ANNUAL REVIEW OF ENGLISH JUDICIAL DECISIONS ON ARBITRATION 2006

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English courts rendered over 70 arbitration-related decisions in 2006: some 60 judgments at first instance and 12 by the Court of Appeal. There were no decisions by the House of Lords.

Appeals from arbitration awards on questions of law still make up, at 15 available judgments, the largest category of decisions under the Act (in comparison to 10 and 11 decisions applying ss 67 and 68 respectively). Several decisions confirmed that arbitration agreements and limitations on rights of appeal from arbitration awards were not contrary to the European Human Rights Convention. The Court of Appeal was called, on a number of occasions, to decide the scope of its 'residual jurisdiction' to hear appeals from decisions at first instance where no permission to appeal was given by the High Court. The incorporation of arbitration agreements by reference was further liberalized in favour of arbitration.

I. Enforcement of Arbitration

A number of complaints that arbitration agreements were incompatible with the European Human Rights Convention were dismissed. A claim that an arbitration agreement was inoperative because it did not comply with Art 6 of the EHRC failed in *Paul Stretford v The Football Association Ltd and Anr*[1] where it was considered a valid waiver of rights.

A. Scope of arbitration agreement

An Abu Dhabi arbitration agreement was held not to encompass claims of misrepresentation and fraud relative to the conclusion of a contract in *Abu Dhabi Investment Co and Ors v H Clarkson & Co Ltd and Ors.*[2] A stay was refused and the English court assumed jurisdiction over the matter. The contract in dispute was governed by the law of the United Arab Emirates. Confronted with conflicting evidence on foreign law, Morison J preferred the view that applicable legal norms were to be found solely in the UAE Civil Code, Art 203 of which provides that it is lawful for parties to submit to arbitration anything which

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[1] [2006] ArbLR 57. Appeal dismissed by the Court of Appeal [2007] EWCA Civ 238. See also *Sukuman Ltd v Commonwealth Secretariat* [2006] ArbLR 58 where Colman J held that an arbitration agreement that excluded all rights of appeal was not contrary to the Human Rights Convention. Limitations on rights of appeal from first instance decisions under the Arbitration Act to the Court of Appeal were, likewise, held not to violate the EHRC in *ASM Shipping v TTMI of England* [2006] ArbLR 6.

[2] [2006] ArbLR 3.

may arise between them by way of dispute in the performance of a specific contract. While fraud and misrepresentations which led to the making of the contract might have come within the terms of the parties' arbitration clause which referred 'any dispute, controversy or claim arising from this agreement or the matters related thereto' to arbitration, the law of the UAE was found to be 'code-based'. For Morison J, this meant that, unless permitted by the code, parties were not free to oust the jurisdiction of the courts. The words in the arbitration agreement, 'the matters related thereto', were, accordingly, held to be unenforceable in view of the Civil Code provisions which were construed not as general principle, but as restrictive and covering only disputes arising out of performance to the exclusion of pre-contractual representations. This analysis may appear to take a limited view of civil law and to import judicial anxieties about jurisdiction more present in the common-law context.[3]

Competition between statutory regulations and an arbitration agreement was resolved in favour of arbitration in *Legal Services Commission v Francis Joel Aaronson and Ors*.[4] Three arbitration proceedings were commenced while the Legal Services Commission applied to court seeking an order, under Legal Services Commission (Disclosure of Information) Regulations 2000, for disclosure of a law firm's publicly funded client files which had not yet been billed. When the firm applied for a stay of the claim on ground of an arbitration agreement, the Commission contended that the arbitrator had no jurisdiction to determine the amount owing in individual files. The deputy registrar refused a stay. Jack J, however, granted a stay on the basis that the claim fell within the arbitration agreement. If the firm failed to hand over files for inspection, this was a breach of contract referable to arbitration.[5]

B. Set-off

A cross-claim involving a transaction set-off arising under a separate contract governed by an arbitration agreement was not considered to amount to the bringing of legal proceedings by way of claim or counterclaim in breach of obligations to arbitrate disputes where it was deployed as a defence in *Prekons Insaat Sanayi AS v Rowlands Castle Contracting Group Ltd*.[6] A stay was granted, however, because the contract was governed by Turkish law, evidence of which established that a Turkish court would give effect to the arbitration agreement.

[3] See, as well, *Fiona Trust Holding Corp v Privalov and Ors* [2006] ArbLR 25 where disputes concerning the inducement of a contract by fraud and bribery were held not to come within the scope of an arbitration agreement. Set aside by the Court of Appeal [2007] EWCA Civ 20 and the House of Lords [2007] UKHL 40 which held that arbitration agreements in international contracts should be interpreted liberally.

[4] [2006] ArbLR 45.

[5] See, in contrast, *Best Beat Ltd v Rossall (No 2)* [2006] ArbLR 10, where 'a dispute' was held to arise under the Landlord and Tenant Act, not the parties' lease.

[6] [2006] ArbLR 52. See, as well, the decision of the Superior Court in Ontario, *Lappin v The Corporation of the City of Barrie* (2008) 90 OR (3rd) 145 where Wood J held that a cross-claim was not 'a dispute' which fell within an arbitration agreement on grounds that might appear contrary to the principle of *compétence-compétence*, at 148: 'The arbitrator's power to make binding decisions upon the parties stems only from the agreement. It is therefore outside the scope of the arbitrator's jurisdiction to determine whether or not the dispute he or she is asked to decide falls within or outside the terms of the agreement.'

C. Incorporation by reference

English law on the incorporation of arbitration clauses has been unsettled. Developments since entry into force of the 1996 Arbitration Act, however, have favoured movement towards a modern acceptance of this means of forming an arbitration agreement. The situation results largely from conflicting views expressed in a 1991 Court of Appeal decision, *Aughton v M F Kent Services*.[7] In that case, Sir John Megaw and Ralph Gibson LJ differed as to the degree of reference required to effect incorporation. Relying on the House of Lords decision in *Thomas v Portsea*,[8] Sir John Megaw held that incorporating words had to be express and had specifically to refer to the arbitration clause. Gibson LJ, on the other hand, considered that general words of reference sufficed, provided the language of the arbitration clause or the incorporating document did not contain contrary indications. Under this more flexible test, it was not necessary that an incorporating document expressly refer to the arbitration clause.

In *Aughton*, Sir John Megaw identified three policy considerations in support of the express reference requirement. Following Lord Gorell in *Thomas v Portsea*, he drew attention to the fact that an arbitration clause ousts the jurisdiction of the courts and the corresponding rule that only clear words can produce this effect.[9] Secondly, the requirement that an arbitration agreement be in writing was thought to be an obstacle to incorporation by general words of reference. Finally, the special nature of an arbitration clause as a separate 'self-contained' contract collateral to the substantive contract required specific and additional reference. Another reason for the strict approach is its origin in disputes involving bills of lading which, as negotiable commercial instruments, may come into the hands of parties with no knowledge of terms of the charterparty.[10] Justifications for the narrow rule have outlived their purpose. Arbitration is no longer the exception it was when *Thomas v Portsea* was decided; in international commerce, it has become the norm. The writing requirement is likewise outdated, particularly under the broad definition of 'agreement in writing' at s 5 of the Arbitration Act. The theoretical foundation of the narrow position on the question of incorporation is at odds with the approach of the court where the arbitration clause is defective or where it binds non-signatories by transmission or succession. It runs contrary to current attitudes in favour of strengthening support for arbitration agreements. Given international trends that continue to extend the scope of arbitration clauses and criticism of strict approaches to incorporation,[11] it is opportune for English courts maintain liberalization.

Nonetheless, a series of decisions just prior to the introduction of the 1996 Arbitration Act preferred the narrow test formulated by Sir John Megaw.[12] Section 6(2) of the Act

[7] [1991] 57 BLR 1.

[8] [1912] AC 1.

[9] See *Thomas & Co Ltd v Portsea Steamship Co Ltd* [1912] AC 1 at 9. See *Beaufort Developments Ltd v Gilbert-Ash NI Ltd* [1998] 2 All ER 778 at 800 where this view was recently repeated by Lord Hope in a different context: 'clear unequivocal words must be used to deprive a party to a contract of recourse to the court for the ordinary exercise of its powers and the granting of the ordinary remedies'.

[10] *Federal Bulk Carriers Inc v Itoh & Co Ltd* [1989] 1 Lloyd's Rep 103.

[11] See Xavier Bouccobza (1998) 'La clause compromissoire par référence en matière d'arbitrage international', *Revue de l'arbitrage*, vol 3, p 405 and Claude Reymond (1984) 'La clause arbitrale par référence', *Receuil de travaux suisses sur l'arbitrage international*, Zurich, Schulthess Polygraphischer Verlag.

[12] *Lexair Ltd v Edgar W Taylor Ltd* (1993) 65 BLR 87, *Smith & Gordon Ltd v John Lewis Building Ltd* [1994] CILL 934, *Ben Barrett v Henry Boot Management Ltd* [1995] CILL 1026, *Cooperative Wholesale*

essentially reproduced Art 7(2) of the Model Law. The authors of the DAC Report stated their preference for Gibson LJ's liberal approach, but expressly left further development of the law on this question to the courts.[13]

After entry into force of the new Arbitration Act, a number of decisions involved incorporation of arbitration clauses. In *Hall & Tawse South Limited v Ivory Gate Ltd*,[14] a letter of intent proposed work on the basis of a standard form construction contract containing an arbitration clause. The parties did not enter into the contemplated formal contract after the contractor accepted the letter of intent by commencing work. HH Judge Thornton QC held that 'at the very least the parties must signify their intention to incorporate the arbitration clause with clear language'. A mere letter of intent coupled with 'extraneous evidence that the parties intended the permanent contract, when executed, to contain an arbitration clause' was held to be insufficient reference under either the 1979 or the 1996 Acts.[15] This decision seemed to overlook s 7 of the Arbitration Act which entrenched a strong principle of separability expressly providing that an arbitration agreement would not fail where the host contract does not come into existence. In another case, the Court of Appeal decided that an arbitration clause in an underlying contract applied to a subsequent related contract between the same parties even in the absence of any words of incorporation. It was significant, the court reasoned, that the arbitration clause was broadly worded to include 'any dispute out from or in connection with this contract'.[16]

Jack J held that the new Act had not altered the law or set aside pre-1996 authorities in *Trygg Hansa v Insurance Co Ltd v Equitas Ltd and Ors*[17] and that he was therefore bound by pre-1996 authorities, but anticipated that a higher court may conclude that it 'should take a more innovative approach'.[18] The court, in that case, had to decide whether an arbitration agreement in a primary insurance contract had been incorporated by reference into excess of loss contracts and from there into contracts of reinsurance. The excess of loss contracts were concluded in accordance with 'the same terms, exclusions, conditions, definitions and settlements as the Policy of the Primary Insurers'.[19] The words of incorporation in the reinsurance contracts stated only: 'Form: as original'. For Jack J, this result was consistent the approach of Sir John Megaw and found support in the doctrine of separability. As the arbitration clause is 'of a special nature different to the majority of clauses in a contract',[20] it followed that the different clause required 'separate' and express confirmation of acceptance by the parties. Reliance on the doctrine of separability in this way is to misconceive (and misuse) a concept that evolved out of a concern to support arbitration and against formalism.

Society Ltd v Saunders and Tayler Ltd (1995) 11 Constr LJ 118, *Excess Insurance Co Ltd and Home and Overseas Insurance Co Ltd v Mander* [1995] LRLR 358. See *contra Extrudakerb (Maltby Engineering) Ltd v Whitemountain Quarries Ltd*, The Times, 10 July 1996 and *Roche Products Ltd v Freeman Process Systems; Black Country Development Co v Kier Construction Ltd* [1996] CILL 1171 and (1996) 80 BLR 102.

13 DAC Report at para 42.

14 [1998] CILL 1376.

15 Cf *Smith & Gordon Ltd v John Lewis Building Ltd* [1994] CILL 934.

16 *Davies Middleton & Davies Ltd v Engineering Co* (1997) 85 BLR 66 at 74.

17 [1998] 2 Lloyd's Rep 439.

18 Ibid, at 447.

19 Ibid, at 442.

20 Ibid, at 447.

In contrast, HH Judge Bowsher QC, rendering a decision in a dispute still governed by former arbitration statutes, nevertheless relied on s 6(2) of the 1996 Arbitration Act as leaving 'open to the court to decide in the individual case what reference validly incorporates an arbitration clause' in *Secretary of State for Foreign and Commonwealth Affairs v Percy Thomas Partnership and Kier International Ltd*.[21] The old law remained only as a 'guide'. Disputes arose out of two contracts for the construction of the British Embassy in Amman, one with architects, Percy Thomas, another with the main contractors, Kier International. The Secretary of State for Foreign and Commonwealth Affairs (FCO) brought two applications for the appointment of sole arbitrators under the 1950 Arbitration Act. The FCO's contractual documents and correspondence with Kier referred to and included the terms of standard form of contract C4009, similar to GC/Works/1 which contains an arbitration clause. In an exchange of correspondence, the FCO also entered into a contract with Percy Thomas on the basis of the Architects Appointment RIBA 1982 which, likewise, contains an arbitration clause. In neither case did the parties specifically refer to the arbitration clauses in the standard terms. Both Kier and Percy Thomas contended that they were not bound by the arbitration clauses. The court decided that general words of incorporation sufficed. Judge Bowsher QC criticized the logic of the strict approach to incorporation :

> Sir John Megaw has been taken to require that the test for the formation of an arbitration agreement, contrary to the general rule, shall be a subjective test. The result would be that if two parties signed a written agreement which contained an arbitration clause, those parties would be bound by all of the terms, even if they had not read them, save only for that the arbitration clause would not be binding on a party unless it could be proved that he had read it and 'consciously and deliberately agreed' to be bound by it.[22]

Judge Bowsher QC concluded that there was no consistent line of authority requiring application of Sir John McGaw's narrow test[23] and granted a stay of proceedings on the basis of the arbitration clause contained in the Green Form. Judge Bowsher QC held, both as a matter of binding authority and 'long standing commercial practice', that general words sufficed to effect incorporation, particularly where the very purpose of a standard form is incorporation:

> where the arbitration clause is one of a set of standard conditions written especially for the purpose of incorporation in contracts of a certain type, general words in a contract of that type incorporating those terms as a whole will usually bring the clause into

[21] (1998) 65 Con LR 11.

[22] Ibid, para 64.

[23] Judge Bowsher QC relied on the judgment of Hicks J in *Roche v Freeman* (1996) 80 BLR 102 and that of the Court of Appeal in *Modern Building Wales v Limmer and Trinidad* [1975] 1 WLR 1281. Hicks J had considered the 'irreconcilable views' of the two members of the Court of Appeal in *Aughton* to mean that that decision could not be regarded as binding authority. In *Modern Building Wales*, the Court of Appeal had held that the parties' reference to 'the appropriate form for nominated sub-contractors (RIBA 1965 edition)' was a clear enough designation of 'the Green Form' (issued in a 1963 edition by the National Federation of Building Trades Employers and the Federation of Associations of Specialists and Sub-Contractors. RIBA does not have a form of contract for nominated sub-contractors or any form of contract in a 1965 edition).

that contract so as to make the arbitration clause applicable to disputes under that contract.[24]

A number of cases in 2006 concerning incorporation emphasized the awareness the party contesting the existence of the arbitration agreement had or ought to have had when concluding the main contract.

In *Paul Stretford v The Football Association Ltd and Anr*[25], Sir Andrew Morritt held a licensed agent bound by an arbitration agreement contained in the Football Association rules. The licence required the agent to abide by the rules which became a term of the contract between agent and association. The agent had a duty to keep himself informed of the rules which were published in an annual Association Handbook. Indeed, the agent had exhibited extracts of the rules, including the arbitration clause, to his witness statement in the court proceedings he had initiated.

In *Sea Trade Maritime Corp v Hellenic Mutual War Risk Association Ltd and Ors*,[26] Langley J enforced arbitration where insurance cover was given in accordance with Hellenic's rules which contained an arbitration agreement. Sea Trade's contention that the arbitration clause had not been incorporated into the parties' contract, which made no specific reference to it, was rejected. Whether or not Sea Trade was actually aware of the arbitration agreement was irrelevant when it was familiar with and had copies of the rules through its agents, the brokers. Langley J drew a distinction between 'one-contract' cases and 'two-contract' cases. Specific reference to the arbitration agreement was held to be a requirement only in 'two-contract' cases such as, for example, insurance-reinsurance or charterparty-bill of lading cases, where one party may be different from the parties to the underlying contract and have no notice of its terms.

The fact that general words of incorporation did not specifically refer to arbitration was not a bar to enforcement of an arbitration clause in *AXA Re v ACE Global Markets Ltd*.[27] The challenge to arbitration rested on a contrary reference to the jurisdiction of English courts, not the failure to use express incorporating language. The reinsurance slip signed by Axa provided 'Full wording as Exel 1.1.90 with additional clauses, deletions, endorsements, special condition and warranties . . . This Contract shall be subject to English law and jurisdiction.' The reference to Exel 1.1.90, which was not attached to the slip, was to the 'Joint Excess Loss Committee excess loss claims' containing an arbitration agreement. While the circumstances might have come within the exception Gibson LJ attached to the effect of general words of incorporation in *Aughton*, Gloster J enforced the arbitration agreement on the basis that it was compatible with the reference to English courts viewed as an identification of the supervisory jurisdiction.

In *Sukuman Ltd v Commonwealth Secretariat*,[28] an exclusion of rights of appeal from an arbitration award contained in the Secretariat's statute sufficed to incorporate it into a contract which expressly referred to the statute. Moreover, in that case, both parties had

[24] Ibid, para 75.

[25] [2006] ArbLR 57. Appeal dismissed by the Court of Appeal [2007] EWCA Civ 238.

[26] *The Athena (No 1)* [2006] ArbLR 54.

[27] [2006] ArbLR 7. See also *PT Tri-MG Intra Asia Airlines v Norse Air Charter Ltd* [2009] SGHC 13 and *Ace Capital Ltd v CMS Energy Corp* [2008] EWHC 1843.

