. (3) The law governing the conduct of the arbitration. In the majority of cases all three will be the same. But (1) will often be different from (2) and (3). And occasionally, but rarely, (2) may also differ from (3).
>
> In the present case there was no investigation of (1), the substantive law, because nothing turns on it, but I am content to assume that this was the law of Peru on the ground that this was the system with which this policy was most closely connected. On this appeal there was also ultimately no contest about law (2) which may be regarded as the substantive law of the agreement to arbitrate. The judge rightly held that on the wording of the arbitration clause the parties had agreed expressly that their agreement to arbitrate should be subject to English law and that the leave granted under O.11 to serve the insurers out of the jurisdiction had been correct on this ground. Accordingly, the entire issue turned on law (3), the law governing the conduct of the arbitration. This is usually referred to as the curial or procedural law, or the lex fori.
>
> B. English law does not recognise the concept of a “de-localised” arbitration (see Dicey & Morris at pp.541, 542) or of “arbitral procedures floating in the transnational

firmament, unconnected with any municipal system of law" (Bank Mellat v. Helliniki Techniki S.A. (1984) Queen's Bench 291, 301 (Court of Appeal)). Accordingly, every arbitration must have a "seat" or locus arbitri or forum which subjects its procedural rules to the municipal law which is there in force. This is what I have termed law (3).

C. "Where the parties have failed to choose the law governing the arbitration proceedings, those proceedings must be considered, at any rate prima facie, as being governed by the law of the country in which the arbitration is held, on the ground that it is the country most closely connected with the proceedings" : see Dicey & Morris Vol.1 at p.539 and the references to the approval of this classic statement by the House of Lords in Whitworth Street Estates v. James Miller (supra). Or, to quote the words of Mustill J. in the Black Clawson case (supra) at p.453 where he characterised law (3) as "the law of the place where the reference is conducted: the lex fori" . Although Mr. Milligan contested this, I cannot see any reason for doubting that the converse is equally true. Prima facie, i.e. in the absence of some express and clear provision to the contrary, it must follow that an agreement that the curial or procedural law of an arbitration is to be the law of X has the consequence that X is also to be the "seat" of the arbitration. The lex fori is then the law of X, and accordingly X is the agreed forum of the arbitration. A further consequence is then that the courts which are competent to control or assist the arbitration are the courts exercising jurisdiction at X.

Prima facie, therefore the forum of any arbitration which might arise under this policy was London, since the arbitration clause provided, in effect, that the law in force in London was to be the curial or procedural law of any such arbitration.

D. In the light of some of the matters debated before us it may be helpful to add that in my view none of these principles is different in relation to "institutional" arbitrations, such as those conducted under the rules of the International Chamber of Commerce or the London Court of International Arbitration. The relevant rules of such bodies are incorporated by reference into the contract between the parties, and their binding contractual effect will be respected and enforced by the courts of the forum, except in so far as they may conflict with the public policy or any mandatory provisions of the lex fori.

E. There is equally no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in a country X but subject to the procedural laws of Y. The limits and implications of any such agreement have been much discussed in the literature, but apart from the decision in the instant case there appears to be no reported case where this has happened. This is not surprising when one considers the complexities and inconveniences which such an agreement would involve. Thus, at any rate under the principles of English law, which rest upon the territorially limited jurisdiction of our courts, an agreement to arbitrate in X subject to English procedural law would not empower our courts to exercise jurisdiction over the arbitration in X. That was the basis of the decision in the Whitworth case, holding that a Scottish arbiter could not be ordered by an English court to state his award in the form of a special case, even though he had been appointed pursuant to a submission to arbitration within the meaning of the English Arbitration Act 1950 . Since the locus of the arbitration was Scotland, the lex fori was Scots law, and only the Scottish courts were competent. Similarly, in the Black Clawson case at p.453 Mustill J. emphatically rejected the possibility of any jurisdictional split on these lines between two systems of law. In the context of an agreement which provided for arbitration in Zurich

pursuant to the Arbitration Act 1950 he said:

"Commonsense suggests this provision cannot have been intended to apply the whole of the 1950 Act to an arbitration which was from the outset designed to take place abroad. For otherwise the arbitrators would have been obliged to state a special case from their Zurich arbitration to the English Court; and the latter Court would have had power to set aside or remit the award, and to make interlocutory orders for discovery, security for costs, interim preservation and so on; all in potential conflict with the powers exercisable by the local Court. Such a result would be absurd."

(The reference to the statement of a special case was of course to the law as it stood before the Arbitration Act 1979). Faced with these difficulties Mr. Milligan sought to give some workable effect to the decision in the present case by suggesting a novel sub-division of the curial or procedural law to which I have referred as law (3). He submitted that on the one hand there are the rules of law applicable to arbitral tribunals in the conduct of arbitrations, and on the other hand there are the rules of law concerned with the supervisory powers of the courts over arbitrations. His suggested rationalisation of the split between London and Lima resulting from the decision in the present case was accordingly that the arbitral tribunal would be obliged to sit in Lima and conduct the arbitration according to English law, but that its conduct would then be subject to the supervisory powers of the courts in Lima. But the parties cannot possibly have intended such a complex regime. One only has to glance through our Arbitration Acts 1950 and 1979 to see how the conduct of arbitrations and the powers of the courts in relation to them intermesh. To quote the first sentence of the text of Mustill & Boyd on Commercial Arbitration:

"The law of private arbitration is concerned with the relationship between the courts and the arbitral process."

This cannot be sub-divided. I do not know what the courts in Lima would do if the judge were right in the present case that this was a Lima arbitration to be conducted according to English procedural law. But their task would certainly not be an enviable one.

F. Finally, as I mentioned at the outset, it seems clear that the submissions advanced below confused the legal "seat" etc. of an arbitration with the geographically convenient place or places for holding hearings. This distinction is nowadays a common feature of international arbitrations and is helpfully explained in Redfern and Hunter at p.69 in the following passage under the heading "The Place of Arbitration" :

"The preceding discussion has been on the basis that there is only one 'place' of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or 'seat' of the arbitration. This does not mean, however, that the arbitral tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an arbitral tribunal to hold meetings – or even hearings – in a place other than the designated place of arbitration, either for its own

> convenience or for the convenience of the parties or their witnesses … It may be more convenient for an arbitral tribunal sitting in one country to conduct a hearing in another country – for instance, for the purpose of taking evidence … In such circumstances each move of the arbitral tribunal does not of itself mean that the seat of the arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties."
>
> These aspects need to be borne in mind when one comes to the judge's construction of this policy.
>
> G. Against this background it is clear that the judge's conclusion in the present case is unlikely to be right, because it produces a highly complex and possibly unworkable result which the parties could hardly have intended. Or, to put it in another way, his conclusion can only be right if this is indeed an apparently unprecedented instance of parties' having expressly and clearly agreed to arbitrate in X (Lima) subject to the curial law of Y (London). So the only remaining issue is whether or not they really did so.

The judge relied on three matters, but I cannot agree that any of them, singly or in combination, justify his conclusion.

First, he placed considerable weight on Article 31 of the printed conditions. However, as shown in particular by the word "judicial" , this was a jurisdiction clause submitting any dispute to the appropriate court in the City of Lima. It cannot co-exist with the typed arbitration clause in the subsequent indorsement. This clearly overrides Article 31, both as the result of Article 1 of the printed conditions and as a matter of ordinary principle.

Secondly, the judge contrasted the clause in the indorsement which provided for the settlement of average or claims " in London" with the arbitration clause which referred to arbitration under the conditions and laws " of London" . But linguistic points of this kind are not helpful for the construction of commercial contracts, particularly when concluded between foreign parties in a foreign language. In any event, however, I think that any businessman would say that the phrase "arbitration according to the conditions and laws of London" obviously means that the arbitration is to be held in London, not by the implication of some additional term, which the judge rejected, but simply by giving to these words their ordinary commercial meaning.

Thirdly and mainly the judge relied on the subject matter and language of the contract, and the nationality of the parties, in support of the indications in favour of Lima which he found in the other two points. But these general aspects cannot prevail against this explicit London arbitration clause. Moreover, this was a marine policy between insurers and shipowners who clearly operate internationally. It covered four deep-sea vessels classed in other countries. The premiums were stated in US dollars and had evidently been agreed with reference to reinsurance rates, probably abroad. General average or claims under the policy were to be settled in London. In such circumstances there is nothing surprising in concluding that these parties intended that any dispute under this policy should be arbitrated in London. And the present dispute about appropriate premium rates might well be arbitrated more conveniently in London than in Lima. But however that may be, it would always be open to the arbitral tribunal to hold hearings in Lima if this were thought to be convenient, even though the seat or forum of the arbitration would remain in London, as explained in F. above.

I am therefore left in no doubt that the correct interpretation of this policy is that the seat of any arbitration should be London and that this was the effect of the declaration claimed by

the shipowners. In my view they were entitled to it, and I would allow this appeal. It follows that in the absence of Agreement between the parties, having regard to section 6 of the Arbitration Act 1950 , the shipowners are also entitled to the appointment of an arbitrator by the court pursuant to section 10(1)(a) of that Act. I would accordingly remit the case to the Commercial Court for that purpose.

LORD JUSTICE RUSSELL:

I agree.

SIR DENYS BUCKLEY:

I also agree.

(Order: Appeal allowed, with costs in Court of Appeal and before the deputy judge).

Union of India v McDonnell Douglas Corp

Queen's Bench Division (Commercial Court)

22 December 1992

Case Analysis

Where Reported

[1993] 2 Lloyd's Rep. 48; [1992] 12 WLUK 408;

Case Digest

Subject: Arbitration **Other related subjects:** Conflict of laws

Keywords: Arbitration; Choice of law; Contracts

Summary: Procedure; choice of London as seat; arbitration to be conducted under procedure of Indian Act; whether law of procedure different to that of seat; whether arbitration procedure governed by Indian or English law

D agreed to supply services to P under a contract governed by the laws of India and subject to an arbitration clause which provided that arbitration was to be "conducted" in accordance with the procedure provided by the Indian Arbitration Act 1940, with the "seat" of the arbitration to be London. A dispute was submitted to arbitration and the question arose whether Indian law, under the 1940 Act, or English law, as the place of the seat, was to govern the proceedings.

Held, that (1) the proper law of the commercial bargain and the arbitration agreement was the law of India; (2) although inherently unsatisfactory, it was open to the parties to agree that the procedures to be adopted in the arbitration would be governed by a law other than that of the place of arbitration, subject to the proviso that the jurisdiction of the English Court under the Arbitration Acts over an arbitration in England could not be excluded by an agreement between the parties to apply the laws of another state; (3) (obiter) in order to avoid parallel proceedings a court might be slow to exercise any discretion to interfere, or might consider the choice of a foreign legal procedure as amounting to an exclusion agreement within the Arbitration Act 1979, s.3; and (4) by the use of the word "seat", the parties had chosen English law to govern the arbitration proceedings and the reference to "conducted" had the effect of contractually importing from the Indian Act those provisions which were concerned with the internal conduct of their arbitration and which were not inconsistent with the choice of English arbitral procedural law.

Judge: Saville J

Key Cases Citing

Enercon GmbH v Enercon (India) Ltd

[2012] EWHC 689 (Comm); [2012] 1 Lloyd's Rep. 519; [2012] 3 WLUK 770; QBD (Comm); 23 March 2012

Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc

[2001] 1 All E.R. (Comm) 514; [2001] 1 Lloyd's Rep. 65; [2000] 10 WLUK 772; [2001] C.L.C. 173; Times, November 24, 2000; (2000) 97(47) L.S.G.

Braes of Doune Wind Farm (Scotland) Limited v Alfred McAlpine Business Services Limited

Case No: HT 08 07

High Court of Justice Queen's Bench Division Technology and Construction Court

13 March 2008

[2008] EWHC 426 (TCC)

2008 WL 678195

Before : Mr Justice Akenhead

Date: 13th March 2008, Hearing dates: 13 February 2008

Representation

David Sears QC and Serena Cheng (instructed by Shepherd and Wedderburn) for the Claimant.

Andrew Bartlett QC (instructed by Dundas & Wilson LLP) for the Defendant.

Judgment

Mr. Justice Akenhead:

Introduction

There are two applications before the Court relating to the First Award of an arbitrator, Mr John Uff CBE QC. This award relates to an EPC (Engineering, Procurement and Construction) Contract dated 4 November 2005 ("the EPC Contract") between the Claimant ("the Employer") and the Defendant ("the Contractor") whereby the Contractor undertook to carry out works in connection with the provision of 36 wind turbine generators (the "WTGs") at a site some 18 kilometres from Stirling in Scotland. This award deals with the enforceability of the clauses of the EPC Contract which provided for liquidated damages for delay.

The Claimant applies for leave to appeal against this award upon a question of law whilst the Defendant seeks in effect a declaration that this Court has no jurisdiction to entertain such an application and for leave to enforce the award.

I will deal first with the issue of jurisdiction.

Jurisdiction

The issue here arises out of the application of Section 2 of the Arbitration Act 1996 :

> "(1) The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland".

The seat of the arbitration is identified in Section 3 as being the "juridical seat" of the arbitration "designated by the parties to the arbitration agreement". If the juridical seat of the arbitration was in Scotland, the English Courts have no jurisdiction to entertain an application for leave to appeal. The Contractor argues that the seat of the arbitration was Scotland whilst the Employer argues that it was England.

There were to be two contractors involved with the project. Whilst Vestas-Celtic Wind Technology Limited was to design, supply, construct and install the 36 WTGs themselves, the Contractor was to design and carry out the bulk of the remaining works such as the foundations for the WTGs, other civil and building works, electrical works connecting the WTGs to the switch room and other connection works. There was an "Interface Agreement" between the Contractor, the Employer and the Wind Turbine Contractor.

The material clauses of the EPC Contract were:

> "1.4.1. The Contract shall be governed by and construed in accordance with the laws of England and Wales and, subject to Clause 20.2 [Dispute Resolution], the Parties agree that the courts of England and Wales have exclusive jurisdiction to settle any dispute arising out of or in connection with the Contract.
>
> 20.2.2.
>
> (a) … any dispute or difference between the Parties to this Agreement arising out of or in connection with this Agreement shall be referred to arbitration.
>
> (b) Any reference to arbitration shall be to a single arbitrator … and conducted in accordance with the Construction Industry Model Arbitration Rules February 1998 Edition, subject to this Clause (**Arbitration Procedure**) …
>
> (c) This arbitration agreement is subject to English Law and the seat of the arbitration shall be Glasgow, Scotland. Any such reference to arbitration shall be deemed to be a reference to arbitration within the meaning of the Arbitration Act 1996 or any statutory re-enactment."

The Arbitration Rules , known colloquially as the " CIMAR Rules " provided as follows:

> "1.1 These Rules are to be read consistently with the Arbitration Act 1996 (the Act), with common expressions having the same meaning. Appendix 1 contains definitions of terms. Section numbers given in these Rules are references to the Act.
>
> 1.2 The objective of the Rules is to provide for the fair, impartial, speedy, cost-effective and binding resolution of construction disputes, with each party having a reasonable opportunity to put his case and deal with that of his opponent. The parties and the arbitrator are to do all things necessary to achieve this objective: see Sections 1 (General Principles), 33 (General duty of the tribunal) and 40 (General duty of parties).
>
> 1.4 The arbitrator has all the powers and is subject to all the duties under the

Act except where expressly modified by the Rules.

1.5 Sections of the Act which need to be read with the Rules are printed in the text. Other Sections referred to in the text are printed in Appendix II .

1.6 These rules apply where:

(a) a single arbitrator is to be appointed, and

(b) the seat of the arbitration is in England and Wales or Northern Ireland.

1.7 These rules do not exclude the powers of the Court in respect of arbitral proceedings, nor any agreement between the parties concerning those powers.

4.1 The arbitrator has the power set out in Section 30

4.2 The arbitrator has the powers set out in Section 37 …

4.3 The arbitrator has the powers set out in Section 38(4) to (6) …"

In Appendix I the "Act" was defined to mean the Arbitration Act 1996 .

One must seek to construe the EPC Contract having regard to all its material terms. It is only if there is some irreconcilable ambiguity that one will have to have regard to other principles.

I do bear in mind that, in the absence of clear wording, the parties are unlikely to have wished to exclude this or the Scottish Courts' powers of control and intervention. I was told by the parties in argument that the Scottish Courts' powers of control and intervention would be, at the very least, seriously circumscribed by the parties' agreement in terms as set out in Paragraph 6 above. Mr Bartlett QC indicated to me that the Scottish Courts' powers of intervention might well be limited to cases involving such extreme circumstances as the dishonest procurement of an award.

It is of course always possible for parties to a wholly English arbitration to exclude the right of appeal from an arbitrator's award on questions of law. There are however mandatory provisions of Part 1 of the Arbitration Act (set out in Schedule 1 to the Act) which one can not exclude such as challenges to an award on the grounds of lack of jurisdiction and serious irregularity (Sections 67 and 68). It would be odd, at least, if the parties had consciously agreed that no court should have the right of intervention if for instance there was a material serious irregularity, falling short of any criminal behaviour.

There are a number of different laws which can at least potentially relate to an arbitration:

(a) There is the substantive or proper law of the contract which governs the law by which the parties' substantive rights are to be determined.

(b) There is the law to which the parties have agreed that the arbitration agreement is to be subject.

(c) The curial law relates to the place in which the arbitration is held.

(d) There may be a yet further law which covers the reference to arbitration itself.

Of course, all these applicable laws may be the same as or different to each other.

Lord Justice Kerr in Naviera Amazonica Peruana SA v Compania Internacionale De Seguros Del Peru [1988] 1 Lloyds Rep 116 said this at page 119:

> "B. English law does not recognise the concept of a "delocalised" arbitration … or of "arbitral procedures in the transnational firmament unconnected with any municipal system of law" (Bank Mellat v Helleniki Techniki SA [1984] QB 291 at p. 301 (Court of Appeal) . Accordingly, every arbitration must have a "seat" or locus arbitri or forum which subjects its procedural rules to the municipal law there in force …
>
> C. … Where the parties have failed to choose the law governing the arbitration proceedings, those proceedings must be considered, at any rate prima facie, as being governed by the law of the country in which the arbitration is held, on the ground that it is the country most closely connected with the proceedings …
>
> See Dicey & Morris … and the references to the approval of this classic statement by the House of Lords in Whitworth Street Estates v James Miller … Or, to quote the words of Mr. Justice Mustill in the Black Clawson case … at p. 453 where he characterised law (3) as "the law of the place where the reference is conducted: the lex fori". Although Mr. Milligan contested this, I cannot see any reason for doubting that the converse is equally true. Prima facie, i.e. in the absence of some express and clear provision to the contrary, it must follow that an agreement that the curial or procedural law of an arbitration is to be the law of X has the consequence that X is also to be the "seat" of the arbitration. The lex fori is then the law of X, and accordingly X is the agreed forum of the arbitration. A further consequence is then that the courts which are competent to control or assist the arbitration are the Courts exercising jurisdiction at X …
>
> E. There is equally no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in country X but subject to the procedural laws of Y …
>
> F. Finally … it seems clear that the submissions advanced below confused the legal "seat" etc. of an arbitration with the geographically convenient place or places for holding hearings …"

It is not uncommon at least in this current century and some considerable time before for the parties to agree that arbitrations can be physically conducted in one country but be subject to the procedural control of the laws of another country. However, cases such as in Naviera Amazonica reveal the English courts' reluctance to accept that the parties can agree to a binding or enforceable arbitration taking place in a procedural limbo and not subject to some curial law. But the Court did investigate whether the parties had agreed to arbitrate in Lima subject to the curial law of England.

Various other authorities have been provided but do not take the matter further. Mr Justice Cooke in C v D [2007] EWHC 1541 noted at Paragraph 26 of his judgment that:

> "… the seat of the arbitration and the choice of procedural law will almost invariably coincide, apart from the possibility, provided for in s 4(5) [of the 1996 Act] of the parties choosing another procedural law in relation to the matters covered by the non-mandatory provisions of pt 1, which will take effect …"

I must determine what the parties agreed was the "seat" of the arbitration for the purposes of Section 2 of the Arbitration Act 1996 . This means by Section 3 what the parties agreed was the "juridical" seat. The word "juridical" is not an irrelevant word or a word to be ignored in ascertaining what the "seat" is. It means and connotes the administration of justice so far as the arbitration is concerned. It implies that there must be a country whose job it is to administer, control or decide what control there is to be over an arbitration.

Mr. Bartlett QC submitted that the meaning of Clause 20.2.2(c) was plain and unambiguous: the parties had obviously and expressly agreed that the "seat" was to be "Glasgow, Scotland", and they must be taken by various references to have appreciated that the Arbitration Act 1996 was applicable in some limited respects and to have known what was meant and implied by using the word "seat". Mr Sears QC and Ms Cheng argue that one needs to look at what the parties agreed in substance in relation to the applicable curial law.

I have formed the view that this Court does have jurisdiction to entertain an application by either party to this contract under Section 69 of the Arbitration Act 1996 . My reasons are as follows:

(a) One needs to consider what, in substance, the parties agreed was the law of the country which would juridically control the arbitration.

(b) I attach particular importance to Clause 1.4.1. The parties agreed that essentially the English (and Welsh) Courts have "exclusive jurisdiction" to settle disputes. Although this is "subject to" arbitration, it must and does mean something other than being mere verbiage. It is a jurisdiction over disputes and not simply a court in which a foreign award may be enforced. If it is in arbitration alone that disputes are to be settled and the English Courts have no residual involvement in that process, this part of Clause 1.4.1 is meaningless in practice. The use of the word "jurisdiction" suggests some form of control.

(c) The second part of Clause 1.4.1 has some real meaning if the parties were agreeing by it that, although the agreed disputes resolution process is arbitration, the parties agree that the English Court retains such jurisdiction to address those disputes as the law of England and Wales permits. The Arbitration Act 1996 permits and requires the Court to entertain applications under Section 69 for leave to appeal against awards which address disputes which have been referred to arbitration. By allowing such applications and then addressing the relevant questions of law, the Court will settle such disputes; even if the application is refused, the Court will be applying its jurisdiction under the 1996 Act and providing resolution in relation to such disputes.

(d) This reading of Clause 1.4.1 is consistent with Clause 20.2.2 (c) which confirms that the arbitration agreement is subject to English law and that the "reference" is "deemed to be a reference to arbitration within the meaning of the Arbitration Act 1996 ". This latter expression is extremely odd unless the parties were agreeing

that any reference to arbitration was to be treated as a reference to which the Arbitration Act 1996 was to apply. There is no definition in the Arbitration Act of a "reference to arbitration", which is not a statutory term of art. The parties presumably meant something in using the expression and the most obvious meaning is that the parties were agreeing that the Arbitration Act 1996 should apply to the reference without qualification.

