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Case No: CA-2022-002432
Case No: CA- 2022-002530

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Butcher
[2022] EWHC 2641 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2023

Before:

LORD JUSTICE MALES
LORD JUSTICE NUGEE
and
LADY JUSTICE FALK

- -

Between:

NATIONAL IRANIAN OIL COMPANY	**Appellant/ Claimant**
- and -	
1) CRESCENT PETROLEUM COMPANY INTERNATIONAL LIMITED **2) CRESCENT GAS CORPORATION LIMITED**	**Respondents/ Defendants**

- -
- -

David Bailey KC, Jessica Sutherland & Frederick Alliott (instructed by **Eversheds Sutherland (International) LLP**) for the **Appellant**
Ricky Diwan KC, Tariq Baloch & Moeiz Farhan (instructed by **McDermott Will & Emery UK LLP**) for the **Respondents**

Hearing dates: 3, 4 & 5 July 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 13 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Males:

1. This is an appeal by the National Iranian Oil Company ("NIOC") against the summary dismissal of its application to set aside an arbitration award under section 67 of the Arbitration Act 1996 on the ground that the award was made without jurisdiction. The judge, Mr Justice Butcher, held that NIOC's section 67 application had no realistic prospect of success, but granted permission to appeal to this court.

2. The respondents, referred to together as "Crescent" except where it is necessary to distinguish between them, are Crescent Petroleum Company International Ltd ("CPCIL") and Crescent Gas Corporation Ltd ("CGC"). In addition to resisting the appeal, they seek permission to cross-appeal on the ground that, pursuant to section 73 of the Act, NIOC had lost the right to object that the arbitral tribunal did not have jurisdiction. The judge held by way of preliminary issue that NIOC had made its objection to the arbitrators' jurisdiction in the arbitration and therefore had not lost its right to challenge the award under section 67, albeit that he went on to dismiss that challenge on its merits. He was not asked to, and did not, grant permission to appeal on the section 73 point.

The background

The parties' contract

3. The parties' dispute arises out of a Gas Sale and Purchase Contract ("the contract") entered into on 25th April 2001 between NIOC and CPCIL (who later assigned its interest in the contract to CGC) for the long-term supply of gas from Iran to the United Arab Emirates.

4. The contract is governed by Iranian law. Article 22.2 provides for arbitration as follows:

> "The Parties shall use all reasonable efforts to settle amicably within 60 days, through negotiations, any dispute arising out of or in connection with this Contract or the breach, termination or invalidity thereof. Any dispute, controversy or claim arising out of or relating to this Contract, or the breach, termination or validity or invalidity thereof shall be finally settled by arbitration before three arbitrators, in accordance with a 'Procedures for Arbitration' (attached hereto as Annex 2) which will survive the termination or suspension of this Contract. Any award of the arbitrators shall be final and binding upon the Parties. Either Party may seek execution of the award in any court having jurisdiction over the Party against whom execution is sought."

5. It is common ground that the arbitration agreement is itself governed by Iranian law (cf. *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] UKSC 38, [2020] 1 W.L.R. 4117).

The CNGC contract

6. CGC had in turn entered into a gas supply agreement with a 65% owned subsidiary, Crescent National Gas Corporation Ltd ("CNGC"), under which CGC undertook to

supply volumes of gas on terms which were broadly similar to those in the contract. I shall refer to this as "the CNGC contract". CNGC in turn entered into contracts to supply gas to various third-party end users. CGC also entered into one sale contract with an end user, namely Sharjah Electricity and Water Authority ("SEWA"), directly.

7. The CNGC contract was governed by UAE law and provided for arbitration in the UAE in accordance with LCIA Rules.

The Jurisdiction and Liability Award

8. NIOC did not perform its obligations under the contract and Crescent commenced arbitration on 15th July 2009. The parties agreed that London would be the seat of the arbitration.

9. On 31st July 2014 the then-constituted tribunal issued an award ("the Jurisdiction and Liability Award"), holding (among other things) that it had jurisdiction over the claims presented by Crescent in the arbitration, and that NIOC was in continuing breach of the contract from 1st December 2005 to the date of the award.

10. NIOC sought to challenge the Liability Award under sections 67 and 68 of the 1996 Act, but those applications were dismissed by Mr Justice Burton by judgments of 4th March 2016 ([2016] EWHC 510 (Comm)) and 18th July 2016 ([2016] EWHC 1900 (Comm)).

11. It appears that the jurisdictional arguments run by NIOC during this first phase of the arbitration and under section 67 were concerned with the validity of the assignment of CPCIL's rights to CGC, and whether as a result CGC was a proper party to the contract and the arbitration; and with an argument that the contract was void *ab initio* as a result of having been procured by corruption. These are not arguments with which we are concerned on NIOC's current section 67 challenge.

The Remedies Award

12. The Remedies phase of the arbitration then proceeded. Crescent claimed damages, advancing three heads of loss:

    (1) loss of the profits which it would have made from selling gas to CNGC under the CNGC contract (which I shall call "the loss of profits claim");

    (2) the damages which it was liable to pay to CNGC, consisting of CNGC's loss of profits on contracts with end-user customers ("the liability to CNGC claim"); and

    (3) a declaration that it was entitled to be indemnified against future claims made against it by SEWA or CNGC in respect of any claims against them by third parties ("the indemnity claim").

13. On 28th June 2018, Crescent commenced a second arbitration to claim damages for breach of the contract for the period after 31st July 2014 through to the end of the 25-year period specified in the contract. The parties agreed that the seat of that arbitration would be Geneva.

14. On 27th September 2021 the arbitral tribunal in the first arbitration, by now consisting of the Hon Murray Gleeson AC, Lord Phillips of Worth Matravers and Sir Jeremy Cooke, issued what was described as a Partial Remedies Award:

    (1) CGC was awarded US $1,334.70 million in respect of the loss of profits claim;

    (2) CGC was awarded US $1,085.27 million in respect of the liability to CNGC claim;

    (3) the arbitrators deferred the indemnity claim for further consideration, as they did not have sufficient information to determine it; we were told that, some 14 years after its commencement, the arbitration is still continuing in order for the indemnity claim to be determined.

15. NIOC sought permission to appeal against the Remedies Award pursuant to section 69 of the 1996 Act, but Mr Justice Picken refused permission in a judgment dated 30th June 2022 ([2022] EWHC 1645 (Comm), [2022] Bus LR 726), holding that the award was "not obviously wrong".

NIOC's section 67 challenge

16. During the Remedies phase of the arbitration, NIOC objected that the arbitrators did not have jurisdiction to deal with the liability to CNGC claim. That objection was rejected by the arbitrators. It is Crescent's case that the grounds on which NIOC objected were different from and did not include the ground on which it now pursues its section 67 challenge to the Remedies Award.

17. On 25th October 2021 NIOC issued an application to challenge the Remedies Award under section 67 insofar as the arbitrators had awarded damages of US $1,085.27 million in respect of the liability to CNGC claim. There was no jurisdictional challenge to the award of damages for the loss of profits claim. The grounds of challenge were summarised in NIOC's arbitration claim form as follows:

> "3. NIOC's application under section 67 of the Act is made in summary on the following grounds:
>
> 3.1 The Tribunal did not have substantive jurisdiction (within the meaning in section 30(1)(c) of the Act) to determine the existence and/or amount of CGC's alleged liability to CNGG under the separate CGC-CNGC GSA between CGC and CNGC which was subject to a different dispute resolution mechanism (arbitration in the UAE) and was governed by a different applicable law (UAE law).
>
> 3.2 Accordingly the Tribunal did not have substantive jurisdiction to award substantial damages against NIOC to compensate CGC for its alleged liability to CNGC."