[28] [2006] ArbLR 58.

entered into the contract on the mistaken assumption that there could be no appeal from the arbitrator's decision.

D. Existence of dispute

Arbitration was not enforced where the court found that there was no real dispute in *Best Beat Ltd v Michael Joseph Rossall (No 2)*.[29] Best Beat did not dispute the amount owing, but merely refused to pay it. The court reasoned, that any dispute there may have been arose under the Landlord and Tenant Act which conferred a benefit on the lessee in the event of termination of the lease, not the lease itself.[30] This analysis appears contrary to a majority of the Court of Appeal in *Halki Shipping Co v Sopex Oils Ltd*[31] which upheld a decision by Clarke J, as he then was, that pursuant to s 9, a stay (rather than summary judgment) must be granted even in circumstances where it is clear that no arguable defence can be raised. Amendment of s 1 of the 1975 Act was held to have removed the court's parallel jurisdiction to grant summary judgment. A 'dispute' between parties existed where one party refuses to pay a sum claimed or simply denies that it is owing.[32] The distinction drawn in *Best Beat* between a dispute arising under the contract and a separate one arising under the law governing the contract appears artificial.

E. Pathological clauses

Competing references to both arbitration and the jurisdiction of English courts continue to be resolved in favour of arbitration. In *AXA Re v ACE Global Markets Ltd*,[33] an express choice of English law and jurisdiction was workable alongside a reference to arbitration and did not operate to delete the arbitration agreement. Likewise, a counterclaim was stayed in favour of arbitration in *McConnell Dowell Constructors (Aus) Pty Ltd v National Grid Gas Plc*,[34] notwithstanding the presence of both an English jurisdiction clause and an arbitration agreement in the parties' contract.

[29] [2006] ArbLR 10.

[30] In contrast, a challenge to an award on the basis that an arbitrator lacked jurisdiction because there had been no dispute where liability was admitted failed in *Exfin Shipping (India) Ltd v Tolani Shipping Co* [2006] ArbLR 24. Exfin had admitted liability, but did not pay the amount owing and, instead, advised that payment would be made either in instalments or by a lump sum in about 7 to 9 months. Langley J dismissed the challenge finding that if one party requests payment and the other refuses, they are in dispute. Costs were awarded against Exfin on an indemnity basis for bringing an unmeritorious challenge.

[31] *(The 'Halki')* [1998] 1 WLR 726.

[32] *The Halki* involved both a refusal to admit liability and a refusal to pay. In *Exfin Shipping (India) Ltd v Tolani Shipping Co* [2006] ArbLR 24, Langley J rejected, at para 11, the contention that a distinction could be drawn where liability was admitted and there remained only a refusal to pay: 'I see no good reason why the one should not be characterized as a dispute as much as the other. It would be remarkable if parties had chosen to address the issue of jurisdiction by reference to whether non-payment was due to a failure to admit a valid claim rather than a failure to pay it. Mr Aswani placed much reliance on the decision of the Court of Appeal in *Wealands v CLC Contractors* [1999] 2 Lloyd's Rep 739. It is true that, in the course of his judgment, Mance LJ, at p 745, said, in referring to *The Halki*, that "the question in each case is whether the claim made, whatever its nature, has been admitted". But that was quite sufficient to decide the issue in that case (payment or non-payment was not in issue) and I see no reason to suppose that Mance LJ was intending to address the circumstances of the present claim.'

[33] [2006] ArbLR 7.

[34] [2006] ArbLR 49.

In *Best Beat Ltd v Michael Joseph Rossall*,[35] the courts held arbitration to be optional, not mandatory, under an agreement which specified 'if the landlord and the tenant shall agree to refer any dispute arising under this lease to arbitration, then unless the contrary shall have been agreed, the provisions of the preceding sub-clause [on appointment] shall be deemed to be incorporated in their agreement'.

A self-standing arbitration agreement in *Yisroel Meir Halpern and Anr v Nochum Mordechai Halpern*[36] was found to be governed by English law as indicated by the parties' express reference to the Arbitration Act 1996 in one of the documents comprising the agreement. Notwithstanding this finding, the court also held that the seat of arbitration was Switzerland. In *Cadogan and Anr v Escada AG and Ors*,[37] the court held that its powers to apply business common sense to the interpretation of arbitration agreements was limited in the presence of clear wording.

F. Insolvency

Section 9 of the Arbitration Act provides that the courts 'shall grant a stay' of 'legal proceedings' commenced in violation of an arbitration agreement. The expression 'legal proceedings' is defined at s 82(1) of the Arbitration Act as civil proceedings in the High Court or a county court. An arbitration agreement was not enforced in *Best Beat Ltd v Michael Joseph Rossall*[38] where a petition to wind up the landlord company was brought after an amount owing under a lease was not paid. The landlord's application for a stay was unsuccessful[39] as the court did not accept that a wind-up petition was a 'claim or counterclaim' under s 9 of the Arbitration Act.[40]

[35] [2006] ArbLR 10.

[36] [2006] ArbLR 32.

[37] [2006] ArbLR 15. An alternative claim for rectification was also unsuccessful in the absence of any mistake.

[38] [2006] ArbLR 9 and 10.

[39] See, as well, *Prekons Insaat Sanayi AS v Rowlands Castle Contracting Group Ltd* [2006] ArbLR 52 where the court considered that a 'cross-claim' would not normally be stayed because a transaction set-off deployed as a defence was not the bringing of legal proceedings by way of claim or counterclaim.

[40] Article 8(1) of the UNCITRAL Model Law provides: 'A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.' An attempt to set aside statutory demands as 'legal proceedings' under s 9 was not successful in *Shalson v DF Keane* [2003] ArbLR 38. The High Court considered a statutory demand to be a mere precursor to the presentation of a petition in bankruptcy. As such, it was an essential requisite for the commencement of a certain type of proceeding, but not itself a legal proceeding. Any question of a stay could only arise once proceedings were, in fact, commenced. The court rejected an argument that it should set aside the statutory demands because the inevitable outcome was the bringing of legal proceedings by the presentation of a bankruptcy petition which would have to be stayed under s 9. In *City Hotel (Londonderry) Ltd v Stephenson Architectural Engineering Ltd* [2003] ArbLR 14, the Northern Ireland Court of Appeal upheld a lower court's refusal to grant an injunction to restrain the respondents from presenting or advertising a petition to wind up the appellant company on the basis that a statutory demand was not a legal proceeding that might be stayed in favour of arbitration. See, however, *Re Magi Capital Partners LLP* [2003] ArbLR 29 where the courts agreed to stay a petition to wind up a limited liability partnership in favour of arbitration. The existence of an arbitration proceeding was, however, a factor the court also considered relevant in granting a stay in that case. In *Re Sky Datamann (Hong Kong) Ltd*, 29 January 2002, High Court of Hong Kong,

G. Parallel proceedings

A contention that an agreement to defer disciplinary hearings until an agent commenced litigation did not preclude an application to stay proceedings in *Paul Stretford v The Football Association Ltd and Anr*.[41] The informal meeting relied on concerned only the deferment of the disciplinary hearing and did not result in any agreement that the arbitration agreement would not be relied on.

The court had to balance the effect of enforcement of an adjudication award on an ongoing arbitration in *Harlow & Milner Ltd v Linda Teasdale (No 2)*.[42] The court rejected a contention that an interim charging order on the property in dispute would undermine the arbitral proceeding. The Court of Appeal refused permission to appeal on the ground that the judge at first instance was entitled to exercise wide case-management powers and correct to protect the enforceability of adjudicators' decisions.[43] Opposition to a final charging order was, likewise, unsuccessful on the basis that a stay of the order pending arbitration would undermine adjudication.[44] The question returned to the courts again on an application for an order for sale arising out of the charging order. This was opposed *inter alia* on the ground that evidence should be preserved for the arbitration. HH Judge Coulson QC noted that final resolution of the dispute in arbitration was still some way off and there was no support for the claim that Ms Teasdale would prevail; indeed, it was accepted that part of the amount of the adjudication award was owing. The order

unreported, Yuen J, as she then was, noted that a winding up petition was not an 'action'. She held 'it is clear that the court is not obliged to strike out or stay a petition merely because the petitioner and the company had entered into a contract with an arbitration clause. It is a matter for the discretion of the court. The court will consider all relevant circumstances, including the financial position of the company, the existence of other creditors and the position taken by them.' See, as well, *An Feng International Trading Ltd v Honour Link International Development Ltd* [1999] HKC 116, Le Pichon J, unreported and *Hoo Cheong Building Construction Co Ltd v Jade Union Investment Ltd*, 5 March 2004, High Court of Hong Kong, Barma J, unreported. In *Hollmet AG and Anr v Meridian Success Metal Supplies* [1997] 4 HKC 343, Rogers J held that it was the underlying contract, not the winding-up proceeding, that was subject to the arbitration agreement and that winding-up petitions may not not concern disputes arising out of a contract governed by an arbitration agreement. He stated, at 347: 'Although in many instances, people may regard winding-up petitions as a means of enforcing a contract, that is not what it is. The procedure of winding up is to wind up an insolvent company. What the court is concerned to see is whether or not the company is insolvent . . . If a company wishes to obtain a stay of winding-up proceedings on the basis that the underlying debt upon which the statutory notice is founded is disputed, it must establish in the normal way that there is a bona fide dispute on substantial grounds. If it has not satisfied the court as to the bona fides and substantial nature of its claim it can only expect a short adjournment to enable it to commence the arbitration and then, if sufficient evidence to establish a genuine dispute is still absent it can expect to have to give an undertaking to proceed with the arbitration with all due dispatch. It cannot simply put up its hands and say: "You, the Court, have no jurisdiction because of my contract." That is not what the contract says, and the Companies Court is entitled to be satisfied that there is a proper dispute.' The Hong Kong Law Reform Commission Report on the Winding-Up Provisions of the Companies Ordinance [1999] HKLRC recommended the addition of a provision to clarify that an arbitration clause in a contract should not, in the absence of substantial dispute, be sufficient to preclude the right of a petitioner to wind up a company.

41 [2006] ArbLR 57. Appeal dismissed by the Court of Appeal [2007] EWCA Civ 238.

42 [2006] ArbLR 33.

43 [2006] ArbLR 34.

44 *Harlow & Milner Ltd v Linda Teasdale (No 2)* [2006] ArbLR 48.

which sought handover of the property in one month allowed preservation of evidence for inspection or the making of a permanent record of its condition.[45]

II Anti-Suit Injunctions

The courts dismissed an application for an anti-suit injunction to prevent the family of a crew member, who died when he had to abandon ship after a fire broke out, from bringing suit against the vessel's insurer in Tunisia in *Markel International Co Ltd v Craft and Ors*.[46] Morison J considered that, in determining whether a party was in breach of contract by commencing legal proceedings in court, it was important to distinguish the position of a third party who becomes a party to the contract from that of a person simply asserting entitlements under it.[47] The family committed no breach of contract by initiating proceedings in Tunisia. The judge observed that an anit-suit injunction was a remedy to be used sparingly.

In *Kallang Shipping SA v Axa Assurances Senegal and Ors*,[48] a refusal to accept a Club letter of undertaking in relation to a cargo claim subject to English law and London arbitration appeared to show an attempt to frustrate arbitration. An anti-suit injunction was granted because proceedings in Senegal for the arrest of a vessel were aimed at obtaining not merely security, but also payment.

An anti-anti-arbitration injunction was granted in *Goshawk Dedicated Ltd v ROP Inc*[49] in respect of proceedings in the United States. Disputes arose after novation of a contract. Arbitration was commenced against the original party to the contract while litigation in the United States was brought against the new party with a view to compelling arbitration in London. The original party applied in the United States for an order restraining the London arbitration. The primary purpose of the litigation was to enforce arbitration. There had been no inconsistency in the commencement of parallel proceedings to the extent that the two defendant parties might be liable for the different periods up to and following the novation. ROP's conduct in seeking to intervene in the litigation in the United States and obtain an anti-arbitration injunction immediately after appointing its arbitrator bore all the hallmarks of a contrived attempt to avoid a contractual commitment to arbitrate. England was a natural forum for resolution of the dispute.

III Anti-Arbitration Injunctions

English courts confirmed their power to issue an anti-arbitration injunction where the arbitration agreement is void or where the arbitrator has no jurisdiction. They also confirmed

[45] Ibid.
[46] [2006] ArbLR 35.
[47] See the Court of Appeal's decision in *Through Transport Mutual Insurance (Eurasia) Ltd v New India Assurance Co Ltd* [2004] ArbLR 58.
[48] [2006] ArbLR 39.
[49] [2006] ArbLR 29.

jurisdiction to issue such injunctions, in exceptional circumstances, even where the arbitration seated in a foreign jurisdiction.

In *Weissfisch v Julius & Ors*,[50] parties agreed to appoint an English lawyer who was already acting for them and their group of companies and who had earlier attempted to mediate the disputes. The parties waived all rights to contest his appointment, including on the ground that he had acted for them as legal advisor and mediator. An application was subsequently brought alleging that the arbitration agreement was void and had been avoided, that the arbitrator, who was continuing to act for the parties outside the arbitration, owed fiduciary duties which could not be waived and had breached rules of professional conduct by acting for two clients in conflict of interest. When the arbitrator advised that he intended to issue an award on jurisdiction, an application was made for an interim injunction restraining him from acting pending the outcome of related proceedings in England, including for his removal. The court at first instance refused to order an interim injunction because the arbitrator had *compétence-compétence* to determine his own jurisdiction, including in respect of claims that he was biased or in breach of professional rules.[51] The Court of Appeal found no exceptional circumstances justifying an interim injunction and rejected an argument that the arbitrator purported to act as both judge and witness in his own case. Appropriate safeguards were already in place as the arbitrator's decision would not be final: the courts in Switzerland exercising supervisory jurisdiction pursuant to the parties' express choice of the seat. Issues concerning the validity of the arbitration agreement fell to be determined by Swiss courts under Swiss law. The applications for an interim injunction were followed by a decision on the merits seeking a declaration that the arbitration agreement was void, inoperative, and unenforceable.[52] An injunction was also sought to restrain the arbitrator from continuing to act or using confidential information and seeking delivery-up of house deeds and all documents transferred under the arbitration agreement. Colman J considered that an English court's interference with the jurisdiction of a foreign arbitrator to determine the threshold issue of jurisdiction would 'represent a serious judicial invasion of international arbitral territory as reflected in the UNCITRAL Model Law section 16(1) of which provides: "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."'[53]

In contrast, it was not an invasion of 'international arbitral territory' to injunct an arbitration taking place in England in *Fiona Trust Holding Corp v Privalov and Ors*[54] where it was alleged that contracts had been rescinded on grounds of fraud and bribery and that the disputes arising did not fall within the arbitration agreement. Morison J considered that the arbitrator did not have jurisdiction since the issue of whether a contract had ever been made was not a dispute that could be said to arise out of or under the contract. Only the court had jurisdiction to decide the issue. The unenforceability of the main contracts impugned the arbitration agreements they contained. Morison J compared the

[50] [2006] ArbLR 1 and 64.
[51] Ibid.
[52] [2006] ArbLR 1.
[53] Ibid, at para 124. See *IPOC International Growth Fund Ltd v OAO 'CT Mobile' and Anr* [2007] BdaLR 43 where the Bermuda Court of Appeal issued an anti-arbitration injunction in respect of arbitral proceedings taking place in Sweden and Switzerland.
[54] [2006] ArbLR 25.

situation to a case of *non est factum* or mistake going to the root of the existence of the contract, confirming a weak principle of separability still operative in English jurisprudence despite entrenchment of a strong principle at s 7 of the Arbitration Act which provides that an arbitration agreement 'shall not be regarded as non-existent or ineffective because that other agreement is invalid or did not come into existence . . . '.[55]

IV. Interim Measures

An application for an order for specific performance of a contract, as an interim measure in the wake of one party's termination, failed in *Vertex Data Science Ltd v Powergen Retail Ltd*.[56] The court rejected Powergen's argument that Vertex had no right to permanent injunctive relief as the parties' arbitration agreement expressly excluded arbitrators' powers to order injunctive relief. It was not appropriate to compel the parties to work together where Powergen had a plausible case that current arrangements adversely affected its reputation as a utilities provider.

A without prejudice order for interim relief in support of an arbitration seated in Nigeria was set aside in *Econet Wireless Ltd v Vee Networks Ltd and Ors (No 1)*.[57] There had been no justification for proceeding without notice. The disputes were found not to be governed by two LCIA arbitration provisions, but by an agreement to arbitrate in Nigeria which was the obvious forum. The court's powers to grant interim measures under s 44 could not be invoked where the place of arbitration was not England.

V. Removal of Arbitrators

An arbitrator was removed in *Norbrook Laboratories Ltd v Tank*.[58] The arbitrator had conducted unilateral communications with three potential witnesses without notice to the parties or any record or report. Colman J found the arbitrator had exposed himself to information that might consciously or unconsciously influence his decisions and the future conduct of the arbitration. The judge rejected arguments that overt antagonism to one party's lawyers, attempts to limit legal representation, and expression of views as to the value of expertise evidence showed bias rather than an attempt to impose an orderly procedure.

VI. Confidentiality

An application for an injunction to restrain a law firm from acting in an arbitration against a former client was unsuccessful in *Gus Consulting GmbH v Leboeuf, Lamb, Greene &*

[55] See the review of case law on the question in Shackleton 'Arbitration without a Contract' *Mealey's International Arbitration Report* 17/9 (2002). The decision of Morison J was set aside by the Court of Appeal [2007] EWCA Civ 20 and the House of Lords [2007] UKHL 40.

[56] [2006] ArbLR 62.

[57] [2006] ArbLR 19.

[58] [2006] ArbLR 50.

