Informa Law
Business intelligence | informa

Arbitration law: 2018 in review

In association with Quadrant Chambers

Edited by James M Turner QC

Quadrant CHAMBERS

NEW content included for subscribers to our dispute resolution law package

Arbitration law: 2018 in review is published by Informa Law, Christchurch Court, 10-15 Newgate Street, London EC1A 7AZ. Informa Law is a premium legal research supplier to practitioners across the globe. Our dispute resolution content is available online via single-user subscriptions or multi-user licences at https://www.i-law.com/ilaw/arbitration.htm

Client Services: Please contact Client Services on tel: +44 (0)20 7017 7701; +65 65082430 (APAC Singapore), or email clientservices@i-law.com

Informa Law is an Informa business, one of the world's leading providers of specialist information and services for the academic, scientific, professional and commercial business communities.

Registered Office: 5 Howick Place, London SW1P 1WG. Registered in England and Wales No 1072954.

CONTENTS

Arbitration law: 2018 in review

In association with Quadrant Chambers

Edited by James M Turner QC

Quadrant CHAMBERS

INTRODUCTION

This review covers the most important court decisions in England and Wales in the field of arbitration law in 2018, in particular as regards jurisdiction, arbitrators' powers, challenges under sections 68 and 69, and the enforcement of awards.

We have also sought to provide information on major developments in international arbitration rules, such as the HKIAC (Hong Kong International Arbitration Centre) Rules 2018 and the Prague Rules.

The major arbitration event of 2018 was the CJEU's decision in *Slovak Republic v Achmea BV*, even if it has little bearing on the great majority of arbitrations conducted in the UK. To a jurisdiction as arbitration-friendly as England and Wales, the blow to the ICSID edifice was startling and a rise in jurisdiction challenges in that field is to be expected in 2019.

Of potentially more far-reaching importance was the publication of the much-anticipated Prague Rules. Trailed as the inquisitorial answer to the adversarial IBA Rules, the Prague Rules may offer the Anglo-Saxon arbitration community an alternative to our current procedural model.

These developments aside, 2018 was a solid "business as usual" sort of a year. Practitioners would do well to note the courts' determination to cut down on the costs wasted by hopeless applications under section 68 of the Arbitration Act 1996, and to confine witness statements to the giving of evidence: see pages 4 and 21 to 22 below.

CONTRIBUTOR PROFILES

Quadrant Chambers

Quadrant Chambers is widely recognised as one of the leading commercial sets. Its expert barristers practise across all the major business sectors and in a wide variety of jurisdictions all over the world. They have significant and acknowledged expertise in chancery and commercial litigation and arbitration both in the UK and abroad.

Quadrant Chambers currently comprises 69 barristers, including 25 Queen's Counsel, as well as practice management and support teams. Its members provide a wide range of assistance, from acting as arbitrators and mediators and appearing in court to providing specialist commercial advice.

The *Chambers & Partners* and *Legal 500* directories both recognise Quadrant's barristers as leaders in their fields.

Editor: James M Turner QC

James M Turner QC is a highly regarded and well-known commercial advocate. His practice encompasses commercial contractual disputes across sectors including international and commercial arbitration, energy, shipbuilding, offshore construction, shipping and banking. In the UK he appears frequently in the Commercial Court and the appellate courts, and has extensive experience of arbitration, appearing before all the main domestic and international arbitral bodies (HKIAC, UNCITRAL, LCIA, ICC, LMAA) as well as in ad hoc matters.

James has extensive experience in dealing with foreign law and multi-jurisdictional disputes, and has given written expert evidence of English law in courts worldwide. He is regularly appointed arbitrator, particularly in shipping disputes, and has extensive experience of mediation, both as mediator and as counsel.

Contributors:

Ruth Hosking

Ruth Hosking practises in a range of commercial disputes including general commercial litigation, arbitration, commodities, energy, insurance, international trade, private international law and shipping. Since joining chambers in 2003, she has appeared in the House of Lords, Court of Appeal, High Court and has represented clients in a variety of international and trade arbitrations (including ICC, LCIA, LMAA and GAFTA). She undertakes drafting and advisory work in all areas of her practice and regularly appears in court and in arbitration, both as sole counsel and as a junior. Ruth also accepts appointments as an arbitrator (both as sole and as part of a panel).

Ruth has a client-friendly approach to litigation and is happy to advise on urgent matters out of hours and at short notice. She adopts a collaborative approach, involving clients, experts and her instructing solicitors in progressing cases to trial or arbitration. She is ranked as a "Leading Junior" in *Chambers UK* and *The Legal 500*. She is a meticulous advocate who combines rigorous analysis of detail with a common sense commercial approach. She is "… quick, practical and user-friendly. She hits the nail on the head every single time." … "She is really diligent and has great attention to detail …" (*Chambers UK* 2018).

Simon Rainey QC

Simon Rainey QC is one of the best-known and most highly regarded practitioners at the Commercial Bar with a high reputation for his intellect, advocacy skills, commercial pragmatism and commitment to client care. He has established a broad commercial advisory and advocacy practice spanning substantial commercial

contractual disputes, international trade and commodities, energy and natural resources, and shipping and maritime law in all its aspects. He regularly appears in the Commercial Court and the appellate courts (with three recent landmark cases *Volcafe Ltd v CSAV* [2019] 1 Lloyd's Rep 21; *NYK v Cargill* [2016] 1 Lloyd's Rep 629 and *Bunge SA v Nidera SA* [2015] 2 Lloyd's Rep 469).

He has extensive experience of international arbitration, regularly appearing as advocate under all of the main international arbitral rules (eg LCIA, SIAC, UNCITRAL, ICC, Swiss Rules etc) and Arbitration Act 1996 challenges. He also sits as arbitrator and is a Fellow of the Chartered Institute of Arbitrators.

Current examples of his work as counsel are in arbitration before the Permanent Court of Arbitration in a US$13 billion gas supply dispute; under Nigerian law and seat in relation to an offshore oilfield redetermination dispute between oil majors, under UNCITRAL Rules in a mining supply take or pay dispute involving one of the world's leading mine conglomerates; an ICC arbitration concerning a new mine development in Russia; an ICC Dubai seat arbitration involving offshore services and an HKIAC arbitration involving a long-term gas supply contract as well as in associated section 67 and 68 LCIA challenges in the *A v B* [2017] EWHC 3417 (Comm) litigation in the Commercial Court. Recent arbitral appointments include an ICC Paris seat arbitration concerning a power station failure, a French law and seat arbitration relating to an oil rig drilling contract, an offshore construction contract claim under SIAC Rules and a long-term ore supply contract claim under Swiss Rules.

He sits as a deputy High Court Judge in the Commercial Court and as Crown Court Recorder and is Honorary Professor of Law, Business and Economics, University of Swansea and a member of the newly formed *Lloyd's Law Reports* Editorial Board.

David Semark

David Semark has acted on many arbitrations covering a range of issues including repudiatory breach of contract, conflicts of law, alleged fraud, validity of Letters of Credit, and misrepresentation among many others. He is co-author of the books *Maritime Letters of Indemnity* and *P&I Clubs Law and Practice*, both available on www.i-law.com.

His cases include: *Dera Commercial Estate v Derya Inc (The Sur)* [2019] 1 Lloyd's Rep 57 (section 41(3) of the Arbitration Act 1996 when an arbitral tribunal is asked to dismiss a claim for "inordinate" and "inexcusable" delay); *Navig8 Chemicals Pools Inc v Nu Tek (HK) Pvt Ltd* [2016] EWHC 1790 (Comm) (freezing injunction in support of enforcement of arbitral award; liability of respondent company directors for committal for failure to comply with asset disclosure provisions in the freezing order); *Occidental Chartering Inc v Progress Bulk Carriers* [2012] EWHC 3515 (Comm) (arbitration appeal; section 69; approach to the construction of an arbitral award); *Sovarex SA v Romero Alvarez SA* [2011] 2 Lloyd's Rep 320 (jurisdiction; whether proceedings should be stayed in favour of Spain; application to enforce FOSFA arbitration award under section 66; effect of real doubt as to the validity of the award); and *X v Y* [2011] 1 Lloyd's Rep 694 (shipping; modified Centrocon arbitration clause; consecutive voyage charter; whether arbitration commenced within 12 months of final discharge or termination of charterparty).

Michael Howard QC

Michael Howard QC advises and acts as advocate in domestic and international commercial disputes. He also frequently acts as arbitrator in shipping and other commercial cases. His first appointment was in 1983, since when he has been appointed several hundred times by parties, arbitrators or arbitral bodies as arbitrator, either sole or as one of a panel (in the latter case usually, but not invariably, as umpire or chairman of arbitral tribunal).

He has been appointed as an ICC arbitrator and an LCIA arbitrator. He is a member of the LCIA, a member of the SCMA and a supporting member of the LMAA. Michael has been a part-time judge since 1989 and the Leader of the Admiralty Bar since 2000. He was a member of the Panel of

Salvage Arbitrators appointed by the Council of Lloyd's from 1989 to 2009. He has been an ADR-accredited mediator since 2004. He has written or contributed to several legal textbooks and has contributed articles, notes and reviews on commercial and arbitration law in legal journals.

Nigel Cooper QC

Nigel Cooper QC's commercial practice predominantly covers the fields of shipping, energy and insurance law. He appears before the Commercial and Admiralty Courts, in arbitration (both domestic and international) and before the appellate courts. He accepts appointments as an arbitrator in all his areas of practice, and has acted as a mediator and as a party's representative in mediations. He has experience of public inquiries having appeared for the government in three major shipping formal investigations.

Nigel appears regularly in international arbitrations including arbitrations under the major institutional rules, such as those of ICC, LCIA and SIAC, and under the rules of organisations such as the LMAA, SCMA, and GMAA as well as ad hoc arbitrations. He advises regularly on strategies to ensure that parties are held to their agreement to arbitrate and to ensure the effective enforcement of arbitration awards in different jurisdictions.

Nevil Phillips

Nevil Phillips' practice envelops all aspects of commercial and shipping advisory and advocacy work, encompassing the broadest spectrum of contractual, international trade, commodities, shipping, maritime, energy, insurance, reinsurance, banking, and jurisdictional disputes and associated areas and remedies. He appears regularly in commercial arbitration (both domestic and international, with experience before a wide variety of arbitral institutions, bodies and trade associations, including LMAA, GMAA, LCIA, ICC and associated bodies), the Commercial Court, and the appellate courts.

Nevil also has substantial experience as an arbitrator, which extends to almost all forms of arbitration, with regular appearance in LMAA and LCIA disputes, and significant experience in other institutional and ad hoc fora (including ICC, GMAA and others). He has also given expert evidence on English law to courts in other jurisdictions, and has written and/or contributed to a number of leading textbooks in his fields, including his own authoritative work on *The Merchant Shipping Act 1995 – An Annotated Guide*. Nevil also has significant mediation experience, having assisted in the preparation for, and having attended, a large number of formal mediations. He is a member of the newly formed *Lloyd's Law Reports* Editorial Board.

Paul Toms

Paul Toms is an experienced junior barrister practising across a wide range of commercial disputes. He is described as "A delight to work with. He is approachable, astute and commercially minded" (*Chambers UK* 2018). He appears regularly in the High Court (mainly the Commercial and Circuit Commercial Courts) and in domestic and international arbitrations. Paul has particular expertise in the following commercial fields: information technology, insurance, energy, international trade, commodities and sale of goods, shipping and shipbuilding. He also has significant experience of procedural issues commonly arising in commercial litigation, including seeking and resisting injunctive relief (eg freezing, anti-suit and asset disclosure orders) and jurisdictional challenges (both in court and arbitration).

He has been recommended for many years in the Legal Directories, namely *Who's Who Legal: UK Bar*, *The Legal 500* and *Chambers UK*. His significant experience of disputes with an Asian Pacific aspect is reflected by his recommendation for shipping by *The Legal 500* in its Asia Pacific rankings. "He combines strong analytical skills and legal knowledge" (*The Legal 500 Asia Pacific: The English Bar*, 2019).

Arbitration law: 2018 in review

ARBITRATION RULES

Ruth Hosking

Introduction

There were two major developments in the area of international arbitration rules in 2018. The first was the HKIAC[1]'s new version of their Administered Arbitration Rules ("the 2018 Rules"). The second was the publication on 14 December 2018 of the Rules on the Efficient Conduct of Proceedings in International Arbitration ("the Prague Rules").

In addition, there were two developments in respect of investment treaty disputes. On 3 August 2018 the ICSID[2] Secretariat published proposals for rule amendments (the fourth time the rules and regulations will have been updated). The central goals are to modernise, simplify and streamline the rules, while also leveraging information technology to reduce the environmental footprint of the ICSID process. Additionally, in late 2018 the IBA published its report on ISDS[3] Reform, "Consistency, efficiency and transparency in investment treaty arbitration", which concluded that increasing consistency, efficiency and transparency would foster the ISDS's legitimacy.

Finally, both GAFTA and FOSFA published changes to their arbitration rules in the course of 2018. Those changes are not addressed in this document, but a review of them can be found online.[4]

HKIAC Rules 2018

The 2018 Rules introduced amendments relevant to the use of technology (articles 3.1(e), 3.3, 3.4 and 13.1), third-party funding (articles 34.4, 44 and 45.3(e)), multi-party contract arbitrations (article 29), the early determination of disputes (article 43), ADR (article 13.8), emergency arbitration proceedings (article 23.1 and Schedule 4) and time limits for the delivery of awards (within three months) (article 31.2).

In addition, the 2018 Rules provide an express basis for an arbitral tribunal to conduct multiple arbitrations at the same time, one immediately after another, or to suspend any of the arbitrations until the determination of any other of them (article 30).

The 2018 Rules came into force on 1 November 2018.

The Prague Rules

The Prague Rules were launched on 14 December 2018. Like the IBA Rules on the Taking of Evidence in International Arbitration ("the IBA Rules") the Prague Rules will work as guidelines and will only apply if adopted by the parties. The Prague Rules and IBA Rules offer different options to parties depending on whether they want a more inquisitorial/civilian approach (the Prague Rules) or a more adversarial/common law one (the IBA Rules).

In broad terms the Prague Rules encourage the tribunal to play a more active role in a bid to increase the efficiency and cost-effectiveness of international arbitration. The Prague Rules Working Group identified three main culprits in taking evidence which it considered extended time and cost in the arbitration procedure, namely:

(1) *Document production* – which often entails broad categories of document requests leading to lengthy and tedious document disclosure processes;

1 Hong Kong International Arbitration Centre.
2 International Centre for Settlement of Investment Disputes.
3 Investor-state dispute settlement.
4 See, eg, the summary of them by Hill Dickinson LLP at http://bit.ly/HD_GnF

(2) *Too many factual and expert witnesses* – which often include witnesses who testify on irrelevant facts that do not assist the tribunal in resolving the issues in dispute; and
(3) *Extended cross-examination at lengthy oral hearings* – including cross-examination on issues the tribunal considers irrelevant.

Dealing with those specific issues the Prague Rules provide for:

(1) *Document production* – the tribunal "are encouraged to avoid extensive production of documents, including any form of e-discovery" (article 4.2). Parties may only request specific documents as opposed to categories of documents;
(2) *Factual and expert witnesses* – the parties are given an opportunity to comment on which witnesses should be called. However, the tribunal will determine which witnesses to call for examination (article 5.2). The tribunal will have greater control of expert witnesses but that does not preclude a party from submitting its own expert reports (article 6); and
(3) *Hearing* – the default position is that if (and to the extent) possible, the dispute should be resolved on documents only (article 8). If a hearing is to take place then it should be conducted in the most cost-efficient manner and in the quickest time.