(e) Looked at in this light, the parties' express agreement that the "seat" of arbitration was to be Glasgow, Scotland must relate to the place in which the parties agreed that the hearings should take place. However, by all the other references the parties were agreeing that the curial law or law which governed the arbitral proceedings was that of England and Wales. Although authorities establish that, prima facie and in the absence of agreement otherwise, the selection of a place or seat for an arbitration will determine what the curial law or "lex fori" or "lex arbitri" will be, I consider that, where in substance the parties agree that the laws of one country will govern and control a given arbitration, the place where the arbitration is to be heard will not dictate what the governing or controlling law will be.

(f) In the context of this particular case, the fact that, as both parties seemed to accept in front of me, the Scottish courts would have no real control or interest in the arbitral proceedings other than in a criminal context, suggests that they can not have intended that the arbitral proceedings were to be conducted as an effectively "delocalised" arbitration or in a "transnational firmament", to borrow Lord Justice Kerr's words in the Naviera Amazonica case.

(g) The CIMAR Rules are not inconsistent with my view. Their constant references to the 1996 Act suggest that the parties at least envisaged the possibility that the Courts of England and Wales might play some part in policing any arbitration. For instance, Rule 11.5 envisages something called "the court" becoming involved in securing compliance with a peremptory order of the arbitrator. That would have to be the English Court, in practice.

The Employer also relied upon an estoppel argument whereby in effect the Contractor is estopped from asserting that this Court does not have jurisdiction. Although I do not have to decide the point, I would have been against the Employer on this argument:

(a) It was predicated upon the fact (supported by witness statement evidence) that both parties orally accepted at the arbitration hearing that English law governed the dispute and did not assert that Scottish law governed the procedure.

(b) The fact that the parties' representatives did not assert that Scottish law governed the procedure does not give rise to any estoppel; it is very rare for silence to give rise to any form of estoppel and the circumstances when it does (for instance, a fiduciary relationship) do not apply here.

(c) Even if both parties' lawyers both parties did orally accept at the arbitration hearing that English law governed the dispute, that acceptance does not amount to some unequivocal or any material estoppel. The acceptance is as much, and in context more, applicable to an acceptance that the substantive law was English,

> rather than that the English Courts had jurisdiction to control the arbitration. Something much clearer would be required to support the type of estoppel relied upon by the Employer.

The application for leave to appeal

It is certainly unusual for liquidated damages clauses to be found to be unenforceable. There is however established authority in English law, the substantive law in this case, that, if such damages amount to a penalty, the clause will be unenforceable (Dunlop Pneumatic Tyre Co. v New Garage and Motor Co [1915] AC 79). Various variants on that have been developed in construction cases such as Bramall & Ogden Ltd v Sheffield City Council (1983) 29 BLR 76 .

Clause 8.7 materially says as follows:

> "8.7.1 Subject to the limitations contained in this Clause 8.7, if the requirements of Clause 8.2 [Time for Completion] are not complied with, the Contractor shall … pay delay damages to the Employer for this default at the rate set out in Clause 8.7.2 below. These delay damages shall be paid for every day which shall elapse between the relevant Time for Completion up to and including the date of issue of the Taking-Over Certificate. For the avoidance of doubt, the Contractor will be entitled to an extension of time pursuant to Clause 8.4.1(c) to the extent that it suffers any delay, impediment or prevention caused by or attributable to other contractors on the Site (including for the avoidance of doubt the Wind Turbine Contractor) subject to compliance by the Contractor of his applicable and relevant obligations under this Contract and under the Interface Agreement.
>
> 8.7.2 The amount of delay damages shall be £642 … for each MW of the total installed capacity for the Plant which is unavailable ("Unavailable Capacity") for each day of such unavailability for the period from 1 October to 31 March and £385 … for each MW of Unavailable Capacity for each day of such unavailability for the period from 1 April to 30 September, provided that the Contractor's maximum total liability to pay delay damages under this Clause 8.7 shall not exceed 50% … of the Contract Price …"

The Arbitrator, who is well known and extremely experienced in construction law fields, was required to address disputes between the parties which related to the Employer's entitlement to liquidated damages under Clause 8.7 for allegedly culpable delay on the part of the Contractor. Issues arise, although not addressed in detail by the Arbitrator in this first award, as to whether the Contractor was entitled to extensions of time which would reduce or eliminate any culpable delay.

A one day hearing was held on 5 December 2007 in Edinburgh. The issue to be addressed was whether:

> "… absent any extension of time under the EPC Contract, the [Employer] is entitled to withhold liquidated or other delay damages against sums otherwise due to the [Contractor] under the EPC Contract; and whether in consequence the [Contractor] is entitled to an award in respect of the liquidated damages so withheld." (Paragraph 1.14 of the award)

The Arbitrator analysed the EPC Contract against the parties' contentions and concluded that for various reasons:

> "… the provisions of Clause 8.7 are not capable of generating with certainty liquidated damages flowing from an identified breach by the [Contractor]. Accordingly, in accordance with established authority, Clause 8.7 should not be enforced."

He then decided that there was no entitlement to withhold or set off against sums otherwise due to the Contractor and issued his award in a money sum, £2,836,840.30 plus VAT and interest.

Having seen the papers lodged by the Employer and initially spent some four hours reading the papers, I formed the view that a short hearing would be helpful because (a) I suspected that there could be a jurisdictional challenge although I did not anticipate precisely that which was taken, (b) it was unusual for liquidated damages clauses freely agreed to by the parties to be regarded as unenforceable and (c) it was at the least arguable that the Arbitrator, eminent though he is, was obviously wrong.

I am mindful of the requirements of Section 69(3) of the Arbitration Act 1996 . The Court can only grant leave to appeal an arbitrator's award if the following conditions are met:

> "(a) that the determination of the question will substantially affect the rights of one or more of the parties;
>
> (b) that the question is one which the tribunal was asked to determine;
>
> (c) that, on the basis of the findings of fact in the award—
>
> (i) the decision of the tribunal on the question is obviously wrong; or
>
> (ii) the question is one of general public importance, and the decision of the tribunal is at least open to serious doubt; and
>
> (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question."

It is accepted, and properly so, that the first two requirements have been met.

Mr Bartlett QC reserves an argument for another court that the issue on this application was not a question of law because it involved a one off point of contractual construction, which even if wrong was one which an arbitrator could reasonably have adopted. That can not be right. Questions of contractual construction do involve questions of law: the parties have legally made the law governing their particular relationship by agreeing the contract in question. Rules of interpretation apply as a matter of substantive law. Clearly, on that basis, the issue resolved by the Arbitrator was a question of law, namely whether the liquidated damages provisions for culpable delay are enforceable. If it is obviously wrong, the 1996 Act requires the Court, subject to other criteria being established, to give leave to appeal.

I do not consider that the question of law, however, involved a question of general importance although, of course, it was of particular importance to the parties. Although the form of contract was adapted from the FIDIC "Silver Book" used for EPC contracts, the liquidated damages clause is very much a "one-off". It is not unheard of, particularly

on “turnkey” power station contracts, for liquidated damages to be related to the loss of electricity which could have been generated during a period of culpable delay. However, what is very much a “one-off” liquidated damages arrangement, and I have never heard of one before, lies in the practical juxtaposition of the work of the Contractor and the Wind Turbine Contractor.

Therefore, I must approach the question of leave to appeal on the basis of considering whether the Arbitrator was obviously wrong in reaching his decision. It is not enough that a part of his or her reasoning is wrong or that conceivably another tribunal might respectably have reached the opposite decision. I consider however that the test of obviousness is not only passed if the Award is obviously wrong to the judge considering leave after half an hour's reading of the papers by the judge considering leave. The reference in CMA CGM SA v Beteiligungs-Kommanditgesellschaft MS Norther Pioneer [2003] 1 Lloyds Rep 212 at Paragraph 23 that the judge should be able to digest the written submissions in 30 minutes does not impose such a restriction. If it takes four hours for the judge to understand the submissions and he or she then forms the view that the Section 69 criteria are established, those criteria are established.

To be “obviously wrong”, the decision must first be wrong at least in the eyes of the judge giving leave. However, any judge of any competence, having come to the view that it is wrong, will often form the view that the decision is obviously wrong. It is not necessarily so, however, as a judge may recognise that his or her view is one reached just on balance and one with which respectable intellects might well disagree; in those circumstances, the decision is wrong but not necessarily “obviously” so.

I have formed the view, perhaps contrary to my initial impressions, that the Arbitrator was not obviously wrong. Although my own analysis would have been different and I might disagree with part of the Arbitrator's reasoning, I consider that his decision was ultimately right. The most convincing argument advanced by Mr Bartlett QC for the Contractor was that the liquidated damages clause could well impose a liquidated damages liability on the Contractor in respect of delays to individual wind turbines caused by the Wind Turbine Contractor:

> A. The extension of time clause (Clause 8.4) did allow the Contractor extensions to the extent that overall or critical delay was caused by the Wind Turbine Contractor.
>
> B. There was no provision in the contract for sectional completion of the Works. Thus, until all 36 WTG's were complete and fully connected into the (Contractor's) Works, the Works could not be completed.
>
> C. However, if overall or critical delay was caused by the Contractor but individual WTG's were delayed by the default of the Wind Turbine Contractor, there was no provision to alleviate the imposition of liquidated damages on the Contractor.
>
> D. As each WTG accounted for 2 MW and each MW accounted for £642 or £385 (depending upon the time of year) by way of liquidated damages per day of unavailability, the Contractor could end up paying liquidated damages for delays caused by the Wind Turbine Contractor's defaults in completing their work on the turbines even though the parties had agreed that for critical or overall delay the Contractor was not responsible.
>
> E. Because it was clearly intended that the Contractor was not as such to be responsible for the defaults of the Wind Turbine Contractor or at least those which

> good co-ordination by the Contractor would have avoided, the parties nonetheless agreed a liquidated damages clause which would impose such damages upon the Contractor in certain foreseeable circumstances.
>
> F. In those circumstances, there is in law a penalty which English Law will not enforce.

It is unnecessary to determine whether the Section 69(3)(d) criterion was made out by the Contractor. Although this is a separate criterion, it can not necessarily be considered in isolation from the other criteria. I accept that the fact that the arbitrator was here a highly experienced and well known construction law QC is a relevant factor to take into account under Section 69(3)(d) (see Keydon Estates Ltd v Western Power Distribution (South Wales) Ltd [2004] EWHC 996 (Ch)). It seems to me that this sub-section is an overall “catch-all” provision, albeit an important one. However, it could properly be said that, if all the other criteria were established, it would often, but not invariably, be unjust for an obviously wrong decision on an important question of law not to be put right by the Court. That could be thought to be even more so if the chosen highly respected arbitrator has simply had a major intellectual aberration.

I hasten to say that, in this case, the fact that Mr Uff QC is a very experienced construction law Silk coupled with the fact that his decision is not obviously wrong leads me to the inevitable conclusion that the Claimant's application be dismissed and the Defendant must have leave to enforce the Award pursuant to Section 66(1) …

Enercon GmbH, Wobben Properties GmbH v Enercon (India) Limited

Case No: 2011 FOLIO 1399

High Court of Justice Queen's Bench Division Commercial Court

23 March 2012

[2012] EWHC 689 (Comm)

2012 WL 609298

Before: Mr Justice Eder

Date: 23/03/2012

Hearing dates: 12 and 13 March 20120

Representation

David Joseph QC and Joe Delaney (instructed by Cripps Harries Hall) for the Claimants.

Philip Edey QC and Malcolm Jarvis (instructed by Enyo Law) for the Defendant.

Judgment

Mr Justice Eder:

Introduction

The background to these proceedings and the present applications is complicated and convoluted but in essence concerns a long running dispute between the parties, who are German and Indian interests, with regard to a wind energy joint venture in India. As referred to below, the parties have been engaged for some years in protracted litigation in India. The current dispute concerns various claims by the claimants under an alleged written agreement between the first claimant ("Enercon") as licensor and the defendant ("EIL") as licensee dated 29 September 2006 entitled Intellectual Property Licence Agreement ("IPLA"). The claimants say that these claims (consisting mainly of sums allegedly due by way of royalties and damages) total a minimum amount of approximately Euros 89 million. On 13 March 2008 ie over 4 years ago, the claimants referred their claims to arbitration by appointing Mr VV Veeder QC as their arbitrator pursuant to clause 18 of the IPLA . For reasons which I will briefly explain, that proposed arbitration has ground to a halt. It is now March 2012. The merits of the underlying disputes have not been resolved. Indeed, although the parties appear to have spent considerable amounts of time and money on procedural matters, the determination of the substantive merits appears somewhere in the far distance. The

author of Bleak House would be appalled by this story. And rightly so.

At the heart of the current dispute is clause 18 of the IPLA which provides as follows:

> **"18. Disputes and Arbitration**
>
> 18.1 All disputes, controversies or differences which may arise between the Parties in respect of this Agreement including without limitation to the validity, interpretation, construction, performance and enforcement or alleged breach of this Agreement, the Parties shall, in the first instance, attempt to resolve such dispute, controversy or difference through mutual consultation [sic]. If the dispute, controversy or difference is not resolved through mutual consultation within 30 days after commencement of discussions or such longer period as the Parties may agree in writing, any Party may refer dispute(s), controversy(ies) or difference(s) for resolution to an arbitral tribunal to consist of three (3) arbitrators, of whom one will be appointed by each of the Licensor [Enercon] and the Licensee [EIL] and the arbitrator appointed by Licensor shall also act as the presiding arbitrator.
>
> 18.2 The arbitrators shall have powers to award and/or enforce specific performance. The award of the arbitrators shall be final and binding on the Parties. In order to preserve its rights and remedies, either Party may seek preliminary injunctive relief or other temporary relief from any court of competent jurisdiction or from the arbitration tribunal pending the final decision or award of the arbitrator(s). Any such application to a court of competent jurisdiction for the purposes of seeking injunctive relief, shall not be deemed incompatible with this agreement to arbitrate or as a waiver of this Agreement to arbitrate.
>
> 18.3 All proceedings in such arbitration shall be conducted in English. The venue of the arbitration proceedings shall be London. The arbitrators may (but shall not be obliged to) award costs and reasonable expenses (including reasonable fees of counsel) to the Party(ies) that substantially prevail on merit. The provisions of the Indian Arbitration and Conciliation Act, 1996 shall apply.
>
> The reference of any matter, dispute or claim or arbitration [sic] pursuant to this Section 18 or the continuance of any arbitration proceedings consequent thereto or both will in no way operate as a waiver of the obligation of the Parties to perform their respective obligations under this Agreement."

In essence, EIL's case is that the IPLA was and is not legally binding although EIL now concedes that there is a good arguable case to the contrary ie that the IPLA is legally binding. Notwithstanding such concession, it remains EIL's case that there is equally a good arguable case that the IPLA is not binding and, in any event, that although clause 18.3 stipulates that the "venue of the arbitration proceedings" shall be London, "venue" is not synonymous with "seat" and, on the contrary, the "seat" of any arbitration under clause 18 is not London but India.

On 28 March 2008 ie shortly after the appointment of Mr Veeder QC, the claimants issued proceedings in this court (Claim No. 2008 Folio 296) seeking a declaration under s.32 of the Arbitration Act 1996 (the "English 1996 Act") that EIL was bound to refer IPLA disputes to arbitration; a declaration that the seat of the arbitration was England; and an anti-suit injunction restraining certain proceedings on behalf of EIL in the Bombay High Court ("BHC") as described further below. After the application for an anti-suit was issued but before it was heard, EIL filed its own claim in the Daman court

in India seeking a declaration that the IPLA is not a concluded contract, that EIL is therefore not bound by its arbitration agreement and an anti-suit / anti-anti-suit injunction (which EIL obtained on an interim basis on 8 April 2008) from the Daman court in India restraining Enercon from pursuing the English proceedings.

Although it asserted that the IPLA was not legally binding EIL appointed under protest a retired Indian Judge, Mr Justice Reddy, as its arbitrator. Following certain correspondence, the arbitrators indicated that the arbitration agreement contained in Clause 18 was, in their view, unworkable. On 5 August 2008, the arbitrators informed the parties that they were unable to appoint a third arbitrator and that the parties would "doubtless take such steps as they are advised". As appears below, the arbitration then ran into the sand as a result of the initiation and pursuit by EIL of proceedings in India.

Eventually, after a delay of more than 3 years, the claimants issued the current proceedings by way of an Arbitration Claim Form dated 21 November 2011 ("ACF") claiming, in particular, (i) the appointment by the court of a third arbitrator pursuant to s.18(a) of the English 1996 Act ; and (ii) injunctions pursuant to s.44 of the English 1996 Act and/or s.37 of the Senior Courts Act 1981 in effect prohibiting EIL from commencing or prosecuting proceedings in India (a) to restrain or otherwise to interfere with the application for the appointment of a third arbitrator and (b) to pursue claims in connection with IPLA . Following an application without notice by the claimants, an order was made by Flaux J dated 25 November 2011 giving the claimants leave to serve the ACF out of the jurisdiction and granting both injunctions on an interim basis until disposal of the present proceedings or further order.

On 15 February 2011, the claimants made a further application without notice to this court for a freezing injunction against EIL. That application came before me. I duly granted the freezing injunction and certain ancillary relief with regard to the provision of financial information by EIL as set out in my order of that date.

The applications before the court

The present hearing is concerned with four main applications viz.

i) EIL's application to challenge the jurisdiction of this court with respect to the claims in the ACF;

ii) Enercon's application under s.18 of the English 1996 Act for the appointment of an arbitrator;

iii) EIL's application to set aside or to vary the anti-suit injunctions granted by Flaux J on 25 November 2011;

iv) EIL's application to set aside or to vary the freezing injunction granted by me on 15 February 2012 and Enercon's application to continue the same.

Summary of main issues

In summary, Mr Joseph QC on behalf of the claimants identified the following main issues which arise on these applications:

Jurisdiction for s.18 application

(1) Do the claimants show a good arguable case as to the existence of an agreement to arbitrate in London and as to the seat of that arbitration being England?

(2) If so, is there any good reason not to uphold the permission to serve out of the jurisdiction granted pursuant to the Order of Flaux J?

S.18 application

(3) When considering the claimants' s18 application is the correct test a “good arguable case” or does any different test apply to the questions identified in (1) above and if so is that test satisfied?

(4) Does clause 18.3 of the IPLA on a true application deprive the English courts of its powers under s.18 the English 1996 Act ?

(5) If the claimants satisfy the above is there any good reason not to appoint an arbitrator from the proposed list of three ie (i) Lord Hoffmann (ii) Sir Simon Tuckey (iii) Sir Gordon Langley.

(6) Should this court whether with respect to the disposal of the s.18 claim or the question of gateway jurisdiction grant a stay of all proceedings pending the outcome of such appeals as have been or may be brought by EIL in India to the decision of the Daman District Court?

(7) What is the correct approach of the court to the question of consideration of the designated seat? In particular is EIL correct to suggest that the question of whether or not the claimants can satisfy a good arguable case of English seat is determined in accordance with Indian law?

Anti-suit injunction

(8) Does the English court have jurisdiction to grant an anti-suit injunction under s.37 of the Senior Courts Act 1981 and/or s.44 of the English 1996 Act ?

(9) If so, is this case in all the circumstances a proper case for the grant of anti-suit injunctive relief in the terms set out in paragraphs 1 and/or 2 of the Order of Flaux J.? In particular should any amendment to these Orders be made to permit EIL to take further steps in India and if so what amendments?

Freezing Order

(10) Have the claimants made out a sufficient case of real risk of dissipation other than in the ordinary course of business?

(11) Is this a proper case for the grant of the freezing injunction obtained and sought to be continued? In particular have the claimants unduly delayed in bringing these proceedings, or failed to make fair disclosure, and if so what if

anything is the impact of this on the grant or continuation of the freezing injunction?

(12) Alternatively is any variation of the freezing injunction or fortification of the cross undertaking required?

The arguments deployed in relation to these issues ranged far and wide. The evidence and exhibits adduced by the parties occupied no less than 10 lever arch files with an additional 3 volumes of authorities. The skeleton argument submitted on behalf of EIL extended to some 82 pages. The claimants' skeleton extended to 53 pages. Such documents are of a type which unfortunately seems to be becoming a norm despite what has been repeatedly stated by the court (see, for example, Tombstone Ltd v Raja [2009] 1 WLR 1143 and Midgulf International v Groupe Chimique Tunisien [2010] 2 Lloyd's Rep 543 at pp 553–554) although in deference to counsel's endeavours (for which I am grateful) I should say that some at least of the issues were of some difficulty and even seemingly intractable. In the event, it does not seem to me necessary to deal with all the issues canvassed before me. In my view, it is sufficient to set out briefly the relevant facts; and I will then deal with those issues which are, in my view, necessary for the purpose of determining the present applications.

The facts

The claimants are German companies and world leaders in the field of wind energy and, on their case, are the owners and holders of important patents and trade marks in the field of wind energy. Their founder is Dr Wobben. EIL is an Indian joint venture company set up in 1994 to manufacture and to sell Wind Turbine Generators (“WTGs”) in India. It is owned as to 56% by Enercon. The other 44% shareholding is owned by two Indian individuals viz Messrs Yogesh and Ajay Mehra.

The Shareholding Agreement

Apart from the Articles of Association and Indian law generally, the relationship between these two groups of shareholders is governed by a Shareholding Ag as subsequently amended (“SHA”). The SHA is governed by Indian Law (Art.13.1) and provides in effect for all disputes to be determined by arbitration by the Indo-German Chamber of Commerce in Bombay (Art 16.2).

The Tkha (and Stkha)

On the same date ie 12 January 1994, Enercon and EIL entered into another agreement, the Technical Know-How Agreement (“TKHA”). Mr Edey QC on behalf of EIL made detailed submissions on the scope and effect of the TKHA. However, I do not think it is necessary to set out the many provisions of the TKHA at length. For present purposes, it is sufficient to note that, in summary, it is EIL's case that (a) the effect of the TKHA is that Enercon initially agreed to transfer the technical know-how relating to three types of WTGs to EIL to enable it to manufacture for itself in India the entire WTG, save only for the electrical control components which EIL was to buy from Enercon and which Enercon was obliged to continue to supply to EIL even after the expiry of the TKHA; (b) in addition to the cost of parts supplied by Enercon to EIL (on which Enercon would have made a profit), royalties were payable but only up to DM2.5m: once that was reached, no matter when it was reached (it was in fact reached in 2002), no further royalties were payable, although of course as majority shareholder in EIL, Enercon continued to benefit from all sales of WTGs; (c) Cl.5.5 and Cl.9.2 plainly therefore reflect

the fact that even after the expiry of the TKHA, EIL retained the right to manufacture the WTGs using the Enercon technology; and (d) that its rights were therefore what Mr Edey QC described as “evergreen”.