McCrae.[59] The potential conflict arose when a lawyer acting in the arbitration against the former client moved to the law firm. The court found that, while the law firm was in possession of confidential information, there was no risk of disclosure of information which, moreover, involved transactional matters conducted nine years earlier. The law firm was also found to have taken precautions to protect confidential information.[60] An appeal against the decision was dismissed.[61] The Court of Appeal found that there was no rule of confidentiality prohibiting a law firm from acting against ex-clients. There would be no risk of a breach of confidentiality justifying an injunction in the presence of clear and convincing evidence that precautions had been taken to provide protection. The effectiveness of the precautions taken was a matter for the court at first instance.

VII. Loss of Rights to Challenge

Parties who deliberately choose not to avail themselves of opportunities to protest irregularities during arbitration may lose rights to rely on them in a subsequent challenge of the award.

In *ASM Shipping v TTMI of England,*[62] ASM lost rights to challenge an interim award on grounds of procedural irregularity that included unfairness and bias by not applying to the court to remove an arbitrator. The challenge was unsuccessful despite the court's finding that the circumstances established a real possibility of bias and the expression of the court's view that the arbitrator should not continue. For Morison J, a party with concerns that an arbitrator was biased was required to make an election:

> Owners were faced with a straight choice: come to the court and complain and seek his removal as a decision maker or let the matter drop. They could not get themselves into a position whereby if the award was in their favour they would drop their objection but make it in the event that the award went against them. A 'heads we win and tails you lose' position is not permissible in law as s 73 makes clear. The threat of objection cannot be held over the head of the tribunal until they make their decision and could be seen as an attempt to put unfair and undue pressure upon them.[63]

The decision might appear to read too much into s 73 of the Arbitration Act which only requires that an 'objection' be raised. Unfairness and unequal treatment are procedural

[59] [2005] ArbLR 28. Upheld by the Court of Appeal [2006] ArbLR 30.

[60] See as well, *Koch Shipping Inc v Richards Butler* [2002] ArbLR 22. Koch obtained an injunction to restrain the respondent law firm from acting in a London arbitration. Richards Butler had recruited a solicitor from the law firm that represented Koch in the arbitration. Richards Butler acted for the other party in the same arbitration. At first instance, Smith J considered the danger of disclosure to be 'slight', but could not dismiss the risk as 'fanciful'. In reversing the lower court, the Court of Appeal noted the modest sums in dispute and the solicitor's undertaking not to communicate with Richards Butler case handlers involved in the arbitration, not to enter their offices, and not to participate in department know-how lunches.

[61] [2006] ArbLR 30.

[62] [2005] ArbLR 5.

[63] [2005] ArbLR 5 at para 49.

irregularities and, as such, may found a challenge to an award where rights are preserved by objection. The Court of Appeal held that it had no jurisdiction to grant permission to appeal as the court at first instance had not granted permission.[64] The Court of Appeal's residual jurisdiction could not be invoked because it could not be said that the High Court failed to take a decision. There was no evidence that the decision at first instance contravened ASM's rights under the European Human Rights Convention since a decision of a court does not violate a Convention right merely because it is wrong.

In *Norbrook Laboratories Ltd v Tank,*[65] an arbitrator's failure to provide reasons for his decision was a serious procedural irregularity, especially as there had been no agreement between the parties to dispense with reasons. Norbrook lost rights to set aside the decision on this basis because it had not applied to court for an order that the arbitrator give reasons. In another case, Morison J considered that rights to object to enforcement on ground of illegality may be lost where no objection was raised at the time of the award and no challenge brought on such grounds.[66]

VIII. Security for Costs for Proceedings in Court

The courts retain a power to order security for costs only in respect of arbitration-related proceedings before the courts.[67]

Clarke J refused to order security for a challenge to jurisdiction in *Arduina Holdings BV v Celtic Resources PLC (No 1)*.[68] The arbitrator had dismissed an application for security brought on the basis that Arduina was a 'shell' company with no assets. A second request for security was made on an *ex parte* basis pursuant to Art 25(1) of the LCIA Rules on the additional basis that costs of arbitration were being paid by a third party. The arbitrator again refused to make an order stating: 'There is at the very least a question whether English law allows an arbitrator to decide such an application *ex parte*; but, whatever the legal position as to jurisdiction, I would decline to do so in the exercise of my discretion.' Clarke J doubted that the arbitrator was saying that, if he had jurisdiction, he would refuse to order security and, instead, interpreted this comment to mean only that the arbitrator would decline to determine the matter *ex parte* even if he had jurisdiction to do so.[69] The court considered the arbitrator's position to be a relevant factor in applying its own discretion, but did not consider itself bound by the arbitrator's decision:

[64] [2006] ArbLR 6.
[65] [2006] ArbLR 50.
[66] *Kohn v Wagschal and Ors* [2006] ArbLR 43.
[67] Arbitration Act 1996, s 70(6).
[68] [2006] ArbLR 5.
[69] Ibid, at para 36. It is generally accepted that the principles to be applied in granting security for costs in international arbitration proceedings differ from those operative in litigation before local courts. Unlike litigation, parties agree to arbitrate disputes. As a result, a prima facie case that a claimant may not be able to meet a costs award against it will not always be sufficient. Arbitral tribunals often require a fundamental change in the situation of the claimant since the date of the arbitration agreement or exceptional circumstances justifying such an order usually defined as a fundamental change of circumstances since the conclusion of the arbitration agreement; improper conduct by a claimant on the brink of bankruptcy who wishes to maintain a highly speculative claim on its balance sheet as an 'asset' to avoid bankruptcy; deliberate fraud by a claimant in relation to the commencement of a sham arbitration; or deliberate

The Court is entitled to consider whether, on ordinary principles, Celtic, as a judgment creditor, is entitled to a freezing order and to do so on the evidence put before it. That is not, to my mind, a review of the exercise of the arbitrator's discretion but the exercise

organization of insolvency while commencing what may prove to be lengthy and expensive arbitral proceedings (Fouchard, Goldman, and Gaillard, *International Commercial Arbitration* (The Hague: Kluwer, 1999) at p 688). Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 2004) at p 349, observe, for example: 'it is not usual for an application for security for costs to be made in an international arbitration'. Craig, Park, and Paulsson, *International Chamber of Commerce Arbitration* (Paris: ICC Publishing, 2000) at pp 467–8 confirm that orders for security are 'not usually granted' and rare: 'Even prior to the entering into effect of Article 23(1) of the Rules authorizing the ordering of "any interim or conservatory measure it deems appropriate" ICC tribunals had found that they had the power to grant security for costs as part of their inherent powers in connection with the conduct of arbitral proceedings. However, they were extremely reluctant to grant the remedy . . . O ne of the reasons for not specifying security for costs as an interim measure is that many considered it undesirable to call attention to its availability or to suggest that it was a normal interim measure. The remedy is considered by many to be inappropriate in most circumstances for ICC arbitration . . '. Likewise, Fouchard, Gaillard, and Goldman, *International Commercial Arbitration* (The Hague: Kluwer, 1999) at p 687 after a discussion in which they conclude that arbitrators have jurisdiction to award security, state: 'The second question raised by requests for security for costs is whether such a measure should be granted in international arbitration. It would be particularly unfortunate if the granting of security for costs were to become the norm . . . ' . This approach is endorsed by commentators on the Arbitration Act 1996. For example, Tackaberry and Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice,* 4th edn (London: Sweet & Maxwell, 2003) at p 188, state: 'Arbitrators should be even slower to exercise any such power where one or both of the parties are based outside England. The concept of security for costs is a very English concept and its application to cases outside the English domestic sphere has given rise to much controversy and adverse comment, particularly among civil lawyers. Indeed when the 1996 Act was being drafted, the English rules on security were included. They were subsequently dropped, before the Act reached Parliament, following on objections by practitioners both in England and abroad.' In commentary on the Arbitration Act, 'England' in *The ICCA Handbook of International Commercial Arbitration* (The Hague: Kluwer, 1997) at p 43, VV Veeder states that the power to order security 'is likely to be exercised most sparingly where the arbitration is truly international, as distinct from the traditionally English forms of London arbitration'. The ARIAS (UK) Arbitration Rules contain an explanatory note to the express power to order security under Art 13(1)(8): 'Arbitrators should only use this provision in exceptional circumstances'. Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer, 2005) at pp 601–2, referring specifically to the express power granted by Art 25(2) of the LCIA Rules state: 'On what conditions should the tribunal exercise this power. There are few cases where arbitrators have ordered security for costs. This may be an indication that tribunals are reluctant to exercise this power. One reason is the strong view that orders for security for costs are not appropriate in arbitration. There are good arguments that a higher standard should be applied than in court proceedings. Arbitration generally requires that the respondent agreed to arbitrate with the claimant. Furthermore, the burden placed on the claimant by the obligation to pay an advance on costs under the institutional rules or to the arbitrators in respect of their fees is considered to be a sufficient safeguard to exclude any abusive and extravagant claims. Since the lack of sufficient funds is often due to the actions or contractual nonperformance of the respondent it is feared that in those cases parties may abuse requests for additional security to prevent underfunded claimants from pursuing their rights.' This approach was accepted and applied in a ruling issued in 2007 in LCIA Case No 5665 by an arbitral tribunal comprising Richard Siberry QC, Dr Bernard Hanotiau, and Dr Gavin Griffith QC. The matter involved proceedings in London arising out of a contract governed by English law. Although satisfied that a prima facie case that a significant risk of non-recovery of costs from the claimant had been made out, the tribunal declined to order security: 'We are satisfied, both from our consideration of the various texts and commentaries to which the parties referred us, and from our own experience of international arbitration, and in particular of arbitration conducted under the LCIA Rules, whether in London or elsewhere, that despite the apparent width of the discretion conferred by the Act and the Rules, as a matter of practice security for costs is only awarded if something akin to "exceptional circumstances" are shown. That is, as it appears to us, generally known in the international arbitration community.'

> of an independent jurisdiction. At the same time, it would seem to me relevant to have regard to a decision of the arbitrator not to grant relief similar to that now sought by the applicant, not least because the arbitrator was the person whom the parties agreed should resolve their dispute.[70]

In *Gemyat Gemi Insa Ve and Anr v Oakley and Ors*,[71] a counterclaim by sellers was dismissed when they did not pay security for costs. Nor did the sellers pay booking fees for an oral hearing they had requested. When the arbitrators vacated the hearing, deciding to proceed on documents only, the sellers initiated proceedings to remove them before the High Court which ordered the sellers to pay the arbitrators' costs. A majority of the arbitrators issued an award in favour of the buyers. In proceedings issued by the sellers to appeal from the arbitration award, they were ordered to provide security for costs for the arbitrators in the amount of £37,500 and for the buyers in relation to both sets of proceedings in the amount of £40,000. In addition, the first and second court proceedings were stayed pending payment of security. The Court of Appeal refused permission to appeal finding that the judge at first instance had fully considered the issue of a possible stifling of the claim and noting that no evidence was provided of access to funds from sources outside the sellers' company although such sources must exist since the sellers had been

[70] Ibid, at para 37. The exercise of discretion in granting orders for security in the context of international arbitration was considered by the Court of Appeal in *Gater Assets Ltd v Nak Naftogaz Ukrainiy* [2007] EWCA Civ 988. In issue was the power of the court to order security pursuant to s 70(b) of the Arbitration Act against a party who sought to challenge arbitrators or an award. Lord Justice Rix held that it was not necessary to decide that there was technical jurisdiction to order security for costs. Assuming that the court had jurisdiction, he considered it wrong in principle, save perhaps in exceptional circumstances stating, at paras 75 *et seq*: 'In any event, for the reasons given I consider that as a matter of principle, the courts should be reluctant, save in an exceptional case, to order security for costs against the award creditor, even if the power to do so is technically available. I proceed, however, contrary to my view, on the basis that the regime is available here . . . . Even so, in my judgment, the ordering of security for costs in this case was wrong in principle, that is to say that it was wrong at a "higher order" of discretion. For similar reasons of principle, it would not be just for security to be ordered in favour of Naftogaz.' In setting out his reasons, Lord Justice Rix specifically referred to the exercise of discretion in awarding security for costs 'in arbitration' and extended principles operative there to the discretion to be exercised by the court: 'The place of security for costs in the international arbitral setting has been a controversial one: see the discussion of the *Coppée-Lavalin case* [1995] 1 AC 38 above. Its application within arbitration itself was there restricted and its survival in the hands of the court was abolished in the 1996 Act: it became a matter for the arbitrators themselves. Although enforcement, in one of course important sense, lies outside the arbitration itself, since the arbitrators have made their award, and is now centred in the court, nevertheless many of the considerations which were in play in relation to security for costs in the arbitration itself survive in this wider sphere. It is true that an award creditor who comes to England to seek enforcement is invoking the English jurisdiction and may be said therefore to have to be prepared to take it as a whole, for better or worse: nevertheless he does so as a participant in an arbitration setting which itself has nothing whatsoever to do with England and, in the case of a Convention award, under the regime of the New York Convention which is his guarantee that the state parties to it, which are very numerous, will enforce his award under its provisions. In that context Lord Mustill's view that even the impecuniosity of a claimant does not make it just for security for costs to be imposed, although in the minority in that case, becomes in my respectful judgment compelling in the context of enforcement. There he was considering a claimant who had yet to make his case good in what promised to be a long and expensive arbitration. Here, we are considering an award creditor of a Convention award, which has already survived attack in its domestic sphere, up to the Russian Supreme Court, and which the award debtor bears the burden of showing has been procured by fraud. . . . I n these circumstances, Gater's lack of ready funds is of uncertain relevance, but I am nevertheless prepared to assume that the condition laid down by CPR r 25.13(2)(c) is to be treated as having been formally fulfilled. Even so, for the reasons given above, I do not regard it as a decisive factor.'

[71] [2006] ArbLR 26 and 27.

able to fund the litigation. Although there is no provision for the court to order security for costs for an application to remove arbitrators under s 24, such powers were to be found under the general provisions in CPR 25.12.

IX. Preliminary Questions of Law

A concern to preserve the role of the English judiciary as a primary source of English legal norms led the framers of the Arbitration Act to retain the avenue of appeal to the courts from the legal merits of an arbitration award.[72] One justification for this was a perceived demand on the part of arbitration users. Another was the need to provide the courts with a flow of disputes from arbitration awards in order to afford the necessary opportunity for the production of English law.[73]

A further consequence of this adherence to a statist vision of arbitration was the introduction of recourse to the courts for the purpose of rulings on questions of law during the arbitral proceeding itself. In practice, however, s 45 has rarely been used. The first two known instances of applications for preliminary rulings on questions of law occurred only in 2003, some seven years after the Arbitration Act was enacted.[74] Moreover, neither case involved a question of substantive law, but raised for the courts issues of procedure and evidence where it is usually accepted that arbitrators enjoy dominion.[75]

[72] Section 69 of the Arbitration Act.

[73] See the comment of Rix LJ in *Hyundai Merchant Marine Co Ltd v Furnace Withy (Australia) Pty ('Doric Pride')* at para 1: 'This is what nowadays is a very rare bird, namely a case in the courts about off-hire, under a time charter; the sort of dispute which tends to go to arbitration and not to figure in the courts at all.' At paras 47 *et seq*, Rix LJ cites an arbitration award in reviewing the possible legal norms applicable. See his comments to the same effect in *Tidebrook Maritime Co v Vitol SA of Geneva* [2006] EWCA Civ 944 at para 3. See also Lord Justice Rix's extrajudicial comments concerning the risk of atrophy of English law if appeals from arbitration awards were restricted in Sandra Speares (2004) 'English Commercial Law Could Atrophy' (speech by Lord Justice Rix), *Lloyd's List*, 31 March 2004. See as well Sir Anthony Colman, 'Arbitrations and judges: How much interference should we tolerate?' *Arbitration* 72/3 (2006) 217 and Sir Bernard Rix, 'International arbitration, yesterday, today and tomorrow' *Arbitration* 72/3 (2006) 224.

[74] See *Attorney General for the Falklands Islands v Gordon Forbes Construction (Falklands) Ltd (No 2)* [2003] ArbLR 6 and *Beegas Nominees Ltd v Decco Ltd* [2003] ArbLR 7.

[75] Section 34 of the Arbitration Act. See *GKN Centrax Gears Ltd v Matbro Ltd* [1976] 2 Lloyd's Rep 555 at 575 where Lord Denning MR stated: 'It seems to me that the questions of evidence and discovery and so forth are essentially matters for the arbitrator and not matters for the Court on case stated . . . The arbitrator is the final judge of fact, of admissibility of evidence and discovery and such like.' In *Unistress Building Construction Ltd v Humphrey's Estate (Forrestdale) Ltd* [1991] 1 HKC 519, claimants in an arbitration sought the court's determination on a point of law, under s 23A of the Arbitration Ordinance (Cap 341), as to whether the defendants should be ordered to provide additional particulars. Although the arbitrator consented to the application to court for an answer to the question, Kaplan J refused to determine the point because he did not accept that the matter of procedure was ever intended to be the sort of issue s 23A was intended to deal with. Kaplan J noted, in particular, modern trends in arbitration and the strong shift away from court interference towards party autonomy. In *JJ Jennings Ltd v David O'Leary and Anr*, 27 May 2004, unreported, the Irish High Court refused an application for an order directing an arbitrator to state a case on a question of law concerning the admissibility of expert evidence adduced in an arbitration proceeding. Geoghegan J stated: 'the parties must be considered to have agreed that what might be termed the normal and regular questions which arise in a hearing as to the admissibility of evidence would be decided by the arbitrator'.

The scope of the court's powers to intervene under s 45 arose in *Taylor Woodrow Holdings Ltd and Anr v Barnes & Elliott Ltd*.[76] The contract provided 'that either party may (upon notice to the other party and to the arbitrator) apply to the court to determine any question of law arising in the course of this reference'. Two questions were referred to the court under this provision. Both concerned the interpretation of the parties' contract. Jackson J rejected the contractor's objection that the court should exercise discretion not to make the determinations which were matters of mixed fact and law and more appropriately decided by the arbitrator. Noting that none of the factual evidence was disputed, the judge considered that the court was in just as good a position as the arbitrator to interpret the contractual provisions and correspondence. Jackson J also relied on the principle of party autonomy, considering that the court was the parties' chosen tribunal for any questions of law arising. He also thought it cost-effective for the courts to resolve the question of law at the outset.