Article 9 of the Prague Rules provides that the tribunal may, to the extent permissible under the lex arbitri, express their preliminary views with regard to the parties' respective positions and assist in the amicable settlement of the dispute.

JURISDICTION

Simon Rainey QC and Ruth Hosking

Overview

In 2018 the English courts considered section 73 of the Arbitration Act 1996, the nature of a challenge under section 67 of the 1996 Act, the scope of arbitration agreements/clauses and whether there was an agreement to arbitrate. In one case the court amended (applying principles of construction rather than rectification) an exclusive sales agency agreement to substitute the correct parties and imply the correct contractual details, with the result that the arbitrator had jurisdiction to make awards for damages for breach of the agreements (*SEA2011 Inc v ICT Ltd*[5]). If there is a general theme, it is that in the main the court has upheld the arbitral tribunal's jurisdiction.

In its landmark decision in *Slovak Republic v Achmea BV*,[6] the Court of Justice of the European Union ("CJEU") declared that arbitration clauses in bilateral investment treaties between EU member states are incompatible with EU law. Applications to the English courts challenging jurisdiction on the basis of Achmea are likely to be heard in 2019.

Section 67 challenge

Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction (section 30(1) of the 1996 Act). That determination includes whether there is a valid arbitration agreement and what matters have been submitted to arbitration in accordance with the arbitration agreement (section 30(1)(a) and (c) of the 1996 Act).

A party to arbitral proceedings may apply to the court to challenge jurisdiction by either: (a) challenging any award of the arbitral tribunal as to its own substantive jurisdiction; or (b) for an order declaring an award made by the tribunal on

5 [2018] EWHC 520 (Comm); [2018] 1 Lloyd's Rep 463.
6 Case C-284/16; EU:C:2018:158; [2018] 4 WLR 87; [2018] 2 CMLR 40.

the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction (section 67(1) of the 1996 Act). The right to seek recourse to the court under section 67 may be lost (section 73 of the 1996 Act).

The decision of the Commercial Court in *GPF GP Sarl v Republic of Poland*[7] reinforces the well-known position that a challenge to jurisdiction under section 67 takes place as a full rehearing of that challenge and not as a review of the arbitral tribunal's prior decision on the same issue of jurisdiction; the tribunal's conclusions carried no legal or evidential weight. The decision of Bryan J confirmed:

(1) that there is no difference between a question of jurisdiction ratione personae (ie a fundamental issue concerning a claimant who claimed not to be party to the arbitration agreement) or ratione materiae (ie the scope of disputes referred to arbitration); both are subject to a rehearing;
(2) that the position is no different where a party fails to raise issues in the arbitration and seeks to raise wholly new points on the section 67 challenge, irrespective of the nature of the jurisdictional aspect in play; and
(3) that resort by one party to "waiver" to preclude the other party from raising such new points on the rehearing was ineffective (and it was difficult to see how a waiver could arise in circumstances where it is well established that there can be a rehearing under section 67, a fact parties are taken to know).

In *A v B*[8] the court had to construe an arbitration clause in a foreign language. The claimant shipowners applied to set aside an arbitration award by which the arbitrators ruled they had no jurisdiction. The underlying charterparty was subject to English law but in Russian. It was in two parts, with an express provision that in the case of conflict Part I would take precedence over Part II. Clause 24 of Part II provided for the ad hoc appointment of arbitrators by the parties. Clause J of Part I contained a provision in Russian, the literal wording of which was "Arbitration proceedings – London international arbitration court". The appropriate translation was in dispute.

The claimant shipowners commenced arbitration under the LMAA[9] Terms 2012. The respondent charterer appointed its own arbitrator (who also accepted on LMAA Terms) but subsequently challenged jurisdiction under section 31 of the 1996 Act. They argued that there was no such body as the "London International Arbitration Court". The arbitral tribunal took advice from Russian-speaking solicitors who advised that if the words "London Court of International Arbitration" was translated into Russian it would follow the same word order and capitalisation as that in clause J. The tribunal found that the words referred explicitly to the LCIA,[10] whose rules provided that it appointed its own arbitrators, and thus it did not have jurisdiction. The claimant owners made an application to the court under section 67 of the 1996 Act.

The court adopted an orthodox approach to the contract's construction. Although the conflict provision could not be ignored, it only came into effect if there was indeed a conflict between the relevant provisions. Thus in determining whether there was a conflict it was necessary to first construe the clauses and that required taking them together. Phillips J gave the following guidance where the arbitration clause is in a foreign language:[11]

> "... construing a clause in a foreign language where there is doubt as to the proper translation requires the court to reach its final determination as to the meaning of the clause by way of combined process of assessing the evidence as to the translation together with the usual tools of construction. The end purpose of a process of construction is to reach a proper interpretation of the meaning and effect of the contract as agreed by the parties."

7 [2018] EWHC 409 (Comm); [2018] 1 Lloyd's Rep 410.
8 [2018] EWHC 1370 (Comm).
9 London Maritime Arbitrators Association.
10 London Court of International Arbitration.
11 *A v B*, at para 12.

The court did not consider the use of the words (in Russian) clearly indicated a choice of the LCIA. The Russian words and their capitalisation did not mirror those used by the LCIA in its own Russian version of its name. The court considered it could refer either to the LCIA or to any international arbitral body in London that was appointed ad hoc by the parties. Clause 24 (in Part II) provided an agreed mechanism for the appointment of arbitrators. That was unnecessary if an LCIA arbitration was required. Phillips J noted that it was at least doubtful that the parties would have intended to limit themselves to LCIA arbitration in a maritime dispute. The court concluded that, although "by no means beyond doubt",[12] on the balance of probabilities the parties' intention was not to refer specifically to LCIA arbitration but to an ad hoc arbitration in London before a tribunal appointed pursuant to the mechanism set out in clause 24. Thus the tribunal had jurisdiction.

In *Exportadora de Sal SA de CV v Corretaje Maritimo Sud-Americano Inc*[13] the Commercial Court expressed its disapproval of the practice which has grown up of serving a very full witness statement with the arbitration claim form. Andrew Baker J saw this as having arisen because of "the perceived convenience in a section 67 claim of setting out the claimant's detailed case as to the material facts, with explanatory comment or an outline of the proposed argument, in a single, main supporting witness statement from the claimant's solicitor".[14] He laid down the following reminders:[15]

(1) "Where the material facts will be proved by contemporaneous documents, whether generated by the original transaction or by the arbitral proceedings, the proper function of a witness statement may well be only to serve as the means by which those documents [are adduced] into evidence", ie by being exhibited;
(2) "The claimant's case as to what those documents prove, and as to the conclusions to be drawn, can and should be set out in the arbitration claim form as part of the statement of the 'Remedy claimed and grounds on which claim is made', a statement often produced in the form of a statement of case attached to the claim form";
(3) "The content of any witness statement, beyond a bare identification of exhibited documents, can and should be limited to matters of fact intended to be proved, if disputed, by calling the maker of the statement as a factual witness at the final hearing of the [arbitration] claim"; and
4) "If a witness statement … has not been properly limited … it is essential, if the maker of the statement is to be called as a witness at the final hearing of the claim, that proper thought is given to which parts of the statement it is necessary or appropriate to take as their factual evidence in chief."

The decision context was highly unusual: arbitral jurisdiction existed when the arbitration was commenced, but (it was argued) had been removed subsequently by a supervening governmental act which declared the contract and arbitration agreement null and void ab initio. The court stressed that, given the importance of jurisdiction, a party had to act very quickly indeed, within a timescale of days not weeks, treating the investigation of any potential jurisdictional argument as one of the "highest priority". Andrew Baker J explained the rationale for this as follows:[16]

> "The general context in which that question of reasonable diligence falls to be assessed is that when faced with a legal claim asserted through arbitration, logically and practically the first question any respondent can fairly be expected to consider and keep under review throughout is whether it accepts the validity of the process."

12 Paragraph 17.
13 [2018] EWHC 224 (Comm); [2018] 1 Lloyd's Rep 399.
14 Paragraph 25.
15 Paragraphs 25 to 26.
16 Paragraph 48.

Agreement to arbitrate

Section 6 of the 1996 Act defines an arbitration agreement as an agreement to submit to arbitration present or future disputes (whether they are contractual or not). Arbitration agreements must be in writing (section 6(2)) but are not required to be in any particular form.

In *Jiangsu Shagang Group Co Ltd v Loki Owning Co Ltd (The Pounda)*,[17] the court set aside an award of damages to a shipowner which claimed that the charterer's parent company had orally agreed to guarantee the charterer's obligations. The court held that it had not been shown that it was more likely than not that the parent had guaranteed and become party to the charterparty. There was therefore no valid arbitration agreement between the parties.

Scope of the arbitration agreement

The presumption in *Fiona Trust & Holding Corporation v Privalov*[18] is well known, ie that parties are likely to intend "any dispute arising out of the relationship into which they have entered"[19] to be decided by the same tribunal, unless the language makes clear that certain matters were to be excluded from the arbitrator's jurisdiction: the so-called "one-stop shop". In 2018 the court considered numerous arbitration agreements/clauses and the applicability of the *Fiona Trust* one-stop presumption, including cases where there was more than one contract between the parties.

In *Uttam Galva Steels Ltd v Gunvor Singapore Pte Ltd*[20] the question was whether a claim under bills of exchange fell within the arbitration clause in a sale contract which contemplated payment by bills of exchange. The arbitration clause provided that: "All disputes arising out of or in connection with each Contract and/or these Terms shall be finally settled by arbitration in London under the Arbitration Regulations of the LME".[21]

The court held that the claim under the bills did fall within the arbitration clause:

(1) The clause, with its reference to "all disputes arising out of or in connection with each Contract and/or these Terms", was widely worded.
(2) It was difficult to see how the parties, as "rational businessmen", were likely to have intended that a dispute under bills of exchange stipulated in the contracts as the means of payment should be resolved in anything other than arbitration, at the same time as any dispute under the contracts.
(3) There was no rule of English law that an arbitration clause could not extend to a claim under a bill of exchange (at least as between the immediate parties to the underlying sale contract, where those parties remained the parties to the bills of exchange).

Dreymoor Fertilisers Overseas Pte Ltd v EuroChem Trading GmbH[22] was a case of multiple contracts between the same parties. An "umbrella" agency agreement for the sale of fertiliser into the Indian market had an English choice of law clause, but was silent as to forum. In some cases, Dreymoor bought the goods as principal from EuroChem and on-sold to Indian buyers; in others, the sale was between EuroChem and the Indian buyer with Dreymoor named as agent in the sales contract. The first type contained an LCIA arbitration clause; the latter type contained an ICC arbitration clause.

The breaches of the sales contracts alleged by EuroChem (essentially, that they were procured by bribery) would, if made out, all also be breaches of the agency agreement. Dreymoor argued that the proper application of the one-stop presumption, as explained in multi-contract cases by the Court of Appeal in *AmTrust Europe Ltd v Trust Risk Group SpA*,[23] was that none of the claims were captured by the arbitration clauses. They argued in essence that the claims arose out of the agency agreement and therefore should fall within the dispute resolution

17 [2018] EWHC 330 (Comm); [2018] 2 Lloyd's Rep 359.
18 [2007] UKHL 40; [2008] 1 Lloyd's Rep 254.
19 Paragraph 13.
20 [2018] EWHC 1098 (Comm); [2018] 2 Lloyd's Rep 152.
21 Paragraph 4.
22 [2018] EWHC 909 (Comm); [2018] 2 Lloyd's Rep 523.
23 [2015] EWCA Civ 437; [2015] 2 Lloyd's Rep 154.

provision of that agreement. As the agency agreement was silent as to forum, the claims would all be heard together in whatever court took jurisdiction according to its own gateway and forum conveniens rules. If claims were captured by the arbitration clauses there would be fragmentation: essentially the same bribery allegations would be determined in multiple arbitration fora.

> In 2018 the court considered numerous arbitration agreements/ clauses and the applicability of the *Fiona Trust* one-stop presumption, including cases where there was more than one contract between the parties

Butcher J rejected Dreymoor's argument. He considered the absence of a specified forum in the agency agreement to be a key feature:[24]

> "I consider that reasonable business people would not have considered that this uncertain jurisdictional position should apply to a dispute such as the present as opposed to the specified dispute resolution mechanism in the individual contracts."

The width of an arbitration clause was considered (in the context of an anti-suit injunction) in *Nori Holdings Ltd v Public Joint-Stock Company Bank Otkritie Financial Corporation*.[25] The underlying dispute related to the termination by agreement of Loan Agreements and Pledge Agreements between the claimants and the defendant bank. The majority of the Pledge and the Pledge Termination Agreements were governed by Cypriot law and each contained an agreement for arbitration in London under LCIA rules "of any dispute or disagreement arising under, or in connection with, this Agreement".[26]

The last Pledge Agreement and the Loan Agreements were subject to the jurisdiction of the Moscow Arbitrazh Court. Post-termination the bank purchased bonds issued by a company in the claimants' group. Males J said that the effect of this was "to replace the bank's short-term loans secured by pledges of shares in a company which owned valuable Moscow real estate with long-term unsecured bonds".[27] After the restructuring, a temporary administrator was appointed for the bank who commenced proceedings on its behalf in the Moscow court, seeking to invalidate the restructuring and to reinstate the loan and pledge agreements. The bank also commenced proceedings in Cypriot courts to annul the restructuring and claimed that the transaction was fraudulent.

The claimants commenced a series of LCIA arbitrations and brought proceedings before the English Commercial Court, seeking a final anti-suit injunction to restrain the Russian and Cypriot proceedings against them, arguing that they were in breach of the arbitration clauses in the Pledge and Pledge Termination Agreements. They also commenced 10 arbitrations under these agreements, seeking declarations that the agreements had been validly terminated and similar anti-suit relief.

The court held that the arbitration clause was in wide and general terms with no express exclusion of disputes of any kind. The court was prepared to assume in the bank's favour that certain of the claims in Russia could properly be characterised as insolvency proceedings under Russian law. However, the judge rejected an argument that there was or should be a presumption under English law that an arbitration clause would not extend to claims to avoid a transaction made by a liquidator or other office holder in insolvency proceedings. In this respect, English law differs from the law of Singapore (cf *Larsen Oil and Gas Pte Ltd v Petroprod Ltd*[28]). If, on its proper construction, the arbitration clause is wide enough to encompass a claim in insolvency proceedings, the claim will fall within the scope of the arbitration clause. There was no good reason or necessity to imply any limitation in respect of

24 Paragraph 58.
25 [2018] EWHC 1343 (Comm); [2018] 2 Lloyd's Rep 80.
26 Paragraph 9.
27 Paragraph 13.
28 [2011] SGCA 21; [2011] 3 SLR 414.

claims in insolvency proceedings. Those claims were arbitrable: they were factual disputes about whether the transactions constituted a fraud on the bank by replacing valuable secured loans with worthless bonds. Males J held that they could be determined in arbitration, irrespective of whether they could properly be characterised as insolvency claims under Russian law. (See further below, under *Court assistance and intervention: anti-suit injunctions*.)

The width of an arbitration clause was also considered in *Cavity Insulation Guarantee Agency Ltd v ThermaBead Ltd*[29] where the TCC held that a dispute between the Cavity Insulation Guarantee Agency and one of its members had to be referred to arbitration in accordance with the Agency's rules because the arbitration clause in the Agency's rules was not limited to settling disputes between members and their customers.

The scope and applicability of an arbitration clause in a multi-contract case arose in *Sonact Group Ltd v Premuda SpA (The Four Island)*.[30] In that case, disputes arose under a charterparty which contained an arbitration clause. The disputes were subsequently settled but the agreed settlement figure was not paid. The settlement agreement did not contain an arbitration clause. Males J held that the arbitration clause in the charterparty covered claims for the settlement sum.