18. This application was developed in lengthy "Grounds of Challenge and Relief Sought" which adopted evidence of Iranian law contained in a report by Dr Ali Mohammad Mokarrami, an Iranian lawyer.

19. In response, Crescent issued two applications. The first was an application for determination of a preliminary issue whether NIOC's section 67 challenge was precluded by section 73 of the 1996 Act on the basis that NIOC had not made its objection that the arbitral tribunal lacked substantive jurisdiction before the arbitrators. Crescent acknowledged that NIOC had objected to the tribunal's substantive jurisdiction, but contended that the objection made to the arbitrators was not the same objection as it was now making under section 67, and that it either knew or could with reasonable diligence have discovered its new objection during the Remedies phase of the arbitration. Crescent's second application was for the summary dismissal of the section 67 challenge on the basis that it had no real prospect of success.

20. An order was made by Mr Justice Foxton that these applications should be heard at a combined hearing. It was this combined hearing which came before Mr Justice Butcher on 27th and 28th September 2022.

Relevant provisions of the Arbitration Act 1996

21. The object of arbitration and the general principles according to which Part I of the 1996 Act is to be construed, are set out in section 1:

> "The provisions of this Part are founded on the following principles, and shall be construed accordingly –
>
> (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
>
> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
>
> (c) in matters governed by this Part the court should not intervene except as provided by this Part."

22. Arbitration is a consensual process under which the arbitral tribunal has such jurisdiction to resolve disputes as the parties agree to confer upon it. The Act uses the concept of "substantive jurisdiction", which refers to the matters specified in section 30(1)(a) to (c). Section 30 provides that:

> "(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—
>
> (a) whether there is a valid arbitration agreement,
>
> (b) whether the tribunal is properly constituted, and
>
> (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.
>
> (2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part."

23. Section 31 provides for an objecting party to make its objection that the tribunal lacks substantive jurisdiction in the arbitration proceedings, and permits the tribunal either to rule on the matter in an award as to jurisdiction or to deal with the objection in its award on the merits. This is intended to ensure, so far as possible, that a jurisdictional objection will not delay the progress of the arbitration. A further possible course is to permit determination of any question as to the tribunal's substantive jurisdiction by the court under section 32.

24. An award by the tribunal, including an award as to jurisdiction, may be challenged under section 67 of the Act on the ground that the tribunal has exceeded its substantive jurisdiction. This section provides:

> "(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court—
>
> (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
>
> (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.
>
> A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
>
> (2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.
>
> (3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—
>
> (a) confirm the award,
>
> (b) vary the award, or
>
> (c) set aside the award in whole or in part.
>
> (4) The leave of the court is required for any appeal from a decision of the court under this section."

25. A section 67 challenge involves a rehearing (and not merely a review) of the issue of jurisdiction, so that the court must decide that issue for itself. It is not confined to a review of the arbitrators' reasoning, but effectively starts again; the decision and reasoning of the arbitrators is not entitled to any particular status or weight, although (depending on its cogency) that reasoning will inform and be of interest to the court (*Dallah Real Estate & Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763).

26. Section 67 is one of only three grounds on which an award may be challenged, the others being that there has been a serious irregularity (section 68) and an appeal on a

point of law (where such an appeal has not been excluded) (section 69). However, as section 67 warns, the right to challenge an award on the ground that the arbitral tribunal has exceeded its substantive jurisdiction may be lost. Section 68 contains a similar warning that the right to object on the ground of a serious irregularity may also be lost, again with a cross-reference to section 73.

27. The circumstances in which the right to object to an excess of substantive jurisdiction or a serious irregularity may be lost are set out in section 73 as follows:

> "(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—
>
> (a) that the tribunal lacks substantive jurisdiction,
>
> (b) that the proceedings have been improperly conducted,
>
> (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or
>
> (d) that there has been any other irregularity affecting the tribunal or the proceedings,
>
> he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.
>
> (2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling—
>
> (a) by any available arbitral process of appeal or review, or
>
> (b) by challenging the award,
>
> does not do so, or does not do so within the time allowed by the arbitration agreement or any provisions of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling."

28. Paragraph (a) of subsection (1) corresponds to the grounds of challenge to an award under section 67, while paragraphs (b) to (d) correspond to the grounds under section 68 and (perhaps) section 24 (removal of an arbitrator).

29. Section 73 applies when a party takes part in the arbitral proceedings. In contrast, section 72 provides, in effect, that a person who takes no part in the arbitral proceedings has an unfettered right to challenge an award under section 67, so long as the application is made in accordance with the procedural rules including time limits in section 70.

The judgment

30. Mr Justice Butcher dealt first with the issue whether NIOC had lost the right to challenge the award under section 67 of the 1996 Act as a result of the principles set out in section 73.

31. He considered a number of first instance authorities on section 73, of which the most important were *Rustal Trading Ltd v Gill & Duffus SA* [2000] 1 Lloyd's Rep 14; *JSC Zestafoni v Ronly Holdings Ltd* [2004] EWHC 245 (Comm), [2004] 2 Lloyd's Rep 335; *The Ythan* [2005] EWHC 2399 (Comm), [2006] 1 Lloyd's Rep 457; *Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd* [2013] EWHC 4071 (Comm), [2014] 1 Lloyd's Rep 479; and *Province of Balochistan v Tethyan Copper Co Pty Ltd* [2021] EWHC 1884 (Comm), [2021] 2 Lloyd's Rep 443. These cases include consideration of the degree of specificity with which the ground of challenge has to be raised before the arbitrators in order to avoid losing the right to raise it before the court on a section 67 challenge. The judge held that the essential question was whether the party challenging the arbitrators' jurisdiction had communicated the substance of each ground of objection relied upon to the other party and the tribunal, and summarised the applicable principles as follows at [36] of his judgment (omitting citations):

> "(1) The fundamental principle, or policy, is fairness, and justice, in the sense of openness and fair dealing between the parties …
>
> (2) There is also a concern to seek to avoid waste of time and expense …
>
> (3) The issue as to jurisdiction must normally have been raised at least on some grounds before the arbitrator …
>
> (4) In addition, each ground of challenge to jurisdiction or of objection to jurisdiction must have been raised if it is to be raised; by this is meant the irregularity that the party considers renders the whole or the relevant part of the arbitral process invalid …
>
> (5) It is wrong to be prescriptive or try to lay down precise limits in the abstract for the meaning of the phrase 'ground of objection', but it is usually easy to recognise (or obvious) in particular cases whether a party is attempting to raise a new ground of objection to jurisdiction on an appeal …
>
> (6) The 'grounds of objection' should not be examined closely as if a pleading, but broadly, or adopting a broad approach. The fact that different and broader arguments are raised or new evidence is put forward does not mean that there is a new ground …
>
> (7) This is not to suggest a relaxed approach, especially bearing in mind sub-para. (1) above. The substance of each ground of objection relied upon should have been communicated to the other party (and the arbitral tribunal).

> (8) It would be unfair if a party took part in arbitration yet kept an objection up his sleeve and only attempted to deploy it later …
>
> (9) It is not enough that the party mention an issue; the issue must be properly put to the arbitral tribunal as denying jurisdiction."

32. Applying these principles, the judge held that the case was "close to the borderline", but that NIOC had done just enough to communicate the substance of its ground of objection. In summary, that was because there was no doubt that NIOC was taking a point that the arbitral tribunal did not have jurisdiction over the liability to CNGC claim, and that the objection was on the basis that the arbitration clause in the contract did not embrace a claim founded on an assertion of a liability of CGC to CNGC under another contract, even though nothing had been said in the arbitration about the narrow scope of the arbitration clause as a matter of Iranian law.