X. Time Limits for Challenge or Appeals

A party was not allowed to circumvent statutory time limits for challenge, in *Karl Leibinger and Anr v Stryker Trauma GmbH*,[77] by filing an arbitration claim form which did not contain sufficient particulars just before expiry of the deadline and then applying for permission to amend at a later stage.

XI. Jurisdiction

The courts approach challenges to arbitral jurisdiction as a complete rehearing including new argument and evidence.[78] In *Oceanografia SA DE CV v DSND Subsea AS*,[79] however, Aikens J declined to order disclosure of legal advice concerning approval by the Finnish Maritime Administration for a vessel to remain in the Gulf of Mexico alleged to be a condition precedent to the contract. Disclosure was not ordered on the basis that no attempt had been made to seek production of the documents during the arbitration.

[76] [2006] ArbLR 61.

[77] [2006] ArbLR 46.

[78] See *Ecuador v Occidental Exploration and Production Co* [2006] ArbLR 21 at para 7. The courts have followed the decision in *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd's Rep 68 in which Rix J, as he then was, stated, at 70: 'even if there has already been a full hearing before the arbitrators, the Court, upon a challenge under s 67, should not be placed in a worse position than the arbitrator . . . it is not as though the court is required to review a challenge through the eyes of the arbitrator or on his findings of fact . . .'. The decision in *Azov* has been followed in a number of first instance decisions. See *contra*, the decision of Toulson J in *Ranko Group v Antarctic Maritime SA* 12 June 1998, Comm Ct, unreported: 'The underlying philosophy of the 1996 Arbitration Act is that, wherever possible, matters which arise in an arbitration should be determined by the arbitrator including, as laid down in s 30, questions as to his own jurisdiction. The role of the court is intended essentially to be one of review, rather than rehearing, and the essence is on speed and practical justice. It would, I think, be most unfortunate if in a situation of this kind, parties could contest before the arbitrator a question for his jurisdiction and then, on a later application under s 67, seek to introduce a raft of new evidence, causing additional delay to the whole procedure.'

[79] [2006] ArbLR 51.

Application for disclosure was made only on the morning of the court hearing, which had already been adjourned. In another case, an application for disclosure was unsuccessful where the documents sought were not considered relevant to the validity of the arbitration award.[80]

Service of proceedings to challenge an award on grounds of jurisdiction was not allowed to be made on a London barrister in *The Department of Civil Aviation under the Ministry of Transport and Communications of the Kyrgyz Republic v Finrep GmbH*.[81] Finrep was domiciled in Austria and represented by a New York firm of lawyers. In the absence of instructions as to acceptance of service by a solicitor's firm in London, permission was obtained to serve the claim form on the barrister personally. Finrep succeeded in setting aside the order for service on the barrister. An order extending time for service of the arbitration claim form was also made as well as an order permitting service upon Finrep to be effected on its London solicitors and deeming it already to have been effected. Tomlinson J considered that, in the context of arbitration in London, there would normally be good reason to allow service on solicitors acting in the arbitration.

A. Jurisdiction *ratione materiae*

An argument that an arbitrator exceeded jurisdiction by granting declaratory relief in relation to the occurrence of a precondition to payments under a number of assignments, the validity of which was in issue before Russian courts, was unsuccessful in *Arduina Holdings BV v Celtic Resources plc (No 2)*.[82] The precondition was contained in a separate framework agreement which was before the arbitrator. The claim that, as a matter of English law, the framework agreement had been terminated owing to non-fulfilment of the condition precedent was found to arise out of the framework agreement and the arbitrator did not purport to decide, as a matter of Russian law, the effect of his ruling on the assignment agreements. Toulson J noted the absence of any protest of the arbitrator's jurisdiction in relation to this issue during the arbitration.

Two seemingly contradictory approaches to arbitrators' jurisdiction over transactional set-off were considered in *Econet Satellite Services Ltd v Vee Networks Ltd (No 2)*[83] where

[80] *Arduina Holdings BV v Celtic Resources plc (No 1)* [2006] ArbLR 4.

[81] [2006] ArbLR 44.

[82] [2006] ArbLR 5.

[83] [2006] ArbLR 20. In *Metal Distributors (UK) Ltd v ZCCM Investment Holdings plc* [2005] ArbLR 42 Cresswell J dismissed a challenge to an arbitral award that had declined jurisdiction over a transactional set-off. The court held that the parties' arbitration agreement did not confer jurisdiction in relation to disputes arising under a wholly unrelated alleged agreement between other parties or in connection with an alleged negligent misstatement or collateral contract concerning a wholly unrelated transaction. In *JSC Zestafoni G Nikoladze Ferroalloy Plant v Ronly Holdings Ltd (No 2)* [2004] ArbLR 33 at para 33, Gross J stated: 'Questions of some intricacy arise as to the classification of set-offs and the correct approach to be followed when a claim before an arbitrator is met by an argument that there is a set-off available arising under some separate transaction over which the tribunal does not have jurisdiction. Provisionally, I would be minded to think that an arbitrator does or should have jurisdiction to allow a "transaction" set-off, in effect amounting or akin to a defence, to be raised to reduce or extinguish a claim, even though that set-off arises under another contract, outside the tribunal's jurisdiction. . . As it seems to me, the investigation and determination of the availability and amount of such a set-off do not involve the arbitrator arrogating to himself a jurisdiction over separate contracts which he does not have (albeit that considerations of issue estoppel may well arise); instead, these steps form part of the process of arriving at a conclusion of whether a defence is properly available in respect of the contract as to which the arbitrator alone has jurisdiction.

the parties had concluded four contracts. When disputes under the fourth contract were referred to arbitration, a counterclaim was formulated in respect of amounts owing under the other contracts. The contract was governed by English law and provided for ad hoc arbitration under the UNCITRAL Rules, Art 19(3) of which allows counterclaims arising out of the same contract for purposes of set-off. Field J dismissed the challenge noting that, contrary to the general jurisdiction enjoyed by the courts, arbitral jurisdiction depended on the scope of the arbitration agreement. Referring to *JSC Zestafoni G Nikoladze Ferroalloy Plant v Ronly Holdings (No 2)*,[84] the judge stated: 'if Gross J was intending to say that however the arbitration agreement is worded the tribunal will have jurisdiction to determine a transaction set-off based on a separate contract, I respectfully disagree with him'. Field J preferred the decision of Cresswell J in *Metal Distributors (UK) Ltd v ZCCM Investment Holdings plc*[85] that the tribunal's jurisdiction over a set-off depends on the construction of the arbitration agreement. He rejected the argument that the question should be determined with reference to the governing law. The law applicable to the merits, in this case English law, did not prevail over the procedural rules relevant to determining jurisdiction. Article 19(3) of the UNCITRAL Rules plainly allowed set-off as a counterclaim only if it arose out of the same contract.

The scope of disputes arbitrators might decide under the wording of an investment treaty was reviewed in *Republic of Ecuador v Occidental Petroleum and Production Co*.[86] Costs incurred by Occidental required payment of VAT which Ecuadorian authorities began to refuse to reimburse in 2000. Occidental commenced arbitration under a bilateral investment treaty concluded between the USA and Ecuador which excluded matters of taxation. Article X(2) of the treaty, however, provided 'Nevertheless, the provisions of this Treaty, and in particular Arts VI and VII, shall apply to matters of taxation only with respect to . . . (a) expropriation, pursuant to Article III . . . (c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Art VI(1)(a) or (b).' The arbitrators accepted that there had been no expropriation, but concluded that Ecuador was liable on the ground that the claim could be regarded as involving 'the observance and enforcement of terms of an investment agreement or authorisation'. Ecuador challenged the award contending that matters of taxation did not come within the terms of the treaty. In the event Ecuador was successful, Occidental sought to challenge the award on ground of jurisdiction, namely that the arbitrators had been wrong to hold that there was no expropriation.

Aikens J dismissed Ecuador's challenge and Occidental's contingent challenge finding that the dispute fell within the exceptions set out in Art X(2)(c) of the BIT. Matters of taxation concerning the observance and enforcement of the terms of an investment agreement included the entire bargain, including parties' obligations under a civil law system to deal with one another in good faith. The parties' assumptions concerning the economy of the contract included the premise that VAT was fundamental to the performance of the agreement. The fact that Occidental had not specifically pleaded that the arbitrators had jurisdiction under Art X(2)(c) of the treaty, but relied on broader jurisdiction, did not preclude the arbitrators from finding jurisdiction on the narrower basis. Aikens J found

However, all these observations are provisional only, given that for reasons which follow, such questions do not arise for decision in this matter.'

[84] [2004] ArbLR 33.

[85] [2005] ArbLR 42.

[86] [2006] ArbLR 21. Appeal dismissed by the Court of Appeal [2007] EWCA Civ 656.

that the arbitrators had dealt with the merits of Occidental's claim that there had been an expropriation. They had not declined jurisdiction to hear it by declaring it inadmissible, but had considered and dismissed it.

The question of arbitrators' powers to review their own earlier awards arose in *Republic of Kazakhstan v Istil Group Inc Istil*.[87] The arbitrators rendered an interim award on jurisdiction, but the claimant subsequently advised that it had merged with its parent company. In a second award, the arbitrators concluded that their first award had been a nullity because the claimant ceased to exist. Steel J rejected an argument that the matter of jurisdiction had been decided in the earlier interim award and that the arbitrators did not have the power to review their interim award, notably because Kazakhstan had not challenged it. The court found that the arbitrators had the power to review their earlier award and clearly considered the interim award as open to any available arbitral process of review, an approach not challenged by the parties.[88] Nor had Istil challenged the arbitral award on grounds of serious irregularity for excess of powers thereby losing the right to object. The partial award had not been a nullity, in any event, since Istil became universal successor in respect of all proceedings, including arbitration. The parties had not concluded an ad hoc arbitration agreement.

A sole arbitrator appointed to deal with 'all sums currently due and owing' also had jurisdiction over claims arising during the arbitral proceeding in *Harper Versicherungs AG v Indemnity Marine Assurance Co Ltd*.[89] A second counter-arbitration was commenced seeking a declaration that the arbitrator had no jurisdiction over additional claims, but only over amounts claimed at the time of appointment. Tomlinson J concluded that the first arbitrator's appointment covered all further balances: 'there would be a need to constitute a fresh tribunal every time further statements were drawn up and there would be the opportunity for the parties by judicious tribunal-shopping to obtain from one tribunal a decision which might in whole or in part pre-empt the decision of another. I cannot believe that any commercial parties would ordinarily wish to achieve such an absurd result.'[90] The arbitrator's jurisdiction to consider parties' rights to inspect records under the terms of appointment was also confirmed.

B. Jurisdiction *ratione personae*

An attempt to hold a state bound under a contract concluded by state entities failed in *Republic of Kazakhstan v Istil Group Inc Istil*.[91] Istil's predecessor had concluded contracts for steel with enterprises belonging to Kazakhstan. These fell into financial difficulty and Kazakhstan subsequently 'invalidated' the contracts. Court proceedings were brought against Kazakhstan in Paris, but the courts held that Kazakhstan was not party to an

[87] [2006] ArbLR 41.

[88] See as well, *Charles M Willie & Co (Shipping) Ltd v Ocean Laser Shipping Ltd ('The Smaro')* [1999] 1 Lloyd's Rep 225, where arbitrators decided to refuse amendments to pleadings they had previously allowed in an 'interim final award'. The court held that issue estoppel did not apply to mere questions of procedure as distinct from final decisions on the merits. Further, by reason of the procedural nature of the decision, the decision was not an 'award' rendering the arbitrators *functi officio*. Arbitrators are masters of the procedure and where they 'are clear in their own minds that they have erred, it is no bad thing that they should have the courage to say so'.

[89] [2006] ArbLR 36.

[90] Ibid, at para 53.

[91] [2006] ArbLR 41.

arbitration agreement and declined jurisdiction on grounds of sovereign immunity. Arbitration was commenced against Kazakhstan. The arbitrators concluded that Kazakhstan had become a party to the contracts in dispute pursuant to a transaction in which the steel mill was sold and undertakings were given by Kazakhstan to creditors of the state enterprises. Steel J set aside the award. Kazakhstan and the state enterprises enjoyed separate legal personalities and Kazakhstan was not a party to the contracts. It had not become a party by way of universal succession. Moreover, the French proceedings gave rise to *res judicata* on the question of whether Kazakhstan could be a party to the arbitration.[92]

A party was not allowed to rely on its failure to sign a contract containing an arbitration agreement in *Oceanografia SA DE CV v DSND Subsea AS*,[93] even though signature was an express precondition to the contract. Oceanografia was held to have confirmed the contract by conduct, notably in paying the mobilization fee for the vessel and signing an on-hire statement. Oceanografia had also agreed to extend the departure date, signed an off-hire redelivery statement with reference to the charterparty, and confirmed payment of the demobilization fee. The parties were, accordingly, bound by the contract and the arbitration agreement it contained.

Arbitration commenced in the name of parties who had transferred their business to a third party was held to be valid in *Harper Versicherungs AG v Indemnity Marine Assurance Co Ltd*.[94] The arbitrator issued an order substituting Ocean Marine as claimant in the arbitration. For Tomlinson J, the entity commencing arbitration would reasonably have been understood to be the party entitled to recover under the reinsurance. Commencement in the name of the original parties was mere misnomer and not misleading. Lawyers acting for the claimants in the arbitration had authority from Ocean Marine from the outset or their actions had been ratified.

Complaints that an arbitral tribunal had not been properly appointed were dismissed where the parties had already raised the same grounds, unsuccessfully, before German courts. In *Karl Leibinger and Anr v Stryker Trauma GmbH*,[95] the claimants had entered into a contract with Stryker and Pfizer for the sale of a company.

The contract was governed by German law and contained an agreement referring disputes to arbitration specifying that no two of the arbitrators could be of German or American nationality. One arbitrator was to be appointed by Pfizer and the other by a majority of the sellers. The third arbitrator was to be agreed by the first two appointed within 120 days of commencement failing which the Law Society of England and Wales was to make the appointment. When disputes arose, Stryker appointed a German national as arbitrator. The sellers objected to the appointment by Stryker (as opposed to Pfizer) and also objected to the nationality of the arbitrator, but proceeded to appoint a second German national. The two party-appointed arbitrators then appointed a third arbitrator to act as chair, but did so after the 120-day time limit set out in the arbitration agreement. The German

[92] On the basis of the first instance decision, Kazakhstan subsequently secured an anti-arbitration injunction [2007] EWHC 2729.

[93] [2006] ArbLR 51.

[94] [2006] ArbLR 36. The result compares with *SEB Trygg Holding Aktiebolag v Manches and Ors* [2005] ArbLR 51 and 52. See, in contrast, *Hussmann (Europe) Ltd v Al Ameen Development & Trade Co* [2000] EWHC 210 (Comm); [2000] 2 Lloyd's Rep 83 where the courts allowed a challenge arising from the description of the claimant.

[95] [2006] ArbLR 46.

Court of Appeal dismissed a challenge by the sellers to the jurisdiction and constitution of the tribunal.

The sellers' challenge to an award by the tribunal in England was dismissed on the basis that German courts had already dealt with the alleged requirement for arbitration to be commenced jointly by Stryker and Pfizer and the authority of the two party-appointed arbitrators to appoint the chair giving rise to issue estoppels on these questions. The sellers could not rely on the nationality requirement which they waived by appointing a second German national. Cooke J considered the complaint concerning the appointment of the chair to have had some merit, but been time-barred as it had not been fairly raised in the claim form.

XII. Procedural Irregularity

A number of challenges on ground of procedural irregularity were resolved on the basis that an examination of the arbitral award established what the arbitrators were alleged to have done not to be unfounded. Tomlinson J issued a call for more clearly expressed awards:

> Challenges such as this are immensely time-consuming and therefore costly. For the purposes of this hearing I was supplied with thirteen lever arch files of documents plus two elaborate (and very helpful) skeleton arguments and a further bundle of authorities. I spent one whole day reading in advance of the hearing, which was inadequate, and the hearing itself occupied one and a half days although the estimate had been for simply one day. Had it not been for the excellence of the oral argument and the opportunity to pre-read, inadequate though that was, the hearing would have taken very much longer. Preparation of the judgment has taken some time. Whilst the court will never dictate to arbitrators how their conclusions should be expressed, it must be obvious that the giving of clearly expressed reasons responsive to the issues as they were debated before the arbitrators will reduce the scope for the making of unmeritorious challenges as this ultimately has proved to be. It will be of little comfort to ABB but it may be instructive to know that at the end of my pre-reading in this case I was fairly certain that I would have no alternative but to remit or to set aside the award, notwithstanding the court's general approach to strive to uphold arbitration awards. I have had to strive a little harder than I might reasonably have expected. Reasons which were a little less compressed at the essential points might have been more transparent as to their meaning and might even have dissuaded the unsuccessful party from challenging the award or, at any rate, from mounting so wide-ranging a challenge.[96]

[96] *ABB AG v Hochtief Airport GmbH and Anr* [2006] ArbLR 2 at para 87. See *Havant Borough Council v South Coast Shipping Co Ltd*, Court of Appeal (14 July 1998) unreported, where the Court of Appeal considered that 'use by an arbitrator of oversimplified exposition or inept language will not be construed by the courts as a procedural irregularity where the sense of the arbitrator's conclusions are clear'. In *Department of Economic Policy & Development of the City of Moscow v Bankers Trust and Anr* (No 1) [2003] ArbLR 15a where Cooke J considered, at paras 34 and 35, that minimalist manner of setting out reasons was not uncommon in civil law jurisdictions, as opposed to common law jurisdictions, and declined to interfere with an international award on the basis that this evidenced failure to deal with issues.