In *Catlin Syndicate Ltd v Weyerhaueser Co*,[31] Robin Knowles J had to construe dispute resolution provisions in an excess insurance policy to determine whether the arbitration clause in the lead policy was applicable. Rejecting submissions to the contrary as uncommercial, he held that it was and granted the anti-suit injunction sought. As the judge himself recognised, the decision turned "on its particular wording, fact and context" (para 26) and is thus an application of existing principle, rather than breaking new ground.

Scope of the arbitration reference

In addition to considering the scope of an arbitration by reference to the terms of the agreement or clause, the court has also considered the scope of the arbitration by reference to the basis on which the arbitral tribunal was appointed.

In *Bond v Mackay*,[32] Mr Bond and British Gas plc entered into a deed which allowed British Gas to run a pipeline under Mr Bond's land. British Gas was subsequently succeeded by Southern Gas Network. The agreement provided that if Mr Bond wished to work any minerals on the land, he had to give 30 days' notice of his intention to do so. Southern was then entitled to serve a counter-notice. Disputes arose as to whether Southern had properly complied with the counter-notice procedure and as to the amount of any compensation payable.

Mr Bond referred the disputes under the compensation procedure to arbitration. The arbitrator identified the terms of the reference to arbitration as "to determine the disputes between the parties concerning the compensation payable in respect of the sterilization of minerals". Subsequently Mr Bond sought to add an additional claim. The arbitrator took a narrow view and held that the new claim was not within the initial reference to arbitration and the arbitrator therefore had no jurisdiction to decide it. The court took a different view, stressing the importance of taking a "broad view" of the factual background when determining the scope of the reference to arbitration. The court held that the second claim was within the reference to the arbitral tribunal.

29 [2018] 11 WLUK 532.
30 [2018] EWHC 3820 (Comm).
31 [2018] EWHC 3609 (Comm).
32 [2018] EWHC 2475 (TCC); [2018] BLR 768.

REMOVAL AND POWERS OF ARBITRATORS

David Semark

Removal of arbitrators

In *Allianz Insurance plc and Another v Tonicstar Ltd*[33] the Court of Appeal reviewed party-imposed eligibility requirements for arbitrators. The arbitration clause under consideration required that arbitrators appointed should have not less than 10 years' "experience of insurance or reinsurance". The claimant appointed a QC who had over 10 years' experience of acting in insurance and reinsurance cases. At first instance,[34] the respondent had successfully applied under section 24(1)(b) of the 1996 Act for his removal for lack of qualification.

The Court of Appeal allowed the appeal, overruling an earlier first instance decision: *Company X v Company Y*.[35] On a proper construction of the arbitration clause the parties did not intend a "trade arbitration" in which only persons who had worked in the insurance/reinsurance industry were eligible to be appointed as arbitrators. The clause simply required "experience of insurance or reinsurance", without imposing any restriction on how that experience was acquired. The court emphasised that insurance professionals needed some understanding of insurance law, and lawyers practising in the field of insurance/reinsurance had to understand the practical aspects of the business.

It found that a lawyer who had specialised in the area for more than 10 years would have acquired considerable practical knowledge of the business. It stressed that because the practical and legal aspects of the insurance and reinsurance industry were so intertwined, both market professionals and specialist lawyers were commonly appointed as arbitrators. Both had skills making them suitable for appointment and a barrister who had specialised in the field for more than 10 years would "naturally" be regarded as qualified for appointment.

The decision reconfirms that eligibility requirements in arbitration clauses will usually be interpreted broadly. If the intention is to exclude a category of persons, such as lawyers, from eligibility, clear words are needed to effect this.

The vexed question as to whether it is legitimate for the same arbitrator to accept multiple appointments in overlapping references without giving rise to the appearance of bias came before the Court of Appeal in *Halliburton Co v Chubb Bermuda Insurance Ltd and Others*.[36]

The question arose against the backdrop of multiple arbitral references commenced following the *Deepwater Horizon* incident in the Gulf of Mexico. When the claimant in one of these proceedings discovered that the respondent had asked a court-appointed third arbitrator to act as an arbitrator in two other arbitration proceedings concerning overlapping subject matter, it applied for his removal under section 24(1)(a) of the 1996 Act.

The appellant had unsuccessfully claimed at first instance[37] that the arbitrator's acceptance of the appointments in the other two proceedings without disclosing those appointments, and his response to the challenge to his impartiality, gave rise to an appearance of bias.

Eligibility requirements in arbitration clauses will usually be interpreted broadly. If the intention is to exclude a category of persons, such as lawyers, from eligibility, clear words are needed to effect this

Dismissing the appeal, the Court of Appeal held that while an arbitrator's "inside information" and knowledge obtained in one reference could be a legitimate concern in overlapping arbitrations involving a common arbitrator but only one common party, that in itself did not justify an

33 [2018] EWCA Civ 434; [2018] 1 Lloyd's Rep 389.
34 [2017] EWHC 2753 (Comm); [2018] 1 Lloyd's Rep 229.
35 17 July 2000, unreported.
36 [2018] EWCA Civ 817; [2018] 1 Lloyd's Rep 638.
37 [2017] EWHC 137 (Comm).

inference of apparent bias. The court emphasised that arbitrators are assumed to be trustworthy and to understand that they should approach every case with an open mind. They could be trusted to decide a case solely on the evidence or other material in the reference in question and that was equally so where there was a common party. The mere fact that an arbitrator accepted appointments in multiple references concerning the same or overlapping subject matter with only one common party did not therefore of itself give rise to an appearance of bias. Something more was required, and that had to be "something of substance", which was not present in the material before the court.

The Court of Appeal emphasised, however, that the arbitrator concerned ought to have disclosed the other appointments to the appellant at the time that he had been appointed in the other references, both as a matter of good practice in international commercial arbitration and as a matter of law.

Strike-out for want of prosecution

Dera Commercial Estate v Derya Inc (The Sur)[38] was the first opportunity the English courts have had to examine, in any depth, the principles applicable to the operation of section 41(3) of the Arbitration Act 1996 when an arbitral tribunal is asked to dismiss a claim for "inordinate" and "inexcusable" delay.

Section 41(3) is modelled on the classic strike-out jurisdiction finally laid down in *Birkett v James*.[39] It provides as follows:

> "If the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay—
> (a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or
> (b) has caused, or is likely to cause, serious prejudice to the respondent,
> the tribunal may make an award dismissing the claim."

The arbitration proceedings in *Dera* had been commenced in September 2011. The claim in question was particularised in June 2015 by way of a counter-claim. In May 2016 a successful application was made to have the claim struck out for want of prosecution. The legitimacy of the tribunal's decision was the subject of an appeal to the Commercial Court.

In assessing the court's own power to strike out claims for delay, the Court of Appeal had held in *Trill v Sacher*[40] that only in exceptional cases can a claim be struck out for want of prosecution within the six-year limitation period applicable to contractual claims. The issue for the court was whether the position was different where the contractual limitation period was one year.

The appellant argued that the tribunal was wrong to focus on the one-year contractual time bar as the yardstick for assessing whether a delay in particularising a cargo claim is "inordinate" and that inordinate delay should be measured against what is regarded as acceptable according to the standards of those normally involved in that type of arbitration. The court disagreed, holding that absent any agreed extensions of time or consent to the delay, "... there is no reason why the one-year rule is not objectively relevant for the purpose of assessing delay. It sets the tone and content for that exercise".[41] However, the judge was careful to stress that "[i]t would nevertheless be wrong to elevate the relevant limitation period to the status of being 'the' yardstick. Rather it is 'a' yardstick, albeit an important one ...".[42]

In striking out the claim, the tribunal had stated that it was "entitled to consider the full period of the delay from the time the cause of action arose, once the limitation period has expired ..." when comparing this to the one-year Hague Rules time limit. The appellant argued that the tribunal had applied this period mechanistically.

The court confirmed that this exercise cannot be "a purely mechanical" one, and that "[in] cases where there are periods of procedural activity and non-

38 [2018] EWHC 1673 (Comm); [2019] 1 Lloyd's Rep 57.
39 [1978] AC 297; [1977] 2 All ER 801.
40 [1993] 1 WLR 1379; [1993] 1 All ER 961.
41 *Dera*, para 69.
42 *Dera*, para 64.

activity, it will normally be appropriate to assess individual periods of delay separately and distinctly, arriving at a cumulative picture of overall delay …".[43] However, the judge concluded on the facts that the tribunal had not adopted a purely mechanical approach, because there had been no substantive procedural activity which would have obliged the tribunal to demarcate individual periods of delay.

> In cases where there are periods of procedural activity and non-activity, it will normally be appropriate to assess individual periods of delay separately and distinctly, arriving at a cumulative picture of overall delay

The appellant also said that the tribunal had erred by failing to take into account the difference between an evidential burden and a legal burden when assessing whether its delay was inexcusable. As to this, the court confirmed that the legal (or persuasive) burden of proof lies at all times on the applicant on a section 41(3) application to establish (on a balance of probabilities) not only that there was inordinate, but also inexcusable, delay. The judge found, however, that while:

> "beyond the question of legal burden, as presaged in *Trill v Sacher*, it could be said that there is a shift of evidential burden on to the responding party once inordinate delay is established by the applying party …"[44]

it will seldom be necessary, or helpful, to talk of a shift of evidential burden. This was on the basis that:

> "… [if] the responding party has good reason for the delay it will no doubt come forward with that evidence, for the applying party then to address as it can …"[45]

and that:

> "… although each case will be fact specific, as a matter of practice it will be the responding party that identifies what it contends to be a credible excuse for the delay. Otherwise, a tribunal will normally be driven to the conclusion that there is (probably) no such excuse."[46]

Interplay between tribunal's power to correct and time limit to challenge an award

With Michael Howard QC

This topic was reviewed by the Commercial Court in *Daewoo Shipbuilding & Marine Engineering Co Ltd v Songa Offshore Equinox Ltd and Another*.[47] After the awards were published, those acting for the claimant (DSME) requested the arbitrators to correct four errors in the awards. These errors were "classic clerical and typographical errors … not connected in any way, shape or form with DSME's subsequent appeal".[48] The tribunal did so, by "Memoranda of Correction" published 27 days after the award. DSME issued its claim form challenging the awards 16 days later. Its primary case was that its appeal was in time because the corrections of the award restarted time under section 70; if that was wrong, it sought a retrospective extension of time under section 80(5). The respondent argued that the appeal was out of time and that time only ran from the date of a correction if the correction was in some way material to the decision to appeal.

The court held that there is a clear distinction drawn in section 70 between "an arbitral process of appeal or review" and "any recourse under section 57". The reference to an arbitral process of appeal or review in section 70 was to a process by which an award was subject to an appeal or review by another arbitral tribunal, and not to an application to the same tribunal for a correction of the award. In the court's view the principles of

43 *Dera*, para 127.
44 *Dera*, para 139.
45 *Dera*, para 141.
46 *Dera*, para 141.
47 [2018] EWHC 538 (Comm); [2018] 1 Lloyd's Rep 443.
48 *Daewoo*, para 10.

speed and finality of arbitral proceedings would be undermined if the effect of making any application for a correction was that time for appealing ran from the date the appellant was notified of the outcome of that request. On their proper interpretation, it did not follow from sections 54 and 57 that where there had been any correction the date of the correction was to be treated as the date of the award.

After reviewing the authorities, Bryan J held, following *K v S*,[49] that the general rule was that time started to run from the date of the original award. He went on to observe, obiter, that if there was a correction which was material to a party's ability to decide whether or not to appeal, time would run from the date of the corrected award. Given that the corrections in this case had nothing to do with any proposed appeal, time ran from the date of the signature of the original award.

In relation to the application for an extension of time, Bryan J applied the principles governing the discretion under section 80(5) set out by Popplewell J in *Terna Bahrain Holding Company WLL v Al Shamsi*[50] and those identified by Colman J in *AOOT Kalmneft v Glencore International AG*,[51] approved by the Court of Appeal in *Nagusina Naviera v Allied Maritime Inc (The Maria K)*.[52] Holding that 24 days' delay could not be considered trivial and that the applicants had offered no sensible justification for the delay, Bryan J dismissed the application.

COURT ASSISTANCE AND INTERVENTION

Nigel Cooper QC and Nevil Phillips

Introduction

In 2018 there were notable decisions on: (i) extension of time for the commencement of arbitral proceedings under section 12 of the 1996 Act; (ii) interim assistance under section 44; (iii) the stay of court proceedings in favour of arbitration under section 9; and (iv) injunctive relief to restrain the pursuit of court proceedings brought in breach of an arbitration agreement (or vice versa).

The court also had occasion to consider the extent to which it should grant injunctive relief to restrain foreign proceedings, whether in a foreign court or before a foreign arbitration tribunal. Each of the decisions can be reconciled with existing authority but only on the basis of careful factual analysis. The cases also emphasise the difficulties of bringing disputes involving multi-national businesses before one forum. The courts are having to recognise that it may simply be a facet of the multi-jurisdictional nature of some organisations that their disputes will be fought in different countries with similar issues and a consequent risk of irreconcilable decisions.

Section 12: extensions of time for commencement of arbitration

In *P v Q; Q v R; R v S*,[53] the issues arose out of a chain of back-to-back voyage charters. The time bar was identical under each charter, clause 67 of each providing in relevant part that "claimant's arbitrator [must be] appointed within thirteen (13) months of the final discharge of the cargo and where this provision is not complied with, the claim shall be deemed to be waived and absolutely barred".[54] On the final day of the 13-month period (16 November),

49 [2015] EWHC 1945 (Comm); [2015] 2 Lloyd's Rep 363.
50 [2012] EWHC 3283 (Comm); [2013] 1 Lloyd's Rep 86.
51 [2002] 1 Lloyd's Rep 128; [2001] CLC 1805.
52 [2002] EWCA Civ 1147; [2003] 2 CLC 1.
53 [2018] EWHC 1399 (Comm); [2018] 2 Lloyd's Rep 452.
54 *P v Q*, para 1.

O (as disponent owner) gave notice to P, its charterer, of a third-party claim brought against it. P only saw the notice the next day (17 November), after the time bar had passed.

P thereafter commenced arbitration against Q; Q commenced against R; and R commenced against S. Each of the commencements of arbitration by P, Q, and R was sent and received after the time bar had passed. P, Q and R each applied to the High Court for: (i) declarations that each claim had been notified in time (on the basis that clause 67, properly construed, did not bar the claims); or alternatively (ii) an extension of time for the commencement of arbitration under section 12.

As regards the effect of the time-bar provision in clause 67, the judge (Sir Richard Field, sitting as a Deputy Judge of the High Court) held (adopting a strict approach) that the time bar was effective and that "the parties took the risk that it might not be possible within the 13-month time limit to pass on a claim validly received within the period".[55] This meant that a section 12 extension was necessary for each party to pursue its claims in arbitration.

As regards the section 12 extension, the judge refused an extension to P and R, but granted one to Q. He applied the approach adopted by Hamblen J in *SOS Corporación Alimentaria SA v Inerco Trade SA*:[56] (i) whether there were relevant circumstances beyond the reasonable contemplation of the parties when they agreed the articles; and (ii), if there were, asking whether, had the parties contemplated them, they would also have contemplated that the time bar might not apply.