The TKHA was duly performed and subsequently amended by a supplementary agreement (“STKHA”) dated 19 May 2000. It is EIL's case that the STKHA made certain important changes to the TKHA which are, it is said by Mr Edey QC, vital for a proper understanding of the present case viz it amended and extended the definition of “Products” in the TKHA and deleted clauses 5.3 and 5.4 of the TKHA. On this basis, it is, in summary, EIL's case that:

a) The former agreement in the TKHA that indigenisation was not to include the electronic control components was deleted: indigenisation was thereafter to include even those components.

b) Related to that, Enercon was no longer to be the exclusive manufacturer of the electronic control components and EIL was no longer obliged to purchase even the special components from Enercon (though it remained entitled, even after expiry of the TKHA, to do so – See Cl.5.5, which the STKHA did not amend).

In short, it is EIL's case that under the TKHA as amended by the STKHA:

i) Enercon was committed to a transfer to EIL of all the technical know-how relating to every element of at least 5 types of WTG so that they could be wholly manufactured by EIL in India for all time (i.e. even after expiry of the TKHA), though if EIL wanted Enercon to supply the electronic control components, Enercon was also obliged to do so at list price.

ii) In return, Enercon was entitled to receive: a maximum of DM2.5m by way of royalties; list price (no doubt including a suitable profit for Enercon) for any items which EIL chose to purchase from Enercon rather than manufacture itself; and an increasingly valuable 56% shareholding in EIL. Financially therefore:

a) Enercon invested around €615,000 in 1994 for its stake in EIL. Its stake (on the basis of assets at book value less liabilities) is now worth tens of millions.

b) Enercon has received €2m in dividends; DM2.5m (equivalent to €1.28m) royalties under the TKHA; and around €97m in profits in respect of parts.

The TKHA (as amended) expired (naturally) in 2004. However, consistent with what EIL submits is the “evergreen” regime as set out above, EIL continued to manufacture and to sell the WTGs in India thereafter; it continued to purchase certain parts from Enercon; and it paid no royalties to Enercon, the limit of DM2.5m having been reached in 2002 (after which no further royalties were sought or paid until after the dispute about the IPLA arose). EIL complains that none of that was explained to Flaux J or me and submits that the foregoing is important because it casts Enercon's case in a completely different light: it is (submits EIL) simply wrong for Enercon to suggest that everything that happened after expiry of the TKHA is explicable only on the basis that the IPLA was

a binding agreement, since it must at least be common ground that everything which happened between 2004 and 2006 cannot be on the basis of the IPLA ; and there is therefore no intrinsic reason to suppose that the IPLA must be the explanation for what happened after 2006 either. EIL further submits that whether it in fact was so, depends entirely on a consideration of the circumstances surrounding the signature of the IPLA , without any preconceptions as to what must have been agreed in order to explain what has happened, in terms of manufacturing of WTGs and purchase of parts from Enercon, since 2006. Put differently, on EIL's case, EIL's ongoing right, since 2006, to continue to manufacture and to sell WTGs in India, to use the Enercon name, and to purchase parts from Enercon as required is entirely consistent with the TKHA/STKHA.

The Agreed Principles and disputed IPLA

After the expiry of the TKHA, there were discussions about the possibility of a further agreement which would cover future technologies developed by Enercon. There was also discussion about the possibility of royalties once again becoming payable. Those discussions led, in 2006, to successive Heads of Agreement.

It is common ground that on 29/30 September 2006, Dr Wobben on behalf of the claimants and Mr. Yogesh Mehra on behalf of EIL initialled every page of and signed the IPLA . However, at the same time, it is EIL's case that Dr Wobben on behalf of Enercon and Mr Yogesh Mehra “for the Mehra family” also initialled every page of/signed a separate document entitled the Agreed Principles, to which the IPLA was attached, and certain other documents which were also attached to the Agreed Principles. The first paragraph of the Agreed Principles provides as follows:

> “The following binding principles are agreed between the parties being shareholders and Joint venture partners of Enercon India Limited (”Company”). It is agreed that all definitive Agreements between the parties shall be prepared and finally executed on the basis of the binding principles agreed herein.”

The second page of the Agreed Principles provides as follows:

> “The Agreed Principles as mentioned above, in their form and substance would be the basis of all the final agreements which shall be finally executed.
>
> The agreed Principles shall be finally incorporated into the
>
> A IPLA “Draft enclosed”
>
> B Successive Technology Transfer Agreement
>
> C. Name Use Licence Agreement
>
> D. Amendment to Existing Share Holding Agreement.
>
> The above agreements will be made to the satisfaction of all parties, And then shall be legally finally executed” (emphasis added)

In light of the above, it is EIL's case that the IPLA is not a binding agreement: it is no more than a “draft” which was required to be brought into line with the Agreed Principles before being finally executed.

The start of the breakdown

Thereafter, it appears that the relationship between the parties started to break down. It is unnecessary to try to identify the precise reason for such break down. For present purposes it is sufficient to note that it is Enercon's case that EIL failed to pay royalties due under the IPLA , nor has it paid for approximately $19m worth of power cabinets, parts and raw materials supplied in or prior to 2007, nor has it accounted for royalties in accordance with the terms of the IPLA (Art 5), nor has it given access to its books and records in accordance with the terms of the IPLA (Art 6). On the basis of these alleged breaches and the totality of EIL's conduct, the claimants terminated the IPLA in December 2008 . As I have summarised above, the claimants say that their claims total a minimum sum of €89m. On the other side, EIL denies any breaches. Moreover, it is EIL's case that in the course of 2007 Enercon wrongfully stopped certain supplies of WTG parts causing serious disruption to EIL's business and substantial losses which EIL says total approximately €75m and that it is entitled in effect to set off this sum against any amounts otherwise due to Enercon. I should make plain that Enercon denies any breach or wrongdoing and in any event says that the quantum of such alleged claim is grossly exaggerated. Be that as it may, the interruptions in supply and resulting losses prompted the Mehras to commence litigation under the TKHA before the BHC in September 2007 (as referred to below).

The Indian proceedings

The Company Law Board

The first legal proceedings in India were commenced on 14 August 2007 by Enercon before the Company Law Board (“CLB”) in Delhi, against the Mehras, EIL and all its subsidiaries, alleging oppression and mismanagement of EIL. In those proceedings:

i) Interim relief sought by Enercon includes what amounts to very similar relief to the freezing relief injunction obtained by it here. The CLB has not granted that relief.

ii) Enercon alleges that the Mehras have “recklessly” denied the existence of the IPLA as a binding agreement. In response, the Mehras/EIL have set out their position as regards the Agreed Principles, draft IPLA and TKHA.

Just over a year later, on 16 October 2008, the Mehras filed their own claim before the CLB against in particular Enercon and Dr. Wobben alleging oppression by them, in particular in the form of Enercon seeking to prejudice EIL's relations with its banks.

Although the IPLA is or at least may be very much in issue in the CLB proceedings, it is common ground that none of the claims in the CLB proceedings arises under the IPLA or are within the scope of the putative IPLA arbitration agreement. I do not read the injunctions granted by Flaux J as affecting such proceedings but for the avoidance of any doubt Mr Joseph QC does not object to the insertion of appropriate wording to reflect this position if the freezing injunction is otherwise continued.

The BHC proceedings

Meanwhile, on 11 September 2007, the Mehras had started a derivative action, in their name, against Enercon before the BHC seeking specific performance of Enercon's alleged obligation under the provisions of the TKHA (and as a result of post expiry correspondence) to continue to supply parts to EIL. On 31 October 2007, the BHC

made an interim (“holding the ring” type) order that the supply of parts and components by Enercon to EIL should be resumed but that in return EIL should pay royalties to Enercon on sales of WTGs based on a stipulated formula in accordance with the Agreed Principles, not the IPLA . EIL duly paid the royalties on that basis until Enercon finally stopped supplying WTG parts. EIL has subsequently brought claims before the BHC seeking to recover its alleged substantial losses (around €75m) resulting from Enercon's alleged breach of the TKHA evergreen supply obligations and contending that Enercon's breach of the BHC's Order of 31 October 2007 is a contempt of court.

Enercon has filed petitions under the Indian Arbitration and Conciliation Act 1996 (the “Indian 1996 Act”) seeking orders that the BHC disputes be referred to arbitration pursuant to the IPLA , alternatively the TKHA. That application has not yet been heard and the substantive claims are stayed until it has been.

Daman Court Proceedings and Writ Petitions before the BHC

I have already referred to the proceedings initiated by EIL in the Daman court and the anti-suit/anti-anti-suit injunction which EIL obtained from that court on an interim basis on 8 April 2008. Thereafter, the key events in relation to these proceedings were in summary as follows:

The claimants issued an application under s.45 of the Indian 1996 Act for EIL's claims to be referred to arbitration and for the Indian anti-suit injunction to be lifted. So far as the former application is concerned, s.45 of the Indian 1996 Act is contained in Part II of that Act under the heading “Enforcement of Certain Foreign Awards, Chapter 1, New York Convention Awards”. The Act then sets out the following sections which provide in material part as follows:

> “44. Definition — In this Chapter, unless the context otherwise requires, “foreign award” means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960-
>
> (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
>
> (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.
>
> 45. Power of judicial authority to refer parties to arbitration.- Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44 , shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

On behalf of the claimants, Mr Joseph QC submitted that Part II s.45 is to be contrasted with Part I s.8 of the same Indian 1996 Act which is, submitted Mr Joseph QC, concerned with the parallel discrete power of the courts to refer disputes to arbitration pursuant to an arbitration agreement where the place of arbitration is in India. It was Mr Joseph QC's submission that this must be the case both because of the terms of s.8 itself and because that section appears in Part I of the Indian 1996 Act which provides by s.2(2) under the heading “General Provisions, Scope” as follows: “This Part shall

apply where the place of the arbitration is in India." In addition, Part I s.20 of the Indian 1996 Act provides as follows:

> "20. Place of arbitration – (1) The parties are free to agree on the place of arbitration. (2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties."

The effect of the statutory wording contained in, in particular, s.2 of the Indian 1996 Act is, I was a told, a matter of controversy as a matter of Indian Law. This was addressed in the evidence before me and I was also referred to the important decision of the Supreme Court of India in Bhatia International v Bulk Trading SA (2002) 4 SCC 105 and a number of other subsequent Supreme Court of India cases including Centrotrade Minerals & Metals Inc. v Hindustan Copper Ltd (2006) 11 SCC 245 ; National Agricultural Coop v Gains Trading (2007) SCC 692 ; Yograj Infrastructure Ltd v Ssang Yong Engineering & Construction Ltd (2011) ; and Videocon Industries v Union of India AIR 2011 SC 2040 . I was also informed that the decision in Bhatia is presently being examined by a 5 judge bench in the Supreme Court of India in another case Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc.. The hearing in that case apparently commenced in January 2012. It is not clear whether the hearing has been completed. In any event, the Judgment of the Supreme Court in Bharat is still awaited. There was much debate before me as to what is the effect of Bhatia ; whether it is distinguishable; and whether it will survive after Bharat . On this hearing, it does not seem to me possible to resolve these interesting and difficult issues. For present purposes, it seems to me sufficient to note what I understood to be common ground viz that whatever the scope of Part I of the Indian 1996 Act , Part II s.45 is only concerned with agreements referred to in s.44 ie an agreement in writing for arbitration to which the New York Convention set forth in the First Schedule applies; that to be caught by the New York Convention , an agreement must be non-domestic under the law of the contracting state; that the only basis for a party seeking and the Indian court making an order under s.45 is that the seat of arbitration must be in a place other than India.

In the event, the Civil Judge (D.S. Shinde) in the Daman court refused the claimants' s.45 application by Order dated 5 January 2009 and the anti-suit injunction by Order dated 9 January 2009.

The claimants then appealed against those orders to the Daman District Court ("DDC") where Judge Purohit allowed the appeals by his judgment of 27 August 2009. The Order made was in the following terms:

> **"Order**
>
> i) All the four miscellaneous appeals stand allowed.
>
> ii) Both the impugned orders of the trial court challenged in these appeals are set aside.
>
> iii) The injunction application of the plaintiffs before the Trial Court stands rejected.
>
> iv) The application of the defendants under section 45 of the Arbitration Act filed before the Court stands allowed in terms of prayer clause 28(a) thereof.
>
> v) The Trial Court to first decide the jurisdiction point before proceeding with the

suit.

vi) R & P sent back to the Trial Court."

By order dated 27 August 2009 Judge Purohit then agreed to a temporary stay of the reference under s.45 to give EIL the opportunity to "approach" the BHC but refused to maintain the anti-suit injunction pro tem.

Shortly thereafter, EIL then filed what it has described as its "appeals" (separately in relation to the anti-suit and s.45 relief) before the BHC. There is no evidence before me as to the precise nature of such proceedings but on their face they do not appear to be "appeals" as such term would normally be understood as a matter of English Law. Rather those proceedings would seem on their face to be Writ Petitions by EIL to the BHC issued pursuant to Article 227 of the Indian Constitution for the issuance by the BHC of what is described as a "Writ of Certorari" and thereafter for the BHC to "quash" the order of Purohit J. I shall refer to these proceedings as the "Writ Petitions". On 4 September 2009 the BHC reinstated the anti-suit pro tem and on 9 September 2009 maintained the stay of the s.45 relief. The latter (ie the stay of the s.45 relief) is common ground as is the fact that such stay remains in force. However, there is a dispute before me as to whether the anti-suit injunction was thereafter discharged and as to whether Enercon is therefore in breach of it and in contempt of the Indian court by having started the current proceedings in this court. Enercon says the anti-suit injunction was discharged on 12 October 2009 when an Order was made by the BHC as follows: "By consent, stand over to 19th November 2009. Ad-interim relief granted on 9th September 2009 shall continue to operate till the next date." On the other hand, EIL says that the anti-suit injunction reinstated on 4 September was unaffected by this order and continued to remain in force; alternatively, if it was (inadvertently) discharged on 12 October 2009, it was again reinstated on 25 January 2010 when the BHC made a further order which provided in material part as follows: "…If the Writ Petition is ready for final disposal, the same shall be added to the final hearing board on 15th February 2010 as per its turn. Ad-interim relief granted earlier to continue till further orders.".

Although the Writ Petitions were issued before the BHC as long ago as September 2009 ie some 2 and a half years ago, it appears that they remain pending and awaiting a hearing. Paragraph 32 (1) and (m) of the affidavit of Mr Allen (sworn on behalf of EIL) summarised the current position as follows:

"(1) On 25 January 2010, there was a further hearing. I understand from Thriyambak Kannan (who attended the hearing) that, again, it lasted only a short period of time. At that hearing, an oral application was made by the Claimants' junior counsel to expedite the hearing of EIL's Writ Petitions in order to resolve the appeal as swiftly as possible. EIL's legal team did not resist this application. Mr Justice Oka then directed in his order that: *"If the Writ Petition is ready for final disposal, the same shall be added to the final hearing board on 15th February, 2010 as per its turn"* …..I am informed that this meant that the hearing of the Writ Petitions, which ordinarily would have had to await their turn, would come before the Court on 15 February 2010 if Court time permitted. With regard to the ad-interim relief, the order, in relation to both petitions, provided that: *"Ad-interim relief granted earlier to continue till further orders* . At no stage during this hearing was it suggested that the Anti-Arbitration Injunction had come to an end.

(m) On 15 February 2010, no hearing took place since there was insufficient Court time with the result that the hearing of the Writ Petitions are awaiting their

> turn. However, it was and is open to the Claimants to seek to "mention" the Writ Petitions before the designated Bombay High Court Judge to seek expedition in the same manner as was directed by Mr Justice Oka on 25 January 2010. However, the Claimants have taken no steps to do so. Therefore, EIL and the Mehras are not frustrating the progress of the appeal as Mr Böhm suggests at paragraph 58 of his witness statement and which has been repeated elsewhere in the Claimants' evidence and submissions made to Flaux J and Eder J. EIL and the Mehras are waiting for the matter to come on in the ordinary course but, in the meantime, it is open to the Claimants to seek to expedite the appeal. With regard to the appeal process, I understand that the determination of the Writ Petitions will be by a single judge sitting in the Bombay High Court and, subject to being granted leave to appeal, the final tier of appeal is the Supreme Court of India."

With regard to the above assertion that the Mehras are waiting for "the matter to come on in the ordinary course", the likely timescale going forward was summarised in paragraph 61 of the third affidavit of Mr Ashford (on behalf of the claimants) as follows:

> "..there is a considerable backlog of cases in the Bombay High Court and the Writ Petitions may take approximately 2–3 years from now (on a conservative basis) to come on for a final hearing. Pertinently, certain Writ Petitions filed prior to 2001 are presently pending final hearing before the Bombay High Court. Any decision in the Writ Petitions would most likely entail filing of a Special Leave Petition/Civil Appeal to the Hon'ble Supreme Court. Should the Special Leave Petition be converted to a Civil Appeal and posted for final hearing, the final hearing would entail approximately another 2–5 years (again on a conservative basis). This is not taking into consideration a remand by the Supreme Court to the High Court for reconsideration of its decision. Whilst there are several things that EIL could do to expedite its appeal, it has chosen not to [do] any of them."

This led to some further debate before me in particular whether, as Mr Edey QC submitted, the fact that EIL did not seek any expedition is of little, if any, relevance given that the claimants could themselves have applied for expedition. Mr Joseph QC submitted that the claimants could not be criticised for failing to take (further) steps to expedite matters and that Mr Edey QC's submission to the contrary was "bizarre". Be that as it may, the present position is that, in effect, there has been no real progress with the Writ Petitions for some 2 and a half years. I deal with this aspect further in the context of the parties' respective submissions although I should perhaps note at this stage that Mr Edey QC indicated that EIL was willing to give an appropriate undertaking to seek expedition of the Writ Petitions. At this stage, it is not clear to me what the future timescale would be if an application for expedition was now made jointly by the parties before the BHC.

Revocation of Patent proceedings

EIL has applied to the Indian Intellectual Property Appellate Board to have 19 of Dr Wobben's patents revoked. It has so far succeeded as regards 12 out of 19; the application as regards the other 7 patents is to be heard in due course. Dr. Wobben appealed in respect of the revocation of the 12 patents but his petition that the revocation be quashed has recently (2 March 2012) been rejected.

Patent and trade mark infringement proceedings

Dr. Wobben has filed these proceedings against EIL and the Mehras objecting to the use of his technology and the name Enercon. The validity and effect of the IPLA is squarely in issue in those proceedings (in a nutshell, Dr. Wobben says that because the IPLA is terminated there is a breach of his patent rights and the Enercon trademark; EIL and the Mehras say that they are contractually entitled to use both as a result of the TKHA and its evergreen provisions and further agreements made in correspondence and meetings).

Jurisdiction for s.18 application

Against that brief summary of the facts and the history of the proceedings in England and India, I turn to consider the present applications in these proceedings.

The original application by the claimants for leave to serve the ACF out of the jurisdiction was made under CPR 62.5 (1) (b) and (c) which provides in material part as follows:—

> (1) The court may give permission to serve an arbitration claim form out of the jurisdiction if –
>
> (b) the claim is for an order under section 44 of the 1996 Act; or
>
> (c) the claimant –
>
> (i) seeks some other remedy or requires a question to be decided by the court affecting an arbitration (whether started or not), an arbitration agreement or an arbitration award; and
>
> (ii) the seat of the arbitration is or will be within the jurisdiction or the conditions in section 2(4) of the 1996 Act are satisfied."

S.2 of the English 1996 Act provides in material part as follows:

> **" Scope of application of provisions.**
>
> (1) The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland.
>
> (2) …
>
> (3) The powers conferred by the following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined—
>
> (a) …
>
> (b) section 44 (court powers exercisable in support of arbitral proceedings);
>
> but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or

Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so.

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

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

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

S.18 of the English 1996 Act provides as follows:

" Failure of appointment procedure.

(1) The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal.

(2) There is no failure if an appointment is duly made under section 17 (power in case of default to appoint sole arbitrator), unless that appointment is set aside.(2)If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.

(3) Those powers are—

(a) to give directions as to the making of any necessary appointments;

(b) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;

(c) to revoke any appointments already made;

(d) to make any necessary appointments itself.

(4) An appointment made by the court under this section has effect as if made with the agreement of the parties.

(5) The leave of the court is required for any appeal from a decision of the court under this section."

As I have already indicated and notwithstanding the concession that there was a good arguable case that the IPLA was a binding agreement, it is EIL's case that the "seat" of the arbitration is not within the jurisdiction but in India and on this basis it is EIL's case that the requirement in CPR 62.5 (c) (ii) is not satisfied. I deal with this argument below. But EIL advanced another separate argument which is linked but logically anterior to any determination of the "seat" of the arbitration and I must deal with that argument first of all.

Should the English court leave the question of seat to the Indian courts ?

The language of CPR Part 62.5(1) (ie "may give permission") is, of course, permissive and not mandatory. Mr Edey QC submitted that the issue of seat is already pending before the BHC in the context of the Writ Petitions. On this basis, Mr Edey QC submitted that it must be wrong to wrest that issue from the BHC. In particular, he submitted as follows:

> I. The starting point is that there can be no basis at all for this court to restrain (as it currently does) the pursuit by EIL of its "appeal" before the BHC:
>
> a) In order to justify restraint of that appeal, the claimants would need to show that pursuit of that appeal was vexatious and oppressive and that England was the natural forum for determination of the issue of seat: see Tonicstar v American Home Ins. [2005] Lloyds Rep. I&R 32 .
>
> b) In particular, the vexatious and oppressive test is, on this issue, the relevant one because on any view (whether the IPLA was agreed or not) there is no contractual agreement that the question of seat should be determined in any particular forum, be that the Indian courts, the English courts or arbitration (with whatever seat).
>
> c) As to vexatious and oppressive:
>
> i) It is hard to see how EIL's pursuit of an appeal in respect of a judgment obtained on an application by Enercon could ever be considered as being vexatious or oppressive.
>
> ii) Ignoring everything else and even assuming that the issue of seat is finely balanced (which is unduly favourable to Enercon), EIL's wish to have that issue determined by the Indian courts can hardly, in those circumstances, be said to be vexatious or oppressive.
>
> iii) But that is even more so when regard is had to the factors connecting the dispute to India, and the absence of any factors connecting it to England (see below).
>
> d) As to the natural forum for determination of the issue of seat, it is manifestly India; certainly it is not England (which is not even a natural forum):
>
> i) With the exception of the fact that the claimants are German and the reference to London in the putative arbitration clause, every single factor here connects the dispute to India. Perhaps most importantly, the issue of seat is a matter for Indian not English law: as further set out below it is thought to be common ground (but is in any event the case) that the arbitration agreement, and therefore its proper construction, is governed by Indian, not English law.
>
> ii) The single factor that might be said to connect the dispute to England is the reference to London in the putative arbitration clause of the IPLA . But for the purposes of deciding where the issue as to the true meaning of that reference to London should be determined, the claimants obviously cannot pray that reference in their aid as being a choice of English seat: that would

be bootstraps. The reference to London therefore has to be ignored for present purposes. That leaves India as the only possibility.

e) The anti-suit, in so far as it currently precludes the pursuit of the “appeal” from Judge Purohit must, on any view, therefore be set aside or varied so as to permit EIL to pursue that appeal and argue the issue of seat before the BHC.