To succeed, a challenge on ground of procedural irregularity must establish substantial injustice. A party needs to show that it was deprived of an opportunity to make a case which might realistically have led to a significantly different outcome.[97] In one case, the loss of avenues of appeal against the award was held to amount to substantial injustice justifying remission.[98]

A. Exceeding powers

Arbitrators who ruled that Ecuadorian regulations and decisions of court were of no legal effect did not exceed their powers in *Republic of Ecuador v Occidental Petroleum and Production Co*.[99] Aikens J found the arbitrators had jurisdiction to declare rights and obligations in international law. Their declarations did not purport to invalidate Ecuadorian laws or direct Ecuador to perform international obligations. In the same case, Ecuador complained that the arbitrators had exceeded jurisdiction by ordering Occidental not to proceed before the courts in Ecuador. For Aikens J, even if this was excess of jurisdiction, no injustice was established because the order was in Ecuador's interest.

Arbitrators who reserved their decision on costs did not lose powers to issue a later award on costs in *Hellenic Mutual Corp and Ors ('The Athena') (No 2)*.[100] There had been nothing unfair about the tribunal's decision to defer a costs decision, especially as neither party had made submissions on costs.

B. Issues

Failure to deal with issues has been a common, but largely unsuccessful, ground for challenge.

In *HBC Hamburg Bulk Carriers GmbH & Co KG v Tangshan Haixing Shipping Co Ltd*,[101] a challenge on the basis that a sole arbitrator failed to deal with arguments central to the main issues, namely that the vessel was off hire for more than 30 days under the provisions of the charterparty under dispute, was dismissed. Morison J found that while the arbitrator left issues unresolved, their resolution had become unnecessary. The arbitrator decided that the parties had effectively agreed to take the vessel out of service in a way not contemplated by the charterparty.

The courts dismissed challenges for failure to deal with issues where the complaints actually involved the arbitrator's assessment of evidence. In *Arduina Holdings BV v Celtic Resources plc (No 2)*,[102] Arduina challenged an award alleging failure to take into account evidence of misrepresentation concerning Celtic's loss of the management and control of another company. For Toulson J, a claim that an arbitrator's decision was contrary to the weight of the evidence did not meet requirements for serious procedural irregularity. In addition, the arbitrator had not failed to take evidence into account accepting that there had been misrepresentation, but finding that disclosure would not have affected

[97] *Bluewater Energy Services BV v Technip Offshore International* [2006] ArbLR 11.
[98] *BTC Bulk Transport Corp v Glencore International AG* [2006] ArbLR 12.
[99] [2006] ArbLR 21. Appeal dismissed by the Court of Appeal [2007] EWCA Civ 656.
[100] [2006] ArbLR 55.
[101] [2006] ArbLR 37.
[102] [2006] ArbLR 5.

the decision to enter into the contract in dispute. Likewise, an allegation that arbitrators failed to deal with issues of Greek law was rejected where the court found that the ground for complaint did not involve procedural irregularity but merely criticism of the adequacy for the arbitrators' reasons.[103]

A decision by arbitrators to defer their assessment of costs did not amount to an omission in *Sea Trade Maritime Corp v Hellenic Mutual War Risk Association and Ors ('The Athena') (No 1)*.[104] The matter was dealt with in the first award in which the arbitrators determined that costs would be the subject of a future award.

C. Right to be heard

A challenge was successful in *BTC Bulk Transport Corp v Glencore International AG*,[105] where arbitrators issued a final award on the merits despite the fact that BTC had proceeded on the basis that the tribunal were only to determine a strike-out application and had reserved rights to file additional evidence and argument in the event the application was unsuccessful. Cooke J considered that substantial prejudice arose as no reasons were requested for the decision; if BTC had been aware that the tribunal was proceeding to a final determination, it might have requested reasons opening an avenue of recourse before the courts.

An award was set aside where one party had no notice of proceedings in *Bulk Trading SA v AP Moeller*.[106] The contract in dispute provided a fax number for the purpose of notices; however, Bulk Shipping instructed agents to deal with the claim. Moeller commenced arbitration and the LMAA appointed a sole arbitrator copying Bulk Trading via the fax number. The sole arbitrator notified Bulk Trading of his appointment and issued procedural directions and the award to the same fax number. Bulk Shipping had become a dormant company, but not informed Moeller. Bulk Shipping maintained a fax facility in the form of a computer which did not forward faxes received. In setting aside the award, HH Judge Mackie QC found that the fax number had been given for notice purposes under the contract but not necessarily for arbitration. Moreover, Bulk Trading had delegated conduct of the arbitration to an agent who was not notified of the proceedings. Because the judge considered that Bulk Trading was responsible for the confusion regarding the communications and the failure of its appointed agent to answer correspondence, he made no order as to costs. The Court of Appeal refused permission to appeal.[107] Noting that it appeared strange that no notice of the restructuring of Bulk Trading had been given to Moeller, the Court of Appeal found the judge's reasons for not ordering costs compelling.

[103] *ABB AG v Hochtief Airport GmbH and Anr* [2006] ArbLR 2.
[104] [2006] ArbLR 54.
[105] [2006] ArbLR 12.
[106] [2006] ArbLR 13. In *Bernuth Lines Ltd v High Seas Shipping Ltd* [2005] ArbLR 8, on the other hand, communication of arbitral proceedings to an email address not used by the respondent was held to be a valid commencement of arbitration. See also *Korbetis v Transgrain Shipping BV* [2005] ArbLR 36 where a failure to communicate acceptance of a proposal to appoint an arbitrator to the correct fax address invalidated commencement of proceedings, depriving the arbitrator of jurisdiction.
[107] [2006] ArbLR 14.

In *ABB AG v Hochtief Airport GmbH and Anr*,[108] an award was challenged the basis of the arbitrators' conclusion that a disputed share transfer had been effected pursuant to three agreements, a point not argued by the parties. In dismissing the challenge, Tomlinson J found that although it had not been contended in terms that the purported transfer of shares took place pursuant to the three agreements, the claim that these transactions amounted to bad faith was before the tribunal. The arbitrators were not required to refer the parties to their analysis of the evidence and additional conclusions they derived from arguments concerning the issues before them. ABB had a fair opportunity to address all essential building blocks to the arbitrators' conclusion.

In *Bluewater Energy Services BV v Technip Offshore International*,[109] it was alleged that arbitrators dismissed a counterclaim on the basis of findings on South African law not addressed by the parties. The arbitrators were also said to have departed from common ground between the parties that the determinative factor was a finding that stability involved 'no movement' in disputes concerning the mooring of a floating production storage and off-loading vessel and installation of flexible flow lines. Steel J, however, found that there had been no agreement that the counterclaim would be made good upon the finding that 'stable' meant 'no movement' and neither party raised the issue when the tribunal suggested that one possible outcome might be the dismissal of both claim and counterclaim.

In the same case, it was alleged that arbitrators relied on waiver although the question of waiver had not been raised by the parties and the tribunal had agreed to 'cross waiver off its shopping list' during the arbitration. Steel J found that the arbitrators had not relied on waiver. An examination of the award showed that the tribunal had not concluded that Bluewater waived its right to a reduction in the purchase price. Their conclusion was based solely on the proposition that, as a matter of construction under South African law, the 'un-priced charge order issued by Bluewater brought about a zero price change'. Moreover, the tribunal had put this issue of construction to the parties during the arbitration.

The court dismissed a challenge contending that arbitrators had come to a conclusion not pleaded by the parties in *Bandwidth Shipping Co v Intaari*.[110] The dispute concerned the calculation and causes of delay under a charterparty. For Gloster J, the express calculation of the loss of time in days and hours left open the possibility that a different period might be identified. Gloster J stated:

> The owners denied that any breach had any relevant causative effect. That joinder of issue may itself be said to have put the consequence of any delay the tribunal found to have been caused by the breach 'into the arena'. The Charterers had put forward a much more extensive claim that, but for the breach, the vessel would have left the Antarctic in mid-May. But for a large claim to whittle down to a much smaller claim is not unusual.[111]

The court declined to review a decision by arbitrators not to order document production in *ABB AG v Hochtief Airport GmbH and Anr*.[112] While Tomlinson J considered that the

[108] [2006] ArbLR 2.
[109] [2006] ArbLR 11.
[110] [2006] ArbLR 8. Appeal dismissed by the Court of Appeal [2007] EWCA Civ 998.
[111] [2006] ArbLR 8 at para 72.
[112] [2006] ArbLR 2.

arbitrators' decision might appear unfair, particularly where document production had been ordered at the request of the other party, arbitrators had express power under the IBA rules to exclude documents they decided lacked relevance or materiality and no substantial injustice could be said to have resulted from the decision.

XIII. Appeals

It remains possible in England to appeal the legal merits of an arbitration award, whether disputes are domestic or international, before local courts.

A two-step process is involved. A party must first apply to the High Court for permission or 'leave' to appeal. If permission is granted, the merits will be debated in a separate hearing usually before a different judge. Before giving permission, the courts must be satisfied that the question was raised during the arbitration and that the arbitrators' decision is 'obviously wrong'. If the question of law is of 'general public interest', the courts may allow an appeal to proceed where the decision is 'open to serious doubt'. The recourse is further limited to questions of English law. The courts must in all circumstances be satisfied, under s 69(3)(d), that it is 'just and proper' to intervene despite the parties' choice to arbitrate rather than litigate.

The retention of rights of appeal against the merits of an arbitration award was controversial at the time of the reforms in 1997 and application of the s 69 criteria continues to be problematic. HH Judge Coulson QC acknowledged 'it is not always easy for the applicant to identify a pure point of law. Many issues which come before the court pursuant to applications under s 69 of the 1996 Act are, in reality, questions of mixed law and fact.'[113] Despite high thresholds of 'obviously wrong' and 'open to serious doubt' which must be met to secure permission to appeal, the courts uphold a number of arbitrators' decisions on the merits.[114] In one case, Morison J described the ground of appeal invoked as 'hopeless' observing: 'Indeed, I think I can say that I would not have given permission for this point to be argued on the s 69 procedure.'[115] The difficulty in applying the test for permission to appeal is well illustrated by *Transfield Shipping Inc of Panama v Mercator Shipping*

[113] *Sinclair v Woods of Winchester Ltd (No 2)* [2006] ArbLR 56 at para 8. See also *The Council of the City of Plymouth v DR Jones (Yeovil) Ltd* [2006] ArbLR 17 and *Walsall Metropolitan Borough Council v Beechdale Community Housing Association Ltd* [2006] ArbLR 63.

[114] Arbitrators' awards were upheld on the merits in *Transfield Shipping Inc of Panama v Mercator Shipping Inc of Monrovia* [2006] EWHC 3030 (Comm) upheld by the Court of Appeal [2007] EWCA Civ 901, but set aside by the House of Lords [2008] UKHL 48, *National Grid Gas plc v Lafarge Aggregates Ltd Pt* [2006] EWHC 2559 (Ch), *Kamilla Hans-Peter Eckhoff KG v AC Oerssleff's EFTF AB* [2006] EWHC 509 (Comm), *Independent Petroleum Group Ltd v Seacarriers Count Pte Ltd ('The Count')* [2006] EWHC 3222 (Comm), *Compania Sud American Vapores v Ms ER Hamburg, Schiffahrtsgesellschaft MBH & Co, KG* [2006] EWHC 483 (Comm) and *Stansell Ltd v Cooperative Group (CWS) Ltd* [2006] EWCA Civ 538, where the Court of Appeal reversed a High Court decision that had set aside an arbitrator's award.

[115] *Compania Sud American Vapores v Ms ER Hamburg, Schiffahrtsgesellschaft MBH & Co KG* [2006] EWHC 483 (Comm) at paras 59 and 62. See also the observation of HH Judge Coulson QC in *The Council of the City of Plymouth v DR Jones (Yeovil) Ltd* [2006] ArbLR 17 at para 39: 'It appears that, in recent times, applications under s 69 are being made, which arise out of building arbitrations and which have no prospect of success.'

Inc of Monrovia.[116] The arbitration itself had been conducted on a documents-only basis without a hearing. The dispute then proceeded through three sets of hearings before the courts to the House of Lords. The majority arbitrators were upheld by the court at first instance[117] and the Court of Appeal[118] only to be set aside by the House of Lords. In introducing his opinion, Lord Hope stated:

> My initial impression at the end of the excellent argument with which we were presented by counsel on both sides was that, on the facts found proved by the majority arbitrators, this appeal must fail. But, having had the benefit of reading in draft the opinions of my noble and learned friends, Lord Hoffmann, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe, I have come to the conclusion that their decision was based on an error of law and that the view of this case that was taken by the minority arbitrator was right.[119]

Whether or not the criteria under s 69 allow too many or too few appeals to reach the courts has been a matter of some debate. Jackson J held that the non-interventionist policy in the Arbitration Act 1996 did not apply in relation to appeals.[120] He drew this conclusion from the need to respect party autonomy and their intention that an appeal shall lie to the courts on any questions of law, pointing out that the principle of non-intervention set out as s 1(c) of the Arbitration Act was qualified by the words, 'except as provided by this Part', reasoning that s 69, which is found in Pt 1 of the Arbitration Act, expressly provides for appeals from arbitration awards. This approach was approved by HH Judge Coulson QC as applicable even in cases where permission to appeal was required.[121] This analysis appears to overlook the requirement, at s 69(3)(d), for the courts to take into account the parties' decision to arbitrate.[122]

Parties may exclude appeals on questions of law in their arbitration agreement. The words 'final and binding' alone were considered insufficient to exclude a right of appeal in *Essex County Council v Premier Recycling Ltd*.[123] On the other hand, in *Sukuman Ltd v Commonwealth Secretariat*,[124] an arbitration agreement providing that a decision by the Commonwealth Secretariat Arbitration Tribunal 'shall be final and binding. . . and shall not be subject to appeal' was an enforceable exclusion. Colman J distinguished the case of an exclusion of liability provision from that of an exclusion of rights of appeal in arbitration which did not go to the substantive rights of the parties and, accordingly, did not require reasonable notice. Arbitration agreements excluding all rights of appeal were not inconsistent with the European Human Rights Convention.[125]

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116 [2006] EWHC 3030 (Comm).

117 [2007] EWCA Civ 901.

118 Ibid.

119 [2008] UKHL 48.

120 *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd* [2006] ArbLR 42 at para 50.

121 *Sinclair v Woods of Winchester Ltd* [2006] ArbLR 56 at para 7.

122 See the DAC Report at para 290: 'The court should be satisfied that justice dictates that there should be an appeal; and in considering what justice requires, the fact that the parties have agreed to arbitrate rather that litigate is an important and powerful factor.'

123 [2006] ArbLR 22.

124 [2006] ArbLR 58.

125 In *Sanghi Polyesters Ltd (India) v The International Investor* (KCFC) (Kuwait) [2000] 1 Lloyd's Rep 480, the parties agreed to arbitrate under the 1988 ICC Rules, Art 24 of which provides that 'the arbitral award shall be final' and that by submitting the dispute to ICC arbitration, 'the parties shall be deemed to

A. Procedure

Evidence admissible in an application for permission to appeal is normally limited to the award.[126] In *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd*,[127] Jackson J found this approach overly restrictive. Considering that contractual provisions cannot be analysed in isolation, but only in the context of the series of documents of which they form a part, the judge held that the court should also receive any document referred to in an award which the court needs to read in order to determine a question of law, including correspondence.[128] The application for permission to appeal is commonly determined without an oral hearing. A number of cases, however, continue to permit oral hearings of the application for permission with the determination of the question of law to follow immediately if permission is granted, a procedure contrary to limitations on appeals from arbitration awards.[129]

have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal . . . ' . The corresponding provision under the 1998 ICC Rules is Art 28(b). See also *Arab African Energy Co Ltd v Olieprodukten Nederland BV* [1983] 2 Lloyd's Rep 419, 423 and *Marine Contractors Ltd v Shell Petroleum Development Co of Nigeria Ltd* [1984] 2 Lloyd's Rep 77, 79. In *Demco Investments & Commercial SA and Ors v SE Banken Forsakring Holding Aktiebolag* [2005] ArbLR 20, however, an oral hearing and extensive submissions were allowed in support of an application for permission to appeal from an arbitration award rendered under the rules of the Stockholm Chamber of Commerce which exclude appeals. Article 40 of the SCC Rules states: 'an award shall be final and binding on the parties when rendered'. See *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 at 334 where Blanchard J stated that although the expression 'final and binding' is not determinative it 'will indicate that the parties did not contemplate becoming involved in litigation over the arbitral award' and that 'the High Court should lean towards giving effect to the stated preference of the parties for finality'. In Canada, the Ontario courts have held that the words 'final and binding' reflect an intention to exclude rights of appeal on questions of law from an arbitration award. See *Superior Propane Inc v Valley Propane (Ottawa) Ltd* [1992] OJ 2773 (Ont Ct Gen Div) and *Labourers International Union of North America, Local 183 v Carpenters and Allied Workers, Local* (1997) 34 OR (3d) 472. Where, however, parties used the term 'binding', but not the expression 'final and binding'; and referred to a 'final' determination precluding any further recourse to the arbitral process, not the courts; they were held not to have excluded appeals on a question of law in *National Ballet of Canada v Glasco* (2000) 186 DLR (4th) 347. A similar position has developed in Australia. In *Corner v C&C News Pty Ltd*, 28 April 1989, unreported, Yeldham J considered that an agreement that an arbitration award would be 'final and binding' did not operate to exclude an appeal on questions of law. In *Raguz v Sullivan and Ors* (2000) 50 NSWLR 236 the New South Wales Court of Appeal stated, at 254, that 'insofar as Yeldham J suggested . . . that an exclusion agreement should expressly refer to the right of appeal . . . we are of the view that this reasoning is wrong'.

[126] *Foleys Ltd v East London Family and Community Services* [1997] ADRLJ 401 and *Hok Sport Ltd v Aintree Racecourse Co Ltd* [2002] ArbLR 17. See also *Walsall Metropolitan Borough Council v Beechdale Community Housing Association Ltd* [2006] ArbLR 63 where HH Judge Coulson QC, at para 21, considered the submission of extraneous material to be a bar to permission to appeal: 'There is a threshold reason why I consider that WMBC's application under s 69 for permission to appeal on the two points identified above should fail. In order to argue that there were errors of law within the award, on which the arbitrator was obviously wrong, WMBC are not relying simply on the award itself. On the contrary, in order to make good their submissions, they purport to rely on a whole raft of extraneous material, including the pleadings, extracts from both parties' written opening submissions, extracts from the transcripts of the hearing, extracts from both the parties' written closing submissions, and elements of the expert evidence. Such material is inadmissible on an application for permission to appeal under s 69, for the reasons set out above.'