Accepting that P's receipt of the claim after close of business on the last day of the limitation period (with the result that any claim down the chain was necessarily out of time) did amount to "circumstances … outside the reasonable contemplation of the parties" and that "the parties in these circumstances would have contemplated that the time bar might not apply given their expectation that claims could be passed up or down the charter chain",[57] he went on to consider whether it would be just to extend time in each case. This, he determined, depended upon whether that party had acted "expeditiously and in a commercially appropriate fashion".[58]

In this latter regard, the judge concluded that only Q (who had given written notice of claim and appointed its own arbitrator on the same day as receiving the notice of claim from P) satisfied this test and so was entitled to an extension. P and R had both delayed unreasonably (from the time of receipt of notice of claim) in the appointment of an arbitrator: they ought to have achieved this within three days. The limited scale of the delay, and the absence of any prejudice resulting from it (other than the loss of a time bar defence down the chain) did not affect the refusal of relief.

In *Haven Insurance Co Ltd v EUI Ltd (t/a Elephant Insurance)*,[59] the parties were both motor insurers and members of the Motor Insurers' Bureau (MIB). Article 75(6)(a) of the MIB's Articles of Association required E to serve the notice of arbitration within 30 days of being notified of a committee's decision. H argued that E's notice was out of time. E argued that, by reason of an accepted practice, its notice was timely.

At first instance, the judge held that E's notice was out of time because it was mistaken as to the date from which the time limit ran, but granted E an extension of time under section 12(3)(a). H appealed, submitting that a unilateral mistake was insufficient to trigger relief under section 12, that E had been guilty of a negligent omission, and that it was not just to grant relief. The Court of Appeal dismissed that appeal.

Again, the court applied the test adopted by Hamblen J in *SOS Corporación Alimentaria SA v Inerco Trade SA*[60] (above). E had believed "reasonably, if wrongly" that time ran from a certain date. Thus, the test was satisfied. As

55 *P v Q*, para 48.
56 [2010] EWHC 162 (Comm); [2010] 2 Lloyd's Rep 345.
57 *P v Q*, para 63.
58 *P v Q*, para 65.
59 [2018] EWCA Civ 2494; [2019] Lloyd's Rep IR Plus 7.
60 [2010] EWHC 162 (Comm); [2010] 2 Lloyd's Rep 345.

regards unilateral mistake, there was no absolute bar to the granting of section 12 relief in the case of a unilateral mistake. As regards negligent omission, there was no absolute rule that section 12 relief would never be granted where the applicant had been guilty of a negligent omission. While ordinarily the court would be very unlikely to grant section 12 relief to a party that had missed a deadline through its own negligence, every case depends upon its own facts.[61]

As regards the justice of granting an extension, while E had taken a risk by delaying, it had done so in the context of widely accepted custom and practice. Moreover, although H had suffered prejudice by releasing its reserve in the belief that E's time for appealing had expired, it too had taken a risk in that regard in that it had failed to consider the possibility of an extension of time being granted to E under section 12.[62]

Section 9: stay of High Court proceedings

In *China Export & Credit Insurance Corporation v Emerald Energy Resources Ltd*,[63] the defendant applied under section 9 of the 1996 Act to stay proceedings before the English High Court on the ground that the proceedings were covered by an arbitration agreement. The defendant had entered into a farm-in and other agreements with the claimant. Those agreements provided for London arbitration.

The claimant had subsequently taken an assignment of a promissory note issued by the defendant. That note provided for English law and non-exclusive English jurisdiction. The claimant brought a claim in the English court against the defendant under the note. The defendant maintained that liability on the note had been replaced by a compromise agreement and that any claim by the claimant had to be brought on that agreement or pursuant to the arbitration clause in the farm-in agreements.

The court (Sir Richard Field, sitting as a Deputy High Court Judge) held that section 9(1) provided for two jurisdictional thresholds to be satisfied before a stay could be granted: (i) whether there was a concluded arbitration agreement; and (ii) whether the issue in the proceedings was a matter which under the arbitration agreement was to be referred to arbitration. In the latter regard, it was for the court, rather than the putative arbitral tribunal, to determine in the first instance whether there was arbitral jurisdiction (per *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamengorsk Hydropower Plant JSC*[64]).

> Section 9(1) provides for two jurisdictional thresholds to be satisfied before a stay can be granted: (i) whether there is a concluded arbitration agreement; and (ii) whether the issue was a matter which under the arbitration agreement was to be referred to arbitration

The judge determined further that whether an arbitration agreement had been effectively superseded by a subsequent consensual contractual process was part of the second threshold condition provided for in section 9(1) (ie point (ii) above). The court concluded that the fact that the defendant wished to run defences based on the terms of the farm-in agreements did not mean that the claim on the note was in respect of a matter agreed to be referred to arbitration.[65]

Sodzawiczny v Ruhan and Others[66] was a conventional decision by Popplewell J: for the purposes of section 9, where a "matter" which was to be referred to arbitration was instead brought in legal proceedings, the court should grant a stay of the proceedings unless satisfied that the arbitration agreement was null and void, inoperative, or incapable of being performed.

61 *Haven*, paras 57 to 58.
62 *Haven*, paras 60 to 63.
63 [2018] EWHC 1503 (Comm); [2018] 2 Lloyd's Rep 179.
64 [2013] UKSC 35; [2013] 2 Lloyd's Rep 281; [2013] 1 WLR 1889.
65 *China Export*, paras 43 to 60.
66 [2018] EWHC 1908 (Comm); [2018] 2 Lloyd's Rep 280.

In applying section 9, the judge stated that the court must determine: first, what is the "matter"; and secondly, whether it falls within the scope of the arbitration agreement. A "matter" constitutes any issue capable of being a dispute or difference which might fall within the scope of the arbitration agreement. In construing an arbitration clause, the assumption is that parties intend any dispute arising out of their relationship to be determined in the same forum. The nature and the substance of the claim and its issues need to be considered, rather than the way in which the issue is formulated in a pleading. Although that approach might lead to a fragmentation of proceedings, that was not a sufficient reason for departing from those principles).[67]

The seat and curial law

Atlas Power Ltd and Others v National Transmission and Despatch Co Ltd[68] was a dispute between power producers in Pakistan and a national grid company owned by the government. The producers had the benefit of an award from an LCIA tribunal, which had been made after the defendant company had refused to take further part in the arbitration on the basis that to participate would breach injunctive relief granted by a court in Pakistan. The central issue for the court was whether the seat of the arbitration was London so that the courts of England and Wales had exclusive supervisory jurisdiction. The defendant alleged that the courts of Pakistan had at least a concurrent jurisdiction, alternatively that the seat of the arbitration was Lahore giving the courts of Pakistan exclusive supervisory jurisdiction.

The defendant challenged the award under section 68, alleging that the arbitrator's decision to proceed to an award when the defendant could not participate was a serious irregularity. The defendant accepted that as a matter of English law, London as a seat would give the English courts exclusive supervisory jurisdiction but argued that the same was not true as a matter of the law of Pakistan, under which there would be at least concurrent jurisdiction for the court in Pakistan. Alternatively, the choice of London seat would be invalid under Pakistani law if that choice excluded the concurrent jurisdiction of the Pakistani courts.

The court rejected the defendant's challenge. The court reiterated that the choice of London as the seat determined the curial law of the arbitration and accordingly the application of mandatory provisions of the 1996 Act. The choice of seat is "akin to an exclusive jurisdiction clause" giving the English courts exclusive supervisory jurisdiction. Otherwise, there would be the possibility of more than one jurisdiction entertaining challenges to an award.

The court had no hesitation in rejecting the defendant's alternative argument that it could challenge the validity of the choice of London seat. The court held that London was the appropriate seat pursuant to section 3 of the 1996 Act. In any event, the defendant had made no timely challenge to the relevant decisions and award. The defendant could not justify this failure on the basis that such a challenge would have constituted a submission to the jurisdiction of the arbitrator because such an argument was clearly wrong.

Anti-suit injunctions

Sabbagh v Khoury and Others[69] was in many respects the reverse of the decision in *Atlas Power*. It concerned a sibling dispute, following their father's death, as to ownership of a Middle East construction group. The daughter had brought claims before the Commercial Court. The two sons had brought claims in an arbitration in Lebanon. The sons had previously sought but failed to obtain an injunction in this jurisdiction staying the litigation in favour of the Lebanese arbitration.[70] The essential reason given by the Court of Appeal for refusing the stay was that the claims advanced here were not subject to any arbitration agreement binding on the daughter.

67 *China Export*, paras 36, 39, 41, 43 to 44 and 46.
68 [2018] EWHC 1052 (Comm); [2018] 2 Lloyd's Rep 113.
69 [2018] EWHC 1330 (Comm).
70 [2017] EWCA Civ 1120.

The daughter now sought an injunction restraining the defendants from prosecuting the Lebanese arbitration or seeking to enforce any award. The court has power to grant such an injunction under section 37 of the Senior Courts Act 1981 ("the SCA 1981") where it appears just and convenient to do so. But where the injunction seeks to restrain participation in an arbitration with a foreign seat offering an appropriate supervisory jurisdiction, the power can only be exercised in exceptional circumstances and with caution. Exercise of the power may be appropriate if continued pursuit of an arbitration will be vexatious and oppressive. There was a dispute between the parties as to the standard of proof required in relation to vexatious and oppressive conduct, namely as to whether it had to be established finally or to a high degree of probability. The judge was inclined to the latter but considered that nothing turned on the difference.

The defendants submitted that it was the Lebanese court which should determine the continuation or otherwise of the Lebanese arbitration. The court rejected this argument on the basis that the issue of whether the Lebanese arbitration had jurisdiction over the claimant's claims had already been decided by the Court of Appeal on the defendants' application and on the basis of expert evidence that there was no appropriate application which could be made to the Lebanese court. In light of this finding, the judge considered that the defendants' conduct was vexatious and oppressive and would lead to uncertainty, wasted resources and costs.

The court recognised the importance of not interfering with the jurisdiction of a foreign supervisory court where there is a valid arbitration agreement. Here, the defendants had put the question of whether there was such an agreement before the English courts previously and lost. There was therefore no foreign supervisory court with jurisdiction. The court granted the injunction sought. This decision is thought to be subject to appeal.

The applications in *Nori Holdings Ltd v Public Joint-Stock Company Bank Otkritie Financial Corporation*[71] arose out of disputes concerning the replacement of short-term secured loan agreements with a long-term unsecured bond issue and whether or not the defendant bank was the victim of a large-scale fraud. In support of its attempts to restore the loan agreements and security, the defendant commenced proceedings in Russia and Cyprus. The claimants in turn commenced a series of LCIA arbitrations relying on the arbitration clauses in the original security agreements, which were incorporated by reference in the agreements said to release the security.

The claimants sought anti-suit injunctions from the Commercial Court restraining the proceedings in Russia and Cyprus. The court granted injunctions to require the discontinuance of the Russian proceedings against the claimants but refused to restrain the Cypriot proceedings and deferred a claim for damages in respect of those proceedings.

The court acknowledged that arbitrators have power to grant anti-suit relief on a final or provisional basis as appropriate. The court held, however, that this power did not prevent the court exercising its jurisdiction under section 37 of the SCA 1981. The court pointed out that a defendant challenging a claim for an anti-suit injunction could seek a mandatory stay of the claim on the basis that it should be determined by the arbitrators. If no stay is sought, there was no reason why a court should not exercise its jurisdiction to grant anti-suit relief in line with the principles laid down in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC*[72] (above).[73] The court accordingly held that if the Russian and Cypriot proceedings were brought in breach of the arbitration clause, then a final mandatory order requiring the bank to discontinue the proceedings in Russia and Cyprus against the claimants would be appropriate.

The court held that the Russian proceedings were a breach of the arbitration clause (see above under *Jurisdiction: Scope of the arbitration agreement*, for a discussion of this point).

[71] [2018] EWHC 1343 (Comm); [2018] 2 Lloyd's Rep 80.

[72] [2013] UKSC 35; [2013] 2 Lloyd's Rep 281; [2013] 1 WLR 1889.

[73] *AES*, paras 58 to 60.

The court rejected a contention that *West Tankers Inc v Allianz SpA* (*The Front Comor)*[74] was no longer good law in light of amendments to the Brussels I Regulation[75] introduced in the Brussels Regulation Recast.[76] The court still has no power to grant an anti-suit injunction restraining proceedings in another member state. However, the arbitrators do have such a power; see *Gazprom OAO*.[77] Otherwise, it was for the Cypriot court to determine whether the proceedings there should go ahead.

Emmott v Michael Wilson & Partners Ltd[78] saw another round in the long-running multi-jurisdictional litigation between former business partners in a legal practice established in Kazakhstan with allegations of fraud, breach of fiduciary duty and unlawful diversion of business. Certain of the claims and counterclaims advanced were determined by arbitration with the result that there were sums due from MWP to Mr Emmott. MWP then obtained judgment in Australia against Mr Emmott's associates and took assignments from them of claims for contribution against Mr Emmott. Relying on the assignments, MWP then commenced further proceedings in Australia against Mr Emmott.

Mr Emmott sought an anti-suit injunction preventing MWP proceeding against him otherwise than pursuant to the arbitration agreements found in either his original agreement with MWP or in a cooperation agreement with his associates. Mr Emmott largely succeeded at first instance.[79] However, on appeal, the court reaffirmed the principles concerning the grant of anti-suit injunction[80] and held:

- The contribution claims were outside the scope of the arbitration agreements because they were brought by MWP as assignee of third-party rights and not as a party to the agreements which contained the arbitration agreement.
- Mr Emmott could not rely on the arbitration agreement in the cooperation agreement because to enable him to do so would run contrary to his assertions until then that he was not a party to the cooperation agreement.
- The decision as to whether the further Australian proceedings were vexatious and oppressive was a matter for the Australian courts, save to the extent that MWP were seeking to relitigate claims which it had lost in the arbitration or which they had consciously not advanced in the arbitration.

Security for costs

The applications in *Progas Energy Ltd and Others v The Islamic Republic of Pakistan*[81] arose out of bilateral investment treaty ("BIT") arbitrations relating to the import of LNG and measures taken by the Pakistani government which were said to have led to the expropriation of the claimants' assets. Those claims were dismissed by the tribunal, which also made costs orders in favour of the defendant, which remained unpaid. The claimants commenced section 68 challenges alleging a failure by the tribunal to deal with all the issues put before it. The defendant sought security for costs of the section 68 challenge as well as security for its costs and interest awarded in the arbitration. The notable feature of the history is that the claimants' costs were funded by a third-party litigation funder. There was no dispute between the parties that the key question was whether the party bringing the section 68 challenge had sufficient assets and whether those assets were available to meet any order for costs.

74 Case C-185/07 [2009] ECR I-663; [2009] 1 Lloyd's Rep 413; [2009] AC 1138.
75 Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
76 Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
77 Case C-536/13 [2015] 1 Lloyd's Rep 610; [2015] 1 WLR 4937.
78 [2018] EWCA Civ 51; [2018] 1 Lloyd's Rep 299.
79 [2016] EWHC 3010 (Comm); [2017] 1 Lloyd's Rep 21.
80 *Emmott* (CA), paras 35 to 40.
81 [2018] EWHC 209 (Comm); [2018] 1 Lloyd's Rep 252.

The court rejected an argument that it was unfair to order security in circumstances where the defendant had by its unlawful acts caused the claimants' impecuniosity, because that argument was contrary to the findings in the award. The court also rejected the claimants' argument that an order for security would stifle the claim. The claimants had funding from a litigation fund. There was no question of the fund being stifled. Similarly,

> There must be something about the making of the challenge which makes an order for security appropriate. Section 70(7) ought not to be used as a substitute for the enforcement regime

the court held that the possibility of a costs order under section 51 of the SCA 1981 against a non-party funder was not a substitute for an order for security for costs. Security enabled a defendant to recover any costs subsequently awarded without delay or other difficulty. Accordingly, the court ordered the claimants to provide security for the defendant's costs of the section 68 challenge.

The court then turned to the defendant's application under section 70(7) of the 1996 Act for security for its costs of the award and interest.