II. If, as is therefore the case, there is no basis on which the English court can or should restrain EIL's “appeal” and therefore the determination of the seat issue before the Indian courts, it would be equally inappropriate for this court to seek to go on to determine that issue in parallel to the BHC or to seek to beat the BHC to the punch in deciding that issue: comity requires the English court in these circumstances to leave the issue to the Indian courts and to stay any consideration by it of that issue in the meantime: see Merkin and Flannery, The Arbitration Act 1996 at p.26; and Jurisdiction and Arbitration Agreements at p.423, fn.260. Otherwise there is a real risk of inconsistent judgments and a resulting battle between the English and Indian courts as to which of them has control over the arbitration. That must be avoided. In short, England is not the appropriate forum for determination of the seat issue; India is.

III. If consideration of the issue of seat is therefore to be left to the Indian courts:

(a) The English court cannot determine the s.18 relief at this stage and the sensible course is therefore also to leave over even the prior question of its own jurisdiction over EIL (which, for the reasons given above, necessarily is here dependent on the issue of seat) for the time being, until the seat has been determined by the Indian courts.

(b) In the meantime:

i) It would obviously be wrong for the English court to maintain the anti-suit or freezing injunctions both of which assume (see above) that the English court has jurisdiction because the seat of the arbitration is England (though there are myriad other reasons why they should be discharged in any event).

ii) If the claimants want interim relief in the meantime, there is nothing to stop them from applying for such to the Indian courts. As a matter of Indian law, any such application is not dependent on them accepting that the seat of the arbitration is India.

(c) If the Indian courts finally determine that the seat of the arbitration is England, then the Claimants can return here and in so far as there remains, in those circumstances any jurisdictional challenge or s.18 issue, there will at least no longer be an issue about seat because that issue will have become res judicata between the parties.

(d) But if the Indian courts finally determine that the seat of the arbitration is India, the English courts will necessarily have no further basis on which to be involved (at least absent some presently unforeseeable basis for seeking s.44 relief in relation to an arbitration the seat of which is India).

As to these submissions, Mr Joseph QC raised three main points. First, he submitted that there are important differences between Tonicstar and the present case. In particular as noted by Morison J at paragraph 4 and 5 of his judgment in that case, the

arbitration clause in that case had no express provision for the seat of the arbitration and thus for its curial law. By contrast, in the present case, Mr Joseph QC emphasised that clause 18.3 in the IPLA specified that the venue of the arbitration was London and that accordingly the court in England not India was the appropriate forum for determining the issue of "seat".

Second, Mr Joseph QC submitted that the question of seat was first raised in this court over 4 years ago when the claimants issued their original arbitration claim form on 27 March 2008. It was as a result of the subsequent proceedings issued in India by EIL that the issue as to the "seat" of the arbitration was, in effect, "wrested" from the English court. Moreover, those Indian proceedings were, submitted Mr Joseph QC, oppressive and vexatious because in particular they in effect sought to prohibit the claimants from pursuing their claims in any arbitration proceedings whether in England or India and therefore Tonicstar was distinguishable.

Third, Mr Joseph QC submitted that the matters determined in the DCC by the Judgment of Judge Purohit were res judicata or at least gave rise to one or more issue estoppels in particular (a) that EIL was bound to refer disputes to arbitration in accordance with the IPLA and (b) that the parties had designated England as the seat of the arbitration. In support, Mr Joseph QC submitted that Judge Purohit in his judgment expressly found that the seat of the arbitration in the IPLA was London and that EIL could not complain of the expense of having to arbitrate in London when it agreed this as the seat – see [63]; that the learned judge rejected EIL's submission as to application of the Indian 1996 Act as the governing procedural law in view of his finding that the seat of the arbitration was London, England — see [26]; that the learned judge also concluded that there was nothing in error in the claimants filing arbitration proceedings in London, which was the place of the seat- see [66]. In view of the terms of the anti-arbitration injunction granted by the learned Judge, Mr Joseph QC submitted that this must have been a reference to the original English court proceedings; and that there are similar findings as to EIL being bound by the terms of a London arbitration provision in the summary paragraph at the end of the judgment – see [70]. Further, Mr Joseph QC submitted that it was necessary for that court to make determinations in that regard in order to decide the claimants' application for a stay under s.45 of the Indian Act ; that, as referred to above, Part II in which s.45 appears applies to foreign arbitrations (i.e. arbitrations with a foreign seat) rather than s.8 which appears in Part I (and applies to domestic arbitrations); that Judge Purohit referred to that distinction at paragraph [58]; that the learned Judge held that England was the seat (see paragraph [21] and also paragraphs [26], [63] and [66]) and it was on that basis that he allowed the s.45 application. Finally, Mr Joseph QC submitted that such res judiciata/issue estoppel was unaffected by any actual or potential challenge to or appeal of the decision of the DCC or any stay imposed by the BHC. In that context Mr Joseph QC relied upon the statement of the law in Res Judicata, Spencer Bower and Handley, 4th Edition, para 5.19 and the cases there cited including Nouvion v Freeman (1889) 15 App Cas 1 , 10–11, 15 and Colt Industries Inc v Sarlie (No.2) [1996] 1 WLR 1287 CA .

I accept some at least of these submissions advanced by Mr Joseph QC. In particular, I accept that there are differences between both the terms of the arbitration clauses and the circumstances in Tonicstar and the present case. Further, I am prepared to assume in Mr Joseph QC's favour that if such matters had been raised by the claimants before this court in 2008 shortly after EIL commenced their own anti-suit proceedings in India, they might well have persuaded this court to grant some at least of the relief that the claimants now seek. In circumstances where the court is faced with an arbitration clause which, at least arguably, identifies London as the seat, it seems to me that there are strong reasons why the supervisory jurisdiction of the English court is thereby engaged. Mr Edey QC submitted that this is a circular "bootstraps" argument in

particular because such supervisory jurisdiction can only arise where the seat is in fact in England. In the event, it does not seem necessary at least at this stage to determine that issue.

This is because it seems to me that the court has to consider the circumstances as they now exist in the light of the relevant general principles as summarised by Hobhouse J in Pathe Screen Entertainment Limited & Others v Handmade Films (Distributors) Ltd (11 July 1989) and quoted by Morison J in paragraph 15 of Tonicstar :

> "15. I therefore conclude that the law is that I should grant the injunction if I am satisfied that in the interests of doing justice between the parties it should be granted in all the circumstances. What is the relevant natural forum is a factor to be taken into account as are the elements of vexation and oppression that are or may be involved. The discretion has to be exercised having regard to the principles of comity. It has to be exercised with caution and, as has been pointed out by Parker LJ in M&R v ACLI [1984] 1 Lloyd's Law Reports at page 613, may call for a higher standard of proof than in the case of an application for a stay. I do not consider myself … obliged to disregard what Lord Brandon said in Abdin v Daver at page 423:
>
> > "In this connection it is right to point out that, if concurrent actions in respect of the same subject matter proceed together in two different countries, as seems likely if a stay is refused in the present case, one or other of the two undesirable consequences may follow: first, there may be two conflicting judgments of the two courts concerned; or secondly, there may be an ugly rush to get one action decided ahead of the other in order to create a situation of res judicata or issue estoppel in the latter."
>
> Lord Diplock said in the same case (at page 412) "comity demands that such a situation should not be permitted to occur as between courts of two civilised and friendly states"; it would be, he said, "a recipe for confusion and injustice". As Bingham LJ said in *Dupont No 1* the policy of the law must be to favour the litigation of issues only once in the most appropriate forum. The interests of justice require that one should take into account as a factor the risks of injustice and oppression that arise from concurrent proceedings in different jurisdictions in relation to the same subject matter."

Bearing these general principles in mind and recognising the permissive nature of CPR Part 62.5 , the important point, in my view, is that the claimants did not pursue their applications in the original proceedings that they issued in this court in March 2008. On the contrary, they engaged fully (albeit perhaps reluctantly) in the Indian proceedings before the Daman court. When they lost at first instance before Judge Shinde, they appealed to the DCC with the result indicated above. That is the choice they made. Having made that choice and now some years down the line, it seems to me that the English court should at least be extremely cautious to intervene at this stage and, in Mr Edey QC's words, to "wrest" back the proceedings to England. To do so at this stage when those proceedings are, in effect, still pending would give rise to the "recipe for confusion and injustice" which Lord Diplock specifically warned against in *The Abidin Daver* as referred to in the passage of the judgment of Hobhouse J which I have quoted above. For that reason alone, I have decided somewhat reluctantly that I should follow the course suggested by Mr Edey QC ie that these proceedings should be stayed at least for the time being pending resolution of the Writ Petitions currently before the BHC. As to the form of order, I would want to hear Counsel for the parties. However, any such stay would have to be on terms including (i) that EIL undertakes to take all

necessary steps to expedite those proceedings; and (ii) that the stay is for a limited period only. I am willing to hear Counsel further as to the length of such period of time (and any other terms which might be imposed) but my present view is that it should be for the shortest time reasonably necessary to enable a renewed application for expedition to be made to the BHC. I very much hope that the BHC will accede to such application. I recognise the time pressures on all courts in all jurisdictions but I hope that the BHC will perhaps bear in mind that the decision I have reached is largely in respect of the comity between our two countries and the general desirability of avoiding the recipe for confusion and injustice to which I have already referred. In reaching this conclusion, I should make plain that if, after hearing further argument, the terms which I would seek to impose are unacceptable to EIL, I would have to reconsider alternative options. Equally, it would be necessary and important for the court to reconsider the position after the expiry of the period of stay in the light of the circumstances existing at that stage.

As I say, I have reached this conclusion somewhat reluctantly in particular because it seems to me that the historic and potential delays in relation to the Daman proceedings and the Writ Petitions are significant and give rise to the risk of real injustice. There is much attraction in Mr Joseph QC's submission that the English court should in effect now grasp the nettle, take control and move things on so that the arbitration on the merits can proceed simply on the basis that the arbitration clause provides that London shall be the “venue of the arbitration proceedings” and that this court can and should decide for itself that the “seat” is therefore London as part of this court's supervisory jurisdiction and exercise its powers under s.18 of the English 1996 Act . However, for good or ill, the claimants have actively engaged in the Daman proceedings. Although Mr Joseph QC hotly disputed that there was any “obligation” on the claimants to seek to renew their application for expedition before the BHC, there is no evidence before me to suggest that that was not a course open to them. However, it appears that they did nothing after February 2010. This is not a case where it might be said that the Writ Petitions were in any sense “improper”; or that such proceedings have in any sense lapsed. If that had been the case or if, perhaps, some particular event had occurred after February 2010 which would suggest that the continued pursuit of such proceedings had become improper, then the position might be otherwise. But that is not this case.

Res judicata/issue estoppel ?

The present position might also have been otherwise if Mr Joseph QC had been correct in his submission that the Judgment and Order of the DDC (Judge Purohit) gave rise to some res judicata/issue estoppel. But in my view that is not so. I have already summarised above Mr Joseph QC's submissions in this regard. Mr Edey QC's submissions were, in summary as follows:

i) It is far from clear that the issues here and before Judge Purohit are exactly the same. The Claimants originally put in no Indian law evidence (as opposed to assertion in their Skeleton Argument before Flaux J) as to what needed to be decided for the purposes of their s.45 application; and said nothing about what was required for their application to discharge the Indian anti-suit injunction. On the former, the determination of seat was in fact unnecessary; on the latter, the anti-suit could have been discharged for reasons other than seat.

ii) The decision of Judge Purohit was not a decision on the merits in the sense used by Lord Brandon in The Sennar (No.2) [1985] 1 WLR 490 or at least the English court should be very wary of treating it as such given the uncertainties (as recognised by Flaux J) about what it in fact decides. EIL does not accept that the

findings which the claimants contend can be found in the judgment are in fact findings at all as opposed to recitation of the arguments made by the claimants. In particular, EIL does not accept that Judge Purohit made any finding about seat (necessary or otherwise).

iii) Whatever it decides, the decision is not final and conclusive on those points:

a) For a decision to be final and conclusive for the purposes of the English concept of issue estoppel, it must be final and conclusive (and establish an issue estoppel) under the law of the place where the decision was made: Carl Zeiss v Rayer [1967] AC 853 at p.919 and p.969. It is notable that the Claimants originally failed to put in any evidence to the effect that Judge Purohit's judgment was final and conclusive as a matter of Indian law, as is required (see Carl Zeiss again at p.919) but rather simply asserted that it was so.

b) As a matter of Indian law (in contrast to the position as it would be as a matter of English law), the mere fact of an appeal does mean that (i) the appealed decision is not final and conclusive and (ii) it does not establish an issue estoppel binding on any other Indian court. In that context, reliance was placed on the evidence of Indian law contained in paragraph 33(h) of the statement of Mr Allen and in particular the two Indian authorities there cited viz. Sheodan Singh v Smt Daryao Kunwar (1966) 3 SCR 300 and Jal Narani v L Bulaqi Das (1969) AIR 504 .

c) Even if one completely ignores the Indian law position, the fact that there is a stay of Judge Purohit's order pending the appeal would, even as a matter of English law, be enough to deprive his judgment of any finality and conclusiveness it might otherwise have: Colt Industries v Sarlie (No.2) [1966] 1 WLR 1287 at p.1293; Berliner Industriebank v Jost [1971] 2 QB 463 at p.470–471. Here it is common ground that the s.45 relief has been stayed and it is the claimants' case (albeit wrongly) that the determination of the seat arose in the context of its s.45 application. On that basis too, Judge Purohit's decision is not final and conclusive.

d) In any event, it cannot possibly be right that a party can pray the concept of issue estoppel in aid of an application for an anti-suit injunction designed to stop, amongst other things, an appeal in respect of the very foreign judgment said to render the particular issue res judicata: that is bootstraps. It would be contrary to the fundamental or overriding principle that issue estoppel should only be applied to avoid doing injustice (Carl Zeiss per Lord Upjohn at p.947). Reliance here on the appealed Purohit judgment would be an injustice; not avoid one.

For present purposes, I am prepared to assume in favour of the claimants that, contrary to these submissions, the Judgment and Order of Judge Purohit, viewed in isolation, did give rise to res judicata/issue estoppel as submitted by Mr Joseph QC. I am also prepared to assume again in favour of the claimants that the Writ Petitions are not, in truth, to be treated as appeals; that, even if that is wrong, as a matter of English law the fact that such judgment and order are being appealed is irrelevant; and that the position as a matter of Indian law is the same regardless of the two Indian authorities relied upon by Mr Edey QC as cited above. However, it seems to me that Mr Edey QC is, at the very least, right when he says that the fact that there is a stay of Judge Purohit's order

pending the hearing of the Writ Petitions is, as a matter of English law, enough to denude his judgment of any finality and conclusiveness it might otherwise have on the basis of the cases cited above. In that context I should mention that I reach that conclusion on the basis of the stay of the Order in relation to s.45 of the Indian 1996 Act . However, insofar as may be necessary it seems to me that EIL is also right to rely on what it says is the stay in relation to the anti-suit because (i) although the position is not perhaps clear-cut, it seems to me, on balance, that EIL is right about the existence of a stay; alternatively (ii) there is sufficient doubt so as to preclude any possible reliance on res judicata/issue estoppel.

For these reasons, I do not accept Mr Joseph QC's submission that there is any relevant res judicata/ issue estoppel.

Good arguable case ?

In the alternative, Mr Joseph QC submitted that the judgment and order of Judge Purohit show that the claimants have, at the very least, a good arguable case that the seat of any arbitration under Clause 18 of the IPLA is London. Whether or not that is the relevant test for the purposes of CPR Part 62.5 (c) (ii) was a matter of considerable debate before me. However, even if it is, it seems to me that this does not of itself get the claimants home. As I have already stated, the power to give leave to serve out under CPR Part 62.5 is permissive . Even on the assumption that the claimants have a good arguable case that the seat of any arbitration is London and that this satisfies the requirement of sub paragraph (c) (ii) it seems to me that this is of no real assistance in the particular circumstances of the present case where the parties have been engaged in litigation in India where that issue arises and, as would appear, remains to be determined. (In that context, Mr Joseph QC submitted that although EIL has certainly raised the issue in the Daman proceedings as to whether the IPLA and the arbitration agreement contained therein were binding, it had not (or at least not properly) raised specifically the issue as to whether (if the IPLA /arbitration was binding) the seat was other than London. That may be correct but there is in my view no doubt that such issue has been raised in the context of at least the Writ Petitions relating to the anti-suit.)

Seat of the arbitration

Another reason why I have reached my conclusion somewhat reluctantly is that I would have reached the conclusion that the “seat” of the arbitration is London which is, of course, the conclusion which the claimants say Judge Purohit reached. Given my conclusion that these proceedings be stayed, my views on this issue are *obiter* . However, this issue was addressed at some length and in the event that this matter goes further or otherwise comes back before the court, it may be convenient to set out my brief reasons for such conclusion. It may also be of assistance to the BHC if and when it comes to hear the Writ Petitions although, as I say, my views are strictly *obiter* .

At the outset, I should mention that the question of “seat” in the context of the present proceedings potentially gives rise to a number of difficult sub-issues. In particular;

i) What is the proper law to be applied to that question? It was common ground that the relevant proper law was the proper law of the putative arbitration agreement. However, the parties disagreed as to what was the proper law. Was it Indian law or English law?

ii) Who is to determine that question? Is it for the court to determine or for the arbitrators to determine subject possibly to the supervisory jurisdiction of the court?

> iii) If the court is to determine that question, what is the relevant standard of proof? Is it (per Mr Joseph QC relying, in particular on Noble Denton Middle East v Noble Denton International Limited [2010] 1 Lloyd's Rep 387) “good arguable case”? Or (per Mr Edey QC) a conclusion on a balance of probability. (One possible conclusion might be that on the application to serve out under CPR 62.5 , the test is one of “good arguable case” but on the exercise of the court's substantive powers under s.18 the court must be satisfied on a balance of probability that the “seat” is in England).

These are difficult issues. However, for present purposes I propose to address the question of “seat” on assumption that it is to be determined on a balance of probability as a matter of English law by the court although I recognise that those assumptions are not necessarily correct.

In my view the starting point is the language of clause 18 itself which I have already quoted above. The essential task must be to give effect to the (objective) intention of the parties as expressed in the wording of the parties' agreement. Here, the arbitration agreement expressly provides: *“The venue of the arbitration proceedings shall be London”* . As to the proper construction of these words, Mr Joseph QC referred me to numerous authorities in which provisions, for example, for “arbitration in London” have been treated by the English courts as a binding provision with London as the designated seat. In particular, I respectfully agree with the approach of Cooke J in Shashoua v Sharma [2009] EWHC 957, [2009] 2 Lloyd's Rep 376 at paragraphs [26] to [32]. That case was concerned with an arbitration agreement which provided that “the venue of arbitration shall be London, United Kingdom” whilst also providing that the arbitration proceedings should be conducted in English in accordance with ICC Rules and that the governing law of the shareholders agreement itself would be the laws of India. In particular, Cooke J stated at paras 26-27:

> “26 ….. It is accepted by both parties that the concept of the seat is one which is fundamental to the operation of the Arbitration Act and that the seat can be different from the venue in which arbitration hearings take place. It is certainly not unknown for hearings to take place in anarbitration in more than one jurisdiction for reasons of convenience of the parties or witnesses. The claimants submitted that in the ordinary way, however, if the arbitration agreement provided for a venue, that would constitute the seat. If a venue was named but there was to be a different juridical seat, it would be expected that the seat would also be specifically named. Notwithstanding the authorities cited by the defendant, I consider that there is great force in this. The defendant submits however that as “venue” is not synonymous with “seat”, there is no designation of the seat of the arbitration by clause 14.4 and, in the absence of any designation, when regard is had to the parties' agreement and all the relevant circumstances, the juridical seat must be in India and the curial law must be Indian law.
>
> “27. In my judgment, in an arbitration clause which provides for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that the venue of the arbitration shall be London, United Kingdom does amount to the designation of a juridical seat. The parties have not simply provided for the location of hearings to be in London for the sake of convenience and there is indeed no suggestion that London would be convenient in itself, in the light of the governing law of the Shareholders Agreement , the nature and terms of that agreement and the nature of the disputes which were likely to arise and which did in fact arise (although the first

claimant is resident in the UK)."

Cooke J summarised his conclusion in paragraph 30:

> "30. "London arbitration" is a well known phenomenon which is often chosen by foreign nationals with a different law, such as the law of New York, governing the substantive rights of the parties. This is because of the legislative framework and supervisory powers of the courts here which many parties are keen to adopt. When therefore there is an express designation of the arbitration venue as London and no designation of any alternative place as the seat, combined with a supranational body of rules governing the arbitration and no other significant contrary indicia, the inexorable conclusion is, to my mind, that London is the juridical seat and English law the curial law. In my judgment it is clear that either London has been designated by the parties to the arbitration agreement as the seat of the arbitration or, having regard to the parties' agreement and all the relevant circumstances, it is the seat to be determined in accordance with the final fall back provision of section 3 of the Arbitration Act ."

Moreover, as Cooke J. noted, this conclusion is consistent with the views expressed in The Conflict of Laws, Dicey, Morris & Collins, 14th Edition at ¶16–035 where the authors state that the seat *"is in most cases sufficiently indicated by the country chosen as the place of the arbitration. For such a choice of place not to be given effect as a choice of seat, there will need to be clear evidence that the parties … agreed to choose another seat for the arbitration and that such a choice will be effective to endow the courts of that country with jurisdiction to supervise and support the arbitration"* .

Apart from the last sentence in clause 18.3 (ie "The provisions of the Indian Arbitration and Conciliation Act 1996 shall apply"), it seems to me that the conclusion that London is the "seat" of any arbitration thereunder is beyond any possible doubt. Thus the main issue is whether this last sentence is to be regarded as "significant contrary indicia" (using the language of Cooke J.) so as to place the "seat" of the arbitration in India. A similar issue was considered by Saville J in Union v of India v McDonnell [1993] 2 Lloyd's Rep 48 which, of course, pre-dates the English 1996 Act . The arbitration agreement in that case provided as follows: "In the event of a dispute arising out of or in connection with this agreement…the same shall be referred to an Arbitration Tribunal…The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940 or any enactment or modification thereof. The arbitration shall be conducted in the English language…The seat of the arbitration proceedings shall be London, United Kingdom." Saville J expressed the view that the arguments on both sides were "finely balanced" but in effect concluded that the reference to the Indian Arbitration Act 1940 did not have the effect of changing the "seat" of the arbitration designated by the parties. Rather, the phrase referring to the 1940 Act was to be reconciled with the rest of the clause by reading it as referring to the internal conduct of the arbitration as opposed to the external supervision of the arbitration by the Courts.