[127] [2006] ArbLR 42.

[128] Ibid, at paras 44 and 45.

[129] See s 69(5) of the Arbitration Act.

Section 69 requires permission of the High Court for appeals to the Court of Appeal. The Court of Appeal, nonetheless, retains residual jurisdiction to grant permission itself. It declined to exercise this jurisdiction in *CGU International Insurance plc and Ors v Astrazeneca Insurance Co Ltd*.[130] Cresswell J had set aside an award holding arbitrators' reference to the wrong applicable law to be an error of law on the basis that arbitrators sitting in London, even in an international dispute, were bound by local conflict of laws rules, a view increasingly regarded as incorrect.[131] Cresswell J declined permission to appeal his decision to the Court of Appeal leaving CGU with no option but to invoke the Court of Appeal's residual jurisdiction on ground of unfairness of the decision at first instance. Before the Court of Appeal, CGU contended that the first instance decision was so misguided or incomprehensible as to amount to no decision at all or that it was so arbitrary and perverse as to breach Art 6 of the European Human Rights Convention. The Court of Appeal confirmed its residual jurisdiction to grant permission to appeal in such circumstances; however, the judge's decision could not be said to be unfair. Rightly or wrongly, the lower court regarded the proper law of the contract as decisive. The judge would be entitled to agree that an award which displaced the proper law in favour of local law raised an issue of general public importance, but his correction of the error by restoring orthodoxy left no room for further controversy. There was no evidence that the judge failed to apply relevant case law principles. An error of law by the High Court did not amount to unfairness in the process entitling a dissatisfied party to invoke the residual jurisdiction of the Court of Appeal. This decision illustrates the pernicious effect maintenance of a regime of appeals on questions of law may have on the development of arbitration practice. In the absence of a choice of institutional rules expressly conferring powers to apply a *voie directe* approach, arbitrators sitting in London may consider themselves bound by this first instance authority which imposes judicial practice.

[130] [2006] ArbLR 16.

[131] [2005] ArbLR 13. See Fouchard, Gaillaird, and Goldman, *International Commercial Arbitration* (Kluwer: The Hague, 1999) at pp 867–8: 'Under one outdated theory, which placed excessive emphasis on the judicial nature of arbitration in that it effectively assimilated arbitrators and judges of the seat of the arbitration, "the rules of choice of law in force in the state of the seat of the arbitral tribunal must be followed to settle the law applicable to the substance of the difference". That was the formulation adopted by the Institute of International Law in its 1957 Amsterdam Resolution following the Sauser-Hall report. This theory has been heavily criticized for disregarding both the transnational nature of the sources of an international commercial arbitrator's powers and the reasons why the parties, the arbitral institution, or the arbitrators themselves choose a place of arbitration (which generally will have nothing to do with the law governing the merits or the private international law of the seat of the arbitration). The approach taken in the 1957 resolution is now obsolete, as is the related notion of the arbitral forum, with most modern arbitration laws having now abandoned all reference to the private international law "of the forum". Laws which grant, as is the case in France, the arbitrators total freedom to select the applicable law when the parties have not done so do not prevent arbitrators from drawing inspiration from the choice of law rules of the place of arbitration. However, arbitrators sitting in France, for example, would be wrong to consider that such rules should take priority over other rules, or indeed that they should be taken into account at all. In a Resolution on encouraging recourse to arbitration to settle legal disputes, the European Parliament underlined "the special nature of arbitration inasmuch as an arbitration tribunal has a greater degree of freedom to choose the body of law to be applied to a dispute without being bound by *lex fori* . . . as normal courts are". To the extent there is no choice of law by the parties, s 46(3) of the Arbitration Act allows the tribunal to "apply the law determined by the conflict of laws rules it considers applicable." The DAC resisted calls for more legislative guidance to be given to arbitrators on this point in the interests of flexibility and adherence to the UNCITRAL Model Law (DAC Report at para 225).' See, as well, Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 4th edn (London, Sweet & Maxwell, 2004), at pp 2–80, where these authors refer to the application of conflicts rules at the seat of arbitration as 'increasingly anachronistic' citing 'the modern tendency' which is 'to give considerable latitude to arbitral tribunals in making their choice of law'.

B. Grounds

In order to secure permission to appeal, the question of law must have been raised before the arbitrators and it must substantially affect the rights of one of the parties. If the question raises issues of public importance, a lower threshold of 'open to serious doubt' will be applied in determining whether to grant permission.

Applications which fail to identify a question of law arising out of the award are dismissed.[132] Some have been dismissed on the ground that the questions sought to be appealed raised issues of mixed law and fact.[133] In other cases, however, questions of mixed law and fact are accepted as questions of law.[134]

The Court of Appeal could not fault a High Court judge for finding that an arbitral tribunal's choice of applicable law, if mistaken, raised an issue of public importance in *CGU International Insurance plc and Ors v Astrazeneca Insurance Co Ltd*.[135]

C. Merits

Three decisions upheld appeals against awards on questions of law in 2006. An arbitrator's decision that claims were not statute-barred was overturned in *The Oxford Architects Partnership v The Cheltenham Ladies College*.[136] The contract provided that no action or proceedings for breach shall be commenced after a period of six years from completion. Causes of action which accrued before completion raised the question as to whether they could still form the basis of claims within the six-year period starting at completion. Ramsey J considered that the parties' contractual provision limited the time in which proceedings could be brought and could not be read as providing that a claim could be made up to six years after completion. It did not limit the architect's rights to rely on statutory limitation defences.

An arbitrators' interpretation of a liberty clause was corrected in *Select Commodities Ltd v Valdo SA ('The Florida')*.[137] The arbitrator found that, in the absence of the liberty clause, the charterparty would have been frustrated by a ban the Nigerian government imposed on imports of vegetable oil. He held, however, that the charterers could not rely on the doctrine of frustration because the clause made full provision for the effects of the ban and held that the owners were entitled to damages. Tomlinson J allowed an appeal, holding the owners not entitled to damages as the clause did not make full provision for all of the effects of the supervening illegality.

An arbitrator was held wrongly to have implied terms relating to responsibility for design into a construction contract in *Gort-Barten v MA Cherrington Ltd*,[138] notably failing properly to apply the test for implied terms in accordance with case law.[139] The arbitrator

[132] See, for example, *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd* [2006] ArbLR 42 and *Sinclair v Woods of Winchester* [2006] ArbLR 56.
[133] *Sinclair v Woods of Winchester* [2006] ArbLR 56.
[134] *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd* [2006] ArbLR 42.
[135] [2006] ArbLR 16.
[136] [2006] EWHC 3156 (TCC).
[137] [2006] EWHC 1137 (Comm).
[138] [2006] EWHC 2877 (TCC).
[139] *BP Refinery (Westport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1978) 52 ALJR.

held that it was reasonable to imply that detailed design was a matter for Mr and Mrs Gort-Barten who wished to build a bespoke house and that it was necessary to imply the term to give the contract business efficacy. For the arbitrator, it was obvious that they would decide questions of 'more detailed design' in repect of which the contract was silent. Ramsey J held that it was not reasonable to impose a design obligation on an employer in a design-and-build contract where that obligation rested on the contractor and that such a term was not necessary where the contract contained express provisions dealing with the involvement of the contractor in the design process. It was not obvious that the employer had a design obligation and the implied term to the contrary was incapable of clear expression and would create uncertainty in the division of obligations between the contractor and employer.

The High Court found that an arbitrator erred in law by deciding that statutory provisions regulating provident societies overrode a contractual prohibition on assignment without consent in *Stansell Ltd v Cooperative Group (CWS) Ltd*.[140] CWS was not an original party to a building contract which provided that neither employer nor contractor would assign it without the other's consent. A general meeting of CRS, the original party, resolved to transfer all property, assets, and engagements to CWS which undertook to fulfil the engagements. Stansell contended that the transfer did not assign the building contract in respect of which Stansell's consent had not been sought or given. An arbitrator concluded that the contractual prohibition on assignment did not prevent CWS from pursuing the claim against Stansell. He considered that the transfer did not constitute an assignment of CRS's interest as envisaged by the building contract so as to trigger the requirement for consent and that even if there was an assignment, s 51 of the Industrial and Provident Societies Act 1965 provided for transfers between registered societies by way of special resolution without conveyance or assignment. Even if it was an assignment, the arbitrator viewed the statutory provision as overriding the contractual prohibition. Blackburn J disagreed. The fact that no conveyance or assignment would be required to perfect CWS's title was immaterial and went to the mechanics by which the transfer was rendered effective, not to whether there was an assignment. The Court of Appeal reversed the decision at first instance effectively restoring the arbitration award.[141]

XIV. Enforcement

Significant issues arose in respect of the enforcement of arbitration awards.

A. State immunity

In *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and Anr*,[142] Lithuania was unsuccessful in contesting the jurisdiction of English courts on the basis that it was not a party to an ICC arbitration agreement pursuant to which an award was sought to be enforced in England. In 1993, Svenska concluded a joint venture agreement for petroleum extraction with then Lithuanian state-owned enterprise, Geonafta AB. The

[140] [2005] EWHC 1601 (Ch).
[141] *Stansell Ltd v Cooperative Group (CWS) Ltd* [2006] EWCA Civ 538.
[142] [2006] ArbLR 59.

JVA referred disputes (Art 9) 'between the Founders' of a joint-venture vehicle to ICC arbitration. The JVA defined the 'Founders' as Geonafta and Svenska only. Lithuania was not part of the joint-venture vehicle and was separately defined in the JVA as 'Government', but signed the agreement, separately, under the statement: 'The Government of the Republic of Lithuania hereby approves the above agreement and acknowledges itself to be legally and contractually bound as if the Government were a signatory to the Agreement.' Under the JVA, the government undertook a number of specific obligations.

The JVA was expressed to be governed by 'the laws of Lithuania supplemented, where required, by rules of international business activities generally accepted in the petroleum industry if they do not contradict the laws of the Republic of Lithuania'. It contained a waiver of immunity (Art 35): 'The Government and [Geonafta] hereby irrevocably waives (*sic*) all rights to sovereign immunity.'

Disputes were referred to an ICC arbitral tribunal in Copenhagen before which both Geonafta and Lithuania were named as respondents. The arbitrators upheld jurisdiction over both respondents in an interim award. They found that Lithuania was a party to the arbitration agreement because it had signed the JVA and had to be presumed to have intended that all disputes in relation to it be dealt with in a single forum under the arbitration clause. They considered that, although there was no evidence of consent to arbitration by Lithuania, there was also no evidence that Lithuania did not intend to be party to the arbitration agreement.

The arbitrators ultimately awarded Svenska damages of over US$12 million. Svenska sought to enforce the final award against Lithuania in England. Lithuania applied to set aside an order for permission to enforce the award on the ground that Lithuania enjoyed immunity from jurisdiction in England under the State Immunity Act 1978 because it had not consented in writing to arbitration as required under s 9 of the Act.

In response, Svenska applied to strike out Lithuania's application contending that the issue as to whether Lithuania was party to the arbitration agreement had been determined by the arbitral tribunal in the interim award giving rise to issue estoppel. Svenska also requested that the court recognize the award.

In a confusing decision, Mr Nigel Teare QC, sitting as deputy judge of the High Court, agreed to 'recognize' the award because it was appropriate to deal with the question of recognition and issue estoppel in order to avoid the need for the court to determine afresh whether Lithuania was a party to the arbitration agreement. He viewed the possibility of issue estoppel as entrenched at s 73(2) of the Arbitration Act and not contrary to the scheme of the New York Convention (s 103 of the Arbitration Act): 'the question whether an award is final and conclusive must depend upon its status in the country where the award was made, just as the question whether a foreign judgment is final and conclusive depends upon its status in the country where the judgment was pronounced'.[143] But the deputy judge also acknowledged Lithuania's right to raise a defence of jurisdiction at enforcement: 'in the case of an arbitration award on jurisdiction, the losing party can, when an attempt is made to enforce the award, seek a declaration that he was not party to the arbitration agreement'.[144] The deputy judge also held that it could not be shown that

[143] [2005] ArbLR 56 at para 35.
[144] Ibid, at para 36.

the award finally and conclusively determined that issue in Denmark as the necessary issue estoppel was not established, and dismissed Svenska's strike-out application on this basis allowing Lithunia's challenge to jurisdiction under the State Immunity Act to continue. The deputy judge granted Svenska leave to appeal his decision, but Svenska did not do so.

The decision of the deputy judge is flawed to the extent that it identifies a foreign award under the New York Convention with a domestic award enforceable under the Arbitration Act. Section 103 of the Arbitration Act does not apply to the enforcement of awards made in the United Kingdom. Likewise, s 73 of the Arbitration Act applies only to domestic arbitration awards and not to New York Convention awards. The grounds for refusing to set aside a New York Convention award are not found in Pt I of the Arbitration Act (which includes s 73), but in Pt III.[145] The legal effect of a 'recognition' that declined to find any estoppel and left open the question of whether Lithuania was a party to the arbitration agreement is also open to considerable doubt.

On the merits, Gloster J dismissed Lithuania's application to set aside the order for enforcement. The Court of Appeal dismissed an appeal against the decision at first instance, but defined yet new grounds from those of the arbitrators and the High Court for finding that Lithuania was a party to the arbitration agreement.[146]

At first instance, Gloster J declined to apply international rules of law considering that if Lithuanian law was the same as international law, it did not need to be applied, whereas Lithuanian law prevailed where it differed from international law.[147] This approach, which assumes there are no *lacunae* in Lithuanian law, reflects a domestic bias in favour of national legal systems and in priority to international practice that might seem out of place in international arbitration, particularly where one of the parties to the contract is a state or a state entity.[148] The parties' choice of law provision was typical of the petroleum industry where

[145] See s 81(1)(c) of the Arbitration Act 1996.

[146] [2006] ArbLR 59. The Court of Appeal and the Supreme Court of Lithuania both held Lithuania not to be a party to the arbitration agreement.

[147] [2005] ArbLR 57 at para 79: 'Furthermore, recourse is to be had to such rules only insofar as they do not contradict the laws of Lithuania. Lithuanian law provides rules for determining whether the arbitration clause is a valid agreement to arbitrate. Insofar as the rules of international arbitration are the same as Lithuanian law they add nothing; insofar as they differ, they are inapplicable because they contradict Lithuanian law. They can, therefore, be disregarded in any event.'

[148] See United Nations Conference on Trade and Development ('UNCTAD') (2004) 'State Contracts', UNCTAD series on issues in international investment agreements, United Nations, New York at pp 3–4: 'This becomes all the more important when it is borne in mind that State contracts are generally viewed as being different from ordinary commercial contracts. Given the strong public policy considerations that may underline governmental contracting, whether in relation to FDI projects or other State sponsored economic functions, an element of public law regulation and governmental discretion is often asserted in relation to the negotiation, conclusion, operation and termination of such contracts. The distinction between ordinary commercial contracts between private parties and a State contract made between a private party and a State or its entity is universally recognised in several domestic legal systems (especially in the French *contrat administratif* concept), although the precise approach varies from system to system (Turpin, 1972; Langrod, 1955). Generally, domestic legal systems treat contracts made with the State or State entities as a special category of contract subject to specialised regulatory rules. For example, the rules of capacity of a State entity to make contracts will be stated in the legislation creating it, which may also identify the types of areas in which the State entity has the capacity to conclude contracts. Equally the source of the law applicable to the contract is usually to be found in statutes and regulations on the subject matter of the contract as well as on the State entity concluding the contract. Often, operation in sectors, such as the petroleum sector, is open only to a State entity or in association with a State entity.

such norms have been applied by international tribunals to supplement a local governing law and even in the absence of express choice by the parties.[149] Instead, the judge applied a curious understanding of civil law rules of contract interpretation finding that 'unlike under English law, the primary objective is to ascertain what the parties subjectively actually intended, regardless of the words they used'.[150]

The Court of Appeal disagreed, considering that international rules could not be excluded where the parties expressly referred to them as governing the contract.[151] International law was, however, also determinative of two other questions, but not considered relevant at first instance or by the Court of Appeal, namely the requirements for an 'agreement in writing' and the power of the court to enforce arbitration awards. Both of these issues fell to be determined under the State Immunity Act 1978 which must be interpreted in light of international law.

The Court of Appeal agreed with Lithuania that s 1 of the State Immunity Act enacts a presumption of immunity reflecting a principle of international law.[152] This presumption is only overridden, for the purposes of s 9 of the State Immunity Act, by an 'agreement in writing' to arbitration. The Court of Appeal further found that the JVA contained no 'express agreement on the part of the Government to submit disputes to arbitration'.[153] The court nonetheless found that an 'agreement in writing' to arbitrate could be derived from the obligations the government undertook in the JVA and the government's signature;[154] the survival of an ICSID arbitration clause in a number of drafts

Thus entry into such a sector by other investors is possible only through the making of a contract with the relevant State entity.'

[149] Ibid at pp 3-4: 'State contracts were regarded to be subject, in principle, to the domestic laws of the host country but at least in the case of petroleum contracts, a tendency developed in the 1950s to regard these contracts as subject to a process of "internationalization". Such contracts came to be regarded as "economic development agreements", which should be subjected to international legal norms. Under the traditional view, the conditions for the validity of a State contract, including such matters as the capacity of the parties and the process of formation of a contract, are governed by the domestic law of each host country. It is recognised that, even in regimes subject to IIAs, if the contract in pursuance of which a foreign investment is made illegal and void in terms of the domestic law, there is no scope for the invocation of a treaty to protect the investment. The theory of internationalization of contract suggests, however, that the obligations arising from a contract may reside in an external system. This external system is variously described as transnational law or business, general principles of law, *lex mercatoria* and even as international law. This theory states that the use of certain clauses may have the effect of internationalizing the contract for certain purposes, at least those connected with termination and dispute resolutions.'