In the context of section 68, the court accepted that this required the defendant to establish that the section 68 challenge prejudiced the ability of the defendant to enforce the award or diminished the claimants' ability to honour the award. The court accepted the claimants' submission that security could not be ordered if its effect was to put the defendant in a better position to enforce the award than it would have been if no section 68 challenge had been mounted and that there was no evidence of any attempt by the claimants to dissipate their assets.

The defendant sought to advance a further argument, which, it said, distinguished this case from other applications for security, namely that security was appropriate in circumstances where the claimant was funded by a commercial funder, who had accepted no responsibility for the adverse costs order made against the claimants by the tribunal. The court rejected this argument and confirmed that the approaches to section 70(7) are the same, irrespective of whether a commercial funder is involved. There must be something about the making of the challenge which makes an order for security appropriate. Section 70(7) ought not to be used as a substitute for the enforcement regime. The court accordingly refused an order for security in relation to the costs of the award and interest.

SECTION 68

James M Turner QC and Paul Toms

2018 saw the usual plethora of failed challenges under section 68 of the 1996 Act. As described below,[82] the courts are now looking at clamping down on hopeless applications for section 68 relief.

The cases

In *X v Y*,[83] the application was brought under section 68(2)(a) (failure to comply with section 33 duty) and section 68(2)(d) (failure to deal with all issues before it). The application was rejected on the grounds that:

(1) The claimant should have sought section 57(3)(a) clarification before making its section 68 challenge (as required by section 70(2)(b)). Compare the position in the *Daewoo*[84] case discussed on page 10 above.
(2) Clarification of ambiguity was within both letter and spirit of article 27.1 of the LCIA Rules 1998 (which governed the reference) (*Xstrata Coal Queensland Pty Ltd v Benxi Iron & Steel (Group) International Economic & Trading Co Ltd*).[85]
(3) Article 27.1 of LCIA Rules did not oust or exclude section 57(3) powers – the Rules were contractually permissive and not exclusionary.
(4) Arguments of failure to take account of evidence were impermissible attacks on tribunal's evaluation of evidence (*UMS Holdings Ltd v Great Station Properties SA*[86]).
(5) Argument of failure to deal with an issue of whether the contract was intended to create legal relations was an attack on tribunal's legal conclusions, disguised as a procedural failure. Any lack of clarity was the result of how the applicant had argued the case (*A v B*[87] and *New Age Alzarooni 2 Ltd v Range Energy Natural Resources Inc*[88]).

Reliance Industries Ltd and Another v The Union of India[89] was a multi-limbed application under sections 67 to 69 giving rise to a lengthy judgment.

(1) First, under section 68(2)(a) and (c), was a challenge to a construction argument that, the claimant said, had been introduced for the first time in the majority's reasons. The court rejected an attempt to suggest a real difference between:
    (a) article 15(1) of the UNCITRAL Rules (under which the arbitration was conducted), requiring "each party [to be] given a full opportunity of presenting his case"; and
    (b) section 33(1)(a) of the 1996 Act, requiring only a "reasonable" opportunity.

    Article 15 did not require a greater than reasonable opportunity. The challenge failed, on what have become classic "building blocks" grounds (*ABB AG v Hochtief Airport GmbH*[90]).

> 2018 saw the usual plethora of failed challenges under section 68 of the 1996 Act. The courts are now looking at clamping down on hopeless applications for section 68 relief

(2) Second, under section 68(2)(a), (b) or (c) and section 67, came a challenge to the tribunal's recourse to pre-contractual negotiations to construe a contractual provision, despite the tribunal having – in a previous award – ruled out such recourse. The challenge was rejected on every ground, the principal point being

82 With thanks to Simon Rainey QC, author of the article from which the text, starting on page 21 below, is adapted.
83 [2018] EWHC 741 (Comm).
84 *Daewoo Shipbuilding & Marine Engineering Co Ltd v Songa Offshore Equinox Ltd and Another* [2018] EWHC 538 (Comm); [2018] 1 Lloyd's Rep 443.
85 [2016] EWHC 2022 (Comm).
86 [2017] EWHC 2398 (Comm); [2017] 2 Lloyd's Rep 421.
87 [2017] EWHC 596 (Comm); [2017] 2 Lloyd's Rep 1.
88 [2014] EWHC 4358 (Comm).
89 [2018] EWHC 822 (Comm); [2018] 1 Lloyd's Rep 562.
90 [2006] EWHC 388 (Comm); [2006] 2 Lloyd's Rep 1.

that the earlier award had not determined the admissibility of such evidence for the purpose for which it was admitted in the award that was being challenged. The applicant had moreover specifically addressed the point in submissions to the tribunal, which would have reached the same conclusion in any event.

(3) The third, under section 69, challenged the tribunal's finding of an estoppel. The court rejected this also, finding no arguable error of law. It also rejected an alternative challenge under section 68, holding that there was no procedural irregularity.

(4) Fourth, under section 68, was a (rare) successful challenge to an express omission to address an issue which, the tribunal wrongly thought, "no longer falls for determination" because of its conclusion on the estoppel point. The very fact that the omission was explicit underscores the difficulty of such challenges where the omission is itself disputed.

(5) Next was a further section 68 challenge which foundered on the court's findings that the applicant had had a sufficient opportunity to address the point complained of.

(6) Sixth was a challenge under sections 67 and 68 to the tribunal's ruling that it had no jurisdiction to adjudicate on the lawfulness of a foreign state's legislative acts, even where the state in question was party to the arbitration (dicta of Lord Neuberger in *Belhaj v Straw*[91] followed).

(7) Seventh was a challenge under section 68(2)(d) to the tribunal's supposed failure to address one of the applicant's quantum arguments. The court rejected this, holding that the "fair reading of the Award is not that the Tribunal had overlooked the argument or failed to deal with it, but rather that it simply rejected it".[92]

(8) Eighth was a challenge to a direction that the applicant produce documents to enable an account to be made of an aspect of quantum. That, too, was rejected by the court.

(9) The ninth and final challenge was to the tribunal's reservation of an issue, rather than its resolution in the applicant's favour. The court rejected this challenge also, as being within the tribunal's "general power to make an award which was not determinative of every issue before it pursuant to section 47(2) of the 1996 Act and article 32(1) of the UNCITRAL Rules".[93]

Navigator Spirit SA v Five Oceans Salvage SA (The Flag Mette)[94] is a graphic illustration of the proposition established by *The Magdalena Oldendorff*:[95] the question whether a party has been given a fair opportunity to deal with a point must be answered from the point of view of the arbitral tribunal. Thus where the tribunal appreciates that a party has missed a point, it should be raised with that party; but the tribunal is under no duty to do so if it does not appreciate that the point has been missed. On the facts, the arbitrator reasonably thought he had raised the point; and counsel reasonably thought that the point raised was a different one; there was therefore no breach of section 33. The court also made observations regarding the nature of LOF salvage arbitration and held that "it is impossible to say that the conduct of the … arbitrator was so far removed from what could reasonably be expected of the arbitral process that justice calls out for it to be corrected".[96] The court also found no substantial injustice, in circumstances where the applicant was unable to say how the arbitrator might have reached a different conclusion, had the appellant addressed him on the point in question. The application (variously couched under section 68(2)(a) to (c)) was rejected.

In similar vein was *Grindrod Shipping Pte Ltd v Hyundai Merchant Marine Co Ltd*.[97] It was alleged that the tribunal had failed to comply with its duties under section 33 when granting an award on paper dismissing a claim under section 41(3) for inordinate and inexcusable delay on the part of the claimant. It was said that the tribunal had founded its award on a specific item of prejudice (namely the costs of providing security for the claim) which was not relied upon as a head of serious prejudice within section

91 [2017] UKSC 3; [2017] AC 964.
92 *Reliance*, para 140.
93 *Reliance*, para 158.
94 [2018] EWHC 1108 (Comm); [2018] 2 Lloyd's Rep 391.
95 *Bandwidth Shipping Corporation v Intaari (The Magdalena Oldendorff)* [2007] EWCA Civ 998; [2008] 1 Lloyd's Rep 7.
96 *Navigator Spirit*, para 52.
97 [2018] EWHC 1284 (Comm); [2018] 2 Lloyd's Rep 121.

41(3)(b) but rather only as a matter going to the tribunal's discretion to make an award dismissing the claim. The award was accordingly challenged under section 68(2)(a). Sir William Blair held that "the tribunal was not bound by the head under which the parties raised a point"[98] and that the points relied upon by the tribunal were "in play" and "in the arena" (being the language used in the case law when considering this type of alleged irregularity).[99] The application under section 68(2)(a) accordingly failed on the classic "building blocks" ground referred to above in *Reliance Industries*.

A more striking (and, indeed, successful) example of a challenge under section 68(2)(a), based on a breach by the tribunal of its obligations under section 33, came in *Fleetwood Wanderers Ltd v AFC Fylde Ltd*.[100] The challenge arose out of the signing by one professional football club ("Fleetwood") of a player contracted to another. It was contended that the player had repudiated his contract of employment and Fleetwood had procured the breach. In addition to a claim for damages at common law, a claim for compensation was made under FIFA regulations alleged to have been applicable in England by Football Association rules. The sole arbitrator held that the common law claim failed on causation grounds, but awarded compensation under the FIFA regulations. Prior to issuing the award, and without notifying the parties, the arbitrator had both approached the FA to ask if it had done anything to incorporate the regulations and carried out his own research.

The court unsurprisingly had little difficulty in holding that those activities "without at least sharing the information with the parties and giving them an opportunity to make representations"[101] constituted an irregularity by reference to the authorities identified.[102]

The court concluded[103] that the irregularity had caused the applicant substantial injustice by reference to the approach set out in *Maass v Musion Events Ltd*,[104] namely whether "the irregularity in the procedure caused the arbitrators to reach a conclusion which, but for the irregularity, they might not have reached, as long as the alternative was reasonably arguable".[105]

The court considered whether it was appropriate to set aside or declare the award of no effect under section 68(3), as opposed to remitting the matter to the tribunal to re-consider his award on this part of the claim in the light of further submissions (and possibly evidence). The court set out four reasons for concluding that remission was appropriate,[106] including that the arbitrator had been motivated to achieve the correct outcome, as he perceived it, and there was no suggestion of bias.

In *No Curfew Ltd v Feiges Properties Ltd*[107] an application was made under section 68(2)(b) (exceeding powers) on the basis that tribunal had amended its award without power to do so under section 57(3)(a). Rejecting the application, the court held that:

(1) The error in question (misunderstanding the evidence) was not within section 57(3)(a): it was an error of thought process rather than an error in expressing that thought (*Mutual Shipping Corporation of New York v Bayshore Shipping Co of Monrovia (The Montan)*;[108] *Gannet Shipping Ltd v Eastrade Commodities Inc*[109]).
(2) There was therefore an irregularity under section 68(2)(b).
(3) However, to undo the correction would cause substantial injustice to the defendant, and it could not therefore be said that the irregularity had caused injustice to the applicant (*CNH Global NV v PGN Logistics Ltd*[110]).

An unusual lis pendens issue arose in *SCM Financial Overseas Ltd v Raga Establishment Ltd*.[111] This was a case in which a Ukrainian court was seised with the same question as the tribunal.

98 *Grindrod*, para 81.
99 *Grindrod*, para 87.
100 [2018] EWHC 3318 (Comm); [2019] Lloyd's Rep Plus 7.
101 *Fleetwood*, para 39.
102 *Fleetwood*, para 35.
103 *Fleetwood*, para 41.
104 [2015] EWHC 1346 (Comm); [2015] 2 Lloyd's Rep 383.
105 *Fleetwood*, para 40.
106 *Fleetwood*, para 47.
107 [2018] EWHC 744 (Ch).
108 [1985] 1 Lloyd's Rep 189; [1985] 1 WLR 625.
109 [2002] 1 Lloyd's Rep 713; [2002] 1 All ER (Comm) 297.
110 [2009] EWHC 977 (Comm); [2009] 1 CLC 80.
111 [2018] EWHC 1008 (Comm); [2018] 2 Lloyd's Rep 99.

The tribunal had been asked to defer its decision until the Ukrainian court had issued its judgment but, with no information as to when that would be, decided to proceed to publish its award. On the facts, the decision reached by the tribunal was within its wide discretion and was not unfair. No breach of section 33 was made out and the section 68 application failed.

Procedure

Simon Rainey QC and Paul Toms

Several cases in 2018 addressed procedural aspects of section 68 challenges. In *Orascom TMT Investments Sarl v Veon Ltd*[112] (an unsuccessful application under section 68(2)(d) where it was alleged that the tribunal had failed to deal with the issue of whether a settlement was unlawful under Italian law), the court gave guidance as to what matters should be included within claim forms and witness statements.

(1) As to the former, in the event that there is no specific order for an exchange of statements of case, the claim form should be "a sufficiently detailed and particularised statement of case to enable, in the first place, the defendant to the challenge, and then, ultimately, the judge dealing with the matter, to see precisely the nature of the challenge, the grounds upon which it is said to arise and, as a result, the particular questions that will need, or may need, to be dealt with at any hearing".[113] As made clear by Males J in *T v V and Another*,[114] the claim form also needs to "make clear exactly what is said to constitute the irregularity" and "to make clear the nature of the substantial injustice which the claimant claims to have suffered".[115]

(2) As for witness statements, they "should contain evidence, not comment or argument. They are not the proper vehicle for setting out the analytical case to be advanced before the court".[116] (See also the comments of Andrew Baker J in *Exportadora de Sal*,[117] addressed above under *Jurisdiction – section 67 challenge*.)

Paragraph O8.5 of the Commercial Court Guide gives the Commercial Court the power to summarily determine section 68 challenges either on the court's own initiative or on the application of the other party. The court may dismiss the section 68 challenge summarily if it is satisfied that it has no real prospect of success. In the event that the application is dismissed summarily, the applicant has the right to apply to set aside the order "and to seek directions for the hearing of the application". The Guide further provides that if there is a hearing and the application to set aside is dismissed, the court may consider whether it is appropriate to make an indemnity costs order.

Witness statements "should contain evidence, not comment or argument. They are not the proper vehicle for setting out the analytical case to be advanced before the court"

In *Midnight Marine Ltd v Thomas Miller Speciality Underwriting Agency Ltd (The Labhauler)*,[118] the court considered the procedure that should apply where an application was made to set aside an order dismissing a section 68 challenge. It did so in the context of a hearing where the court approved a consent order for further witness statements and skeleton arguments in addition to those relied upon for the paper application and where significant legal costs were incurred. The court observed that "the application to set aside the dismissal on paper has been argued as fully as the section 68 application itself would have been".[119]

Males J suggested the following procedure should apply in most cases:

112 [2018] EWHC 985 (Comm).
113 *Orascom*, para 4.
114 [2018] EWHC 1492 (Comm); [2018] 2 Lloyd's Rep 215.
115 *T v V*, para 5.
116 *Orascom*, para 5.
117 [2018] EWHC 224 (Comm); [2018] 1 Lloyd's Rep 399, at paras 25 to 27.
118 [2018] EWHC 3431 (Comm); [2019] Lloyd's Rep Plus 14.
119 *Midnight Marine*, para 4.

> "hearings should be short, typically no more than 30 minutes; they should where possible be listed before the judge who has dismissed the application without a hearing; there should be no need for further written submissions in addition to those already provided by both parties save for the applicant to explain succinctly what is said to be wrong with the judge's reasons for dismissing the application without a hearing; and … in general respondents should not attend or, at any rate, should not recover their costs if they do."[120]

It can be anticipated that changes of some kind to the Commercial Court Guide will follow in due course.