With regard to this decision of Saville J, Mr Edey QC made a number of detailed submissions. In particular:

> i) First, unlike the clause in this case, the clause there specifically referred to the "seat" of the arbitration being London. That very particular use of a legal term of art formed the central plank of the arguments put forward in favour of English law being the chosen procedural law of the arbitration: see p.50. In ABB v Keppel [1999] 2 Lloyd's Rep.24 , Clarke J rightly interpreted the decision in Union of India

as turning on the use of the word “seat” (see p.33rhc). In that context, the conclusion is perhaps unsurprising. But here, the much more ambiguous term “venue” (which appears neither in the English or Indian Act) has been used.

ii) Second, the fact that the clause there referred to the arbitration being *“conducted in accordance with the procedure”* provided in the old Indian Act (emphasis added), made it much easier for Saville J to give the reference to the old Indian Act the narrow scope which he did: indeed that and the use of the word “seat” were the linguistic linchpins of his reasoning (see p.51). That is not a route open on the language here: Cl.18.3 simply states that the provisions (not just some of them) of the Indian Act “shall apply”.

iii) Third, in this case, unlike that, the choice of law clause (here Cl.17, there Cl.11) not only provides that the contract itself is governed by and to be construed in accordance with Indian law, but that also that “any disputes” are governed by Indian law. In The Bay Hotel v Cavalier Construction [2001] UKPC 34, the Privy Council held that an agreement that disputes were to resolved by the laws of Turks & Caicos Islands, was a choice of those laws as the procedural laws of the arbitration.

iv) Fourth, Saville J's analysis (p.50–51) as regards the ability of the parties to agree that the seat of the arbitration is England but under procedural law of another country, needs to be taken with caution in light of the provisions of the subsequently enacted English 1996 Act . In particular, under that Act, unlike its predecessors, it is expressly provided that where the parties have agreed that a foreign law should govern any matters within the non-mandatory parts of the Act, that agreement shall be taken as ousting those non-mandatory parts: s.4 .

v) Fifth, it is not at all clear which provisions of the Indian Act Saville J accepted would, on his basis, be relevant to the internal conduct of the arbitration. For their part, here, the claimants have also (understandably) shied away from identifying (and EIL cannot identify) which provisions of the Indian 1996 Act might apply on this limited basis and what, if anything, they would materially add to an arbitration under a clause without the final sentence of Cl.18.3.

vi) Sixth, by contrast, the more recent case of Braes of Doune v Alfred McAlpine [2008] 1 Lloyd's Rep.608 points in favour of EIL: in that case Akenhead J decided that even the express reference to Glasgow as the “seat” of the arbitration did not, in context, amount to a choice of Glasgow as the juridical seat of the arbitration but only of the place where hearings would physically take place, holding that “where in substance the parties agree that the laws of one country will govern and control a given arbitration, the place where the arbitration is to be heard will not dictate what the governing or controlling law will be” (para.17(e)).

vii) Finally the following matters all further support EIL's case on this:

a) First, Clause 18.1 refers to the third arbitrator being “the presiding arbitrator”. That is, of course, not a term used by the English 1996 Act which refers to an umpire or chairman (ss.16 and 20–22). By contrast, the Indian 1996 Act uses the concept of “presiding arbitrator” in s.11.3 . That is a clear pointer towards the parties envisaging Indian arbitration.

b) Second, if the claimants are right and EIL is wrong about this, the consequence is that there is no right of appeal under the English 1996 Act , since the IPLA is governed by Indian law and a decision on foreign law is a finding of fact which is not appealable under s.69 of the English 1996 Act no matter how obviously wrong it may be. Of course the parties may exclude the right of appeal under s.69 , but it would be a little surprising to find that they had done so by this back-door.

c) Third, stepping back from things, India as the seat / Indian law as the procedural law of the arbitration makes complete sense in the context of the relationship between these parties, the focus of which was exclusively India. Any suggestion that it is inherently unlikely that the German parties would agree to Indian procedural law to govern any arbitration is belied by the fact that they clearly so agreed in the SHA and TKHA and they agreed for Indian law to govern all the contracts between the parties.

d) Fourth, if the seat is India/the procedural law Indian, the consequence is that the contract as a whole is governed by Indian law; the arbitration agreement is governed by Indian law; on the Claimants' case the internal conduct of the arbitration is governed by some parts of the Indian Act; but the remaining procedural law is English law. While possible (and the result in the Union of India case is an example of that possibility), it is not an attractive result. On the language here, as distinct from that in Union of India , it is not a result to which the court is driven.

These are forceful submissions and like Saville J in Union of India , I find the arguments in the present case finely balanced. For example, I accept that the reference to “presiding arbitrator” in clause 18.1 is a pointer in favour of EIL's construction. I also recognise that there are potentially important differences of language between the arbitration clause in that case and in the present case: in particular, the point emphasised by Mr Edey QC viz that the parties have not chosen the word “seat” but “venue” which are not, at least necessarily, synonymous. However, in the present context, it seems to me that a focus of the potential linguistic nuances of these two words may well not be appropriate for reasons similar to those expressed in the context of the scope of arbitration clauses by the House of Lords in Fiona Trust v Privalov [2008] 1 Lloyd's Rep 254 . Moreover, given the approach as stated by Cooke J in Shashoua v Sharma (with which, as I have stated, I respectfully agree), I do not read the last sentence of clause 18.3 as, in effect, constituting India as the seat of any potential arbitration for the following main reasons.

First, although the word “venue” is, of course, not necessarily synonymous with “seat”, it seems to me that in the context of this particular clause, the parties' agreement that the venue shall be London is and can properly only be a reference to London as the “seat”. I do not accept Mr Edey QC's suggestion that London was chosen simply as a convenient geographical venue for the parties. London was not a convenient geographical venue for disputes concerning an Indian joint venture; intellectual property in India; an Indian and German company; where the evidence would be located in India and possibly to some extent in Germany. In my judgment, the designation of London therefore had to have some other function for it to be explicable. EIL argues that maybe London was chosen because it was a neutral venue. However, as submitted by Mr Joseph QC, neutrality in this sense is to be understood in terms of a neutral place to

anchor the proceedings. In other words a place which is neutral and will not favour either side. A designated room for the hearing of evidence is not the meaning of the words used but in any event is rarely anything other than neutral.

Second, the language in clause 18.3 refers to the “arbitration proceedings”. That is an expression which includes not just one or more individual or particular hearings but the arbitration proceedings as a whole including the making of an award. In other words the parties were anchoring the whole arbitration process in London right up to and including the making of an award. The place designated for the making of an award is a designation of seat. Moreover the language in clause 18.3 does not refer to the venue of all hearings “taking place” in London. Clause 18.3 instead provides that the venue of the arbitration proceedings “shall be” London. This again suggests the parties intended to anchor the arbitration proceedings to and in London rather than simply physically locating the arbitration hearings in London. Indeed in a case where evidence might need to be taken or perhaps more likely inspected in India it would make no commercial sense to construe the provision as mandating all hearings to take place in a physical place as opposed to anchoring the arbitral process to and in a designated place. All agreements including an arbitration agreement should be construed to accord with business common sense. In my view, there is no business common sense to construe the arbitration agreement (as contended for by EIL) in a manner which would simply deprive the arbitrators of an important discretion that they possess to hear evidence in a convenient geographical location.

Third, Mr Joseph QC submitted that the last sentence of clause 18.3 can be reconciled with the choice of London as the seat. First, he submitted that it can be read as referring simply to Part II of the Indian 1996 Act ie the enforcement provisions. Mr Edey QC's response was that if that is all the last sentence meant, then it would be superfluous. However, I do not consider that any such superfluity carries much, if any, weight. Alternatively, Mr Joseph QC submitted that it can be read as referring only to those provisions of the Indian 1996 Act which were not inconsistent with the English 1996 Act. As to the latter, Mr Edey QC submitted that there were few, if any, provisions of the Indian 1996 Act which fell into such category and that, in any event, the attempt to carry out some kind of reconciliation process was difficult, if not impossible, and would lead to uncertainty and confusion. It is not necessary for me to carry out such reconciliation process although some such issue may well arise in the future. For present purposes, it seems to me sufficient that on either ground the last sentence of clause 18.3 either is or may not be entirely meaningless.

Further, Mr Joseph QC also relied upon the fact that the parties previously under the TKHA and SHA had made provision for Indian arbitration to take place at the Indo-German Chambers of Commerce in Bombay. I am uncertain as to whether reference to these earlier agreements is legitimate as an aid to the construction of the arbitration agreement in the IPLA . But, on the assumption that such reference is permissible, it seems to me that there is at least some force in Mr Joseph QC's argument that this change from India to England must be taken to have some real and effective purpose and that the most credible explanation for this change of place or seat outside of India is to render an award enforceable in India under the provisions of the New York Convention (i.e. Part II of the Indian Arbitration Act). If the provisions of clause 18.3 were construed as rendering the place of arbitration as India, then it would give rise to a domestic award and not be enforceable in India under the Indian 1996 Act's enactment of New York Convention . In an international contract of this type (with parties of different nationality) the desirability of enforceability of an award under the provisions of the New York Convention as enacted in India and elsewhere is a legitimate commercial reason to construe the agreement as the claimants contend.

For all these reasons, it would have been my conclusion that, whether applying the test

of “good arguable case” or on a balance of probability, the effect of clause 18.3 is that London would be the “seat” of any arbitration thereunder. It would also follow from that conclusion that the English 1996 Act would apply and that the English court's “supervisory jurisdiction” would be engaged including, of course, the court's power to give the necessary leave to serve relevant proceedings out of the jurisdiction and its power under s.18 of the English 1996 Act to appoint an arbitrator.

The Injunctions

Given my conclusion with regard to the stay and my reasons for such conclusion, it seems to me to follow inevitably that I should also set aside paragraphs 1 and 2 of the Order of Flaux J. at least so far as the existing Writ Petitions are concerned. I should mention that Mr Edey QC advanced a number of independent arguments why those parts of that Order (indeed the whole Order) should be discharged – in particular because of the claimants' alleged inexcusable delay, alleged contempt of the Indian proceedings and failure to comply with their duties of full and frank disclosure at the without notice hearing. In the event, it is unnecessary to deal with these arguments.

As to the freezing injunction which I granted, the position is perhaps more complicated. As stated above, I granted the freezing injunction at the without notice hearing on 15 February 2012. The injunction was granted in the proceedings commenced by the AFC for which Flaux J. granted leave to serve out as I have already described. Given my earlier conclusion that the proceedings should be stayed and although I suppose it is arguable that I still have jurisdiction to continue the freezing injunction, one possible view is that it follows that I must (or at least should as a matter of discretion) decline to do so. However, on the assumption that (i) there is at least a good arguable case that the IPLA is binding and that the seat of any arbitration is London and (ii) “good arguable case” is the relevant test, there is a counter-argument that s.44 of the English 1996 Act and/or s.37 of the Senior Courts Act 1981 continue to apply and that, on that basis, I can and should continue the freezing injunction. In the circumstances, it is not necessary to decide that issue. I am prepared to assume in favour of the claimants that my jurisdiction to continue the freezing remains extant. Further, I do not consider that it is necessary to consider the separate arguments advanced by Mr Edey QC that the freezing injunction should be discharged including (again) the claimants' alleged failure to comply with their duties of full and frank disclosure at the without notice hearing. However, it seems to me that, as submitted by Mr Edey QC, there is both a short and a long answer to the continuation of the freezing injunction. The short answer is that, even on the assumption that s.44 of the English 1996 Act applies, the claimants cannot satisfy the requirements of “urgency” and s.37 of the Senior Courts Act 1981 (again assuming it applies) cannot be used to circumvent the restrictions in s.44 . The long answer is that I do not consider that there is sufficient evidence of “risk of dissipation” to justify the continuation of the freezing injunctions. These two answers overlap to some extent. I deal with both answers shortly below.

In support of the continuation of the freezing injunction, Mr Joseph QC relied upon a number of matters under two broad headings.

A. EIL's conduct to the claimants

First, Mr Joseph QC relied upon what he described as “EIL's conduct to the Claimants”. This was dealt with in paragraphs 151-154 of Mr Joseph's QC skeleton argument as elaborated in the course of his oral argument. I do not propose to set out these submissions in any detail. The two main sub-points were these. First, Mr Joseph QC identified a number of matters in relation to EIL's conduct which were, he submitted, in

flagrant breach of the IPLA . That may be. However, it seems to me that that this ignores the dispute between the parties as to whether the IPLA is binding. If, as EIL contends, the IPLA is not binding then the claimants' complaints of breach – let alone flagrant breach – fall to the ground. For present purposes, I proceed on the basis (as EIL has now conceded) that the claimants have a good arguable case. However, it seems to me that this is of little, if any, significance. Of course, in order to obtain a freezing injunction, it is trite law that a claimant must show a “good arguable case”. However, that is a prerequisite but not, at least of itself, a sufficient justification of the grant of a freezing injunction. There must, in addition, generally be “solid evidence” of the risk of dissipation. In circumstances where the court is satisfied that the claimants have an unarguable or even a very strong case, such fact can no doubt be taken into account by the court in considering whether or not to grant the freezing injunction. However, it does not seem to me that this is a case where I can or should go further than the concession made by EIL ie that the claimants have a “good arguable case”. The claimants seek to rely on the fact that this concession came very late; but, in my view, this provides the claimants with little, if any assistance. Moreover, this is not a dispute which has suddenly arisen. On the contrary, it appears that it goes back some 5 years or more and has been at the heart of most if not all of the Indian proceedings that I have described above. Mr Joseph QC then submitted that even if the IPLA is not binding, EIL has failed to pay some Euros 19 million for which there is no real defence and, again, that is something which I can and should take into account. However, in that context, it is EIL's case that it has a cross-claim of approximately Euros 75 million which it is, in effect, entitled to set-off against such claim. In response, Mr Joseph QC took me through the detailed summary of such cross-claim and submitted that, in truth, it was obviously “paper thin” and, in any event, grossly exaggerated. As to the former (ie paper thin), I am unable to express a view on the material before me; and as to the latter (ie grossly exaggerated), I am equally unable to express a view although even if Mr Joseph QC is right (as he may well be), there is no basis upon which I could say it could not overtop the claimant's claim of Euros 19 million.

B. EIL's financial profile and dealings with affiliates and subsidiaries controlled by Mr Mehra

This aspect was addressed in paragraphs 155-160 of Mr Joseph QC's skeleton argument as elaborated in oral argument. In particular, Mr Joseph QC took me through a detailed letter (in effect, an expert's report) from KPMG dated 6 March 2012 which Mr Joseph QC submitted demonstrated a real risk of dissipation. Indeed, it was, Mr Joseph QC's submission that this letter showed that there had already been a significant dissipation of current net assets. The letter shows on p5 a comparison of data from the 2009, 2010, and 2011 draft accounts prepared by the Indian firm of Deloitte Haskins & Sells (“Deloitte”). In particular KPMG highlight the decline in net current assets (p8), the limited provision in the accounts for royalties under the IPLA (p10), the material increase of investments in and loans to subsidiaries and associates (pp11–12), what is said to be certain inconsistencies between the draft accounts as regards inter-company trading balances (pp13–14), and the material movements in the balances to loans to subsidiaries including a very large trading balance of €67m to one subsidiary (pp15–17). The summary conclusions are at pp18–19.

In addition, Mr Joseph QC relied upon the network of companies associated with EIL which he submitted was “particularly troubling” for the reasons Mr Ashford gives in his first witness statement paragraphs 40-44 and in his third witness statement paragraphs 80-83 which Mr Joseph QC submitted had not been answered satisfactorily. In summary, it was Mr Joseph QC's submission that it is perfectly clear that EIL is loaning substantial sums of money, without the consent or knowledge of Enercon to vehicles wholly owned by the Mehra family; that Mr Mehra's protestations that every subsidiary

was established with the full knowledge of Enercon, is a wholly owned subsidiary or has direct ownership by Enercon and the EIL, is, as Mr Ashford points out, simply untrue; and that, as Mr Mehra himself notes at in his own witness statement, *"[Enercon] are not actively engaged in the business of these subsidiaries* " in any event. Further, it was Mr Joseph QC's submission that Mr Mehra's evidence generally on the role and purpose of these subsidiaries is dubious at best. By way of example, Mr Joseph QC relied in particular on the following:

a) Mr Mehra's figure for the "long term loans" does not appear in the Deloitte 2010 report. In fact, the figure in the DHS report appears to be double the sum Mr Mehra gives.

b) Mr Mehra also states that he and his family own companies that were incorporated to acquire land *"for the potential use as wind farm sites"* because he says that that is necessary due to *"limitations on how much land each company can acquire."* As Mr Ashford points out however, this apparent citation of India law cannot be right, because it would imply EIL was seeking to establish wind farms in urban locations on plots of between 500 – 2000 square metres, which would plainly be ridiculous. In any event, Enercon has not seen any evidence that such companies have sold land to EIL as Mr Mehra envisages. If indeed they have, it is difficult to see how that could be done lawfully due to the self-dealing rules, Enercon not being involved in management and the CLB directing that no board meetings should take place.

c) In response to Mr Ashford's contentions that EIL's net worth reduced from 2009 to 2010, Mr Mehra merely asserts that EIL's turnover and net profit have all increased without revealing the source of those figures. He does not attempt to explain why the figures Mr Ashford was looking at are not correct.

Finally, Mr Joseph QC submitted that EIL's continued activities are also very troubling in view of the *status quo* orders from the CLB. In particular, Mr Joseph QC submitted that, on the one hand, Mr Mehra suggests that Enercon should take some comfort from the fact that EIL's business is subject to the CLB proceedings and from the fact that orders have been made to preserve the status quo; but on the other hand, Mr Allen says that the status quo order has *"fallen away"* . Mr Joseph QC relied upon certain other particular parts of the evidence in support of a general submission that the overall "impression" is that that the Mehras have little concern for the proper running of EIL or compliance with court orders and that the running of EIL since Enercon was excluded smacks of the Mehra family treating it as their own personal fiefdom.

I am prepared to accept that there may well be a strong and genuine suspicion on the part of the claimants that EIL has dissipated its assets and that there is a risk of future dissipation of assets on the part of EIL. However, I am not satisfied that there is "solid evidence" to such effect; nor that this is a case where it would be appropriate to make any inferences that would justify such a conclusion. In particular, it does not seem to me that the KPMG letter shows any such actual or future risk of dissipation. I agree that it raises certain queries. I also agree that it shows a very substantial reduction in what are described as "net current assets" (ie Rs 4,685 m in 2007 to only Rs 439 m in 2011) during a period of dramatic growth in profits in the same period (ie from Rs 217 in 2007 to Rs 1,837 m). This was, indeed, Mr Joseph QC's main point in his oral submissions. However, it does not seem to me that this is necessarily evidence of dissipation of assets. Certainly, there is nothing in the KPMG letter to that effect. On the contrary, it

seems to me that, as explained in Mr Mehra's witness statement and as submitted by Mr Edey QC, this picture is entirely consistent with EIL using its profit and net current assets to fund the growth of EIL's corporate interests. The fact that this may be done through subsidiaries or even third party companies owned and controlled by the Mehras does not seem to me sufficient to warrant the conclusion that EIL's assets are being dissipated. The main thrust of Mr Joseph QC's complaints is that the reduction in EIL's net current assets means that there is or will be a reduction in the cash (or cash equivalent) within EIL to pay the claimants' claims. However, to my mind, the flaw in such complaints is the failure to recognise that the purpose of a freezing injunction is not to give the claimants security over any particular asset or money.

Of all the arguments advanced by Mr Joseph QC in this context, the one which did initially impress me most was the submission that many of the investments which had apparently been executed (in particular to third party companies owned or controlled by the Mehras) were made in breach of the SHA ie without the consent of Enercon. However, Mr Edey QC complained that this was an entirely new allegation which he would, if necessary, need further time to address. However, it seems to me that, as submitted by Mr Edey QC, these are matters which are, in effect, within the purview of the proceedings before the CLB.

In any event, there are a number of matters which, in my judgment, undermine the continuation of the freezing injunction. First, EIL is not some one-ship company or fly-by-night outfit incorporated in an off-shore jurisdiction. On the contrary, it is a substantial and growing company. As at 31 March 2011, it had a turnover of Euros 560 million and profits of Euros 26.3m. It had (book value) assets (including factories in Daman, Karnataka and Tamilnadu) exceeding liabilities by Euros 111m. It employs around 4,300 employees in India. Its operations are subject to Indian law. Second, EIL is audited annually by Deloitte. Enercon has been provided with the annual accounts. Any dissipation of assets would be expected to come to light in that context. There is absolutely no evidence in those accounts of dissipation of assets – and, as I have indicated above, the matters relied upon by Mr Joseph QC (in particular, the reduction in net current assets) do not, in my view, of themselves indicate any such “dissipation”. Third, EIL has substantial and ongoing relationships with its banks. Mr Mehra has personally guaranteed capital loans by banks to EIL of around Euros 100m. As submitted by Mr Edey QC, EIL must provide monthly reports to the banks as a result of which any sign of dissipation would be expected to come to light.

Fourth, it seems to me relevant to take into account that there is no proper explanation for the delay in applying to the court for a freezing injunction. In that context, Mr Joseph QC referred me to Madoff Securities International & Others v Raven & Others [2011] EWHC 3102 (Comm) where after citing certain passages from two recent decisions in the Commercial Court viz Fiona Trust v Privalov [2007] EWHC 1217 (Comm) and Antonio Gramsci Shipping Corp v Recoletas Ltd [2011] EWHC 2242 (Comm) , Flaux J. summarised the applicable principles in paragraph 156 of his Judgment as follows:

> “ It seems to me that the following principles relevant to the present application can be discerned from those two cases:
>
> (1) The mere fact of delay in bringing an application for a freezing injunction or that it has first been heard *inter partes* , does not, without more, mean there is no risk of dissipation. If the court is satisfied on other evidence that there is a risk of dissipation, the court should grant the order, despite the delay, even if only limited assets are ultimately frozen by it;
>
> (2) The rationale for a freezing injunction is the risk that a judgment will remain unsatisfied or be difficult to enforce by virtue of dissipation or disposal of assets

(see further the citation from Congentra AG v Sixteen Thirteen Marine SA ("The Nicholas M") [2008] 2 Lloyd's Rep 602; [2008] EWHC 1615 (Comm) below). In that context, the order for disclosure of assets normally made as an adjunct to a freezing injunction is an important aspect of the relief sought, in determining whether assets have been dissipated, and, if so, what has become of them, aiding subsequent enforcement of any judgment;

(3) Even if delay in bringing the application demonstrates that the claimant does not consider there is a risk of dissipation, that is only one factor to be weighed in the balance in considering whether or not to grant the injunction sought."