[150] [2005] ArbLR 57 at para 82. Gloster J stated, at para 89, that under English law, she would have held Lithuania not to be a party to the JVA or the arbitration agreement it contains: 'If I had been approaching the interpretation of the JVA in accordance with English law principles of construction (and in the absence of a claim for rectification), I would reject Mr Bools' submissions, as the language of art 9, when construed in the context of the entire JVA and against what would be the permissible factual matrix under English law, does not support the conclusion that the state has agreed to arbitrate its disputes.' The Court of Appeal agreed [2006] ArbLR 59 at para 30: 'We therefore agree with the judge that, if one were not entitled to look beyond the language of the document itself, it would be impossible to construe Article 9 as extending to disputes involving the Government.'

[151] [2006] ArbLR 59 at para 21.

[152] Ibid, at para 113.

[153] Ibid, at para 81.

[154] Ibid, at para 62.

of the JVA;[155] Lithuania's failure to object to an early draft of the JVA which contained a reference to ICSID arbitration;[156] the tidying-up of a discrepancy between drafts of Arts 9 and 35 of the JVA and the removal of the ICSID clause from Art 35;[157] the survival of the waiver of immunity clause (Art 35) after the deletion of the reference to ICSID;[158] and the findings of the arbitral tribunal (although the Court of Appeal disagreed with the arbitrators' reasoning).[159] These conclusions are questionable to the extent the Court of Appeal implied Lithuania's consent and none of the factors relied on established the required consent in writing where the arbitration agreement referred only to disputes between Svenska and Geonafta. The court notably relied on the state's failure to express opposition to arbitration during negotiations. The separability of the arbitration agreement, which had been accepted at first instance, appears to have been overlooked by the Court of Appeal: 'What matters for this purpose is whether the Government intended to undertake legally binding obligations towards [Geonafta] and Svenska and that is essentially a question of construction.'[160]

Moreover, one ground relied on by the Court of Appeal might appear consistent with Lithuania declining consent: Lithuania's willingness to consent to ICSID arbitration, a specialized forum administering arbitration of disputes with states. Provision for ICSID arbitration was dropped during negotiations for the JVA when a BIT between Sweden and Lithuania came into force providing this recourse to Svenska in any event. A state's willingness to consent to ICSID arbitration, however, cannot be equated to general consent to private arbitration under ICC Rules.[161]

The Court of Appeal's decision also appears contrary to the requirement, in international law, that state consent to arbitration be unequivocal, not implied *inter alia* from mere involvement in negotiations for a contract to be concluded by a state entity, signature of the contract containing the arbitration agreement between other parties, an isolated waiver of immunity in the context of holding out a state entity as party to the contract and state undertakings of obligations of a public nature under a contract with a state entity, particularly in the area of natural resources.[162]

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155 Ibid, at paras 63 and 64.

156 Ibid, at para 58.

157 Ibid, at para 65.

158 Ibid, at para 68.

159 Ibid, at para 116.

160 Ibid, at para 26. At paras 27 and 28, the Court of Appeal elaborated on the significance of the agreement to the underlying JVA: 'the Government's intention in signing the Agreement appears to be clearly stated in the rubric to which we referred earlier. It was both to "approve" the Agreement *and* to acknowledge itself to be "legally and contractually bound as if it were a signatory to the Agreement. . . ". The expression "legally and contractually bound as if [it] were a signatory to the Agreement" is very strong and was clearly intended to go beyond mere approval of the Agreement in the exercise of sovereign authority. On the face of it those words are evidence of an intention to undertake obligations of the same nature and extent as would arise from its being a party to the Agreement in the full sense.'

161 See the decision of the Cour d'appel de Paris, 12 July 1984, 3 ICSID Reports 79 at 86.

162 See the Privy Council decision in *Bols Distilleries (t/a as Bols Royal Distilleries) and Anor v Superior Yacht Services Ltd (Gibraltar)* [2005] UKPC 45 where their Lordships, who were considering the 'agreement in writing' requirement for jurisdiction clauses under the Brussels Convention, held that the conclusion of such a clause should not be implied just because the main contract was concluded and drafts of the contract contained a jurisdiction clause. Their Lordships stressed the fact 'the draft jurisdiction clause had not been discussed or agreed expressly and there was no reason to imply that it had been agreed because of a "failure to object" to the draft. Implications of consent should be made even more sparingly in the case of arbitration agreements than jurisdiction agreements. In the case of state consent to arbitrate with a private party, the evidential requirements are higher still.

Unlike the court at first instance, the Court of Appeal accepted to consider the relevance of decisions by international tribunals and state courts as evidence of international practice, but took a restrictive view of the principles to be derived choosing to distinguish available authorities and, on that basis, did not apply them. *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt ('The Pyramids Case')*,[163] for example, was viewed as an 'authority of little assistance'[164] because the Court of Appeal considered that there had been no attempt in that case to establish the parties' common intention in relation to the government's participation in the arbitral process and the terms in which Egypt signed the contract in dispute in that case, 'approved, agreed and ratified', contrasted with Lithuania's signature of the JVA.[165] The Court of Appeal also distinguished decisions by the District

[163] (1992) 3 ICSID Reports 102.

[164] Ibid, at para 77.

[165] Establishing parties' 'common intentions' and the absence of any prohibition on the 'admissibility' of pre-contractual documents is not specific to Lithuanian law, but is a feature common to civil law systems and international practice. The contract in dispute in *The Pyramids Case* was governed by Egyptian law, a civil-law system derived from and closely related to French law, and international law. Rules of contract interpretation under French and Egyptian law are wholly comparable to Lithuanian law requiring evidence of parties' common intentions (*volonté commune*). This requirement would have been self-evident to international and civil-law arbitrators in an ICC arbitration as well as the Paris Cour d'appel and the Cour de cassation. It would not, in itself, have merited the special mention, consideration, or dispute that arose in the context of litigation before English courts required to take into account materials extraneous to the contract. In fact, the ICC arbitral tribunal in *The Pyramids Case* expressly sought to rely on the parties' intentions as ICC Award No 3493 (1984) IX *Yearbook of Commercial Arbitration* 111 at para 42, records: '*They must establish to our satisfaction, not only that there was no bar within the Egyptian legal system to the Government concluding an agreement to arbitrate, but that such an agreement was in fact executed binding not only EGOTH but also the Government*.' Like the Court of Appeal in *Svenska Petroleum*, in determining the parties' intentions, the ICC tribunal had regard to: (a) Egypt's willingness to arbitrate in other *fora* (notably an agreement to ICSID arbitration contained in the Egyptian Foreign Investment Law); (b) Egypt's contractual undertakings in earlier contracts relative to the project; (c) the meaning of the word 'agreed' which implied contractual obligation consistent with the Egyptian Government's express acceptance of contractual undertakings in earlier related agreements (the September agreement); and (d) a presumption that Egypt intended all disputes to be dealt with in a single forum: 'By the Minister signing not only "approved" but also "agreed" (which clearly means the undertaking of an obligation of its own) the Government also became a contractual party to the December Agreement. The obligations of the parties must be seen in the context of a unified contractual scheme embracing both the September and December Agreements. As to obligations specifically cast to the charge of the Government the first and paramount was the following: by reasserting in the December Agreement its continuing consent to, and support of, the Pyramids plateau project the Government undertook to do nothing which would prevent its being carried out in accordance with the Agreements already executed. This basic conclusion hardly needs a detailed explanation as it stems from elementary principles of contract law prevailing at municipal as well as at the international level. Reliance upon governmental support was the inducement for SPP to enter into the contract. By the signature of the Minister the Government undertook the following obligations: (1) It reaffirmed in the context of the redefinition of the Agreement between SPP and EGOTH the support of the Government promised in the September Agreement; (2) It committed the Government to the support of the project as defined in both Agreements; (3) It consequently committed the Government not to take any steps which would prevent that project being carried through to completion. We hold that in the light of the evidence submitted to us this support of the Government was contractual in nature. Thus, by contractually undertaking a number of obligations under the December Agreement, the Government became a party to it and engaged its responsibility with respect to the performance of the said obligations. By so doing, the Government necessarily extended its agreement to the mechanism provided for the settlement of disputes, ie to clause 20, reading as follows: "Any dispute relating to this agreement shall be referred to the arbitration of the International Chamber of Commerce in Paris, France." We accept the principle that acceptance of an arbitration clause should be clear and unequivocal: however, in the December Agreement we see no element of ambiguity. The Government, in becoming a party to that agreement, could not reasonably have

Court in Lithuania[166] and the Lithuanian Court of Appeal,[167] on the same JVA arising out of parallel proceedings Svenska Petroleum commenced in Lithuania. Both decisions held that Lithuania was not a party to the arbitration agreement. Again, for the English Court of Appeal, it was not evident that these decisions took account of the need to determine the parties' common intentions, a point not expressly mentioned in the judgments.[168] The supposed failure of civil law courts in France and Lithuania to apply civil law rules of contract interpretation as a ground for the Court of Appeal to distinguish relevant cases is surprising indeed; it is akin to a foreign tribunal deciding to disregard English authorities on the basis that there was no evidence English judges had applied an objective test to contract interpretation simply because this was not made explicit in the decisions and, instead, applying its own different notions of objective construction.

The Court of Appeal distinguished *Westland Helicopters*[169] on the basis that this controversy involved only a question of the separate legal personality of AOI.[170] ICC Case No

doubted that it would be bound by the arbitration clause contained in it.' The ICC tribunal's reasoning, which bears direct comparison to the conclusions of the Court of Appeal in *Svenska Petroleum v Lithuania*, was expressly rejected by the French Cour d'appel and Cour de cassation as a basis on which a state's consent might be implied even under civil law. The French courts notably required Egypt's consent specifically in relation to the arbitration agreement, not merely the underlying contract or assumptions arising from related contractual obligations. The fact that the Egyptian Government accepted contractual obligations for the project (whether as a party or otherwise) and signed the contract containing the arbitration provision was not adequate evidence of consent to the ICC arbitration agreement contained in the December agreement. See the decisions of the French Cour d'appel and the Cour de cassation (Cour d'appel Paris 12 July 1984 Le Clunet (1985), p 118 3 ICSID Reports 79, 86 ILR 475 and 23 ILM 1048 (1984); Cour de cassation (Civ I), 6 January 1987 *Revue d l'arbitrage* (1987) p 469 note Leboulanger, Le Clunet (1987) 638, note Goldman; 26 ILM 1004 (1987)). See, in contrast, *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs Government of Pakistan* [2008] EWHC 1901 where Aikens J, at para 79, accepted to apply *The Pyramids Case* to the question of whether a state was bound by an arbitration agreement.

166 On the same day as the decision of the High Court, 4 November 2005, the Klaipeda District Court in Lithuania rendered its decision in the context of parallel proceedings in Lithuania relative to the same ICC award between the same parties. Lithuanian courts concluded that Lithuania was not a 'founder' under the JVA and had not consented to arbitration. The Klaipeda court also concluded that use of subsoil resources was a matter of public administration and regulatory in nature, not commercial.

167 20 March 2006. In Germany, Svenska Petroleum applied for a declaration that the award was enforceable against Lithuania (the equivalent of an order for permission to enforce). On 10 August 2006, the Kammergericht Berlin granted the declaration on the basis that Lithuania was precluded from contesting jurisdiction because it had decided not to challenge the interim award on jurisdiction at the seat of arbitration in Copenhagen (XXXII (2007) *Yearbook of Commercial Arbitration* 363). On 17 April 2008, the Bundesgerichtshof set aside the appeal court's declaration on the ground that preclusion requires reliance by Svenska Petroleum which could not establish that it had in any way relied on Lithuania's decision. The matter has been remitted to the Kammergericht Berlin.

168 Ibid, at para 85.

169 See the decisions of the Cour d'appel de Genève and the Swiss Tribunal fédéral (1991) *Yearbook of Commercial Arbitration* XVI, 174 and 180.

170 Ibid, para 75. The significance of contractual obligations actually assumed by the founding states was, in fact, an issue in *Westland Helicopters*. The arbitral tribunal held that provisions of a shareholders' agreement, as well as guarantees given by the four founding states to the British government that the companies controlled by AOI would fulfil contractual obligations to UK companies involved in the project, were evidence of '*Westland's desire to be protected by the States' guarantees and the latter could not help but be aware of the implications of their actions*' ((1986) XI *Yearbook of Commercial Arbitration* 127 at 132). Whether or not the parties undertook contractual obligations as 'parties' was immaterial. What was important to Swiss judges was the issue of consent to the specific obligation contained in the arbitration agreement as the Tribunal fédéral, in upholding the Swiss Court of Appeal, stated (at para 29): '*Even if the founding States had further financial engagements, this would not mean that they are bound by the arbitration clause signed by AOI.*'

9151, *Joint Venture Yashlar and Bridas SAPIC v Government of Turkmenistan* (1999), was distinguished on a number of grounds: (a) Turkmenistan was not designated as a 'party' in the argument; (b) Turkmenistan did not sign the agreement; and (c) it was made obvious to Bridas that Turkmenistan had chosen to allow the state entity to enter into the contract in that case.[171] *Bridas SAPIC v Government of Turkmenistan* (2003) (US Court of Appeals, 5th Circuit) was distinguished on the basis that Turkmenistan 'was not described as a party to the agreement, had not signed it and thus did not fall within the terms of the arbitration clause',[172] again overlooking the principle of separability.[173] The

[171] Ibid, at para 78. Although Turkmenistan did not sign the contract, it undertook contractual obligations under the contract. Other circumstances present in that case are not distinguishable. Lithuania was not designated under the JVA as either a 'party' or as a 'Founder'. Lithuania signed the agreement, but in a different capacity from the parties (as defined in the JVA) and only in respect of obligations allocated in the JVA to the Government (also a defined term of the JVA), which expressly excluded numerous obligations, including arbitration. Lithuania chose to allow Geonafta to enter into the JVA and the arbitration agreement it contained, a fact made known to Svenska in the contractual definitions of the parties to the JVA and the parties to the arbitration agreement as well as in the Regulations of the Oil Works Licensing Committee, which provide that Geonafta, not the state, was to conclude arbitration agreements for disputes arising out of 'oil works'. The court at first instance relied on the absence of objection to the arbitration agreement by Lithuania during negotiations, but did not take into account the state's expression of intention through this legislation which was passed during the parties' negotiations regulating precisely this question of Geonafta's capacity to conclude oil exploration and extraction contracts with foreign parties and to conclude arbitration agreements.

[172] 345 F 3rd 347 (5th Cir 2003). This case did involve contractual undertakings by Turkmenistan. The arbitral tribunal held that the government was bound to arbitrate the dispute with *Bridas* because: (a) the government had not taken any steps to extricate itself from the proceedings; and (b) the tribunal's evaluation of the evidence revealed at least 22 commitments in the JVA 'that only the Government could give or fulfil'. The United States Court of Appeals for the Fifth Circuit set aside the arbitrator's award because the state's consent to arbitration could not be implied on this basis. The American Court of Appeals had regard specifically to the fact that Turkmenistan was not defined as a party in the contract and that only the parties, as contractually defined, undertook obligations to arbitrate under ICC Rules: 'The agreement describes the framework for the relationship between two parties: the "Foreign Party," defined as Bridas, and the "Turkmenian Party," defined as Turkmenneft. Considering that the purpose of the joint venture was to develop the hydrocarbon resources of a nation whose economy and land is dominated by the Government, the Government itself is not mentioned frequently in the agreement.' These circumstances would appear relevant to the controversy between Svenska Petroleum and Lithuania where, as the Court of Appeal acknowledged, at para 30: 'EPG and Svenska are identified in the preamble as the "Lithuanian Founder" and the "Swedish Founder" respectively, and other references to the "Founders" indicate that only two persons are included in that description: see, for example Article 10.2. Moreover, a clear distinction is drawn in Article 11 between the Founders and the Government.' The arbitration agreement extended only to 'the Founders' as defined in the JVA and 'Government' was defined separately and allocated separate and different obligations, none of which included the obligation to arbitrate. In a footnote to its decision identifying the obligations undertaken by the state in that case, which are entirely comparable to those undertaken by Lithuania under the JVA and of a sovereign or administrative nature: Article 3.29 defines '[r]egistration' as 'the official registration of the Joint Venture as a legal entity by the government of Turkmenistan'; Article 11.8 provides for the government to receive its royalties from the hydrocarbon production in kind, subject to the agreement of the parties, and Art 11.9 permits JVK to exchange its product for product produced by Government-owned refineries; Article 22.3 states, 'Interests, rights and obligations of Turkmenistan, as represented by Turkmenian party, and interest, rights and obligations of the Foreign Party under this Agreement, shall be solely governed by the provisions of this Agreement which may be altered or amended only by the mutual written agreement of the Parties to this Agreement . . . Article 27.5 permits JVK to rent property from the Government that may be reasonably necessary for its operations.'

[173] For the Court of Appeal, 'the question whether the parties intended that disputes between Svenska and the Government should be referred to arbitration is intimately bound up with the question whether the Government itself was to be a party to the agreement or was to incur obligations under it' (para 62). This reasoning is identical to the ICC tribunal's decision, in *The Pyramids Case*, set aside by the

Court of Appeal concluded: '[n]one of the cases cited to us supports any such proposition' that 'as a matter of law the Government cannot be treated as having intended to arbitrate in the absence of an express assurance to that effect'.[174]

At first instance, Gloster J held that Lithuania was estopped from contending that it was not bound by the arbitration agreement because it had elected not to challenge the interim award on jurisdiction before Danish courts.[175] For Gloster J, the situation under Danish law could be equated to the legal position in England under ss 31 and 73 of the Arbitration Act.[176] Like the earlier decision of Deputy Judge Teare QC, the identification of a New York Convention award with a domestic award for enforcement purposes is questionable.[177]

Paris Cour d'appel and Cour de cassation (even under civil law principles of contract interpretation). The arbitrators had concluded in that case: 'By contractually undertaking a number of obligations under the December Agreement, the Government became a party to it and engaged its responsibility with respect to the performance of the said obligations . . . By doing so, the Government necessarily extended its agreement to the mechanism provided for the settlement of disputes.' (ICC Award No 3943 (1984) IX *Yearbook of Commercial Arbitration* 111 at para 115.