33. Turning to the merits of Crescent's application for summary dismissal of NIOC's section 67 challenge, in view of the fact that the arbitration clause was governed by Iranian law, the judge considered first the proper role of evidence as to foreign law. In accordance with the position set out in *BNP Paribas SA v Trattamento Rifiuti Metropolitani SpA* [2019] EWCA Civ 768, [2020] 1 All ER 762 at [45] to [49] (see below), he held that the function of expert evidence of foreign law is to inform the court as to the applicable principles of construction established by the foreign law, but that it is then for the court (and not the expert) to interpret the contract in accordance with those principles. Accordingly there were two relevant questions:

(1) what principles of construction does Dr Mokarrami's report indicate are applicable?

(2) applying those principles, does an argument that the scope of the arbitration clause does not cover the liability to CNGC claim have a realistic prospect of success?

34. The judge then identified three principles of Iranian law contained in Dr Mokarrami's report at [57] of his judgment:

> "(1) That Iranian law looks to the words of the arbitration agreement itself. 'This is because the words of the arbitration agreement are paramount in conveying the mutual intention and consent of the parties thereto to submit their disputes (as defined in the relevant arbitration agreement) to arbitration.' (paragraph 22) '[A]n arbitration agreement, like any other contract, is only subject to interpretation under the relevant principles of applicable law where there is an ambiguity in the text of the agreement. If there is no ambiguity, the text is strictly interpreted.' (paragraph 29)
>
> (2) That Iranian law applies a restrictive approach in interpreting the scope of arbitration provisions, whereby 'there is a presumption that jurisdiction is only conferred on to arbitrators to resolve those specific claims, disputes or controversies that the parties have expressly agreed and articulated in the

> arbitration agreement to be within the competence of the arbitrators.' (paragraph 23)
>
> (3) Iranian law does not recognise an equivalent of what may be called the *Fiona Trust* presumption that arbitration clauses are to be interpreted widely such that any dispute arising out of the relationship between the parties should be decided by the same tribunal and that distinctions in the wording of arbitration clauses should not normally result in significant differences in scope. (paragraph 32)"

35. Applying these principles, the judge held at [59] that NIOC's case that the liability to CNGC claim fell outside the scope of the arbitration clause in the contract stood no realistic prospect of success, for the following reasons:

> "(1) As has been set out above, the question is whether there is a realistic prospect that the court, itself construing the words of the arbitration provision in the light of the relevant principles of construction, will hold that it did not extend to the claim in issue.
>
> (2) The words of the clause refer to arbitration 'any dispute, controversy or claim arising out of or relating to this Contract, or the breach, termination or validity or invalidity thereof'. Without adopting any 'pro-arbitration' construction, or a '*Fiona Trust*' presumption, and indeed taking a literalistic approach to them, the words used are wide. In particular the words 'relating to' are wide, and the category of disputes, controversies or claims which may at least 'relate to' [the contract] or to its breach is broad.
>
> (3) The proper interpretation of an arbitration clause must necessarily be considered 'at the time that the … agreement is made', and be 'forward looking'. That is how it was put in *BNP Paribas v Trattamento* at [56]-[57]). There is no reason for considering that Iranian law, if it is relevant in this regard, is to any different effect, given that Dr Mokarrami states that the starting point of the enquiry as to the scope of the clause is the words used because they convey 'the mutual intention and consent of the parties'. What is accordingly involved here is to ask whether the clause, in referring to arbitration all claims arising out of or relating to [the contract] or its breach, extended to a claim which might in the future be brought by one of the parties to [the contract] for damages which that party alleged that it had sustained by reason of its liability to a third party as a direct result of the other contracting party's breach of contract. I do not consider that there is a realistic prospect of that question being answered in the negative."

36. Accordingly the judge's answer to the preliminary issue ("Is the Claimant precluded from advancing the jurisdictional objection in the Section 67 Claim by Section 73(1) of the Arbitration Act 1996?") was "No" and he summarily dismissed the section 67

challenge itself. He granted NIOC permission to appeal to this court against the summary dismissal of its section 67 claim. Crescent did not seek permission to appeal against the judge's determination of the preliminary issue concerning section 73.

The cross-appeal: section 73

37. It is logical to begin with the cross-appeal. If NIOC has lost the right to raise its objection to the arbitrators' substantive jurisdiction, the merits of its section 67 challenge will not be reached. However, Crescent accepts that it needs permission to pursue its cross-appeal and, in circumstances where no such permission was sought from or granted by the judge, the first question which arises is whether the Court of Appeal has jurisdiction to grant that permission. That depends on whether the judge's decision that the right to challenge the arbitrators' jurisdiction under section 67 was not lost pursuant to section 73 was "a decision of the court under this section" (i.e. under section 67) within the meaning of section 67(4). It is established that only the first instance court can grant permission to appeal from a decision under section 67 and that the Court of Appeal has no jurisdiction to do so (*Athletic Union of Constantinople v National Basketball Association (No. 2)* [2002] EWCA Civ 830, [2002] 1 WLR 2863). There are exceptions to this rule where a purported decision is not a judicial decision at all (*Aden Refinery Co Ltd v Ugland Management Co Ltd* [1987] QB 650) or a decision is made without jurisdiction (*Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 1 WLR 3555), but these exceptions are not relevant here.

38. It is relevant to note that because the section 73 point came before the judge for determination as a preliminary issue, he made an order specifically answering that issue. It is from that order that Crescent seeks to appeal. There was some brief discussion in the course of argument as to what the position would be if, instead of a preliminary issue and an application for summary dismissal of the section 67 challenge, the proceedings had taken what may be a more typical course, with both points being dealt with together in a final hearing, and the judge had simply made an order dismissing the section 67 challenge. I express no view whether, in the event of an appeal by NIOC with the judge's permission in those circumstances, Crescent would be entitled to run its section 73 argument by way of Respondent's Notice without needing to obtain permission to appeal. As Mr Ricky Diwan KC accepted on behalf of Crescent, that is not what happened here and Crescent does need permission to appeal.

Submissions

39. On behalf of Crescent Mr Diwan submitted that only a decision which finally disposed of a section 67 challenge qualified as a "decision … under" section 67. Thus a decision under section 73 that a party *had* lost the right to object to the arbitrators' substantive jurisdiction would be a decision under section 67 because it would mean that the section 67 application had to be dismissed, as in *ASM Shipping Ltd v TTMI Ltd* [2006] EWCA Civ 1341, [2007] 1 Lloyd's Rep 136, a case on the equivalent provision in section 68(4); but a decision that a party *had not* lost the right to object would not be a decision under section 67, because it would leave the section 67 application itself still to be determined. Similarly, and if necessary, a case management decision on a section 67 challenge, for example an order providing for expert evidence, would not be a "decision … under this section" because it would not finally dispose of the challenge. Mr Diwan submitted that this conclusion followed as a matter of the policy of the 1996 Act, and that the statutory language should be interpreted in accordance with that policy.

40. Essentially, Mr Diwan's submission was that the primarily applicable policy at stages prior to the final disposal of a section 67 challenge was not to promote finality and avoid unnecessary delay and expense, but rather to support the arbitration award, and that it would be in accordance with this policy to allow an award creditor seeking to knock out a section 67 challenge under section 73 who had failed at first instance to seek permission to appeal from the Court of Appeal – in other words, although he did not put it quite this way, to have two opportunities to seek permission to appeal with a view to upholding an award on the ground that the objecting party had lost its right to object.