I respectfully agree with and am content to adopt those principles. However, it does not seem to me that they are of any assistance to Mr Joseph QC. Delay in bringing the application is at least one factor to be weighed in the balance in considering whether or not to continue the freezing injunction. As submitted by Mr Edey QC, it is not simply the fact of delay that is so important but what it tells the court about the risk of dissipation. Absent some proper explanation, the fact that the claimants here waited for almost 2 and a half years before seeking a freezing injunction raises, at the very least, a large question mark as to whether there is indeed a real risk of dissipation particularly against the background of the many and varied Indian proceedings in which the parties have been engaged since 2007. This was a point which troubled me at the without notice hearing on 15 February; and I raised it specifically with Mr Joseph QC. In broad terms, Mr Joseph's answer was that when the anti-suit injunction was in place, the claimants could not apply to this court for a freezing injunction and thereafter (ie after September 2009) they were otherwise occupied because of what Mr Joseph QC described as a "deluge of Indian litigation", in particular the various patent suits. As I said then, I find that difficult to accept. The other main reason given for the delay is that the information with regard to risk of dissipation has only emerged in stages. That explanation has perhaps more force but Mr Joseph QC was unable to point to any particular information which has only recently become available and which is somehow of critical importance. In the event, I do not consider that the delay and the lack of proper explanation of itself justifies the discharge of the freezing injunction. However, it is a factor which I can and do take into account.

In all the circumstances and for the reasons stated above, I am not persuaded that that this is a case in which the freezing injunction should be continued.

Conclusions

For all these reasons, it is my conclusion that, in principle and subject to any further submissions in the light of my comments in paragraph 48 above, paragraphs 1 and 2 of the Order of Flaux J should be set aside; the freezing injunction should be set aside; and the present proceedings should be stayed on terms which I hope can be agreed. Counsel are requested to prepare a draft order for my approval failing which I will hear further argument and determine any outstanding issues.

Process & Industrial Developments Limited v The Federal Republic of Nigeria

Case No: CL-2018-000182

High Court of Justice Business and Property Courts of England and Wales Commercial Court (QBD)

16 August 2019

[2019] EWHC 2241 (Comm)

2019 WL 03848529

Before: Mr Justice Butcher

Date: 16/08/2019

Hearing dates: 14th June 2019

Representation

Ian Mill QC (instructed by Kobre & Kim (UK) LLP) for the Claimant.

Harry Matovu QC (instructed by Curtis, Mallet-Prevost, Colt & Mosle LLP) for the Defendant.

Approved Judgment

Mr Justice Butcher:

Introduction

This is an application by the Claimant, Process and Industrial Developments Ltd ("P&ID"), pursuant to s. 66 Arbitration Act 1996 , for an order that P&ID have leave to enforce an arbitration award dated 31 January 2017 in the same manner as a judgment or order of this court to the same effect. The Defendant, the Federal Republic of Nigeria ("the FRN"), resists the making of such an order.

The award of 31 January 2017 to which this application relates is stated to be a Final Award made by the majority of a tribunal consisting of Sir Anthony Evans, Chief Bayo Ojo SAN, and Lord Hoffmann ("the Tribunal"). The majority was comprised of Sir Anthony Evans and Lord Hoffmann, and Chief Bayo Ojo dissented. I will refer to that award as "the Final Award".

The Final Award was made in arbitration proceedings relating to a dispute between P&ID and the FRN arising out of a Gas Supply and Processing Agreement (the

"GSPA") entered into between P&ID and the FRN acting by its Ministry of Petroleum Resources ("the Ministry"), dated 11 January 2010.

An application to enforce an arbitration award under s. 66 Arbitration Act 1996 is a summary procedure. It usually does not require a detailed investigation of the facts of the arbitration. In the present case, however, because there is an issue between the parties as to the seat of the arbitration, and as to whether enforcement under s. 66 Arbitration Act 1996 is available to P&ID at all, it is necessary to summarise the salient facts.

Factual Background

Under the terms of the GSPA between the parties:

(1) The FRN was to supply natural gas ("Wet Gas"), at no cost to P&ID, via a government pipeline, to the site of P&ID's production facility.

(2) P&ID was to construct and operate the facility necessary to process the Wet Gas by removing the natural gas liquids ("NGLs") contained within it, and to return to the FRN lean gas suitable for use in power generation or other purposes, at no cost to the FRN.

(3) P&ID was to be entitled to the NGLs stripped from the Wet Gas.

(4) The GSPA was to run for 20 years from the date of first regular supply of Wet Gas by the FRN.

Clause 20 of the GSPA provided, in part, as follows:

"The Agreement shall be governed by, and construed in accordance with the laws of the Federal Republic of Nigeria.

The Parties agree that if any difference or dispute arises between them concerning the interpretation or performance of this Agreement and if they fail to settle such difference or dispute amicably, then a Party may serve on the other a notice of arbitration under the rules of the Nigerian Arbitration and Conciliation Act (Cap A18 LFN 2004) which, except as otherwise provided herein, shall apply to any dispute between such Parties under this Agreement. Within thirty (30) days of the notice of arbitration being issued by the initiating Party, the Parties shall each appoint an arbitrator and the arbitrators thus appointed by the Parties shall within fifteen (15) days from the date the last arbitrator was appointed, appoint a third arbitrator to complete the tribunal. …

The arbitration award shall be final and binding upon the Parties. The award shall be delivered within two months after the appointment of the third arbitrator or within such extended period as may be agreed by the Parties. The costs of the arbitration shall be borne equally by the Parties. Each Party shall, however, bear its own lawyers' fees.

The venue of the arbitration shall be London, England or otherwise as agreed by the Parties. The arbitration proceedings and record shall be in the English language.

> The Parties shall agree to appropriate arbitration terms to exclusively resolve any disputes arising between them from this Agreement."

By 2012 a dispute had arisen in relation to the GSPA. P&ID contended that the FRN had failed to make available Wet Gas in accordance with the GSPA. On 22 August 2012 P&ID served its Notice of Arbitration. On 19 September 2012, P&ID appointed Sir Anthony Evans to act as arbitrator. On 30 November 2012, the FRN appointed Chief Bayo Ojo, SAN as its arbitrator. The two arbitrators invited Lord Hoffmann to become "chairman" of the arbitral tribunal, and he accepted this appointment on 29 January 2013.

By its initial Statement of Case in the arbitration, served on 28 June 2013, P&ID claimed that the FRN was in repudiatory breach of the GSPA, and that that repudiation had been accepted. P&ID claimed damages, quantified at that stage as US$5,960,226,233 plus interest.

On 3 July 2014 the Tribunal made a unanimous Part Final Award. It bore the heading "In the matter of the Arbitration Act 1996 (England and Wales) and in the matter of an arbitration under the Rules of the Nigerian Arbitration and Conciliation Act (Cap A18 LFN 2004)". That Part Final Award dealt with certain preliminary issues which arose. The first was as to whether the Tribunal had jurisdiction to rule on its own jurisdiction. It held that it had. It said that the Arbitration Rules scheduled to the Nigerian Arbitration and Conciliation Act 1988 ("ACA") were clear on this point, and cited Article 21 of those Rules. It continued in paragraph 36: "By the law of the seat of arbitration, England, section 30(1) of the Arbitration Act 1996 confers a similar jurisdiction." The Part Final Award also determined that the Ministry and the Government of the FRN were one and the same, and it had entered into the GSPA on behalf of the Government. The Part Final Award specified, at the end: "Place of arbitration: London, United Kingdom".

A hearing on liability took place before the Tribunal on 1 June 2015. On 17 July 2015 the Tribunal issued a second Part Final Award, which has been referred to on this application, and to which I will refer, as "the Liability Award". It bore the same heading as the first Part Final Award. In the Liability Award the Tribunal unanimously decided that the FRN had repudiated the GSPA by failure to perform its obligations thereunder; that P&ID was entitled to and did accept the FRN's repudiation of the GSPA; and that P&ID was entitled to damages, in an amount to be assessed, for the repudiation of the GSPA. The Liability Award stated, at the end: "Place of arbitration: London, United Kingdom".

Following the Liability Award, there occurred a number of matters which have been the subject of debate on this application, and which it is necessary to refer to in somewhat more detail.

On 23 December 2015 Stephenson Harwood LLP, acting for the FRN, issued an Arbitration Claim Form in this Court (ie the Commercial Court). In that Claim Form the "Remed[ies] Claimed" were as follows: (1) an order under CPR Part 62.9(1) extending the time under s. 70(3) Arbitration Act 1996 for an application under s. 68 of that Act; and (2) an order setting aside the Liability Award and/or remitting it for further consideration under s. 68(2)(d) or s. 68(2)(f) Arbitration Act 1996 , on the basis that there had been a serious irregularity. The Grounds specified in the Claim Form were: (A) that there was an internal inconsistency in the Liability Award; (B) that the Tribunal had not dealt with the Ministry's case that it lacked factual authority to perform the GSPA separately from its case that it lacked legal capacity to do so; and (C) that there had been no reasoning on the issue of whether the Ministry's conduct was repudiatory.

The FRN's solicitors served a witness statement in support of its applications for an

extension of time and under s. 68 Arbitration Act 1996 . This was a statement of Folakemi Adelore, the Director of Legal Services at the Ministry, and was dated 22 December 2015. Ms Adelore stated (at paragraph 10) that the proposed claim was brought 4 months, 8 days out of time; that "this delay was not in any way deliberate or calculated"; and that the reason for it was the political situation in Nigeria, which had seen elections on 28 and 29 March 2015 result in the defeat of the administration of President Goodluck Jonathan, and a subsequent period in which the new administration was settling into office, meaning that ministers, including the Attorney-General of the FRN, had only been appointed in November 2015.

Ms Adelore's witness statement stated, at paragraph 22:

> "On 21 July 2015, TMS [Twenty Marina Solicitors (the legal representatives of the Ministry in Nigeria)] advised me as to whether the Award failed completely and/or clearly to address the issues presented by the Respondent and as to whether or not it should be challenged accordingly. The Ministry understood that in order to challenge the Award, it would need to instruct a firm of solicitors in the U.K. given that any such challenge would have had to be before the English courts under the English Arbitration Act 1996. (Nothing set out in this statement shall constitute a waiver of privilege.)"

Ms Adelore's witness statement further stated, at paragraph 33:

> "Since receipt of the documents on 25 November 2015, Stephenson Harwood and Leading Counsel have been considering the merits of the Applications, advising the Ministry on the same and preparing the Applications. The issue of jurisdiction of this Court and the seat of the Arbitration had first to be considered, in particular given the differing headings on the various procedural orders and the Part Final Award dated June 2014."

As is standard practice, the FRN's applications were put before a judge of the Commercial Court on paper. On 10 February 2016 Phillips J made an order dismissing the FRN's application for an extension of time. Phillips J's Reasons stated that there was no adequate explanation for the delay. Paragraph 3 of those Reasons was as follows:

> "In refusing to extend time I further take into account that the grounds of appeal have no merit. As to ground (A), it is incorrect to say that the Tribunal found that the claimant was not in breach of art 6(a): the finding was that the claimant had put itself in a position where it was impossible for it to comply with art 6(a) by virtue of its own breach of art 6(b). There was no internal inconsistency in the Tribunal's reasons. As to ground (B), the Tribunal clearly addressed the actual authority of claimant to enter and perform the GSPA, holding that that was the *prima facie* position and rejecting the claimant's arguments to displace that starting point. There was no ambiguity or confusion in its findings between the concepts of capacity and authority. As to ground (C), there was a clear and sufficient finding that the breach of art 6(b), rend[er]ing it impossible to perform art 6(a), was a repudiatory breach. The contention that separate consideration should have been given to a breach of art 6(b) alone is misconceived."

After this decision by Phillips J, by Originating Motion dated 24 February 2016 the Minister of Petroleum Resources of the FRN commenced proceedings in the Lagos

Judicial Division of the Federal High Court of Nigeria. The Originating Motion sought essentially the relief which had been sought in the English action: an extension of time, and the setting aside and/or remission of the Liability Award. One of the Grounds of this application was stated to be that "The parties have effectively agreed that the seat of arbitration is Nigeria and consequently Nigerian law is the *lex arbitri* ." In the Affidavit in Support sworn by Safiat Kekere-Ekun, she said that after the ruling of Phillips J, the FRN had "embarked on a careful and comprehensive review of the entire case file of the arbitration proceedings … followed by series of brainstorming sessions particularly with respect to the seat of the arbitration." She said that, as a result of this consideration, she believed that the GSPA was "more closely connected to Nigeria than any other country including England", and that "the present Applicant's reference to the English courts was as an inadvertence."

The Originating Motion and, the Affidavit in Support were sent to P&ID's representatives and to the members of the Tribunal, by email, on 4 March 2016. On 7 March 2016, the legal representatives of the Ministry wrote to the Tribunal, requesting an extension of time to serve its statement on damages. The letter stated: "As the Tribunal is aware, we are dissatisfied with the Award on liability; we are currently contesting the Award in a court of law." This produced a response from SCA Ontier on behalf of P&ID on 8 March 2016. That response strongly opposed any extension of time. As to the mention of a contest to the Liability Award in a court of law, SCA Ontier referred to the prior application to the English court, following consideration of the issue of the location of the seat by the Ministry's legal team. SCA Ontier stated that "P&ID regards [the Nigerian] proceedings as abusive and as a deeply unattractive attempt to forum shop." The Ministry's legal representatives responded to this on 9 March 2016. That letter stated, in part "It cannot seriously be contended that the parties have agreed to any other curial law or law governing the proceedings of this arbitration than the Nigerian Arbitration and Conciliation Act 1988 … and the Rules made pursuant thereto… Since the claimant has chosen to address matters of 'seat' not raised in our request we feel it is important to respond by way of clarification. Contrary to the Claimant's assertion the issue of seat of the arbitration has not been determined by any Court. Furthermore, and contrary to the Claimant's assertion, the arbitration clause did not designate 'England as the Seat of the Arbitration'. The Arbitration clause merely makes mention of the 'venue' of the arbitration. In any event we fail to see the relevance of these matters to the fairly straight forward application for extension of time."

On 10 March 2016, SCA Ontier replied to the email of 9 March 2016. This email stated that P&ID's position was that the parties had agreed, by the arbitration clause in the GSPA, that London was the seat of the arbitration; alternatively, it had been determined by the Tribunal, without objection from the FRN, by the statement in the two Part Final Awards and in procedural orders that the "Place of Arbitration" was London; alternatively, by the English Court's assumption of jurisdiction at the invitation of the FRN. The Ministry's representatives took issue with this by email on 11 March 2016, stating that "Place of Arbitration" referred simply to the venue for hearings; and that the Ministry had "always maintained its position that this arbitration including its seat is Nigeria." SCA Ontier replied on the same date, disagreeing, and stating that the "place of the arbitration" meant the seat; and also referring to a letter which P&ID's solicitors had written on 24 October 2013 which had stated that the seat of the arbitration was London with which no issue had been taken by the Ministry until 2016. The Ministry's legal representatives disputed these matters on 13 March 2016.

On 14 March 2016 Lord Hoffmann, on behalf of the Tribunal, sent an email to the parties' legal representatives. This email stated: "The Tribunal notes the correspondence between the parties as to (1) the seat of arbitration (2) the respondent's application for an extension of time for it to serve its evidence. The Tribunal will shortly

give a ruling on these matters and does not invite further submissions."

On the same date, Mr Shasore SAN on behalf of the Ministry sent an email to the Tribunal which stated: "Respondent has not made an application for determination of seat which we do not believe is in controversy. We merely asked for extension of time." The terms of this email are perhaps surprising. That a "controversy" in relation to the seat of the arbitration had by now arisen was quite clear from the correspondence of the previous ten days.

On 16 March 2016 the Tribunal gave to the FRN an extension of time for its statement and evidence on quantum until 8 April 2016. On 18 March 2016 SCA Ontier wrote to the Ministry's legal representatives, copying in the Tribunal, saying that it was clear that the issue of the seat of the arbitration was in controversy and that "the Tribunal's forthcoming determination of the issue of seat will provide necessary clarity on the point." On 1 April 2016 SCA Ontier wrote to the Tribunal encouraging it to rule on the seat of the arbitration prior to a hearing in the Nigerian proceedings scheduled for 20 April 2016.

In response to these developments, on 5 April 2016 the Ministry issued a Motion on Notice in the action which it had commenced in the Federal High Court of Nigeria giving notice that it would seek "An order restraining the parties in this suit whether by themselves or through their agents, servants, privies, assigns, representatives or anybody whatsoever from seeking and or continuing with any step, action and or participate directly or indirectly in the arbitral proceedings between the parties before: Lord Leonard Hoffmann ('Presiding Arbitrator'), Sir Anthony Evans, and Chief Bayo Ojo, SAN pending the hearing and determination of this suit." A copy of this Motion was sent by email to SCA Ontier and to the Tribunal on 5 April 2016.

SCA Ontier responded on 8 April 2016, stating that P&ID would not be participating in the Nigerian proceedings, "inter alia on the basis that London is the seat of the arbitration", and (amongst other things) that "the reality is that your client's recently instituted Nigerian proceedings, including its application for injunctive relief, are an illegitimate attempt to circumvent the ongoing arbitration and a breach of your client's own obligation to participate in the arbitration in good faith."

The Ministry's response was, on 14 April 2016, to ask the Tribunal to await the outcome of the pending interlocutory application in the Nigerian Courts. SCA Ontier on 19 April 2016 urged the Tribunal to make a prompt ruling in relation to the issue of the seat of the arbitration, which was "now especially urgent" in light of the hearing in the Nigerian Courts scheduled for 20 April. On the same day, Lord Hoffmann responded on behalf of the Tribunal:

> "The Tribunal acknowledges receipt of [SCA Ontier's email of 19 April 2016]. Until now, the Tribunal has not considered that there was an issue arising in the arbitration which required it to pronounce upon where the seat is located. It has not been invited to do so by the Nigerian court. However, if that court were to grant an injunction affecting the arbitration, the Tribunal would of course have to rule on the question of the seat in order to decide what effect should be given to the injunction. [SCA Ontier's email of 19 April 2016] invites the Tribunal to give such a ruling in advance of any decision in Nigeria. The members of the Tribunal will consult on whether it would be appropriate to do so."

On 20 April 2016, the Hon Justice I.N. Buba made an order in the Lagos Judicial Division of the Federal High Court of Nigeria, as follows

> "(1) That an order is granted to the Applicant [the Minister of Petroleum Resources] restraining the parties to this suit whether by themselves or through their agents, servants, privies, assigns, representatives or anybody whatsoever from seeking and or continuing with any step, action and or participate directly or indirectly in the arbitral proceedings between the parties before: Lord Leonard Hoffmann ('Presiding Arbitrator'), Sir Anthony Evans, and Chief Bayo Ojo, SAN pending the hearing and determination of the Motion on Notice dated 5/4/2016."

The Court adjourned the hearing of the substantive application for an extension of time and to set aside or remit the Liability Award until 23 May 2016.

The fact that this order had been made by the Nigerian court was notified by the Ministry's legal representatives to the Tribunal, and to SCA Ontier, by email on 21 April 2016. On that date SCA Ontier also wrote to the Tribunal referring to the events in the Nigerian Court on the previous day, and saying "we would be grateful if the Tribunal would confirm that a ruling will now be made on the question of seat" and "it would assist [P&ID] to know if that ruling is likely to be made prior to 23 May 2016."

On 26 April 2016 the Tribunal made "Procedural Order No. 12". It stated at the end: "Place of arbitration: London", and was "signed on behalf of the Tribunal" by Lord Hoffmann as "Presiding Arbitrator". Procedural Order No. 12 was to the following effect:

> (1) In light of the Ministry's commencement of proceedings in the Federal High Court in Lagos, it was apparent that there was a dispute between the parties as to whether the Nigerian courts were entitled to exercise supervisory or curial jurisdiction over the arbitration, and that this depended on whether Nigeria or England was the "seat" or "place" of the arbitration. It was stated that "This is an important question, not only for the purpose of determining the jurisdiction to supervise the proceedings and award, but also for the purpose of the enforceability of the award."
>
> (2) That the issue of the seat of the arbitration had been first raised by the Ministry in its originating motion in the High Court of Lagos on 24 February 2016; that it had been contested by P&ID and that the parties had made submissions on it in letters or emails dated 8, 11 and 13 March 2016.
>
> (3) That P&ID had requested a ruling on seat before the injunction granted by the Nigerian court. "The Tribunal considers that it must therefore consider the question of the seat of arbitration for the purpose of deciding the future conduct of the arbitration. The Tribunal has the power to determine its own jurisdiction (section 12 of the Nigerian Arbitration Act) and its opinion on the disputed question may also be of assistance to the Nigerian court."
>
> (4) That, as to the law, the meaning of the words "the venue of the arbitration shall be London, England" in the GSPA were to be construed in accordance with Nigerian law, and reference was made to s. 16 of the ACA. The Tribunal concluded that the parties had agreed on the "place of the arbitral proceedings" within s. 16(1) of the ACA and thus that the Tribunal's power to determine that place was excluded. The question was as to what was the effect of the choice of London by the parties. Having referred to the fact that the ACA was based on the UNCITRAL Model Law, to textbook authority, and to the decision of the Supreme Court of Nigeria in Nigerian National Petroleum Corporation v Lutin Investments (2006) 2

NWLR (Pt 965) 506, the Tribunal said:

> "In the opinion of the Tribunal, the parties' selection of London as 'the venue *of the arbitration* ' rather than of any particular steps (such as hearings) *in the arbitration* indicates that London was selected under section 16(1) as the place of the arbitration in the juridical sense, invoking the supervisory jurisdiction of the English court, rather than in relation to any particular events in the arbitration."

> (5) That in any event, by reason of matters in the course of the arbitration – set out in paragraphs 19-39 of Procedural Order No. 12 – "the parties and the Tribunal have consistently acted upon the assumption that London was the seat of the arbitration", and that "the Tribunal considers that the Government must be taken to have consented to this being the correct construction of the GSPA."

On 9 May 2016 the FRN issued an originating motion in the Nigerian Courts seeking to set aside the Tribunal's Procedural Order No. 12 and to remove the arbitrators. This motion contended that the Tribunal had misconducted itself, had not given the FRN a proper opportunity to present its case on the issue of seat, and had violated the obligation to provide the FRN with a fair hearing. It was contended that Procedural Order No. 12, which it argued was a partial award, was contrary to Nigerian public policy. The action commenced by this originating motion was ultimately struck out on 21 November 2016 for want of prosecution by the FRN.

On 24 May 2016 the High Court of Lagos made an order in the action which had begun on 24 February 2016 as follows:

> "1. That an order is granted to the Applicant enlarging the time within which the Applicant may apply to set aside the arbitration award of the tribunal on liability dated 17th July 2015 …
>
> 2. That an order is granted to the Applicant setting aside and/or remitting for further consideration all or part of the arbitration Award of Lord Leonard Hoffmann, Chief Bayo Ojo, SAN and Sir Anthony Evans and for such further or other orders as this Honourable Court may deem fit to make in the circumstances."