That decision had been preceded by *Asset Management Corporation of Nigeria v Qatar National Bank*,[121] another case where the application to set aside the order summarily dismissing the section 68 challenge appears to have been approached by the parties (or at least the applicant) as if they were arguing the substantive section 68 application itself. In that case the court observed that the Commercial Court Guide did not entitle a party in all cases to an oral hearing of its application to set aside the summary dismissal of its section 68 application. However, the court said that where a hearing was sought by a party after the initial refusal on paper of its section 68 challenge, "it would usually be granted by the court unless the underlying application was seen as something akin to vexatious".[122]

While the court extolled the benefits of an oral hearing, it proceeded on the basis that the relevant question on such an application was whether the judge who had dismissed the application on paper had been correct to conclude that there was no real prospect of the section 68 challenge succeeding.

Finally, in this context, it should be noted that in *T v V and Another*[123] (above), the application to dismiss the section 68 challenge was initially made not by the other party to the arbitration

"Where a hearing was sought by a party after the initial refusal on paper of its section 68 challenge, "it would usually be granted by the court unless the underlying application was seen as something akin to vexatious"

but by the arbitrator. That application failed on paper. Of the arbitrator's application, Males J remarked that it was "somewhat unusual … The usual course – and, in my judgment, much the wiser course – is for an arbitrator to refrain from intervention in section 68 proceedings unless he or she has something specific to contribute".[124]

That should be the usual course because if the matter were otherwise suitable to be remitted, the independence and impartiality of the arbitrator might have been compromised. The position would be different if there was a specific attack on the conduct or integrity of the arbitrator or an application for payment by the arbitrator of the costs of the application; in those circumstances it would (or might) be appropriate for the arbitrator to intervene.

120 *Midnight Marine*, para 39.
121 [2018] EWHC 2218 (Comm).
122 *Asset Management*, para 41.
123 [2018] EWHC 1492 (Comm); [2018] 2 Lloyd's Rep 215.
124 *T v V*, para 10.

SECTION 69

James M Turner QC

In *Agile Holdings Corporation v Essar Shipping Ltd (The Maria)*,[125] permission to appeal had been granted under section 69. At the appeal hearing, the respondent sought to reopen an issue determined by the judge who had granted permission: whether the gateway requirement under section 69(3)(b) had been satisfied, ie that the issue was one which the tribunal had been asked to determine. The court rejected the attempt, holding that:

(1) There was no absolute bar to a party re-opening a point that had been determined at the permission stage.
(2) The court ought, however, to give considerable weight to the decision of the judge granting permission, particularly if there had been a hearing or the evidence before the appellate court was in substance the same.
(3) In this case, there was no basis for re-arguing the point, the permission judge having considered four sets of written submissions on pretty much the same evidential basis.

ENFORCEMENT OF AWARDS

Michael Howard QC

Introductory

This section is concerned with the enforcement in England and Wales of arbitration awards, whether English or foreign. An English arbitration award is one where the seat of the arbitration is England. The section is not concerned with the enforcement abroad of awards made in England or Wales, which will be governed by the local law of the country of enforcement.

English arbitration awards may be enforced in either of two ways. (i) The principal and simplest method is a direct application under section 66(1) of the 1996 Act for an order which in effect makes the award of the arbitration tribunal a judgment of the court. This is a summary procedure. It can be opposed, and distinct grounds for refusing enforcement must be demonstrated. (ii) Alternatively, the successful party may bring an action in the English court for enforcement of the contractual term, implied into every arbitration agreement, that the tribunal's award will be satisfied. This is a simple contractual claim, expressly preserved by section 66(4) of the 1996 Act, which will generally be within the jurisdiction of the English court. Actions like this are comparatively rare but may be appropriate in certain circumstances, such as where it is desired to enforce the award partly or wholly in some foreign jurisdiction.

Foreign arbitration awards may be enforced in the same way as English arbitration awards, pursuant to section 66. In many cases, however, such awards are covered by an international convention, most notably the New York Convention.[126] The enforcement of such awards is governed by sections 101 to 105 of the 1996 Act and is essentially straightforward, subject to the satisfaction of certain formal requirements. In addition, the award may be challenged on a number of grounds set out in section 103 of the Act. These grounds are exhaustive. The result is that New York Convention awards are difficult to challenge successfully.

Even more impermeable are the decisions of arbitration tribunals under the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), where arbitration awards are wholly immune to challenge by national courts, even on grounds of public policy. This statement may require qualification in the light of recent authority discussed below.

125 [2018] EWHC 1055 (Comm); [2018] Lloyd's Rep Plus 79.

126 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Interrelationship between awards under the ICSID Convention and EU law

From 1993 onwards, Romania was seeking to join the EU. In the following decade, with the encouragement of the European Commission, Romania sought to encourage inward investment by certain tax incentives. In *Micula and Others v Romania*[127] the appellants were Swedish investors who had invested substantial sums in an integrated food production operation in Romania. In 2002 Romania and Sweden entered into bilateral treaty arrangements which included mutual consent to the resolution of investor-state disputes by ICSID procedures. In 2004 Romania repealed nearly all of these tax incentives and the following year, the appellants began an ICSID arbitration. Romania, which became a member of the EU in 2007, argued, with the support of the European Commission which participated in the arbitration, that payment of compensation would amount to state aid illegal under EU law. In 2013 the ICSID tribunal made an award in favour of the appellants in a sum which was the equivalent of more than £170 million at the time of the appeal.

The High Court: (a) granted a stay of enforcement of that award; and (b) refused to order Romania to provide security for it. The Court of Appeal dismissed the subsequent appeal so far as it related to the stay, but allowed it in relation to the request for security.

The first ground of appeal was that the decision of the ICSID tribunal in favour of the investors was res judicata and that the decision accordingly overrode the ruling of the Commission on the question of whether or not the enforcement of the award would amount to a breach of the anti-subsidy provisions of EU legislation. The appellants argued that *Kapferer v Schlank & Schlick GmbH*[128] established that domestic rules of res judicata take precedence in cases of conflict between domestic court decisions (or registered awards) and EU law. Romania and the Commission argued that a decision only became res judicata from the completion of any annulment proceedings and not from the handing down of the award; but the Court of Appeal, like the judge, rejected this contention. Nonetheless, the court held that the domestic rules of res judicata cannot interfere with the effective control of state aid, in line with the decision of the ECJ in *Klausner Holz Niedersachsen GmbH v Land Nordrhein-Westfalen*.[129]

The second and third grounds of appeal concerned the question of whether or not there was a conflict between the court's obligations under the 1996 Act which gave effect to the ICSID Convention and its duties in respect of EU law. Arden and Leggatt LJJ held that the judge was wrong to hold that EU law applied to the registration of the award merely because the UK was a member of the EU; but that a stay of enforcement was rightly granted because that was consistent with the purposes of ICSID. Hamblen LJ held that there was no conflict, but that a stay should be granted because the enforcing court would itself be acting unlawfully if it contradicted the Commission's prohibition on satisfying the award. Arden LJ for her part considered that article 351 of the Treaty on the Functioning of the European Union ("TFEU") should normally be considered when there was a request for the stay of enforcement of a duly registered ICSID award.

Nonetheless, it was held that Parliament is unlikely to have intended the 1996 Act to have the effect that registered ICSID awards should fall within the scope of a later international treaty (which does not expressly affect the UK's ICSID Convention obligations) by the mere procedural step of registering the award under the 1996 Act. It would be inconsistent with the ICSID Convention if a national court could refuse to enforce an award on the ground that, if the award had been a domestic judgment, giving effect to it would be contrary to a provision of national law. For these purposes, EU law was in no different a position.

The Court of Appeal reversed the decision of Blair J[130] on the security question and ordered that Romania

127 [2018] EWCA Civ 1801.
128 Case C-234/04; [2006] ECR I-2585.
129 Case C-505/14; EU:C:2015:742.
130 [2017] EWHC 1430 (Comm).

should secure the award as a condition of being granted the stay of enforcement of the award until the EU proceedings on the question of the alleged infraction of the subsidy obligations were resolved or until a further order of the court in the meantime. CPR 40.8A gives the court discretion to stay execution of final judgments and this must apply to ICSID awards on registration, pursuant to the 1996 Act. The provision of security by Romania would not breach the decision of the Commission.

State immunity and the enforcement of awards

In *PAO Tatneft v Ukraine*,[131] Tatneft sought to enforce an arbitration award against Ukraine. Tatneft had participated in the creation of a Ukrainian oil company called Ukrtatnafta, the other major shareholders being Tatarstan and Ukraine. Tatneft's participation arose out of a bilateral investment treaty (the BIT) between the governments of Russia and Ukraine. Subsequently, two other entities, AmRuz and Seagroup, acquired shareholdings, in each case of a little less than 10 per cent, and these were subsequently acquired by Tatneft. Action by the Ukrainian government caused those shares to be returned to Ukrtatnafta and sold to third parties.

Meanwhile in 2007 the company's Kremenchug refinery was seized by the Ukrainian court bailiff, and it was Tatneft's case that this was part of a criminal adventure by a Ukrainian oligarch with connections to the Ukrainian government. This event caused Tatneft to serve a Notice of Dispute under the BIT. An arbitration took place in two stages. First, there was a challenge to the tribunal's jurisdiction; and when this was rejected, the tribunal proceeded to a "merits award" in July 2014. (The jurisdictional challenge rejected by the tribunal did not involve consideration of a state immunity claim.) In the merits award, it was held that Ukraine had breached the obligation to treat Tatneft fairly and equitably in relation to its own and AmRuz's and Seagroup's shares in Ukrtatnafta. Ukraine was ordered to pay Tatneft US$112 million plus interest.

In August 2017 Tatneft obtained an order from the English High Court allowing enforcement of the merits award which was served in October. In January 2018 Ukraine applied to set aside the enforcement order. It invoked the doctrine of state immunity.

Tatneft submitted that Ukraine's arguments were jurisdictional, in that they were concerned with whether Ukraine had, in accordance with section 9 of the State Immunity Act 1978, waived its immunity by a contractual submission in the arbitration agreement. On the analogy of sections 67 and 73 of the 1996 Act they contended that such jurisdictional arguments should have been raised before the arbitration tribunal. This submission was rejected on the basis that nothing in the 1978 Act suggests that there is any restriction on the state's claim to immunity by reference to what was argued in front of an arbitral tribunal. Accordingly, the court was bound to give effect to section 1 of the 1978 Act unless Ukraine had agreed in writing to submit a dispute to arbitration within section 9.

Ukraine argued that the specific disputes resolved by the tribunal in the merits award fell outside the scope of its consent to arbitration as contained in the Russia-Ukraine BIT. The arbitrators had accepted Tatneft's contention that it was entitled to rely on the fair and equitable treatment standard of protection contained in the Ukraine-UK BIT on the basis of the "most favoured nation" provision contained in article 3(1) of the Russia-Ukraine BIT.

Before the English courts, Ukraine argued that the Russia-Ukraine BIT did not expressly provide for the fair and equitable treatment standard of protection and that this therefore was not within the scope of the arbitration agreement contained in article 9. The English court rejected this contention. The wording used in article 9 of the Russia-Ukraine BIT ("in the case of any dispute … which may arise in connection with the investments") was broad enough to show that Ukraine had agreed to refer any dispute to arbitration. The question of whether Ukraine should have afforded Tatneft

131 [2018] EWHC 1797 (Comm); [2018] 2 Lloyd's Rep 403.

the protection of the fair and equitable treatment standard was therefore a dispute in connection with Tatneft's investments in Ukrtatnafta, which fell within the scope of Ukraine's consent to arbitration and was therefore a merits issue to be decided by the arbitral tribunal.

The second argument deployed by Ukraine was that the AmRuz and Seagroup Shareholdings did not amount to "investments" as defined in article 1(1) of the treaty, because the assets in question were an American and a Swiss company, and because the payment went to the shareholders rather than directly into Ukraine. The court, however, pointed to article 1(1) of the Russia-Ukraine BIT which defined investments as including "assets and intellectual property *of all kinds* that are invested by an investor" (emphasis supplied). These disputes too, therefore, fell within the scope of the arbitration agreement. There was no requirement for the direct commitment of capital into Ukraine by Tatneft.

Finally, Ukraine argued that the investment by AmRuz and Seagroup were made before the alleged breach and that in any event the purchase of the AmRuz and Seagroup Shareholdings was specifically designed to bring the losses of those companies within the scope of the arbitration. Butcher J rejected both these arguments, the first because the timing argument failed on the facts and the second because the argument amounted to a possible substantive defence, that is, within the scope of the tribunal's jurisdiction.

Ukraine also argued that Tatneft had not complied with its duty of full and frank disclosure when making its application to allow enforcement of the merits award because it had failed to alert the English court: (a) to the possibility that Ukraine might put forward state immunity arguments; and (b) to the existence of parallel enforcement proceedings before the courts of France, the United States and Russia which it was said might have resulted in an inter partes hearing. Butcher J rejected these arguments too. This case is thought to be subject to appeal.

In *Boru Hatlari Ile Petrol Taşima AŞ and Others v Tepe Insaat Sanayii AS*,[132] Tepe Insaat Sanayii AS ("Tepe"), a Turkish construction company, entered into two contracts with Boru (also known as Botaş Petroleum Pipeline Corporation), a crude oil transportation company for the construction of the Baku-Tbilisi-Ceyhan crude oil pipeline. Botaş is a Turkish state-owned enterprise ("SOE"). Disputes which arose when Botaş terminated the contract were referred to two ICC arbitrations in Paris. It was held that the termination was unlawful and Tepe was awarded damages approaching US$100 million which Botaş failed to honour.

> The Privy Council held that state immunity does not automatically extend to the property of state-owned entities. Such property is not in general "property of a state" that is immune from enforcement

Tepe began proceedings in Jersey (whose law incorporates the English State Immunity Act 1978) to enforce against the shares owned by Botaş in its two Jersey subsidiary companies, Turkish Petroleum International Co Ltd and Botaş International Ltd. Botaş resisted enforcement on the ground that the property was the subject of state immunity. The Privy Council held that state immunity does not automatically extend to the property of state-owned entities. Such property is not in general "property of a state" that is immune from enforcement.

The case turned on the interpretation of section 13(2)(b) of the 1978 Act which immunised "the property of a state" against enforcement of judgments and awards. Botaş advanced two main arguments. First, it was said that the Jersey shares were the "property" of the Turkish state because, although not legally or beneficially owned by Turkey, the shares were not used or intended for use for commercial purposes, and therefore were used for sovereign purposes and immune from

[132] [2018] UKPC 31.

execution. Secondly, Botaş contended that the shares were to be treated as the property of the Turkish state because of the extent of the control exercised by Turkey over them.

The Privy Council rejected both arguments. First, it repudiated the idea that the question whether assets were the property of a state could be determined by reference to the underlying purpose for which they were held rather than who actually held them, as this would "tend to undermine the evident purpose behind the establishment of separate entities by states". If states could treat the assets of their SOEs as the state's own assets when convenient, it would destroy the distinction between the state and its creature and the purpose of establishing separate SOEs would not be achieved.

The second argument, based on control, might appear at first sight to be obviously fallacious, but it was treated respectfully, though with reservations, by the Privy Council. There is academic commentary[133] on the United Nations Convention on the Jurisdictional Immunities of States and their Property, based on the travaux préparatoires, which at first sight lends support to the claim that the notion of "property of a state" encompasses possession or control. The Convention, the discussion which led up to it and the commentary on it all post-date the State Immunity Act by a decade or more and, it was held, do not assist in the construction of that Act. This argument is also open to the same objection as the first one, namely that it obliterates the distinction between the state and the SOE.

At all events, the Privy Council held that the question of what is the property of the state is a question for the local law where the property is situate. This is related to but separate from the Board's rejection of the argument that there is some independent and autonomous international concept of "property", and that under English law the mere fact that assets are ultimately under the control of the state does not mean that they therefore cease to belong to the commercial entity which formally owns them. They are therefore available for enforcement of awards (and judgments).