41. In this regard Mr Diwan pointed out that there are other provisions of the Act where issues as to the scope of the arbitrators' jurisdiction may also arise which contain no restriction equivalent to section 67(4). This has been held by the House of Lords in *Inco Europe Ltd v First Choice Distribution* [2000] 1WLR 586, 590E-F to be the result of deliberate drafting:

> "… when the draftsman wished to limit the right of appeal he said so. In section after section in Part I, restrictions similar to the restriction in section 12(6) are set out expressly. In some sections, such as section 32, the restriction on appeals is even more tightly framed. This style of drafting points strongly to the conclusion that where a section is silent about an appeal from a decision of the court, no restriction was intended. …"

42. Examples of sections which contain no equivalent restriction include section 9, where a decision whether to stay legal proceedings in favour of arbitration may require the court to decide the scope of an arbitration clause, or the enforcement provisions in sections 66 and 103, where a similar issue may arise (see in particular section 103(2)(d), providing that recognition and enforcement of a New York Convention award may be refused if the award contains decisions on matters beyond the scope of the submission to arbitration). Mr Diwan submitted that this shows that any policy of avoiding the delay inherent in an appeal is more nuanced than might at first appear.

43. Rather, he submitted that the policy underlying section 73 was to be seen in the February 1996 DAC Report which treats the section as concerned with "recalcitrant parties" who "often seek to delay proceedings or to avoid honouring the award by raising points on jurisdiction, etc, which they have been saving up for this purpose or which they could and should have discovered and raised at an earlier stage". Mr Diwan submitted that the award creditor is seen here as the "innocent" party and that it would be in accordance with the policy of section 73 to impose a restriction on appeal by the award debtor (the "recalcitrant party") in order to avoid unnecessary delay, which should not necessarily apply to the "innocent" award creditor who is seeking to uphold the award. He accepted, however, that when the court has finally disposed of the section 67 challenge, the Court of Appeal has no jurisdiction to grant permission to appeal whichever way the first instance court has decided the issue: at that stage, but not before, the policy in favour of finality applies even if the decision is in favour of the award debtor – presumably because, at that stage, the court has held that the award debtor is not a "recalcitrant party" seeking to avoid its obligations, but on the contrary that its position is justified.

44. Mr Diwan submitted that the language of section 67 was capable of being, and should be, interpreted in this way. The cross reference to section 73 in subsection (1) was merely descriptive and did not advance matters, while the word "decision" was capable of a narrow meaning akin to "judgment" as well as a wider meaning which could include interlocutory decisions or, as he put it, "decisions along the way". He pointed to the terms of section 69(6) and (8) as providing support for the submission that section 67(4) is concerned only with a final decision disposing of the section 67 challenge: the broadly equivalent provision in section 69(8), restricting the grant of permission to appeal to the Court of Appeal on a section 69 appeal on a point of law, must be concerned only with the final disposal of the section 69 appeal as section 69(6) would otherwise be redundant. A similar point could be made about section 32(5) and (6).

Some authorities

45. The question whether the Court of Appeal has jurisdiction to grant permission to appeal from a decision that a party has not lost the right to advance a section 67 challenge has not previously arisen for decision, but there are some authorities which have a bearing on that question.

46. The *ASM Shipping* case involved a challenge to an award under section 68 of the 1996 Act on the ground of apparent bias on the part of the umpire. The judge, Mr Justice Morison, held that there was such apparent bias, but that the objecting party had lost its right to object because it had continued with the arbitral proceedings and taken up the award without bringing proceedings in court to remove the umpire. He therefore dismissed the section 68 challenge. The judge refused permission to appeal and the objecting party sought permission from the Court of Appeal.

47. In a judgment with which Sir Anthony Clarke MR and Lord Justice Rix agreed, Lord Justice Longmore held that the Court of Appeal had no jurisdiction to grant such permission:

> "9. … Here there is no doubt that Morison J had jurisdiction either to accede to the application or to refuse it. Whichever way the decision went, it was still a decision under section 68 of the Act and a refusal of permission to appeal was likewise a decision under the section. It cannot, therefore, be challenged by way of appeal even if the decision is wrong or, even, obviously wrong. The fact that waiver (or indeed estoppel) can be said to operate as a defence to a *prima facie* entitlement is, in our view, nothing to the point. A decision to refuse relief (for whatever reason) is still a decision under section 68 just as much as a decision to grant relief would have been if the decision had gone the other way."

48. Lord Justice Longmore went on at [18] to clarify that it made no difference whether the judge's decision was based on section 73 of the 1996 Act or on waiver at common law. Permission to appeal without the judge's leave was prohibited in either case.

49. *ASM Shipping* is therefore authority for the proposition that a decision under section 73 that a party has lost the right to challenge an award under section 68 is a decision under section 68 from which only the first instance court can give permission to appeal.

Precisely the same reasoning applies to section 67. However, the case does not deal with the present situation, where the first instance court has held that the right to challenge an award has not been lost.

50. The issue in *Sumukan Ltd v Commonwealth Secretariat* [2007] EWCA Civ 243, [2007] Bus LR 1075 was whether the Court of Appeal had jurisdiction to grant permission to appeal from the first instance court's decision that the parties' arbitration agreement had excluded any right to appeal to the court on a point of law under section 69 of the 1996 Act – in other words, whether the parties had "otherwise agreed" for the purpose of section 69(1). The court held that this was a preliminary decision whether the jurisdiction of the court had been excluded, which did not fall within the restrictions on the grant of permission to appeal contained in section 69(6) or section 69(8): it was not a "decision … to grant or refuse leave to appeal" from the arbitral tribunal within section 69(6); nor was it a "decision … on an appeal under this section" within section 69(8). This is not directly relevant for present purposes, but in the course of his judgment Lord Justice Waller, with whom Sir Anthony Clarke MR and Lord Justice Sedley agreed, made three important points.

51. The first concerned the policy underlying the various provisions of the 1996 Act which restrict the right to grant permission to appeal to the first instance court:

> "15. … One must bear in mind that there are many sections in which the right to appeal to the Court of Appeal is circumscribed by the necessity to obtain leave from 'the court' at first instance. This was important to those drafting the 1996 Act. It was the intention of those drafting the 1996 Act to limit appeals to the Court of Appeal to avoid the delay and expense that such appeals can cause. Indeed the wording of the original Bill was altered to make the position absolutely clear [see paragraph 27 of the Supplement to the DAC Report]. Furthermore the philosophy is reflected in section 1(a) of the 1996 Act which provides that 'the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay and expense.' [our underlining]. …"

52. Second, although the critical distinction was between decisions as to the jurisdiction of the court and other decisions under the various sections restricting appeals, for decisions not going to jurisdiction Lord Justice Waller appears to have drawn no distinction between final decisions and decisions made in the course of an application under one of the sections where the grant of permission to appeal is limited to the first instance court:

> "30. Ultimately the following factors have persuaded us that the Court of Appeal does have jurisdiction. First, although there might be a temptation (in the interest of speed and saving expense) to construe any part of the language of the 1996 Act in a way that renders all decisions under the various sections where permission of the court is required as final, if the first instance court so rules, there is a distinction between those cases where the court is assisting or overseeing the arbitration process and the

> cases where the question is whether the jurisdiction of the court has been excluded. …"

53. Third, and of direct relevance in the present case, there is at least a strong indication that a decision under section 73 was "within the compass" of section 67 or section 68, and should therefore be regarded as a decision made under those sections, so that only the first instance court can grant permission to appeal:

> "32. There are two points with which we should deal. First the distinction between a decision as to whether the restrictions in section 70(2) and (3) to which by virtue of section 69(2) the right to appeal under section 69 'is also subject', and a decision as to whether the parties have 'otherwise agreed' under section 69(1), is a fine one. But the decisions which have to be taken as to whether 28 days has expired from the date of the award (section 70(3)) and in that context whether an extension of time should be granted under section 79, or whether the applicant has exhausted other avenues (section 70(2)) are procedural points not going to jurisdiction in the fundamental sense. For that reason, the wording of section 69(2) brings the questions that arise on section 70(2) and (3) within the compass of the process of deciding whether permission to appeal should be given, *in the same way as subsections (2) of section 67 and 68 bring decisions on section 73 and section 70(2) and (3) within the compass of the decision making process under those sections*. …" (emphasis added).