When this order was notified to the Tribunal, Lord Hoffmann emailed the parties on 27 May 2016, as follows:

> "… As the parties will be aware from Procedural Order No 12, the Tribunal has decided that the seat of the arbitration is England. It follows that the Federal Court of Nigeria had no jurisdiction to set aside its Award.
>
> The Tribunal will therefore be proceeding with the reference and would be grateful if the Respondent would indicate whether it intends to take part in the proceedings. It wishes to issue a Procedural Order for the further conduct of the arbitration and would therefore wish to have the Respondent state its position before Friday 3 June 2016."

On 21 June 2016, the Ministry wrote to the Tribunal saying that it intended to participate

in the damages phase of the arbitration "while maintaining its position on the award on liability."

The arbitration proceedings continued. There was an oral hearing on quantum on 30 / 31 August 2016. The Tribunal issued its Final Award, as I have said, on 31 January 2017. In the Final Award:

> (1) The majority of the Tribunal found that, had the FRN not repudiated its obligations under the GSPA, P&ID would have performed its obligations thereunder, and had therefore suffered loss in the amount of the income over 20 years from the sale of the NGLs which would have been extracted from the Wet Gas supplied by the FRN, less CAPEX and OPEX.
>
> (2) As the damages had to be assessed once and for all, it was necessary to estimate the value of that stream of profit at the time of the breach, making an appropriate discount for the fact that P&ID would be awarded immediate payment of sums which would actually have been received over a 20 year period.
>
> (3) The net present value of the profits which would have been earned was assessed by the majority as being US$6,597,000,000. It was stated (in paragraph 110): "This is the measure of damages. It is a very large sum because (a) it is the present value of income which would have been earned over a long period and (b) the GSPA would have been very profitable for P&ID and (although the Tribunal has not had to make any findings on the point) probably for the Government as well."
>
> (4) The FRN was also ordered to pay interest on the sum of US$6,597,000,000 at 7% per annum from 20 March 2013 until the date of the Final Award and at the same rate thereafter until payment.

The FRN has not paid any part of the Final Award, and has not applied to set it aside in any jurisdiction.

The present proceedings

P&ID commenced the present proceedings in this Court, seeking leave to enforce the Final Award in the same manner as a judgment, on 16 March 2018.

On 24 May 2018, the Foreign and Commonwealth Office served the Arbitration Claim Form on the FRN. The FRN did not file an Acknowledgement of Service in time, or until 12 October 2018, when it applied for relief from sanctions. At a hearing on 21 December 2018, Bryan J granted relief from sanctions and set a timetable for the filing of further evidence and skeleton arguments leading to a planned hearing on 15 February 2019. Due to an increase in the time estimate for the hearing, that hearing date was vacated, and the matter came on before me on 14 June 2019.

The nature of the hearing

CPR r. 62.18 establishes a procedure whereby an applicant may apply to the court without notice for an order giving permission to enforce an arbitration award in the same manner as a judgment; for the court to give such permission; for the defendant, if it wishes to do so, then to apply to set aside that order; and for there to be no

enforcement of the award until after the end of the period in which the defendant may apply to set the order aside or until any application made by the defendant within that period has been disposed of. That is not the procedure which has been followed here, in that P&ID has not sought an order under s. 66 Arbitration Act 1996 without notice, but has sought an order on notice and *inter partes* . This way of proceeding has been sensible in the circumstances. As Mr Mill QC for P&ID submitted, the significant matter to observe is that the objections to enforcement which can be raised by the FRN must be the same as could have been raised on an application to set aside an order made without notice.

That, however, is subject to a further particular feature of the present case. Through Mr Mill, P&ID stated that, if the Court were to consider that the juridical seat of the arbitration was not in England and Wales, and thus, as he put it, the Final Award was not "a domestic award", then P&ID's present application under s. 66 Arbitration Act 1996 would fail and should be dismissed. He said that in such circumstances P&ID would take other steps to seek to enforce the Final Award, which I understood to mean an application under s. 101 Arbitration Act 1996 to enforce a New York Convention Award. Whether, in view of s. 2(2)(b) and s. 104 Arbitration Act 1996 , this concession was necessary is not clear to me, but it was made, and the hearing proceeded on that basis: P&ID Skeleton, paras. 25, 29.4; Transcript pp. 71-72, 111, 168-169.

The Contentions of the Parties

For P&ID, Mr Mill made the following principal submissions.

(1) First, that the Tribunal was entitled to rule, as it did in Procedural Order No. 12, on the seat of the arbitration, and that it is no longer open to the FRN to challenge that ruling. On that basis, the order of the High Court of Lagos on 24 May 2016, purportedly setting aside or remitting the Liability Award was of no effect: the seat of the arbitration was England, and only the English courts had jurisdiction over challenges to an award, and England was the sole forum for remedies seeking to attack an award by the Tribunal.

(2) Secondly, and if necessary for P&ID to succeed which Mr Mill submitted it was not, that Procedural Order No. 12 created an issue estoppel in relation to the seat of the arbitration.

(3) Thirdly, that, in any event, the conclusions of the Tribunal in Procedural Order No. 12 were correct.

(4) Fourthly, and again if necessary, that the FRN's application to the English Court under s.68 Arbitration Act 1996 had itself created an issue estoppel which precluded an argument that Nigeria was the juridical seat of the arbitration.

(5) Fifthly, that the arguments which the FRN has sought to raise as to (a) the award of damages in the Final Award being manifestly excessive and penal, and (b) the Tribunal having no jurisdiction to award pre-award interest, are without merit.

For his part, Mr Matovu QC, for the FRN, made the following main submissions:

(1) That the issue of the location of the juridical seat of the arbitration was to be determined in accordance with the law governing the arbitration clause of the GSPA; that that was Nigerian law; and that as a matter of Nigerian law the seat of the arbitration was Nigeria.

(2) That the orders of the Nigerian Court (i) on 20 April 2016 to restrain further conduct of the arbitration, and (ii) on 24 May 2016 to set aside and/or remit the Liability Award were highly significant, given that, as he contended, the Nigerian Court was the supervisory court. Procedural Order No. 12, on this basis, was issued in "flagrant breach" of an injunction of the supervisory court, as well as having been arrived at in a procedurally unfair fashion. Equally, the Liability Award had been set aside by the supervisory court, and the Final Award, which depended on it, was therefore a "nullity".

(3) That the FRN's earlier application under s. 68 Arbitration Act 1996 to the English Court had been a mistake, and had not created an issue estoppel.

(4) That in light of the foregoing there was nothing to prevent the FRN from arguing before this Court that the seat of the arbitration was Nigeria.

(5) If, contrary to these arguments, the seat was England, then nevertheless as a matter of discretion the Final Award should not be enforced because (a) the amount awarded and the basis on which it was awarded were manifestly excessive and contrary to English public policy; and (b) that as a matter of Nigerian law, as the governing law of the GSPA, pre-award interest was not available.

Analysis

There are two groups of issues which fall for consideration. In the first place, the issue of what is the seat of the arbitration, and whether it is open to the FRN to contend that it is Nigeria and not England. Secondly, if the seat of the arbitration is England, or if it is not open to the FRN to contend otherwise, are the other bases on which the FRN resists enforcement of the Final Award valid. I will deal with these two matters in turn.

The Seat of the Arbitration

As I have said, there are issues as to whether it is open to the FRN to contest that the seat of the arbitration was England, and if it is, where the seat was. It is convenient before considering those issues to summarise the legal framework of these debates.

Legal Framework

There was no dispute that the concept of the legal or juridical seat of an arbitration indicates a link between the arbitration and a system of law. Nor was it in issue that it is the courts of the seat of the arbitration which, alone, will have supervisory jurisdiction over challenges to awards in the arbitration.

Section 3 of the Arbitration Act 1996 provides:

"In this Part 'the seat of the arbitration' means the juridical seat of the arbitration designated-

(a) By the parties to the arbitration agreement, or

(b) By any arbitral or other institution or person vested by the parties with powers in that regard, or

(c) By the arbitral tribunal if so authorised by the parties,

or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances."

In the present case, the GSPA was governed by the laws of the FRN, and clause 20 of the GSPA provides that the rules of the ACA apply to any dispute between the parties. It was not in dispute that the exercise of determining the seat of the arbitration (by whoever conducted) requires a consideration of Nigerian law. In the first place, because Nigerian law is the governing law of the GSPA, questions of construction of the GSPA have to be conducted in accordance with the principles of construction recognised by Nigerian law. Secondly, because of the incorporation of the rules of the ACA it is necessary to see whether and what that Act provides as to what the seat of the arbitration is, and how it may be chosen or determined.

The provisions of the ACA include the following:

"[Section 15]

(1) The arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules set out in the schedule to this Act.

(2) Where the rules referred to in subsection (1) of this section contain no provision in respect of any matter related to or connected to any particular arbitral proceedings, the arbitral tribunal may, subject to this Act, conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure fair hearing.

…

[Section 16]

(1) Unless otherwise agreed by the parties, the place of the arbitral proceedings shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of subsection (1) of this section and unless otherwise agreed by the parties, the arbitral tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for the inspection of documents, goods or other property.

…

[Section 26]

(1) Any award made by the arbitral tribunal shall be in writing and signed by the arbitrator or arbitrators.

…

(3) The arbitral tribunal shall state on the award-

> (a) the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms…
>
> (b) the date it was made; and
>
> (c) the place of the arbitration as agreed or determined under section 16(1) of this Act which place shall be deemed to be the place where the award was made."

The ACA also provides, by section 12:

> "(1) An arbitral tribunal shall be competent to rule on questions pertaining to its own jurisdiction and on any objections with respect to the existence or validity of an arbitration agreement.
>
> …"

The Arbitration Rules which appear as schedule 1 to the ACA contain, in Articles 15 and 16, the following:

> "General Provisions
>
> Article 15
>
> Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.
>
> …
>
> Place of Arbitration
>
> Article 16
>
> 1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.
>
> 2. The arbitral tribunal may determine the locale of the arbitration within the place agreed upon by the parties. It may hear witnesses and hold meeting for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.
>
> 3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or document. …"

It was not in dispute before me that, as it appears in section 16(1), as opposed to section 16(2), of the ACA, the "place of the arbitral proceedings" meant the same as the juridical seat (Transcript p. 119, 125).

The issue which, from the end of February 2016 onwards, separated the parties was as

to where the juridical seat of the arbitration was, and in particular whether the provision in clause 20 of the GSPA that the "venue" of the arbitration was to be "London, England or otherwise as agreed by the Parties" represented a choice of that seat, or merely of the geographical location where the arbitral tribunal might hold hearings. There was (and is) no issue but that the parties could determine the seat. Equally, there was (and is) no suggestion that this was a case in which, because the parties had not chosen the seat, it fell to the arbitral tribunal to choose the seat.

P&Id First Argument: Procedural Order No. 12 determines seat without reference to the doctrine of issue estoppel

P&ID contended that the decision of the Tribunal in Procedural Order No. 12 meant that the issue of seat was determined between the parties, and not something which the FRN could now challenge. Further, P&ID contended that this was so, whether or not Procedural Order No. 12 technically established an issue estoppel.

The issue which the Tribunal addressed in Procedural Order No. 12 is perhaps a somewhat unusual one. It was not an issue which was amongst the matters in dispute between the parties at the outset and which had been referred to arbitration. Yet it was an issue which depended on the proper construction of the GSPA, and upon whether the conduct of the parties had established some other agreement.

Nevertheless, although not amongst the pre-existing issues which were referred to arbitration, I consider that it was an aspect of the parties' agreement to arbitrate that the Tribunal should have the ability to determine an issue as to where the seat of the arbitration was, including an issue as to the construction of the arbitration clause in the GSPA. It is true that, ifsuch an issue arose and were not first determined by the arbitral tribunal, then it would fall to be determined by a court, whether on enforcement or otherwise, but in the first instance it would be for the arbitral tribunal to decide. I consider that this is implicit in the agreement to arbitrate in the present case. It is clear that, by reason of subjecting the arbitration to the ACA and Arbitration Rules, the parties agreed that, to the extent that they had not effectively provided for the seat, the Tribunal could decide on where it should be. It would be consistent with that for the Tribunal to be able to decide any dispute as to whether there had been an effective choice of seat, and if so what the chosen seat was. The parties may be taken to have desired that the Tribunal should determine that matter, because if the arbitrators could not do so, then the question would arise as to who should, in circumstances where the parties might be at loggerheads as to where the seat was, and thus what was the curial court. Furthermore, although I do not consider that the issue of the determination of seat is strictly one of the arbitrators' jurisdiction or as to the existence or validity of an arbitration agreement, s. 12 ACA, applied to the arbitration by clause 20 of the GSPA, demonstrates the intention of the parties to confer a very wide power on the arbitrators to decide issues relating to the validity and width of the arbitration agreement itself.

The somewhat unusual nature of this type of determination might give rise to an argument as to whether a ruling on such an issue constitutes an award or a procedural order. In the present case, the Tribunal decided it by way of procedural order. In its origination motion in the Nigerian courts commenced on 9 May 2016, by contrast, the FRN contended that it amounted to an award. Mr Mill for P&ID submitted before me that it could have been an award but that it made no difference. It appears to me that the correct characterisation of the determination might have had implications as to whether the Tribunal itself could have revisited it and, at least if the seat of the arbitration is England and ss. 67-69 of Arbitration Act 1996 are applicable, as to when and how it could be challenged in court: see the review of the law in relation to procedural orders and awards in ZCCM Investments Holdings PLC v Kansanshi Holdings PLC [2019] EWHC 1285 (Comm) . Here, however, no challenge has been pursued in any court,

either to the decision on seat itself, or as to the Final Award in the arbitration.

As I understood P&ID's first argument, the combination of a matter which the Tribunal was, in accordance with the arbitration agreement between the parties, authorised to decide, coupled with the lack of challenge to that decision in any court means that that decision must be taken as binding on the FRNfor the purposes of ascertaining the seat of the arbitration when it comes to enforcement; and that it is not necessary to examine in turn all the requirements of an issue estoppel, which is a concept which applies to a wider field, and whether or not it applies is not determinative of whether there can a challenge to the location of the seat here. In principle, I consider that this submission is correct. Given the consensual nature of arbitration, and the importance to be accorded to respecting the integrity of the parties' choice, given that the Tribunal has made a ruling on seat, which has not been successfully challenged in any court, then subject to an examination of the particular arguments of the FRN to which I will turn, I consider that this is not an issue which can be revisited on an application under s. 66 Arbitration Act 1996 .

The FRN relied, as I understood it, on three particular grounds to resist the above conclusion.

The first was that it contended that Procedural Order No. 12 was sought by P&ID and made by the Tribunal in breach of the injunction of the Nigerian Court of 20 April 2016. Mr Matovu submitted that, as the Nigerian court was the supervisory court, Procedural Order No. 12 was a nullity, or at least that this Court could not, in exercising its discretion as to whether to enforce the Final Award, fail to have regard to the breach.

As to this, while it may be the case that, assuming the Nigerian Court had relevant jurisdiction, P&ID's request on 21 April 2016 for the Tribunal to confirm that it would proceed to make a ruling on seat might have been in breach of the order of 20 April 2016, I do not consider that the Tribunal was acting in breach of that order in issuing Procedural Order No. 12. The arbitrators were not named as respondents to the application for an injunction; they had not been named in the Motion on Notice for this injunction as parties who would be served; and the terms of the injunction did not, in my judgment, apply to them. The order restrained the parties, "whether by themselves or through their agents, servants, privies, assigns, representatives or anybody whatsoever from seeking and or continuing with any step, action and or participate in the arbitral proceedings between the parties before" the Tribunal. I do not consider that, when the Tribunal proceeded to a ruling, there was thereby a breach of the injunction that the parties should not seek or continue with any step or action or participation in the arbitration, or that the parties were in some way acting bythe arbitrators when the Tribunal issued its Procedural Order No. 12. In the circumstances, I do not consider that Procedural Order No. 12 was made by the Tribunal in breach of an order of the Nigerian Court.

Insofar as Mr Matovu sought to bolster this first point by submitting that the order of the Nigerian court was an order "of the supervising court", that depends, in part, on Procedural Order No. 12 not being a binding determination of what the seat of the arbitration was, which is what, at this juncture, the FRN is seeking to establish. It is pertinent to recall, in this context, that at the time at which the injunction order was made, and at the time of Procedural Order No. 12, there had been no argument before and no resolution by any court, whether in Nigeria or elsewhere, that Nigeria was the seat of the arbitration. On the contrary, to the extent that any court's jurisdiction had been invoked as that of the supervisory court, it was that of this Court, to which the FRN had applied under s. 68 Arbitration Act 1996 in respect of the Liability Award.

The second point raised by the FRN in this context is a contention that the Tribunal was

not invited to decide the issue of seat. This point overlaps with the third point as to procedural unfairness, considered below. Insofar as it was a discrete point, however, I did not consider that it had force. It is certainly true that the correspondence which led to the making of Procedural Order No. 12 commenced with the FRN seeking an extension of time. During the course of the correspondence it nevertheless became quite apparent that the parties had come to be in disagreement as to what was the seat of the arbitration. No doubt because the FRN wished to get before the Nigerian Courts before the Tribunal had ruled on seat, it sought to suggest that there was not an issue on the subject for the Tribunal to determine (see its email of 14 March 2016). Because it wanted the Tribunal to rule on seat before the Nigerian courts considered the motion to set aside the Liability Award, P&ID, by contrast, was seeking that the Tribunal should proceed to rule on the seat. In my judgment, in light of the fact that it was apparent that the parties disagreed on the issue, and that P&ID had asked it to do so – as it did by its communications of 1 April 2016 and 19 April 2016 – the Tribunal was entitled to decide to make a ruling as to seat.

The third point raised by the FRN is that the procedure adopted by the Tribunal in coming to its conclusion on seat was unfair. Mr Matovu, in his measured and attractive submissions, contended that it had involved "something of a rush to judgment by the Tribunal at the instigation of [P&ID] without giving [the FRN] a fair and proper opportunity to present a fully developed case for the purposes of a putative ruling on seat." Mr Matovu made a particular criticism of the fact that the Tribunal did not give a proper indication of the issues which it was considering deciding. It could, he said, have been contemplating deciding (i) whether there had been an agreement in clause 20 of the GSPA as to seat and if so what it was; (ii) if there had not, should the Tribunal now determine a seat, and if so what it should be; (iii) whether the parties had conducted themselves in such a way that there was a convention or agreement by conduct as to seat; and (iv) whether the Tribunal should rule on those issues or give directions for their determination. As the Tribunal had not identified what matters it was contemplating deciding, it had not had proper submissions on them. Mr Matovu submitted that if proper notice had been given, the Tribunal would have been provided with much fuller submissions on the relevant Nigerian law, and on whether there could be said to have been any agreement as to seat, or an estoppel by convention, by reason of the conduct of the parties. He also argued that it was particularly unfair to the FRN, in that once it had issued its Motion on Notice on 5 April 2016, and a *fortiori* after the injunction order of 20 April 2016, it was precluded from making submissions in the arbitration.

In my judgment, the difficulty with these submissions, whatever otherwise might be their cogency, is that the FRN had remedies for any procedural unfairness, but it did not utilise them.

Thus, if Procedural Order No. 12 was, correctly analysed, a decision which the Arbitral Tribunal itself had power to review and amend, then the FRN could have made submissions to the Tribunal that it should do just that. It did not do so. If, as the FRN was at one point disposed to argue, Procedural Order No. 12 constituted an award, then it could have been subject to challenge pursuant to section 68 Arbitration Act 1996 , on the basis that there had been serious irregularity affecting the tribunal, the proceedings or the award. If, on the other hand, Procedural Order No. 12 was, as it said it was, a procedural order, then it would have been open to the FRN to attack the Final Award pursuant to section 68 Arbitration Act 1996 , on the same basis. It did neither and the time for doing so is long past.

It might be said that the curial remedies which I have referred to in the previous paragraph could only have been sought by recognising that England was the seat of the arbitration, which was the matter the FRN wished to dispute. I consider that the FRN could properly have sought those remedies in order to challenge the Tribunal's finding

of seat, without prejudice to its contention as to where, putting that ruling aside, the seat was located. In any event, and be that as it may, the FRN did not even take the equivalent steps which, consistently with its position that the courts of Nigeria were the supervisory courts, it might have taken there. Thus, it did not pursue, and allowed to be struck out, the action which it began in the Nigerian Court on 9 May 2016, which had included seeking to set aside Procedural Order No. 12 for misconduct under section 30(1) and/or the removal of the arbitrators for misconduct under section 30(2) ACA. Nor has the FRN applied to set aside the Final Award in any jurisdiction, including Nigeria. Again, the time for doing so in accordance with the ACA is long past.

Mr Matovu submitted that it had not been necessary for the FRN to pursue these remedies, including in particular the action which it had begun in the Nigerian Court on 9 May 2016, because it had obtained an order from the Nigerian Court on 24 May 2016 "setting aside and/or remitting [the Liability Award] for further consideration". He submitted that this rendered it unnecessary to seek what he described as "ancillary relief". He referred to the case of Nigerian Agip Exploration Ltd v Nigerian National Petroleum Corp (2014) 6 CLRN 150 , a decision of the Court of Appeal of Nigeria (Abuja Division).

I do not accept this submission. Procedural Order No. 12 was issued before the order of the Nigerian Court purporting to set aside or remit the Liability Award for consideration. As long as Procedural Order No. 12 stood, it of itself created a basis for saying that the order of the Nigerian Court of 24 May 2016 was ineffective, as being made by a court which was not the supervisory court as determined by the decision of the arbitral panel. It also had implications for the future conduct of the arbitration and for future awards. Nor do I accept that the Nigerian Agip case is of relevance here. It concerned the question of whether, when an arbitral panel had issued a partial award, and was proceeding towards a final award on damages, a party which was challenging the partial award in court could obtain an interlocutory injunction stopping the arbitration from proceeding. It was held that it could not, and that the challenge to the partial award would be dealt with in the proceedings. That is not analogous to the facts here.

As a result, I conclude that the terms of Procedural Order No. 12, coupled with the fact that neither it nor the Final Award have been set aside by this or any court, determine the location of the seat of the arbitration as being London, England, and that that is not a matter which the FRN can now ask this court to revisit.

P&Id's Second Argument: Issue Estoppel

P&ID's second argument was that the Tribunal's decision in relation to seat in Procedural Order No. 12 created an issue estoppel. It contended that it was not necessary for it to succeed on this point if I was with it in relation to its first argument, which I am.

The doctrine of res *judicata* has two particular aspects of potential relevance in the present context. The first is what is termed "cause of action estoppel". This was described by Lord Sumption JSC in Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2014] AC 160 at [17] as follows: "… once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. … It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings." There was no contention that a cause of action estoppel of this sort arose in the present case.