174 [2006] ArbLR 59 at para 81.

175 At para 64 'it seems to me unlikely in the extreme that a Danish supervisory court would now permit the state to challenge the interim award in the Danish Courts. I consider that, on the balance of probabilities, a Danish court would decide that any appeal at this point of time to the Danish courts to challenge the interim award would not be an action within "reasonable time" and that they would regard the state, for the purposes of those proceedings and any enforcement proceedings, as effectively having waived its right to do so.'

176 [2005] ArbLR 57 at para 61.

177 This question has been treated differently, notably by the courts in Hong Kong. In *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39, defendants took no steps to challenge an award rendered in China (then a separate Member State in relation to Hong Kong for New York Convention purposes). Kaplan J stated at 48–9: '[Claimant] relied strongly upon the fact that the Defendants had taken no steps to set aside the award in China and that this failure to so act was a factor upon which I could rely. I disagree. There is nothing in s 44 [of the Arbitration Ordinance Cap 341] nor in the New York Convention which specifies that a Defendant is obliged to apply to set aside an award in the country where it was made as a condition of opposing enforcement elsewhere. In my judgment, the Defendants were entitled to take this stance. It is clear to me that a party faced with a Convention award against him has two options. Firstly, he can apply to the courts of the country where the award was made to seek the setting aside of the award. If the award is set aside then this becomes a ground in itself for opposing enforcement under the Convention. Secondly, the unsuccessful party can decide to take no steps to set aside the award but wait until enforcement is sought and attempt to establish a Convention ground of opposition. That such a choice exists, is made clear by Redfern and Hunter in *International Commercial Arbitration*, 2nd edn (London: Sweet & Maxwell) at p 474 where they state: "He may decide to take the initiative and challenge the award; or he may decide to do nothing but to resist any attempts by his adversary to obtain recognition and enforcement of the award. The choice is a clear one – to act or not to act." I therefore conclude that the Defendant's failure to apply to set aside the award is not a factor upon which I should or could rely on in relation to the exercise of my discretion. The Ordinance gives certain rights to the Defendants and these rights have been exercised by them. Those rights are not in any way cut down because of their failure to challenge the matter in the courts of China.' Kaplan J's decision in *Paklito Investment Ltd* was applied by the Hong Kong Court of Appeal in *Hebei Peak Harvest Battery Co Ltd v Polytek Engineering Co Ltd* [1998] HKC 676 where the defence omitted to take advantage of Chinese arbitration law to apply for the revocation of the award within six months. This was held at p 683 'unlikely to impair or eliminate the defendant's right to challenge the plaintiff's legal capacity in the enforcement proceedings in Hong Kong'. *Hebei Peak Harvest Battery Co Ltd* was appealed to the Court of Final Appeal of Hong Kong where Sir Anthony Mason NPJ stated [1999] 2 HKC 220 at 230: 'In *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39, Kaplan J expressed (at 48–9) the view that a party faced with a Convention award against him has two options. He can apply to the court of supervisory jurisdiction to set aside the award or he can wait to establish a Convention ground of opposition. In my view, such a party is not bound to elect between the two remedies, at any rate when, in the court of enforcement, he seeks to rely on the public policy ground, as the respondent did here.' A different approach has

It is difficult to see how domestic legislation could negate the provisions of an international treaty to which the UK is a party and bound to enforce.[178] Where a state party is involved, the High Court's analysis must be all the more in doubt as it effectively places a positive obligation on the state to seize the courts of another state in order to establish that it has not consented to arbitrate. The Court of Appeal disagreed with the first instance decision on this issue: 'it was always open to the Government to challenge the recognition of the award by the English courts and therefore the fact that the award could no longer be challenged in Denmark does not lead inexorably to the conclusion that it can be relied on as giving rise to an issue estoppel'.[179] This effectively also disagreed with the basis for the decision of the deputy judge to 'recognize' the award, but not to enforce it or dismiss Svenska Petroleum's earlier application to strike out Lithuania's challenge under the State Immunity Act. The Court of Appeal, nonetheless, relied on the Deputy Judge's decision to 'recognize' the award, despite his finding that the award had not finally decided the issue of jurisdiction which was allowed to proceed to challenge on the merits. If this had, indeed, been the effect of the earlier interlocutory decision, Lithuania would have been precluded from arguing it was not a party to the arbitration agreement at first instance and in the Court of Appeal. In fact, the Deputy Judge had dismissed Svenska's strike-out application specifically because the interim award did not preclude Lithuania from asserting immunity on the ground that it was not a party to the arbitration. The Court of Appeal does not appear to have considered what legal value, if any, the Deputy Judge's decision to 'recognize' but not enforce, an award—leaving open an avenue of challenge—might have.

The court at first instance rejected Lithuania's argument that the arbitration exception to immunity at s 9 of the State Immunity Act 1978 did not apply to proceedings for the enforcement of a foreign arbitral award on the ground that enforcement proceedings do not 'relate to an arbitration', but solely to the award. Although the arbitration proceedings had no territorial connection to the UK and no assets were identified as available in the UK, both Gloster J and the Court of Appeal adopted a broad construction of s 9 encompassing enforcement of foreign awards which appears at variance with the approach of public international law. It is not reflected in the European Convention on State Immunity 1972 or, over thirty years later, in the 2004 UN Convention on Jurisdictional Immunities of States and their Property of 16 October 2004.[180] Like Gloster J, the Court of

been taken by the courts in Germany. See Stefan Kröll's discussion of OLG Karlsruhe 27 March 2006–9 Sch 2/05, unten S. 455, Nr 37a and OLG Karlsruhe 3 July 2006–9 Sch 1/06, unten S. 456, Nr 37b in (2007) 'Die Präklusion von Versagungsgründen bei der Vollstreckbarerklärung ausländischer Schiedssprüche', *IPRax Heft* 5, 430 discussing two German decisions where a standard of good faith in determining that a failure to challenge at the seat of arbitration precludes defences being raised in enforcement proceedings reasoning in terms of domestic law. The question is presently pending before the German Supreme Court.

[178] Indeed, in *Kanoria and Ors v Anthony Guinness and Anr* [2005] ArbLR 33 at para 42, Gloster J declined to enforce an award rendered in India although challenges to the award were time-barred in India. In that case, Gloster J found that this did not preclude the availability of defences to enforcement in England. A challenge to the award in India had been dismissed as time-barred at both first instance and in the Court of Appeal.

[179] [2006] ArbLR 59 at para 104.

[180] One purpose of the State Immunity Act 1978 was to ratify the European Convention Art 12 of which provides: 'Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in respect of any proceedings relating to: (a) the validity or interpretation of the arbitration agreement; (b) the arbitration procedure; (c) the setting aside of the award, unless the arbitration agreement otherwise provides.' Article 17 of the 2004 United Nations Convention on

Appeal relied on parliamentary debates suggesting that the UK legislator's intent in adopting the State Immunity Act 1978 was deliberately to extend the exception to enforcement beyond the 1972 European Convention in anticipation of the direction the legislator then considered public international law would take.[181] Despite the requirement, as a matter of English law, that the State Immunity Act be interpreted in accordance with evolving international law,[182] the Court of Appeal declined to have regard to the 2004 UN Convention, which confirmed that international law had not developed in accordance with the expectations of the UK legislator in the 1970s,[183] or evidence of state practice since then supporting a narrow scope of the arbitration exception.[184] For the Court of Appeal, the legislative unilateralism evident in the amendments to the State Immunity Act 1978 could be supported by judicial self-reliance: 'isolated observations of a general nature in decisions of foreign courts on their own domestic legislation can at best be of very limited assistance.'[185]

Jurisdictional Immunities of States and Their Property similarly limits the application of the arbitration exception to immunity, and does not extend it to enforcement proceedings. See also Lady Fox, 'States and the agreement to arbitrate' ICLQ (1988) 1 and Dicey and Morris, *The Conflict of Laws* (Lawrence Collins ed), 13th edn (London: Sweet & Maxwell, 2000), p 251: 'This exception applies to proceedings relating to the arbitration, including proceedings to enforce the arbitration agreement or for review of an award. The Bill which resulted in the 1978 Act expressly provided that this Exception did not apply to proceedings for the enforcement of the award. Although the question is not free from doubt, it is suggested that the exception does not apply to enforcement of an award.'

181 [2006] ArbLR 59 at paras 120 *et seq*.

182 *R v Bow Street Magistrates and Ors, ex p Pinochet Ugarte* [2001] 1 AC 147 at 279.

183 In contrast, Aikens J did rely on more recent evidence of international norms in *AIG Capital Partners Inc and Anr v Kazakhstan and Anr* [2005] ArbLR 3 at para 80: 'First, I regard the UN Convention on Jurisdictional Immunities of States and their Property, adopted by the General Assembly, as a most important guide on the state of international opinion on what is, and what is not, a legitimate restriction on the right of parties to enforce against State property generally. I accept that the Convention does not constitute a *jus cogens* in international law. I recognize that the Convention has not yet been adopted by any states. But its existence and adoption by the UN after the long and careful work of the International Law Commission and the UN Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, powerfully demonstrates international thinking on the point.'

184 In the United States, a number of decided cases have declined to infer waiver from the existence of an arbitration agreement, particularly where there was no link with the United States: *Verlinden BV v Central Bank of Nigeria* 488 F Supp 1284 (SDNY 1980); *Obntrup v Firearms Center, Inc* (1981) 516 F Supp 1281 (DCC); and *Zernicek v Petroleos Mexicanos*, 614 F Supp 407 (SD Tex 1985).

185 [2006] ArbLR 59 at para 122. Decisions in other jurisdications are evidence of state practice in international law. The practice of courts in other jurisdictions and, indeed, arbitration awards, are commonly relied on by English courts, particularly in decisions concerning international arbitration. The House of Lords, notably, relied on German jurisprudence on the question of separability in *Fiona Trust* [2007] UKHL 40. In applying the Arbitration Act in an international dispute in *Laker Airways Inc v FLS Aerospace Ltd and Stanley J Burton* [1992] 2 Lloyds Rep 45, Rix J, as he then was, preferred a decision of the Paris Cour d'Appel to English case law that 'arose entirely within a domestic (national) context' involving parties who were familiar 'with the domestic scene'. Rix J preferred the French decision, in part, because it related to an international arbitration, but also because of the Paris Cour d'appel's 'great experience in this field'. See, as well, Guy Canivet, Mads Andenas, and Duncan Fairgrieve (eds), *Comparative Law before the Courts* (London: British Institute of International and Comparative Law, 2004). In their introduction to the collection of essays, Andenas and Fairgrieve state, at pp xxxv and xxxviii: 'Public international law recognizes State practice as a primary source of law. This entails close study of court decisions as an expression of State practice. The International Court of Justice cites national decisions, in particular in their application of public international law. […] An additional problem here is the focus on one's own national approaches (for instance to public international law and EU law) which, while practically important, need to be done with a broader perspective. Fundamental assumptions about the nation state based on nineteenth century thinking still rule.'

B. Parallel proceedings

Execution of an award was stayed in *Hillcourt (Docklands) Ltd v Teliasonera AB*,[186] where new evidence emerged establishing that the parties' contract was avoided giving rise to substantial cross-claims which could be relied on as set-off. Teliasonera discovered, subsequent to enforcement proceedings in England and Sweden, that during negotiations for the lease of a property, its estate agents had advised parties who became the landlords that the freehold of the property was available for sale and that Teliasonera were negotiating a long-term lease. The estate agents received a commission for this. This information led to notice rescinding the lease and legal proceedings in England including to set aside the arbitration award and Teliasonera applied for an injunction restraining enforcement of the award.

C. Public policy

In *Kohn v Wagschal and Ors,*[187] disputes arising from an estate were referred to arbitration by the Beth Din which concluded that the deceased had not intended to make a gift of shares to the daughters, but that the transfer had been effected for other reasons and would be voided as a result. When the son obtained an order from court granting permission to enforce the award, the sisters applied to set it aside on the ground that enforcement would be contrary to public policy since it was tainted by illegality. Morison J disagreed, observing that the daughters had at no time applied to challenge the award which did not purport to enforce an illegality, but sought to put an end to it by voiding the transfer.

D. Right to be heard

A party too ill to participate in arbitration proceedings succeeded in having the award against him in his personal capacity set aside at first instance in *Kanoria and Ors v Anthony Guinness and Anr*.[188] Correspondence prior to the arbitration and the pleadings in the arbitration disclosed no claim against Mr Guinness personally, as opposed to the corporate party to the arbitration, CPL, apart from injunctive relief which the arbitral tribunal had denied. Gloster J found that, in purporting to award an amount against Mr Guinness, the arbitrator exceeded the terms of the submission to arbitration deciding matters beyond the scope of the parties' arbitration submission. Even if the claim against Mr Guinness was within the arbitration submission, Mr Guinness, by reason of his serious illness, was not able to present his case that he was not personally liable. Before the Court of Appeal, Kanoria relied on new evidence: 'Oral submissions made on behalf of Mr Kanoria... at the time of the hearing in the arbitration proceedings' establishing a legal basis for the arbitrator's finding of liability against Mr Guinness. The Court of Appeal rejected the argument based on new evidence. No explanation was offered as to why the evidence was not produced before the judge at first instance and it did not change the fact that Mr Guinness had been unable to present his case owing to serious illness. In addition, he had not been informed of the allegations against him which were contained in the document.

[186] [2006] ArbLR 38.
[187] [2006] ArbLR 43.
[188] [2006] ArbLR 40.

E. Excess of jurisdiction

The courts rejected an argument that an award should not be enforced because it purported to order specific performance in relation to land in *Maimann v Reyhanian*.[189] In a dispute between neighbours referred to the Beth Din, arbitrators ordered the fence between the parties' properties to be removed and replaced as required under a trust at the joint expense of both parties. Lewison J found that the Beth Din had the power to make the award as there was no contract in dispute relating to land. He further held that the phrase 'contract relating to land' in s 48(5)(a) of the Arbitration Act, referred to a contract involving the creation or transfer of rights in land, not a contract which happens to require performance on land.[190]

XV. Effect of Arbitration Award

The courts considered the estoppel effect of arbitration awards in two cases.

In *Dadourian Group International Inc and Ors v Simms and Ors*,[191] Dadourian secured a worldwide freezing order (on the basis of an arbitration award against a company, Charlton), and against individuals: Simms, Rahman, and two other defendants none of whom had been parties to the arbitration. Charlton had no assets and the court was satisfied that the individuals might be bound by the award as privies to the arbitration.[192] On the same basis, permission to appeal was refused.[193] In subsequent proceedings on the merits, the defendants argued they were not bound as privies and that the award was not *res judicata* with respect to findings concerning them. Warren J agreed.[194] Even if Charlton was properly viewed as a sham, the corporate veil could not be lifted to make the individuals contractually liable for Charlton's breach of contract and the arbitration award as they would not have made the purchase in dispute themselves, rather than through a company, if it had been unnecessary to hide their involvement. Another individual was not a privy of Charlton and his conduct of the arbitration, which had formed a ground for the freezing order, was found by the judge to be bona fide. As he had not been a party to the arbitration agreement, no issue estoppels arose with respect to the matters decided by the arbitrator.[195]

[189] [2006] ArbLR 47.

[190] See also *Teliasonera AB v Hillcourt (Docklands) Ltd (No 1)* [2003] ArbLR 41 and *Teliasonera AB v Hillcourt (Docklands) Ltd (No 2)* [2003] ArbLR 42 where Etherton J reviewed the legislative history of s 48(5)(a) and found an arbitrator had the power to order specific performance of an obligation contained in a lease. The statutory prohibition on orders of specific performance relating to land was limited to the creation or transfer of interests in land.

[191] [2006] ArbLR 18.

[192] [2004] ArbLR 17.

[193] [2004] ArbLR 18.

[194] [2006] ArbLR 18.

[195] Cf *Walker International Holdings Ltd v République Populaire du Congo* [2005] ArbLR 65 where enforcement of an arbitration award rendered against Congo was allowed to be enforced against a state-owned company, Jackson. Morison J found Congo to be 'interested beneficially' in Jackson through another company, Fininco, a separate and independent subsidiary of the state-owned oil company SNPC. A number of indications established that SNPC was not an independent commercial company owned

In contrast, issue estoppels were held to arise from an arbitration award in *Rysaffe Trustee Co (Cd) Ltd and Anr v Ataghan Ltd and Ors*.[196] C Freedman QC sitting as deputy judge of the High Court rejected an argument that non-parties to the arbitration award were not entitled to take advantage of the estoppels binding on any persons deriving rights from parties to the award.

XVI. Conclusions

Decisions by the courts in 2006 confirm development of the law strengthening arbitral jurisdiction, in particular the increasing liberalization of approaches to incorporation by reference. The courts continue to show unfamiliarity with some principles introduced by the Arbitration Act 1996, notably *compétence-compétence*, separability, and party autonomy which have yet to be fully developed in practice. The courts also appear hampered when dealing with arbitration agreements requiring knowledge of comparative law, civil law in particular, and international law and practice.

by the state. SNPC had unaudited and unverifiable *compte courants* with the state. It did not declare dividends and its profits did not return to the state in cash. Instead, it made expenditures that were normally made by the state, such as paying for elections, peace initiatives, and making donations by way of humanitarian aid. As a matter of English law SNPC was, effectively, a government department of the state, which does not normally have 'subsidiaries'. Fininco did not make any money and was financially dependent upon the *compte courant* with SNPC. It was a reasonable inference that Fininco was set up because Walker had made attempts to seize assets belonging to SNPC. Fininco was simply a tool of the Congo/SNPC and no more than an extension of SNPC using government money to undertake various projects. As such, it was a device used by Congo to spend more of the money, which should have gone to the Treasury. On the balance of probabilities, this was for the purpose of frustrating creditors.

[196] [2006] ArbLR 53.