54. I think that the reference to "subsections (2) of section 67 and 68" in the passage which I have emphasised must be intended to refer to the cross references to section 73 contained in sections 67 and 68, albeit these are not contained in subsection (2) of those sections.

55. An issue arose in *Johann MK Blumenthal GmbH & Co KG v Itochu Corporation* [2012] EWCA Civ 996, [2013] 1 All ER (Comm) 504 as to how an arbitral tribunal should be constituted. The arbitration agreement did not specify the number of arbitrators to be appointed, but did refer to "arbitrators" in the plural. The parties could not agree whether this clause provided for one or three arbitrators. The judge, Mr Justice Andrew Smith, applied section 15(3) of the 1996 Act, holding that it was a case where there was no agreement as to the number of arbitrators, and that the tribunal should therefore consist of a sole arbitrator. He went on to appoint a sole arbitrator under section 18 and refused permission to appeal to the Court of Appeal. Section 18(5) was in the same terms as section 67(4), providing that a decision under that section could only be brought with the leave of the first instance court. Section 15 contained no equivalent restriction. The would-be appellant submitted that the issue was whether the judge had been right to decide that the clause contained no agreement as to the number of arbitrators and that this was a question arising under section 15, rather than section 18.

56. In a judgment with which Lord Justices Maurice Kay and Stanley Burnton agreed, Lord Justice Gross held that the Court of Appeal had no jurisdiction to grant permission to appeal. It is worth setting out some of his reasoning:

> "17. It is common ground that where s.18(5) of the 1996 Act applies, the reference to 'the court' means the court at first instance, so that if leave is refused by the Judge, the Court of Appeal cannot itself grant leave to appeal: *Henry Boot Ltd v Malmaison Hotel Ltd* [2001] QB 388. The policy of thus restricting appeals, found in s.18 and a variety of other sections in the Act, is deliberate. It reflects the underlying general principles, as to party autonomy and protection of the parties from unnecessary delay and expense, enshrined in s.1(a) and s.1(b) of the Act …
>
> 18. To these ends, court intervention in the arbitral process is broadly restricted to that which is necessary either to support the arbitral process or in the public interest (for example, a challenge to an award on the ground of serious irregularity under s.68 of the 1996 Act). Curtailing appeals to the Court of Appeal serves to avoid the delay and expense to which such appeals can give rise: see *Sumukan Ltd v Commonwealth Secretariat* [2007] EWCA Civ 243, [2007] Bus LR 1075, at [15].
>
> 19. Accordingly, the question for us was whether s.18(5) applied, a question which in turn hinged on whether the decision of Andrew Smith J was a 'decision ….under this section' (i.e. s.18).
>
> 20. At first blush, it plainly was. As already recorded, the respondents' application was for an order under s.18(3)(d); for its part, Itochu sought directions under s.18(3)(a). In the event, the order was made, in terms, under s.18(3)(d). If this first impression is well-founded, then it inevitably follows that we have no jurisdiction to entertain the appeal. …"

57. Lord Justice Gross went on to consider the authorities to which I have referred and concluded that these confirmed his first impression. He summarised the position as follows:

> "28. Pulling the threads together:
>
> (1) For my part, I see no reason to depart from my initial view. The judge's decision was, in form and in substance, a decision 'under' s.18, caught by the restriction on appeal provided by s.18(5).
>
> (2) No question of principle arose in relation to s.15. The sole question was whether, on its true construction, the arbitration clause came within s.15(3). Whatever view the judge took on that question, he had thereafter to take a decision under s.18(3). As already underlined, both parties invoked s.18(3).
>
> (3) It is impossible therefore for Itochu to gain support from *Cetelem (supra)*. On any view, the judge had

> *jurisdiction* to make a decision under s.18(3). For essentially the same reasons, *Sumukan (supra)* likewise does not assist Itochu; all roads led to a decision on the merits under s.18(3). There was here no anterior or preliminary question which might preclude the court from taking a decision one way or the other under s.18(3). This was instead a decision by the High Court, supportive of the arbitral process and curing a failure of the appointment procedure.
>
> (4) As established by this court's decision in *ASM Shipping (supra)*, it is neither here nor there that in coming to his decision the judge based himself upon or had regard to s.15(3). The judge's *decision* was made under s.18, even if his *reasons* (necessarily) encompassed s.15. It is the decision which is the key to the applicability of s.18(5).
>
> (5) Having regard to the policy of the Act (see above), there can be no justification for straining to avoid the operation of the restriction on appeals contained in s.18(5)."

58. Finally, the issue in *Manchester City Football Club Ltd v Football Association Premier League Ltd* [2021] EWCA Civ 1110, [2021] 1 WLR 5513 was whether a judgment dismissing challenges to an award under sections 67 and 68 of the 1996 Act should be published. The judge, Mrs Justice Moulder, held that it should and refused permission to appeal. The Court of Appeal held that this was not a decision "under" sections 67 and 68, so that it had jurisdiction to grant permission to appeal, although it went on to dismiss the appeal. In the course of argument a question arose whether a case management decision about how a section 68 application should be dealt with would be a decision under the section. In a judgment with which Sir Geoffrey Vos MR and I agreed, Sir Julian Flaux C said:

> "39. Citation of those cases provoked a debate between counsel and the court as to where the line was to be drawn between decisions which would be caught by the limitation on the right of appeal in the relevant section of the 1996 Act and decisions which would not. Lord Justice Males posited the example of a case management decision about how a section 68 application should be dealt with. As I said at the time, that would seem to be an example of something which is part of the process of reaching a decision under section 68, so would be caught by the limitation on the right of appeal. Sir Geoffrey Vos MR suggested to Lord Pannick that a consequential decision on a section 68 application, for example as to costs, would also be caught by the limitation.
>
> 40. Lord Pannick made it clear that he was not inviting this court to lay down any general principles applicable in every case, but only to determine that this court had jurisdiction to hear the appeal from the publication judgment. I agree that it is not necessary for present purposes to determine the more difficult question whether case management decisions either side of the

> substantive decision under, say, section 67 or 68, for example as to how a hearing is to be conducted or as to costs, would be caught by the limitation in sub-section (4) of each section. Whilst such case management decisions may be said to be part of the process of reaching the substantive decision, the question whether the substantive decision should be published is a distinct question separate from the decision itself. In the present case, the judge's decision that the merits judgment and the publication judgment should be published was an application of common law principles as set out in the decision of this court in *City of Moscow* [*Department of Economics, Policy & Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314, [2005] QB 207]. It was not a decision of the court under sections 24, 67 or 68 and was, therefore, not caught by the limitation on the right of appeal. In those circumstances, I am satisfied that this court has jurisdiction to hear this appeal under section 16 of the Senior Courts Act 1981 and that the restriction in section 18(1)(g) of that Act is not applicable."

59. Although these authorities do not answer the question we have to decide, they provide at least some support for a number of points.

60. First, the policy underlying section 67(4) and other equivalent provisions has consistently been stated as being to avoid delay and expense. Obviously this is not achieved by excluding appeals altogether, but by making the first instance court the sole gatekeeper to control whether permission to appeal should be given. Paragraph 74(iii) of the DAC Report, commenting on the equivalent provision in what became section 12(6) of the Act, demonstrates that it was intended that appeals should generally be limited to "some important question of principle"[1]:

> "Thirdly, we have made any appeal from a decision of the court under this Clause subject to the leave of that court. It seems to us that there should be this limitation, and that in the absence of some important question of principle, leave should not generally be granted. We take the same view in respect of the other cases in the Bill where we propose that an appeal requires leave of the court."

61. It is worth noting that the policy set out in section 1 of the Act also includes, in addition to the avoidance of unnecessary delay and expense, a policy of non-intervention by the court in the arbitral process except as expressly provided in Part I of the Act.