The Board went on to uphold the Jersey Court of Appeal's view that in any event, whatever degree of control was necessary to satisfy the test of control advanced by Botaş, the test was not satisfied in this case. *The Cristina*[134] was a special case where the state which had wrongfully requisitioned the ship had in fact exercised de facto control once they had on board their own appointed master. Nor does the decision in *USA v Dollfus Mieg et Cie SA*[135] justify a conclusion that Turkey had "control" over the shares, because in that case, as in the instant case, there was no management of the asset required. (There appears to be a considerable overlap between the holding that there was no possession and that there was no control.)

Public policy and fraud as affecting the enforceability of arbitration awards – section 103

In *RBRG Trading (UK) Ltd v Sinocore International Co Ltd*[136] Sinocore agreed to sell to RBRG 14,500 tons of rolled steel coils, to be shipped from China to Mexico by 30 July 2010. The contract contained an arbitration clause referring disputes to determination by CIETAC[137] under Chinese law in China. Payment of the sale price of US$12,616,000 was to be made by a letter of credit which conformed strictly with the sale contract. On RBRG's instructions such a letter of credit was issued; but it was later amended at RBRG's behest so that the shipment date was 20 to 30 July. The goods were shipped on 5 to 6 July and bills of lading bearing those dates were issued. On 22 July Sinocore's collecting bank requested payment from the issuing bank, presenting bills of lading dated 20 to 21 July. These had been forged in order to conform with the terms of the amended letter of credit.

133 O'Keefe and Brown, in *The United Nations Convention on Jurisdictional Immunities of States and their Property: A Commentary* (edited by O'Keefe and Tams) (OUP 2013).

134 [1938] AC 485.

135 [1952] AC 582.

136 [2018] EWCA Civ 838; [2018] 2 Lloyd's Rep 133.

137 China International Economic and Trade Arbitration Commission.

Sinocore terminated the contract on the grounds of the alleged breach of the contract by RBRG and resold the steel coils at a lower price. RBRG began an arbitration against Sinocore in China, the basis being that Sinocore had failed to comply with an inspection clause, and that it was to be inferred that the goods were of defective quality. Sinocore counterclaimed for damages, the basis being that RBRG had unilaterally amended the letter of credit. The tribunal found that there was no breach of the inspection clause, and that even if there had been, that was not the cause of the loss. It held that the cause of the loss was the fact that RBRG was in breach of contract in unilaterally causing the letter of credit to be amended. It awarded Sinocore damages and proceedings were brought in England by Sinocore to enforce that award. It is significant that the tribunal refused to award interest because of Sinocore's presentation of bills of lading which they knew to be misdated. The tribunal appears to have accepted, though it did not formally find, that the bills of lading had been fraudulently misdated. The English Court of Appeal considered that the issue of those bills was in order to have documents which conformed with the terms of the amended letter of credit.

The buyer argued that recognition and enforcement of the award should be refused under section 103 of the 1996 Act, which provides that the court may refuse to recognise or enforce a New York Convention award as being contrary to public policy. It was said that the test laid down by the Supreme Court in *Patel v Mirza*[138] governed the approach to public policy, and that applying the criteria laid down by that decision, the award should not be recognised. A second ground of appeal was that the sellers had caused their own loss by presenting the fraudulent bills of lading.

The Court of Appeal rejected both arguments. They stressed that "it is widely accepted that the public policy ground should be given a restrictive interpretation"[139] and went on to emphasise two important distinctions. The first is between English domestic public policy and international public policy. The second is between public policy which affects the contract and public policy which affects the award. *Patel v Mirza* had no direct relevance to the latter case. The court also held that where the arbitration tribunal has jurisdiction to determine the question of whether or not there was illegality and has concluded that there was none, the English court should generally not involve itself in any enquiry at all as to whether or not such illegality existed. Dicta of Waller LJ in *Soleimany v Soleimany*,[140] and in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd*[141] had suggested that there should be a limited inquiry, but the views of the majority in the latter case were preferred.

The main reason for overlooking the misconduct in the present case was that there was insufficient causal connection between the fraud or misconduct and the loss. It was the non-conforming letter of credit tendered by the buyer and not the forged bills which had caused the termination of the contract and the seller's failure to obtain payment. The attempted fraud had no effect. The buyer and its bank were not deceived and the seller obtained no benefit. There was no public policy to refuse to enforce an award based on a contract during the performance of which there had been a failed fraud attempt (see *National Iranian Oil Co v Crescent Petroleum Co International Ltd*[142]).

In *Stati and Others v The Republic of Kazakhstan*,[143] a Swedish arbitral tribunal had ordered Kazakhstan to pay damages in excess of US$500 million to the appellants, who applied to the Swedish court to set aside the underlying award on the ground that it had been obtained by fraud. The Swedish court declined to set aside the award, making no finding as to whether or not there had been fraud but deciding that that was irrelevant to the continued validity of the award. The award was a New York Convention award and the appellants sought to enforce the award in several jurisdictions including England where they obtained an enforcement order. Kazakhstan applied to set that order aside pursuant to section 103 of the 1996 Act. The appellants issued a Notice of Discontinuance of

138 [2016] UKSC 42; [2016] 2 Lloyd's Rep 300.
139 *RBRG*, para 25.
140 [1999] QB 785.
141 [1999] 2 Lloyd's Rep 65; [2000] QB 288.
142 [2016] EWHC 510 (Comm); [2016] 2 Lloyd's Rep 146.
143 [2018] EWCA Civ 1896; [2018] 2 Lloyd's Rep 263.

their enforcement proceedings and undertook not to attempt to have the award enforced within the jurisdiction. Kazakhstan sought to have the proceedings continued to the extent necessary to resolve the issue of fraud.

At first instance,[144] the Commercial Court had held that the claim for fraud was not an independent claim. Nonetheless, and somewhat inconsistently, the court set aside the notice of discontinuance and ordered that Kazakhstan's allegations of fraud in respect of the award should proceed to trial. The judge held that it would be useful to other courts to have the English court's determination of the fraud issue.

The holding that the claim was not an independent one was upheld. The fraud claim was a defence to the enforcement action, not an independent claim.[145] The Court of Appeal held that it followed in effect that the discontinuance was wholly effective. Unsurprisingly, the Court of Appeal reversed the decision to continue the enforcement proceedings for the purposes of obtaining findings on the fraud issue. The court held that the mere fact that a judgment might be useful to other courts in other countries was insufficient to justify the maintenance of the proceedings. Enforcement proceedings could not be maintained for some collateral purpose. As there was no possibility of the enforcement proceedings bringing about the enforcement of the award, there was no justification in allowing them to continue.

That means that an application for determination by the English court that English public policy had been infringed by the obtaining of the award (or, by a parity of reasoning, that there was some illegality in the conduct of the party seeking enforcement) could not succeed if it was not part of an active attempt to enforce the award. If it were the case that there had been a fraud on the English court itself, the position would be different. But that would be because the court "has the power to require the continuation of proceedings in order to determine whether its processes have been knowingly abused".[146] See also *Re Dalnyaya Step LLC (in liquidation) (No 2)*.[147]

In *Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd*[148] ("EEEL v VCL"), two Seychellois companies entered into six materially identical contracts with VCL for the construction of an hotel. Each such contract contained a disputes clause, clause 20. Clause 20.2 required disputes to be finally resolved by arbitration under ICC Rules.

An application for determination by the English court that English public policy had been infringed by the obtaining of an award (or, by a parity of reasoning, that there was some illegality in the conduct of a party seeking enforcement) could not succeed if it was not part of an active attempt to enforce the award

Clause 20.1 was entitled "Amicable settlement" and provided in part as follows:

> "Should any dispute arise between the Parties under or out of this contract … each party shall notify another [*sic*] of such dispute, and both parties shall try to settle such dispute amicably before any arbitration starts."

Disputes arose between the parties and EEEL terminated the contracts. On 9 July 2012 VCL issued notices of dispute, and EEEL subsequently initiated arbitration proceedings in which they were awarded €14.4 million and 80 per cent of their costs.

VCL challenged the award in France, Paris being the seat of the arbitration. They advanced three grounds which broadly corresponded to those relied on in the English proceedings (see below). The Cour d'Appel dismissed all of VCL's three grounds of challenge on 28 June 2016, and an appeal to the Cour de Cassation was subsequently

144 [2018] EWHC 1130 (Comm); [2018] 2 Lloyd's Rep 144.
145 *Stati* (CA), paras 22 to 24.
146 *Stati* (CA), para 64.
147 [2017] EWHC 3153 (Ch); [2018] Bus LR 789.
148 [2018] EWHC 2713 (Comm); [2019] 1 Lloyd's Rep 1.

abandoned. A challenge was also mounted on similar grounds in the courts of the Seychelles and was dismissed at first instance, but the Seychellois Court of Appeal allowed an appeal on the basis that the Seychelles had repudiated the New York Convention, so that (it was held) there could be no enforcement and no necessity for any ruling on the grounds of challenge.

EEEL had successfully obtained an order in August 2015 from the English High Court granting permission to enforce the arbitration award in England and Wales. However, VCL issued an application to set aside the order on 23 October 2015 pursuant to section 103 of the 1996 Act (and article V of the New York Convention). The proceedings were stayed on 14 June 2016 until the determination of the French Cour d'Appel.

VCL's application under section 103 was based on three grounds, substantially those which had already been canvassed in the French enforcement proceedings:

(1) The tribunal lacked jurisdiction because its composition was not in accordance with the parties' agreement (1996 Act, section 103(2)(e)).
(2) VCL was unable to present its case as the tribunal permitted EEEL to rely on a further expert report submitted after the hearing over VCL's objection, so that VCL were denied a proper opportunity to respond (section 103(2)(c)).
(3) EEEL interfered with a witness, Mr Egorov, who gave a statement to both sides but did not attend the hearing, so that enforcement of the award would be contrary to public policy (section 103(3)).

EEEL contended that none of the three grounds were made out. In addition, they argued that VCL was subject to an issue estoppel arising from the decision of the French court, which amounted to a final decision on the merits by a court of competent jurisdiction between the same parties on the same grounds.

The Cour d'Appel had held that the challenge to the jurisdiction of the arbitrator failed. Cockerill J held that this decision gave rise to an issue estoppel on that point. As she said, "[t]here is no reason in principle that issue estoppel cannot arise from 'rulings made by a foreign court in the course of enforcement proceedings including enforcement proceedings under the New York Convention'",[149] although she acknowledged that the doctrine has to be applied with care. The argument on the jurisdiction issue was said to be "exactly the same and with no differences"[150] from the argument made before, and ruled upon by, the French Cour d'Appel.

The court nonetheless dealt with the point on the merits and, like the arbitrator and the previous courts, held that the notice was sufficient if given by one party only. It said that the "purpose for which the clause obviously exists ... [is] to ensure that the parties know there is a dispute. Notification by one party serves that purpose; requiring both to serve a notice would serve no practical purpose and be a waste of time and costs".[151] There is room for doubt about this statement as a general proposition.[152] Even more dubious is the acceptance of the concession that the argument did not fall within section

149 *EEEL*, para 46(iii).
150 *EEEL*, para 59.
151 *EEEL*, para 78.
152 The terms of the original notice are not set out in the judgment; but it should perhaps be inferred that it covered the whole dispute. If, for example VCL's notice had alleged that EEEL were in breach of contract in terminating the contract, that would hardly give notice of EEEL's claim: (i) that a breach by VCL entitled them to terminate; and (ii) gave rise to a claim for damages. In such a case, it is far from obvious that the natural meaning of the words of clause 20(1) did not require the counterclaimant to give notice of the additional dispute. In a case where the issues were apparently fully argued out without protest, this may not be of much significance; but clauses of the general nature of clause 20(1) are fairly common, and it would be wrong to infer that the words "each party" generally did not have their ordinary meaning and require "each party" to serve a notice, at least when the disputes were different. Fortunately, perhaps, Ground 1 failed for other reasons.

103(2)(e) at all because it was not part of the "arbitral procedure". The fact that something is a precondition of the commencement of the arbitration does not mean that it is not part of the arbitral procedure, which must surely embrace all steps necessary to begin and proceed with the arbitration.

The second complaint is of no general significance because, although it was held that there was no issue estoppel, the court found as a fact that VCL had had ample opportunity to deal with the late expert evidence; and that in any event it made no difference to the result.

> It is always difficult to establish that public policy requires the court to refuse to enforce an arbitration award. This difficulty is enhanced when the award has been considered in the country of the seat of the arbitration, and has not been found to contradict the public policy of that country

The court dismissed VCL's contention in Ground 3 that enforcement would be contrary to public policy under section 103(3) as a result of the alleged witness interference. The discussion of public policy is scattered throughout the judgment.[153] The judgment is authority for the proposition (already well-established) that it is always difficult to establish that public policy requires the court to refuse to enforce an arbitration award. This difficulty is enhanced when the award has been considered in the country of the seat of the arbitration, and has not been found to contradict the public policy of that country. It is implicit, and must be the case, that there is no issue estoppel in relation to public policy, because public policy varies from state to state.

Nonetheless, the alleged shortcomings of the award were considered in the light of English public policy. The foundation of the decision appears to have been that the key point here was causation: had the alleged interference resulted in Mr Egorov not giving evidence? The court concluded "without hesitation" that causation was not made out. Mr Egorov did not claim he was prevented from appearing; there was no evidence VCL attempted to call Mr Egorov and that he refused; there was also evidence that VCL had taken the decision not to call Mr Egorov because it was unsure whether his testimony would be favourable. (It might be said that this is not a very weighty consideration in favour of upholding the award: if the witness had been bribed or offered a bribe by one party, the other party might be forgiven for entertaining doubts as to how favourable his evidence might be if he could be persuaded to give evidence at all.) Additionally, the court found that VCL had "manifestly failed to discharge the burden on them to show that the evidence would (or even might) have contributed substantially to a different outcome".[154]

Finally, the court held that, since VCL was aware of the alleged intimidation but declined to seek a ruling from the arbitrator on the point, it would not be appropriate for the court to refuse enforcement on that basis. Again, one would have thought that the question of whether the proceedings had been vitiated by the misconduct of one party towards or in conjunction with a witness was a matter for a supervisory authority. It is difficult to see what ruling the arbitrator could have made if it had been made out. He or she could hardly decline to make an award at all because of the misconduct of one of the parties, still less to make an award in favour of the other party. The arbitrator might hold that the witness's evidence was to be treated as of lower credibility, but it would hardly be proper to disregard all the evidence of the relevant witness, even when it was inherently credible or corroborated by other evidence. The soundest of this cluster of reasons is that the misconduct did not bring about the result.

One thing which does emerge clearly from this part of the decision is that: (i) in an appropriate case, interference with a witness in the proceedings may amount to misconduct which, as a matter

153 *EEEL*, paras 48 to 49, 110 to 112, 131 and 136.

154 *EEEL*, para 125.

of public policy, would debar the relevant party from enforcing an award in its favour; but (ii) it is only if the misconduct is causatively related to the decision which was reached in the arbitration that public policy may justify resistance to the enforcement of the award under section 103(3). This seems right even though the public policy which recoils from attempts to pervert the course of justice is equally offended whether the attempt to suborn a witness is or is not successful.