In addition to "cause of action estoppel" there can also be "issue estoppel". The nature of such an estoppel was explained by Lord Keith of Kinkel in Arnold v NatWest Bank Plc [1991] 2 AC 93 at 105-106, as follows:

> "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue. This form of estoppel seems first to have appeared in Duchess of Kingston's Case (1776) 20 St. Tr. 355 . A later instance is Reg. v Inhabitants of the Township of Hartington Middle Quarter (1855) 4 E. & B. 780 . The name 'issue estoppel' was first attributed to it by Higgins J in the High Court of Australia in Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 537 , 561. It was adopted by Diplock LJ in Thoday v Thoday [1964] P 181 .
>
> …
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> Issue estoppel, too, has been extended to cover not only the case where a particular point has been raised and specifically determined in the earlier proceedings, but also that where in the subsequent proceedings it is sought to raise a point which might have been but was not raised in the earlier."

The conditions which must be satisfied for there to be an issue estoppel have been considered in a number of cases. They were summarised as follows in Good Challenger Navegante S.A. v Metalexportimport S.A. (The 'Good Challenger') 2004 1 Lloyd's Rep 67 , at [50] per Clarke LJ:

> "The authorities show that in order to establish an issue estoppel four conditions must be satisfied, namely (1) that the judgment must be given by a foreign Court of competent jurisdiction; (2) that the judgment must be final and conclusive and on the merits; (3) that there must be identity of parties; and (4) that there must be identity of subject matter, which means that the issue decided must be the same as that arising in the English proceedings: see in particular Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 2) [1967] 1 AC 853 , The Sennar (No. 2) [1985] 1 WLR 490 , especially per Lord Brandon at p. 499, and Desert Sun Loan Corporation v Hill [1996] 2 All ER 847 ."

That case involved a decision by a foreign court as arguably founding an issue estoppel. There is however no doubt, and it was not contested before me, that an issue estoppel can be created by the decision of an arbitral tribunal: see Arbitration Law , ed Merkin, para. 18.132.

I did not understand there to be an issue as to requirement (3) in Clarke LJ's enumeration of conditions. Nor did I understand there to be any issue as to (4), in that the issue of the location of the seat addressed by the Tribunal is the same as that sought to be raised by the FRN now. As to (2), while the reference to a decision "on the merits" might suggest that only a decision on the substantive issues between the parties could create an issue estoppel, one of the cases referred to by Clarke LJ, Desert Sun Loan Corporation v Hill [1996] 2 All ER 847, [1996] CLC 1132 establishes that an issue estoppel can arise in relation to a procedural or non-substantive issue. As to the other requirement under (2) that the decision should be "final and conclusive", if Procedural Order No. 12 was what it said it was, namely a procedural order, then it may well be that, in theory at least,it was susceptible of review by the Tribunal itself, and if that is right it would not, when issued, have been "final and conclusive". I would consider, nevertheless, that it should be regarded as "final and conclusive" at the point when it could not be reviewed by the Tribunal, which was at latest when the arbitration concluded. If Procedural Order No. 12 was in reality an award which finally determined the issue before the Tribunal (even if it might have been subject to an appeal to a court),

then it will have been final and conclusive on the issue of seat when made. On either basis I consider that Procedural Order No. 12 should be regarded as satisfying requirement (2).

I understood Mr Matovu to contest whether condition (1) was satisfied, by his submission that a "ruling which an arbitral tribunal is not entitled to make will not create an issue estoppel" and that the Tribunal was not entitled to make the ruling contained in Procedural Order No. 12. The contention that the Tribunal had not been entitled to make that ruling was based on the argument that the courts of Nigeria had on 20 April 2016 injuncted the Tribunal from taking any further steps in the reference.

For reasons which will already be apparent, I do not accept the contention that the Tribunal was not entitled to make a ruling on seat. As I have said, I consider that the Tribunal was authorised to determine a dispute as to the location of the seat; that it had been asked to do so by P&ID on 1 and 19 April 2016; and that the order of the Nigerian Court of 20 April 2016, even if the Nigerian Court had relevant jurisdiction, did not injunct the Tribunal from proceeding with the reference (see paragraph 58 above).

Mr Matovu advanced four other arguments as to why there was no issue estoppel created by Procedural Order No. 12. These overlap with arguments of the FRN which I have already considered in relation to P&ID's first way of putting its case.

The first of these arguments was that the FRN "was not, in fact, given a proper opportunity to make submissions to the Tribunal in relation to the issue of seat". Mr Matovu submitted that "Publication of a ruling in these circumstances was contrary to the basic notions of fairness and due process on which the principle of issue estoppel is based." The "circumstances" to which he was referring here were, in particular, the way in which the issue of seat had emerged out of the FRN's application for an extension of time, and what Mr Matovu characterised in the course of his submissions as the tribunal's "rush to judgment".

Given the nature of the FRN's complaint here, which was based on considerations of fairness, and due process, it must be very relevant that the FRN had remedies in relation to the suggested procedural unfairness of the Tribunal's determination, which it did not pursue (see paragraphs 64-66 above). Given that, I am not able to accept that there would be an unfairness in recognising an issue estoppel as a result of Procedural Order No. 12.

The second point advanced on behalf of the FRN in this context was that the FRN could not have participated in making submissions on seat because it had itself been enjoined from taking any steps in the arbitration by the order of 20 April 2016. Mr Matovu submitted that "An issue estoppel cannot reasonably be invoked when a party has been restrained by a court of competent jurisdiction from participating in the earlier proceedings on which the estoppel is founded."

I was wholly unpersuaded by this point. The fact that the FRN was subject to an injunction from the Nigerian courts was because it had obtained one. Moreover, the reason why the FRN had gone to the Nigerian courts to obtain an injunction was, as Mr Matovu frankly accepted, because it was concerned that the Tribunal would hold that the seat of the arbitration was London. But that was not of itself a good reason for seeking to enjoin the parties from pursuing the arbitration. As I have indicated, I consider that the parties had agreed that disputes as to seat should be resolved by the Tribunal and it had no good reason for seeking to prevent that happening. If it had concerns about its ability to make submissions on the point, it could have asked for further time to do so. But I do not see that the fact that, as it says, it was bound by an injunction which it had itself procured from the Nigerian courts, and which it could undoubtedly have had discharged if it had wanted to, constitutes a reason for not

recognising an issue estoppel.

The third argument raised was that once the Liability Award had been set aside or remitted by the Nigerian Court by its order of 24 May 2016, the FRN had no reason to seek to challenge the Tribunal's ruling on seat. I have given reasons why I do not consider that that is correct in paragraphs 65-66 above. I do not consider that this provides a reason for not recognising there as being an issue estoppel on the issue of seat.

Fourthly, Mr Matovu contended that in the light of the decision of the Nigerian High Court (Ogun Division) in Zenith Global Merchant Ltd v Zhongfu International Investment FZE [2017] All FWLR 1837 , there was no issue estoppel. The submission was that that case, albeit decided after Procedural Order No. 12, provided an authoritative statement of the Nigerian law on the determination of seat; that it indicated that the decision of the Tribunal on the issue was wrong; and that, in line with the decision in Arnold v National Westminster Bank PLC [1991] 1 AC 93 , the fact of such subsequent material demonstrates that to recognise an issue estoppel would create injustice.

The exception to the doctrine of issue estoppel recognised in Arnold v National Westminster Bank is that, in the case of "special circumstances", including in particular a subsequent change of the law, it may cause injustice to recognise an issue estoppel. The making of the decision in Zenith Global did not in my judgment constitute "special circumstances" of this sort. Zenith Global did not represent a change in the law of Nigeria. Furthermore, that case concerned the construction of an arbitration clause in terms different from clause 20 of the GSPA. The clause in that case did not contain the word "venue". While Akinyemi J used the term "venue", taking it from the submissions of counsel, to describe the geographical location where an arbitration may take placein contradistinction to the juridical seat, he was not actually construing a contract which included that term, and clearly was not construing one which contained that term in the particular context in which it is used in clause 20 of the GSPA. Moreover, Zenith Global was not a decision that the "venue" of an arbitration can never be the juridical seat, and Mr Matovu did not suggest that it was. In light of these points I do not consider that it can be said that the fact of the Zenith Global decision makes it unjust to recognise the Tribunal's decision in Procedural Order No. 12 as giving rise to an issue estoppel.

Accordingly, I consider that Procedural Order No. 12 did create an issue estoppel which precludes an argument as to seat on this application.

P&Id's Third Argument: the decision of the Tribunal in Procedural Order No. 12 was correct

Mr Mill submitted that, if, contrary to his first two ways of putting the matter, it was open to the FRN to challenge the location of the seat of the arbitration on this application, then this court would have to resolve that question. As he submitted, if that issue was examined by this Court, it would itself reach the same conclusion as reached by the Tribunal in Procedural Order No. 12.

The GSPA is written in English. As I have said, it was not in issue that the question of its construction is governed by Nigerian law. However, it was undisputed before me that Nigerian principles of construction should be taken to be the same as those of English law. In the present case, there was no evidence that those principles are different from those of English law, and so, on the present hearing, they are to be presumed to be the same. Furthermore, Mr Matovu suggested that this presumption probably reflected the reality. Applying the approach to construction of English law, I conclude that, while there are significant arguments the other way, the GSPA provides for the seat of the arbitration to be in England. I say this for the following principal reasons:

(1) It is significant that clause 20 refers to the venue "of the arbitration" as being

London. The arbitration would continue up to and including the final award. Clause 20 does not refer to London as being the venue for some or all of the hearings. It does not use the language used in s. 16(2) ACA of where the tribunal may "meet" or may "hear witnesses, experts or the parties". I consider that the provision represented an anchoring of the entire arbitration to London rather than providing that the hearings should take place there.

(2) Clause 20 provides that the venue of the arbitration "shall be" London "or otherwise as agreed between the parties". If the reference to venue was simply to where the hearings should take place, this would be an inconvenient provision and one which the parties are unlikely to have intended. It would mean that hearings had to take place in London, however inconvenient that might be for a particular hearing, unless the **parties** agreed otherwise. The question of where hearings should be conveniently held is, however, one which the **arbitrators** ordinarily have the power to decide, as indeed is envisaged in s. 16(2) ACA. That is likely to be a much more convenient arrangement. Clearly if the parties were in agreement as to where a particular hearing were to take place, that would be likely to be very influential on the arbitral tribunal. But if for whatever reason they were not in agreement, and it is not unknown for parties to arbitration to become at loggerheads about very many matters, then it is convenient for the arbitrators to be able to decide. If that arrangement was to be displaced it would, in my judgment, have to be spelled out clearly. Accordingly, the reference to the "venue" as being London or otherwise as agreed between the parties, is better read as providing that the seat of the arbitration is to be England, unless the parties agree to change it. This would still allow the arbitrators to decide where particular hearings should take place, while providing for an anchor to England for supervisory purposes, unless changed.

(3) The reference in clause 20 to the provisions of the rules of the ACA is not inconsistent with the choice of England as the seat of the arbitration. The non-mandatory provisions of the Arbitration Act 1996 are displaced by that provision; but the mandatory provisions of the Arbitration Act 1996 apply.

(4) The case of Zenith Global was decided long after the conclusion of the GSPA. It cannot therefore be used to support any argument that, at the time of conclusion of the GSPA the word "venue" was being used in the sense in which it was used in that case. In any event, as I have already set out, it does not involve construction of a clause in the same terms as clause 20 of the GSPA.

For completeness I should say that these conclusions appear to me to be in line with the English jurisprudence referred to in Arbitration Law ed. Merkin, para. 1.30, and in particular Shashoua v Sharma [2009] EWHC 957 (Comm) and Enercon GmbH v Enercon (India) Ltd [2012] EWHC 689 (Comm) . The decision in Zenith Global suggests that such English authorities (as well as those of other common law jurisdictions) would be regarded as persuasive in ascertaining Nigerian law in this area. These cases were not, however, cited at the hearing of the application, and I reached my conclusions on construction without regard to them.

I have also reached the same conclusion as did the Tribunal in relation to there being an agreement by conduct that the seat of the arbitration as provided for by clause 20 of the GSPA should be regarded as London. In this regard the terms of the Part Final

Award of 3 July 2014, which I have quoted in paragraph 9 above are of significance. It stated in terms that the seat of the arbitration was England. Further, that Part Final Award, and the Liability Award both stated, at the end, that the place of the arbitration was London, England. Given the terms of s. 26(3)(c) ACA, that was a clear statement that the Tribunal considered that the legal seat was England. The FRN did not object to these statements in the Part Final Award of 3 July 2014 or the Liability Award and continued to participate in the arbitration. Like the Tribunal I consider that, objectively viewed, there was here an agreement by the FRN that the seat stipulated in clause 20 of the GSPA was England.

P&Id's Fourth Argument: Effect of the application to the English Court

P&ID also contended that the FRN's conduct in making an application under s. 68 Arbitration Act 1996 , and the refusal by Phillips J of an extension of time to bring such an application itself precluded the FRN from denying that the seat of the arbitration was England and that the English courts were its supervisory courts. This submission was not accompanied by any detailed analysis of how the requirements of an issue estoppel were made out in relation to that decision. In view of the conclusion which I have reached on the other points made by P&ID as to the seat of the arbitration and the effect of Procedural Order No. 12, I do not need to express a view as to this point, and in the circumstances, prefer not to do so.

Grounds for Non-Enforcement if the seat of the arbitration is England

Public Policy

The FRN submitted that even if the seat of the arbitration was England and the Final Award was a "domestic" award, this court should refuse leave to enforce it in the same manner as a judgment. Two points were relied upon as reasons why the court should refuse leave.

The first argument is that it would offend English public policy to enforce the Final Award. The FRN contends that it is contrary to English public policy to enforce an award for damages which are "not compensatory, but hugely inflated and penal in nature". To support its contention that English public policy is against enforcement of an award of damages of that nature, the FRN relied on JSC VTB Bank v Skurikhin [2014] EWHC 271 (Comm) , especially at paragraphs 90-92, and Midtown Acquisitions LP v Essar Global Fund Ltd [2018] EWHC 2545 (Comm) , especially at [42]. To support its argument that the Final Award gave damages which were not compensatory, but hugely inflated and penal, the FRN relied on three particular points, namely (1) that the Tribunal had applied an incorrect and unduly low discount rate to the assessment of future cash flows from the project; (2) that the Tribunal had ignored the fact that the GSPA required P&ID to grant the FRN a 10% carried interest in the project; and (3) the majority of the Tribunal did not make any deduction on grounds of a failure to mitigate.

In relation to these points, the FRN relied on evidence from Mark Handley, contained in his Third Witness Statement. That witness statement referred to the reasons why the FRN contends that the sum awarded was manifestly excessive, and stated (at paragraph 121): "… the massive payment of damages to P&ID far and above the level required to be compensatory demands the conclusion that the Final Award was punitive in effect."

The FRN also relied on an expert report of Prof. Louis T. Wells. At the outset of the hearing, P&ID objected to this report, which was served only on 15 May 2019, on the basis that it was served inexcusably late and without notice. I decided, however, that the FRN should be permitted to rely on the report. It had undoubtedly been served late, but I was satisfied that this had not been for tactical reasons. Given the nature of the case,

and its importance to both sides, I considered that it was preferable for the report to be in evidence, if that did not create prejudice to P&ID. I concluded that it did not create prejudice to P&ID in that the points it makes, while expanding upon, and lending expert support to, points made by Mr Handley in his witness statement, did not cover entirely new ground, and also because P&ID confirmed through Mr Mill at the hearing that it was content to deal with the report if admitted, and would not seek an adjournment.

Prof. Wells' report focuses on a particular issue, namely the Tribunal's approach to the discounted cash flow calculation, and in particular the discount rate applied. Prof. Wells expresses the view that the award of damages reached was, as a result of an erroneous approach to the discount rate, "clearly unreasonable and manifestly excessive and exorbitant", and "not a reasonable assessment of P&ID's actual loss; whether intentionally or not, it was punitive."

I did not understand P&ID to dispute that, if enforcement of an award would be contrary to public policy, that would be a ground for refusal of enforcement under s. 66 Arbitration Act 1996 , even though it is not mentioned in the section. I accept, as suggested in Russell on Arbitration (24th ed), para. 8-011, that it would be a matter which fell to be considered by the Court in exercising its discretion.

Looking at the Final Award itself, there can be no doubt that the Tribunal was intending to award only compensatory damages, and that there was not intended to be any element of penalty or punitive damages in the sums awarded. In paragraph 40 it is stated that: "The damage suffered by P&ID is the loss of the net income it would have received if it had been supplied with wet gas in accordance with the contract and had been able to extract and sell the natural gas liquids." The Tribunal went on to consider and reject an argument that P&ID would not have performed the contract, and to hold that losses of the kind referred to in paragraph 40 were not too remote (paragraphs 41-56), and were quantified at US$6,597,000,000 (paragraphs 57-110).

The Final Award, consistently with my earlier conclusions, was one given in an arbitration whose seat was England. It could, accordingly, have been the subject of anapplication under s. 68 Arbitration Act 1996 in relation to serious irregularity. No such application was made and the Final Award has, plainly, not been set aside or remitted.

Are there any grounds of public policy on which such an award, which is intended to and is expressed as awarding compensatory damages, and which could have been but has not been subject to remedies under ss. 68 Arbitration Act 1996 , should not be enforced? In my judgment there are not.

The grounds on which enforcement of an award can be refused by reason of public policy are narrowly circumscribed. In Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Ras Al-Khaimah National Oil Co [1987] 2 Lloyd's Rep 246 , at page 254 Sir John Donaldson MR said this:

> "Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. As Burrough J remarked in Richardson v Mellish (1824) 2 Bing. 229 , 252, 'It is never argued at all, but when other points fail.' It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised."

In IPCO (Nigeria) v Nigerian National Petroleum Corp. [2005] EWHC 726 (Comm), [2005] 2 Lloyd's Rep 326 at [13], in the context of arguments to the effect that a foreign

award should be refused enforcement under s. 103(3) Arbitration Act 1996 , Gross J reiterated the extreme caution with which arguments to the effect that enforcement should be refused on public policy grounds should be approached. In that case he also considered an argument that because of errors allegedly made by the tribunal in its assessment of damages the award was so excessive and that its enforcement would be contrary to public policy. He dismissed the argument at paragraph 50, saying:

> "I can take this point summarily. The NNPC argument was that the tribunal's errors (amounting to misconduct) led to an award so exaggerated in size that its enforcement, against a state company, would be contrary to public policy. With respect, this complaint appears to lack substance. Were it soundly based, a mere error of fact, if sufficiently large, could result in the setting aside of an award. That cannot be right and I say no more about this topic."

Further, in considering whether there should be a refusal of enforcement of an award on the grounds of public policy, it is necessary to have regard to, and take into account, the strong public policy in favour of enforcing arbitral awards: see Westacre Investments Inc v Jugoimport-SPDR Ltd [1999] QB 740 at 770-771, 773 per Colman J (that decision was upheld on appeal: [1999] 2 Lloyd's Rep 65).

In Pencil Hill Ltd v US Citta Di Palermo SpA (Mercantile Court, 19 January 2016), the court considered an argument that a New York Convention award should not be enforced in England and Wales because it included an award in respect of a penalty. HHJ Bird conducted a review of relevant authorities at paragraphs 12 – 25, and concluded that the award should be enforced in its entirety. At paragraph 32 the judge said:

> "In my judgment the public policy of upholding international arbitral awards … outweighs the public policy of refusing to enforce penalty clauses. The scales are tipped heavily in favour of enforcement."

I am clearly of the view that there is no public policy which requires the refusal of enforcement to an arbitral award which states and is intended to award compensatory damages, and where, even if the damages awarded are higher than this Court would consider correct (as to which I express no view), that arises only as a result of an error of fact or law on the part of the arbitrators. The enforcement of such an award would not be "clearly injurious to the public good" or "wholly offensive to the ordinary reasonable and fully informed member of the public". Furthermore, the public policy in favour of enforcing arbitral awards is a strong one, and, if a balancing exercise is required at all, outweighs any public policy in refusing enforcement of an award of excessive compensation. The labelling of such excessive compensation as "punitive" or "penal", as the FRN seeks to do in this case does not alter this conclusion.

The cases to which the FRN referred do not, in my judgment, begin to establish a public policy which would require non-enforcement of the Final Award here. JSC VTB Bank v Skurikhin , which did not involve enforcement of an arbitration award, merely decided that there was an arguable case, for the purposes of CPR Part 24 , that foreign judgments which themselves stated that they awarded "penalties or fines" (paragraph 11) would be unenforceable. Midtown Acquisitions v Essar was a case in which a foreign judgment creditor sought to enforce its judgment. It was successful. Moulder J rejected as unarguable on the facts a defence that, because the amount claimed was said to involve a double recovery, enforcement would be contrary to public policy. She did not examine the ambit of such policy.

Pre-award interest

The FRN also contended that enforcement of the Final Award should be refused to the extent that it awarded pre-award interest. It contended that, under Nigerian law, pre-award interest was only available in circumstances where (i) the parties expressly provided for it in their contract, (ii) the contract includes an implied term to that effect, based on trade usage or mercantile custom, or (iii) there is an applicable statutory power to grant it; and that none of (i) – (iii) applied here. This was said to mean that the Final Award contained "a decision on matters beyond the scope of the submission to arbitration".

P&ID's response to this issue was three-fold. In the first place it contended that this objection was premised on the Final Award being a New York Convention Award, the ground for non-enforcement sought to be relied upon being that in s. 103(2)(d) of the Arbitration Act 1996 , and that it had no application if the Final Award was found to be a "domestic" award.

Secondly, and in any event, that the suggestion that the arbitrators did not have jurisdiction to award pre-award interest was not advanced during the arbitration proceedings. Instead, P&ID had claimed interest in its Notice of Arbitration and in its Statement of Case; the FRN had not joined issue, in its Statement of Defence, with P&ID's entitlement to claim interest; P&ID had maintained its pleaded interest claim in its Statement of Case on quantum; and the FRN, in its responsive written submissions on quantum, had noted that P&ID was claiming pre-award interest and had not argued that this was in issue.

Thirdly, P&ID contended that the FRN was out of time to make an application to set aside the Tribunal's award of pre-award interest.

In circumstances where, as I have found, the seat of the arbitration was England, any excess of jurisdiction by the arbitrators could have been the subject of an application under s. 67 Arbitration Act 1996 . Given that there was no such application in relation to the award of pre-award interest (or at all), I do not consider that there can now be a separate objection to enforcement on the basis of a lack of jurisdiction.

In any event, the suggestion that the award of pre-award interest was beyond the scope of the submission to arbitration is not made out. Interest, which was not said to be confined to post-award interest, was claimed in the Notice of Arbitration. Issue was joined with P&ID's claim, but there was no suggestion that the tribunal lacked jurisdiction to award pre-award interest. In the circumstances I do not consider that the issue was jurisdictional. It may be that the FRN had answers to the claim which it did not put forward, but that is a different matter.

Conclusion

For these reasons, I am prepared to make an order enforcing the Final Award in the same manner as a judgment or order of this Court to the same effect. I will receive submissions from the parties as to the precise form of order appropriate.