62. Second, there are statements which suggest that a decision which is "part of the process" of reaching a final decision on a challenge to an award is a decision "under" section 67 or section 68, as the case may be. More specifically, it was at least assumed in *Sumukan* that a decision under section 73 was "within the compass" of section 67 or section 68, and that the restrictions on appeal contained in section 67(4) and section 68(4) would therefore apply.

[1] I am grateful to my Judicial Assistant, Eloise Hewson, for drawing this paragraph to my attention.

63. Third, there is no support in these cases for the view that only a decision finally disposing of a challenge to an award is capable of being a decision under section 67 or section 68. Nor is any distinction drawn between a decision that a party has lost the right to object and a decision that it has not done so.

Decision

64. Whether a decision that a party has not lost the right to challenge an award under section 73 is a decision under section 67 or section 68 for the purpose of section 67(4) and section 68(4) is a question of statutory interpretation. It must therefore be approached having regard to the object of the 1996 Act. The principles by which the Act must be interpreted are set out in section 1. They include the avoidance of unnecessary delay and expense and the limitation of court intervention in the arbitral process except where expressly provided.

65. In my judgment it is clear that section 73 is entirely ancillary to sections 67 and 68. It has no relevance or application independent of a challenge to an award under one or both of those sections. A decision whether a party has lost the right to challenge an award is undoubtedly "part of the process" for determining a challenge under section 67 or section 68 and is "within the compass" of those sections. It is a preliminary question, but not a question going to the court's jurisdiction, the answer to which determines whether the court needs to consider the merits of the section 67 or section 68 challenge. "Decision" is a broad term and the determination of a section 73 issue is naturally to be regarded as a decision under section 67 or section 68 as a matter of language, whichever way it goes. There is no justification for saying that it is a decision under section 67 or section 68 if the section 73 issue is decided in favour of the award creditor (*ASM Shipping*), but not if it goes against the award creditor.

66. Moreover, it is in accordance with the policy of the Act, as consistently described in the case law, to interpret section 67(4) and section 68(4) as encompassing such a decision. It would be paradoxical to interpret those provisions to mean that only the first instance court can grant permission on the final decision to uphold or dismiss the challenge to an award, but that the Court of Appeal can give permission on preliminary or case management decisions when the first instance court has refused such permission. Although it may be said that the Court of Appeal could be trusted not to give permission in unmeritorious cases, and would be unlikely to do so on case management decisions, even the process of applying for such permission would cause delay and expense, while leaving the status of the award in limbo until the application had been determined. The fact that there are other provisions of the Act, such as section 9 and sections 66 and 103, which may raise broadly similar issues as to the scope of an arbitration clause as arise under section 67, but which contain no equivalent restriction on the grant of permission to appeal, is nothing to the point.

67. The reference to "recalcitrant parties" in the DAC Report does not warrant any different conclusion. It describes what sometimes happens and provides an explanation of the need for section 73, but does not provide any justification for limiting the scope of the natural language of section 67(4).

68. As Lord Justice Gross said in *Blumenthal*, there can be no justification for straining to avoid the operation of the restriction on appeals contained in section 67(4). On the

contrary, that restriction is in accordance with the statutory policy of non-intervention by the court except as expressly provided.

69. For these reasons I would hold that this court has no jurisdiction to grant permission to Crescent on the cross-appeal. That being so, despite the interesting arguments we heard on the merits of the cross-appeal, it would be wrong to say anything further about them.

The appeal: section 67

70. Accordingly I turn to NIOC's appeal against the summary dismissal of its section 67 challenge to the award. On behalf of NIOC, Mr David Bailey KC submitted that the judge had made four fundamental errors, as follows:

(1) He had conducted a mini-trial, evaluating Dr Mokarrami's evidence in a manner which was contrary to the approach to a summary judgment application required by the Supreme Court in *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3, [2021] 1 WLR 1294; instead he should have held that NIOC's case was arguable in the light of the evidence that was likely to be available at trial, including evidence from Crescent's expert, a joint memorandum and cross examination.

(2) He had wrongly adopted a "literalist approach" to the construction of the words "relating to" in the arbitration agreement, rather than a "restrictive" approach as required by Iranian law.

(3) He had asked himself the wrong question; instead of asking whether the claim or cause of action fell within the arbitration agreement, he should have asked himself whether the relevant "matter" (namely the dispute as to the existence and extent of CGC's alleged liability to CNGC under a separate contract) did so.

(4) He failed to allow for the possibility that cross examination of the experts on Iranian law at trial might add to or alter the evidence of Iranian law which was relevant to NIOC's case.

The position under English law

71. I have no doubt that if English law fell to be applied, the arbitration agreement in the parties' contract would confer jurisdiction on the arbitrators to determine what I have called the liability to CNGC claim. The position is explained with clarity in *Mustill & Boyd on Commercial Arbitration* (2001 Companion Volume to the 2nd Edition, page 73, footnote 11):

> "The position is, we suggest, similar to that which does from time to time arise in practice, where in order to resolve a dispute between A and B an arbitrator has to decide an issue arising under a contract between B and C. There is nothing inarbitrable about such an issue, and the arbitrator commits no impropriety by deciding it, although his award will have no effect at all on C. Nor does he exceed his jurisdiction in doing so, for he is not purporting to act as arbitrator in relation to the contract between B and C, in relation to which he was not appointed, but instead he is deciding under the contract between A and B an issue

> which, albeit involving C, does properly arise under that contract."

72. The decision of Mr Justice Andrew Smith in *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm), [2013] 2 All ER Comm 1 is to the same effect. Although the contract in this case was governed by Indian law, there was no suggestion that Indian law differed on this point from English law. Mr Justice Andrew Smith rejected what was essentially the same argument as NIOC now advances:

> "62. I am unable to accept the claimants' argument. As the tribunal observed: 'there is nothing conceptually difficult about a court or tribunal making a determination that a debt is due under another contract in order to determine whether relief should be granted under the contract before it – this is frequently the case, for instance, under contracts of guarantee'. The tribunal needed to determine whether Burley was liable under the SHA in order to determine whether Unitech was liable under the keepwell agreement, and so they had both the jurisdiction and the duty to do so. It was a question that needed to be determined in order to resolve a 'dispute arising out of or in connection with the provisions of [the] Keepwell Agreement', that dispute was referred to it and the question was within the tribunal's substantive jurisdiction."

73. Mr Bailey accepted that this was the position under English law at the hearing of the appeal, but resiled from that position in a note submitted after the hearing had concluded, in which he sought to draw support from what was said by Mr Justice Popplewell in *Sodzawiczny v Ruhan* [2018] EWHC 1908 (Comm), [2018] Bus LR 2419:

> "45, Nothing I have said is intended to apply where the arbitration agreement is in a contract with third parties. The courts sometimes have to determine in a dispute between A and B what rights and obligations exist under a contract between C and D, or between C and A or B, and will do so irrespective of any arbitration agreement in that contract. Different considerations apply in such cases because of the lack of identity of parties."

74. Mr Bailey submitted that Mr Justice Popplewell was drawing a contrast in this passage between what a court will do and what arbitrators have jurisdiction to do. In my judgment, however, Mr Justice Popplewell was doing no such thing. He was not addressing the present issue.

75. It is not surprising, therefore, that the arbitral tribunal dealt briefly with the issue of jurisdiction raised before it. NIOC did not suggest in the arbitration that Iranian law was any different from English law in any material respect or that the application of Iranian law would lead to any different conclusion from that which would be reached under English law.

Dr Mokarrami's report

76. NIOC's case now however, is that the position is fundamentally different under Iranian law, which is the law governing the parties' arbitration agreement. For this purpose NIOC relies on the expert report of Dr Mokarrami.