Another important aspect of the judgment is its emphasis on the importance of finality. In *Minmetals Germany GmbH v Ferco Steel Ltd*[155] Colman J said:

> "Just as great weight must be attached to the policy of sustaining the finality of international awards so also must great weight be attached to the policy of sustaining the finality of the determination of properly referred procedural issues by the courts of the supervisory jurisdiction."[156]

Cockerill J cited the long passage in which this dictum is set and returned to it in a later part of the judgment.[157] It seems therefore that though no issue estoppel arises from the finding as to public policy in a foreign court, such a finding will be a factor in determining what English public policy is in relation to the same question. It is difficult, with respect, to see how this can be correct. Apparently this is so even in relation to the decision of the courts of the Seychelles, but it is of very great significance in the case where there has been a decision by the court entrusted with the supervisory jurisdiction over the arbitration.[158] This means that the policy in favour of finality may trump the policy against misconduct. Not only is the finding of the supervisory court likely to affect the outcome (Colman J in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd*)[159], so is the failure of the arbitration tribunal to decide that the decision had been obtained by fraud, both in the case where that matter was put before the tribunal *and* in the case where it was not, but the complainant had knowledge of the facts necessary to found the argument.[160]

It is not obvious that the tactical considerations, which shape the conduct of the arbitration when a witness is known to be someone whose testimony may be influenced by extraneous or fraudulent considerations, should be brought before the arbitration tribunal. The same is true of the judgments on foreign courts on public policy questions. If it is English public policy which is relevant, it is hard to see how some other country's own general public policy can or should influence the result, especially in the context of enforcement proceedings which are necessarily confined to the rules of the court hearing the case.

155 [1999] 1 All ER (Comm) 315.
156 Page 661.
157 *EEEL*, paras 60 and 88.
158 *EEEL*, para 136.
159 [1999] QB 740 at page 784C.
160 *EEEL*, paras 131 to 136, citing Waller LJ in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [2000] QB 288 at page 309F.

Appendix: judgments analysed and considered in this Review

2018 judgments analysed

A v B (QBD (Comm Ct)) [2018] EWHC 1370 (Comm)

Agile Holdings Corporation v Essar Shipping Ltd (The Maria) (QBD (Comm Ct)) [2018] EWHC 1055 (Comm); [2018] Lloyd's Rep Plus 79

Allianz Insurance plc and Another v Tonicstar Ltd (CA) [2018] EWCA Civ 434; [2018] 1 Lloyd's Rep 389

Asset Management Corporation of Nigeria v Qatar National Bank (QBD (Comm Ct)) [2018] EWHC 2218 (Comm)

Atlas Power Ltd and Others v National Transmission and Despatch Co Ltd (QBD (Comm Ct)) [2018] EWHC 1052 (Comm); [2018] 2 Lloyd's Rep 113

Bond v Mackay (QBD (TCC)) [2018] EWHC 2475 (TCC); [2018] BLR 768

Boru Hatlari Ile Petrol Taşima AŞ and Others v Tepe Insaat Sanayii AS (PC) [2018] UKPC 31

Cavity Insulation Guarantee Agency Ltd v ThermaBead Ltd (QBD (TCC)) [2018] 11 WLUK 532

China Export & Credit Insurance Corporation v Emerald Energy Resources Ltd (QBD (Comm Ct)) [2018] EWHC 1503 (Comm); [2018] 2 Lloyd's Rep 179

Daewoo Shipbuilding & Marine Engineering Co Ltd v Songa Offshore Equinox Ltd and Another (QBD (Comm Ct)) [2018] EWHC 538 (Comm), [2018] 1 Lloyd's Rep 443

Dera Commercial Estate v Derya Inc (The Sur) (QBD (Comm Ct)) [2018] EWHC 1673 (Comm); [2019] 1 Lloyd's Rep 57

Dreymoor Fertilisers Overseas Pte Ltd v EuroChem Trading GmbH (QBD (Comm Ct)) [2018] EWHC 909 (Comm); [2018] 2 Lloyd's Rep 523

Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd (QBD (Comm Ct)) [2018] EWHC 2713 (Comm); [2019] 1 Lloyd's Rep 1

Emmott v Michael Wilson & Partners Ltd (CA) [2018] EWCA Civ 51; [2018] 1 Lloyd's Rep 299

Exportadora de Sal SA de CV v Corretaje Maritimo Sud-Americano Inc (QBD (Comm Ct)) [2018] EWHC 224 (Comm); [2018] 1 Lloyd's Rep 399

Flag Mette, The (Navigator Spirit SA v Five Oceans Salvage SA) (QBD (Comm Ct)) [2018] EWHC 1108 (Comm); [2018] 2 Lloyd's Rep 391

Fleetwood Wanderers Ltd v AFC Fylde Ltd (QBD (Comm Ct)) [2018] EWHC 3318 (Comm); [2019] Lloyd's Rep Plus 7

GPF GP Sarl v Republic of Poland (QBD (Comm Ct)) [2018] EWHC 409 (Comm); [2018] 1 Lloyd's Rep 410

Grindrod Shipping Pte Ltd v Hyundai Merchant Marine Co Ltd (QBD (Comm Ct)) [2018] EWHC 1284 (Comm); [2018] 2 Lloyd's Rep 121

Halliburton Co v Chubb Bermuda Insurance Ltd and Others (CA) [2018] EWCA Civ 817; [2018] 1 Lloyd's Rep 638

Haven Insurance Co Ltd v EUI Ltd (t/a Elephant Insurance) (CA) [2018] EWCA Civ 2494; [2019] Lloyd's Rep IR Plus 7

Jiangsu Shagang Group Co Ltd v Loki Owning Co Ltd (The Pounda) (QBD (Comm Ct)) [2018] EWHC 330 (Comm); [2018] 2 Lloyd's Rep 359

Labhauler, The *(Midnight Marine Ltd v Thomas Miller Speciality Underwriting Agency Ltd)* (QBD (Comm Ct)) [2018] EWHC 3431 (Comm); [2019] Lloyd's Rep Plus 14

Maria, The (Agile Holdings Corporation v Essar Shipping Ltd) (QBD (Comm Ct)) [2018] EWHC 1055 (Comm); [2018] Lloyd's Rep Plus 79

Micula and Others v Romania (CA) [2018] EWCA Civ 1801

Midnight Marine Ltd v Thomas Miller Speciality Underwriting Agency Ltd (The Labhauler) (QBD (Comm Ct)) [2018] EWHC 3431 (Comm); [2019] Lloyd's Rep Plus 14

Navigator Spirit SA v Five Oceans Salvage SA (The Flag Mette) (QBD (Comm Ct)) [2018] EWHC 1108 (Comm); [2018] 2 Lloyd's Rep 391

No Curfew Ltd v Feiges Properties Ltd (Ch D) [2018] EWHC 744 (Ch)

Nori Holdings Ltd v Public Joint-Stock Company Bank Otkritie Financial Corporation (QBD (Comm Ct)) [2018] EWHC 1343 (Comm); [2018] 2 Lloyd's Rep 80

Orascom TMT Investments Sarl v Veon Ltd (QBD (Comm Ct)) [2018] EWHC 985 (Comm)

P v Q; Q v R; R v S (QBD (Comm Ct)) [2018] EWHC 1399 (Comm); [2018] 2 Lloyd's Rep 452

PAO Tatneft v Ukraine (QBD (Comm Ct)) [2018] EWHC 1797 (Comm); [2018] 2 Lloyd's Rep 403

Pounda, The (Jiangsu Shagang Group Co Ltd v Loki Owning Co Ltd) (QBD (Comm Ct)) [2018] EWHC 330 (Comm); [2018] 2 Lloyd's Rep 359

Progas Energy Ltd and Others v The Islamic Republic of Pakistan (QBD (Comm Ct)) [2018] EWHC 209 (Comm); [2018] 1 Lloyd's Rep 252

RBRG Trading (UK) Ltd v Sinocore International Co Ltd (CA) [2018] EWCA Civ 838; [2018] 2 Lloyd's Rep 133

Reliance Industries Ltd and Another v The Union of India (QBD (Comm Ct)) [2018] EWHC 822 (Comm); [2018] 1 Lloyd's Rep 562

Sabbagh v Khoury and Others (QBD (Comm Ct)) [2018] EWHC 1330 (Comm)

SCM Financial Overseas Ltd v Raga Establishment Ltd (QBD (Comm Ct)) [2018] EWHC 1008 (Comm); [2018] 2 Lloyd's Rep 99

SEA2011 Inc v ICT Ltd (QBD (Comm Ct)) [2018] EWHC 520 (Comm); [2018] 1 Lloyd's Rep 463

Slovak Republic v Achmea BV Case C-284/16 (CJEU) EU:C:2018:158; [2018] 4 WLR 87; [2018] 2 CMLR 40

Sodzawiczny v Ruhan and Others (QBD (Comm Ct)) [2018] EWHC 1908 (Comm); [2018] 2 Lloyd's Rep 280

Sonact Group Ltd v Premuda SpA (The Four Island) (QBD (Comm Ct) [2018] EWHC 3820 (Comm)

Stati and Others v The Republic of Kazakhstan (QBD (Comm Ct) [2018] EWHC 1130 (Comm); [2018] 2 Lloyd's Rep 144; (CA) [2018] EWCA Civ 1896; [2018] 2 Lloyd's Rep 263

Sur, The (Dera Commercial Estate v Derya Inc) (QBD (Comm Ct)) [2018] EWHC 1673 (Comm); [2019] 1 Lloyd's Rep 57

T v V and Another (QBD (Comm Ct)) [2018] EWHC 1492 (Comm); [2018] 2 Lloyd's Rep 215

Uttam Galva Steels Ltd v Gunvor Singapore Pte Ltd (QBD (Comm Ct)) [2018] EWHC 1098 (Comm); [2018] 2 Lloyd's Rep 152

X v Y (QBD (Comm Ct)) [2018] EWHC 741 (Comm)

Judgments considered

A v B (QBD (Comm Ct)) [2017] EWHC 596 (Comm); [2017] 2 Lloyd's Rep 1

ABB AG v Hochtief Airport GmbH (QBD (Comm Ct)) [2006] EWHC 388 (Comm); [2006] 2 Lloyd's Rep 1

AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC (SC) [2013] UKSC 35; [2013] 2 Lloyd's Rep 281; [2013] 1 WLR 1889

Allianz Insurance plc and Another v Tonicstar Ltd (QBD (Comm Ct)) [2017] EWHC 2753 (Comm); [2018] 1 Lloyd's Rep 229

AmTrust Europe Ltd v Trust Risk Group SpA (CA) [2015] EWCA Civ 437; [2015] 2 Lloyd's Rep 154

AOOT Kalmneft v Glencore International AG (QBD (Comm Ct)) [2002] 1 Lloyd's Rep 128; [2001] CLC 1805

Bandwidth Shipping Corporation v Intaari (The Magdalena Oldendorff) (CA) [2007] EWCA Civ 998; [2008] 1 Lloyd's Rep 7

Belhaj v Straw (SC) [2017] UKSC 3; [2017] AC 964

Birkett v James (HL) [1978] AC 297; [1977] 2 All ER 801

CNH Global NV v PGN Logistics Ltd (QBD (Comm Ct)) [2009] EWHC 977 (Comm); [2009] 1 CLC 80
Company X v Company Y 17 July 2000, unreported
Cristina, The (HL) [1938] AC 485
Dalnyaya Step LLC (in liquidation), Re (No 2) (Ch D) [2017] EWHC 3153 (Ch); [2018] Bus LR 789
Emmott v Michael Wilson & Partners Ltd (QBD (Comm Ct)) [2016] EWHC 3010 (Comm); [2017] 1 Lloyd's Rep 21
Fiona Trust & Holding Corporation v Privalov (HL) [2007] UKHL 40; [2008] 1 Lloyd's Rep 254
Front Comor, The (West Tankers Inc v Allianz SpA)) (ECJ) Case C-185/07 [2009] ECR I-663; [2009] 1 Lloyd's Rep 413; [2009] AC 1138
Gannet Shipping Ltd v Eastrade Commodities Inc (QBD (Comm Ct)) [2002] 1 Lloyd's Rep 713; [2002] 1 All ER (Comm) 297
Gazprom OAO Case C-536/13 (CJEU) [2015] 1 Lloyd's Rep 610; [2015] 1 WLR 4937
Halliburton Co v Chubb Bermuda Insurance Ltd and Others (QBD (Comm Ct)) [2017] EWHC 137 (Comm)
K v S (QBD (Comm Ct)) [2015] EWHC 1945 (Comm); [2015] 2 Lloyd's Rep 363
Kapferer v Schlank & Schlick GmbH Case C-234/04 (ECJ) [2006] ECR I-2585
Klausner Holz Niedersachsen GmbH v Land Nordrhein-Westfalen Case C-505/14 (CJEU) EU:C:2015:742
Larsen Oil and Gas Pte Ltd v Petroprod Ltd (SGCA) [2011] SGCA 21; [2011] 3 SLR 414
Maass v Musion Events Ltd (QBD (Comm Ct)) [2015] EWHC 1346 (Comm); [2015] 2 Lloyd's Rep 383
Magdalena Oldendorff, The (Bandwidth Shipping Corporation v Intaari) (CA) [2007] EWCA Civ 998; [2008] 1 Lloyd's Rep 7
Maria K, The (Nagusina Naviera v Allied Maritime Inc) (CA) [2002] EWCA Civ 1147; [2003] 2 CLC 1
Micula and Others v Romania (QBD (Comm Ct)) [2017] EWHC 1430 (Comm)
Minmetals Germany GmbH v Ferco Steel Ltd (QBD (Comm Ct)) [1999] 1 All ER (Comm) 315
Montan, The (Mutual Shipping Corporation of New York v Bayshore Shipping Co of Monrovia) (CA) [1985] 1 Lloyd's Rep 189; [1985] 1 WLR 625
Mutual Shipping Corporation of New York v Bayshore Shipping Co of Monrovia (The Montan) (CA) [1985] 1 Lloyd's Rep 189; [1985] 1 WLR 625
Nagusina Naviera v Allied Maritime Inc (The Maria K) (CA) [2002] EWCA Civ 1147; [2003] 2 CLC 1
National Iranian Oil Co v Crescent Petroleum Co International Ltd (QBD (Comm Ct)) [2016] EWHC 510 (Comm); [2016] 2 Lloyd's Rep 146
New Age Alzarooni 2 Ltd v Range Energy Natural Resources Inc (QBD (Comm Ct)) [2014] EWHC 4358 (Comm)
Patel v Mirza (SC) [2016] UKSC 42; [2016] 2 Lloyd's Rep 300
Sabbagh v Khoury and Others (CA) [2017] EWCA Civ 1120
Soleimany v Soleimany (CA) [1999] QB 785
SOS Corporación Alimentaria SA v Inerco Trade SA (QBD (Comm Ct)) [2010] EWHC 162 (Comm); [2010] 2 Lloyd's Rep 345
Terna Bahrain Holding Company WLL v Al Shamsi (QBD (Comm Ct)) [2012] EWHC 3283 (Comm); [2013] 1 Lloyd's Rep 86
Trill v Sacher (CA) [1993] 1 WLR 1379; [1993] 1 All ER 961
UMS Holdings Ltd v Great Station Properties SA (QBD (Comm Ct)) [2017] EWHC 2398 (Comm); [2017] 2 Lloyd's Rep 421
USA v Dollfus Mieg et Cie SA (HL) [1952] AC 582
West Tankers Inc v Allianz SpA (The Front Comor) (ECJ) Case C-185/07 [2009] ECR I-663; [2009] 1 Lloyd's Rep 413; [2009] AC 1138
Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd (CA) [1999] 2 Lloyd's Rep 65; [2000] QB 288
Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd (QBD (Comm Ct)) [1998] 2 Lloyd's Rep 111; [1999] QB 740
Xstrata Coal Queensland Pty Ltd v Benxi Iron & Steel (Group) International Economic & Trading Co Ltd (QBD (Comm Ct)) [2016] EWHC 2022 (Comm)