77. The proper role of expert evidence of foreign law on issues of contractual construction is well established and was not disputed. It was explained by Lord Justice Hamblen in *BNP Paribas SA v Trattamento Rifiuti Metropolitani SpA* at [45] to [49]:

> "45. The role of foreign law experts in relation to issues of contractual interpretation is a limited one. It is confined to identifying what the rules of interpretation are.
>
> 46. It is not the role of such experts to express opinions as to what the contract means. That is the task of the English court, having regard to the foreign law rules of interpretation.
>
> 47. This is well established law and is clearly set out and summarised by Lord Collins in *Vizcaya Partners Ltd v Picord* [2016] UKPC 5, [2016] 3 All ER (Comm) 181 at [60]:
>
> > '60. …Where the applicable law of the contract is foreign law, questions of interpretation are governed by the applicable law. In such a case the role of the expert is not to give evidence as to what the contract means. The role is 'to prove the rules of construction of the foreign law, and it is then for the court to interpret the contract in accordance with those rules': *King v Brandywine Reinsurance Co* [2005] EWCA Civ 235, [2005] 2 All E.R. (Comm) 1 at [68]; *Dicey*, paras 9-019 and 32-144 ('the expert proves the foreign rules of construction, and the court, in the light of these rules, determines the meaning of the contract').
>
> 48. To similar effect is the judgment of Longmore LJ in *Savona* at [15]:
>
> > '15. …In a case in which the main, let alone the only, issue is as to the construction of a foreign jurisdiction clause as opposed to an English jurisdiction clause, the only relevance of evidence of foreign law is to inform the court of any difference of law in relation to the principles of construction, see *King v Brandywine Reinsurance Co (UK) Ltd* [2005] EWCA Civ 235, [2005] 2 All E.R. (Comm) 1 at [68] para 68 per Waller LJ and *Vizcaya Partners Ltd v Picord* [2016] UKPC 5; [2016] Bus LR 413, para 60 per Lord Collins. It is not to have competing arguments as to how the highest court in the foreign jurisdiction would decide the question whether a claim brought in England would (or would not or would also) fall within the foreign jurisdiction clause. The task of the English court is merely to inform itself of any relevant different principles of construction there might be in the foreign law and, armed with such information, look at both

> jurisdiction clauses and decide whether the English claim falls within the English clause. That should be a comparatively straightforward exercise.'
>
> 49. TRM's Italian law expert did express views as to how an Italian court would interpret the IJC and what she considered the IJC to mean. That is inadmissible and irrelevant evidence."

78. This distinction between identification of the foreign law principles of interpretation and their application has been part of English law for at least 160 years (*Di Sora v Phillipps* (1863) 10 HLC 624).

79. Unfortunately, despite the clear warning in Lord Justice Hamblen's judgment, much of Dr Mokarrami's report was directed to the substantive question whether the arbitral tribunal had jurisdiction to determine the liability to CNGC claim, and was not confined to explaining the principles of construction under Iranian law which would need to be applied in order to answer that question. This may not have been Dr Mokarrami's fault, as the question which he was asked to address was "whether, on the proper construction of Article 22.2 of [the contract] as a matter of Iranian law, the Tribunal had jurisdiction to determine the existence and/or amount of CGC's alleged liability to CNGC under the terms of the separate [CNGC contract]". He should not have been asked to address that question. In accordance with the established principles set out in the *BNP Paribas* case, Dr Mokarrami's views about it were irrelevant and inadmissible.

80. However, Dr Mokarrami's report did contain a section in which he set out a number of principles of Iranian law. He began by identifying what he described as "two key principles" which he then went on to explain further. The two key principles were as follows:

> "16.1 First, the Iranian courts are assumed to have general default jurisdiction to determine disputes and claims between parties, whereas an arbitration tribunal has exceptional jurisdiction limited only to the specific matters agreed by the parties' common intent to be *referable* for arbitration; and
>
> 16.2 Second, arbitration agreements are treated as personal in nature and cannot be assumed to extend to non-parties, for example so as to allow a tribunal to assume jurisdiction over matters involving a third party under a different contract, even where there may be some connection or relationship."

81. So far as the interpretation of an arbitration clause is concerned, the principles of Iranian law which Dr Mokarrami identified were as follows:

> "22. As regards interpreting the scope of the Arbitration Agreement, the starting point under Iranian law is the words of the arbitration agreement itself. This is because the words of the arbitration agreement are paramount in conveying the mutual intention and consent of the parties thereto to submit their disputes (as defined in the relevant arbitration agreement) to arbitration.

> 23. Iranian law has a restrictive approach to interpreting the scope of arbitration agreements. The rationale for this approach is that arbitration derogates from the default jurisdiction of the Iranian courts. Accordingly, under Iranian law, there is a presumption that jurisdiction is only conferred on to arbitrators to resolve those specific claims, disputes or controversies that the parties have expressly agreed and articulated in the arbitration agreement to be within the competence of the arbitrators. It follows that if there is any reasonable doubt as to whether a particular dispute or claim or controversy comes within the scope of the arbitration agreement in question, it is generally determined against the tribunal having such jurisdiction."

82. He expanded on this last point as follows:

> "29. The scope of an arbitration agreement can in principle be subject to interpretation, as the examples given immediately above demonstrate. However, an arbitration agreement, like any other contract, is only subject to interpretation under the relevant principles of the applicable law where there is an ambiguity in the text of the agreement. If there is no ambiguity, the text is strictly interpreted. …"

83. He went on in the same paragraph to express the opinion that there was no ambiguity in the text of the parties' arbitration agreement and that the liability to CNGC claim was not within its scope. That part of his opinion, however, was not confined to explaining the principles of Iranian law and was therefore inadmissible.

84. Dr Mokarrami went on to explain that Iranian law does not contain any principle, equivalent to the *Fiona Trust* principle in English law (*Fiona Trust & Holding Corpn v Privalov* [2007] UKHL 40, [2007] Bus LR 1719), that an arbitration agreement should be interpreted so as to include any dispute arising out of the relationship between the parties, regardless of verbal distinctions between phrases such as "arising out of" and "arising under": rather, Iranian law adopts the approach described in paragraphs 22 and 23 of Dr Mokarrami's report.

85. Finally, Dr Mokarrami did not suggest that any of the words contained in the parties' arbitration agreement had a special meaning as terms of art in Iranian law.

Grounds 1 and 4 – wrong approach to a summary judgment application?

86. It is convenient to consider grounds 1 and 4 together, as they both involve a submission that the judge adopted the wrong approach to a summary judgment application. It was common ground that the correct approach in such a case was explained in *Okpabi*:

> "21. At para 9 of *Vedanta* Lord Briggs emphasised that where, as in this case, the jurisdictional issue is whether there is a triable issue as against a defendant, it is important to observe judicial restraint and to avoid mini-trials, in accordance with the well-known guidance set out by Lord Hope of Craighead in *Three*

Rivers District Council v Governor and Company of the Bank of England (No 3) [2003] 2 AC 1:

> '94. For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is - what is to be the scope of that inquiry?
>
> 95. I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman* [[2001] 1 All ER 91], at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.
>
> 96. In *Wenlock v Moloney* [1965] 1 WLR 1238 the plaintiff's claim of damages for conspiracy was struck out after a four day hearing on affidavits and documents. Danckwerts LJ said of the inherent power of the court to strike out, at p 1244B-C: 'this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.'

> 22. Where, as will often be the case where permission for service out of the jurisdiction is sought, there are particulars of claim, the analytical focus should be on the particulars of claim and whether, on the basis that the facts there alleged are true, the cause of action asserted has a real prospect of success. Any particulars of claim or witness statement setting out details of the claim will be supported by a statement of truth. Save in cases where allegations of fact are demonstrably untrue or unsupportable, it is generally not appropriate for a defendant to dispute the facts alleged through evidence of its own. Doing so may well just show that there is a triable issue."

87. Mr Bailey submitted that the judge had not followed this approach. He had embarked on a process of evaluating Dr Mokarrami's evidence, which was a matter for the trial, when fuller evidence from experts on both sides would have been available and would have been tested by cross-examination. Mr Bailey submitted that there was a particular need for caution in cases involving evidence of foreign law, relying on the observation of Mr Justice Leggatt in *Edgeworth Capital (Luxembourg) S.A.R.L. v Maud* [2015] EWHC 2364 (Comm) at [19] that there is a "need to be cautious in dealing with questions of foreign law in English proceedings" at the summary judgment stage.

88. I do not accept this criticism. *Okpabi* requires the court at the summary judgment stage to focus on a party's pleaded case. In this case, NIOC's pleaded case was contained in its "Grounds of Challenge and Relief Sought" which were attached to its arbitration claim form seeking relief under section 67. These grounds expressly adopted the evidence of Iranian law contained Dr Mokarrami's report. The judge's task was not assisted by the fact that much of this report was irrelevant and inadmissible. It was therefore necessary for him to disentangle the admissible from the inadmissible by identifying the relevant principles of Iranian law as to the interpretation of contracts relied on in Dr Mokarrami's report.

89. That is what the judge sought to do in the passage which I have set out at [34] above. There may be a question whether he did so correctly, but that is the subject matter of ground 2 of the appeal. The judge did not in any way seek to evaluate Dr Mokarrami's evidence or consider whether it was likely to be accepted at trial. On the contrary, to the extent that it was admissible he accepted the evidence at face value in order to consider whether the principles of Iranian law identified by Dr Mokarrami afforded NIOC any realistic prospect of success on its section 67 challenge, that being, as the *BNP Paribas* case explains, a question for the court to decide itself. The judge's conclusion was that they did not.

90. That was, in my judgment, precisely the approach commended by *Okpabi*. The judge was not required to speculate whether the result of a trial would be that NIOC's case on Iranian law was somehow better than the case it had pleaded and put forward in its own expert's report.

91. *Edgeworth* affords Mr Bailey no assistance. That was a case where Mr Justice Leggatt was being invited to choose between rival experts of foreign law on a summary judgment application (although it was not a case of contractual interpretation, which meant that the role of expert evidence was potentially more extensive than in the present case). Despite his evident scepticism as to the evidence of one expert, Mr Justice

Leggatt declined to do so, recognising that the evidence had not been tested by the trial process, including cross-examination. The present situation is very different. Far from being "cautious" about the evidence of Dr Mokarrami, the judge treated it as correct so far as it was admissible. The problem for NIOC was that, in the judge's view, the evidence did not assist it.

92. In my judgment there was no error in the judge's approach. In his view this was a case such as described by Lord Hope in *Three Rivers (No. 3)* where it was "clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible". In such case, in other words, it is entirely appropriate for the court to "grasp the nettle" at the summary judgment stage.

Ground 2 – a literalist or a restrictive construction?

93. The real question, in my judgment, is whether the judge was right to take that view. That depends on whether he correctly identified and applied the principles of Iranian law set out in Dr Mokarrami's report. Mr Bailey submitted that he did not. Mr Bailey seized on the judge's reference to taking "a literalistic approach" to the words of the parties' arbitration agreement and submitted that this was contrary to the requirement in Iranian law for a "restrictive approach" to be taken. He listed what he said were 11 principles of Iranian law identified by Dr Mokarrami, which the judge had wrongly "distilled" (the judge's word) into the three principles which I have set out at [34] above.

94. I do not accept this criticism either. In my judgment the judge's distillation was an accurate summary of Dr Mokarrami's evidence to the extent that it was relevant and admissible. As appears from the passages of Dr Mokarrami's report which I have set out above, the fundamental principle of contractual interpretation in Iranian law is that "the words of the arbitration agreement are paramount". The "restrictive approach" which Dr Mokarrami describes applies when a choice needs to be made between rival interpretations in the event of ambiguity, so as to give rise to "any reasonable doubt", but "if there is no ambiguity, the text is strictly interpreted". It is clear that when the judge referred to taking a "literalist approach", without adopting any "pro-arbitration construction" or "*Fiona Trust* presumption", he was saying no more than that he would give paramount effect to the words of the parties' arbitration agreement, in accordance with the principles explained by Dr Mokarrami.

95. Mr Bailey's alleged 11 principles of Iranian law are in reality no such thing. They are not Dr Mokarrami's own evidence, but rather counsel's attempt to summarise his report. In some cases they represent a gloss which is not what Dr Mokarrami himself is saying, and which is not supported by the cross-reference provided to Dr Mokarrami's report. In some cases they are not a principle of Iranian law, but merely the underlying rationale for that principle. But as the judge accepted the principles identified by Dr Mokarrami at face value for summary judgment purposes, he did not need to explore their rationale. In other cases, they are irrelevant. Thus the principle of privity of contract (one of Dr Mokarrami's two "key principles") is of no relevance as there is no question of CNGC or any other third party being bound by the arbitrators' determination of the liability to CNGC claim. Similarly, a principle that references to a contract will not include claims in tort is irrelevant when no claim in tort was being advanced.

96. In my judgment there can be no doubt that the judge applied correctly the principles of Iranian law which he identified. Giving paramount effect to the words of the arbitration agreement, there can be no doubt that the liability to CNGC claim fell within its scope. It was a claim arising out of or relating to the contract or its breach, giving those words (which are not suggested to be terms of art in Iranian law) their natural and ordinary (and I would say, inevitable) meaning. There is no ambiguity which needs to be resolved by adopting a restrictive approach to the interpretation of the clause and none was suggested. It is in any event hard to discern any "restrictive" meaning of "arising out of or relating to" which would exclude the liability to CNGC claim from the scope of the clause.

97. Accordingly, subject only to ground 3, the judge was right to conclude that NIOC's section 67 case had no realistic prospect of success.

Ground 3 – "matters"

98. Mr Bailey submitted that the judge had gone wrong in describing the issue as whether "the relevant claim" (i.e. the liability to CNGL claim) fell outside the scope of the arbitration clause. He submitted that the correct question in the context of a section 67 challenge was whether the relevant "matter" fell outside the scope of the clause, pointing to the phrase "what matters have been submitted to arbitration in accordance with the arbitration agreement" in section 30(1)(c) of the 1996 Act, which defines what is meant by "substantive jurisdiction", and the use of the word "matter" in section 9, which is concerned with the circumstances in which legal proceedings will be stayed in favour of arbitration and was discussed by Mr Justice Popplewell in *Sodzawiczny v Ruhan*. He submitted that the word "matters" includes claims, but is more properly to be understood as meaning issues, and that the judge had overlooked or failed to understand the distinction between a claim for damages and a particular issue or matter as to the existence and extent of CGC's alleged liability to CNGC under a separate contract.

99. In my judgment there is nothing in this somewhat semantic point. The judge was well aware that NIOC's case was that the arbitrators had no jurisdiction to determine the existence and extent of CGC's liability to CNGC because this liability arose under a separate contract. In referring to whether the claim was within the scope of the clause, the judge plainly had in mind all aspects of the claim. Indeed, the arbitration clause expressly says that a claim may be referred to arbitration, which must include the issues or matters required to be resolved in order to determine the claim.

Disposal

100. The judge was right to conclude that the arbitrators had jurisdiction to determine the liability to CNGC claim and that NIOC's section 67 challenge had no realistic prospect of success. I would dismiss the appeal.

101. For the reasons given earlier, I would hold that this court has no jurisdiction to grant permission to appeal on the cross-appeal.

Lord Justice Nugee:

102. I agree.

Lady Justice Falk:

103. I also agree.