Neutral Citation Number: [2022] EWHC 1407 (Comm)

Case No: CL-2021-000100

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND & WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/06/2022

Before :

Sir Ross Cranston
Sitting as a High Court Judge

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Between:

UNION OF INDIA	**Applicant/ Respondent in the Arbitration**
- and -	
(1) RELIANCE INDUSTRIES LIMITED **(2) BG EXPLORATION AND PRODUCTION INDIA LIMITED**	**Respondents/ Claimants in the Arbitration**

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LOUIS FLANNERY QC and A. K. GANGULI SC (instructed by **DENTONS**) for the **APPLICANT**
HARISH SALVE QC, MATTHEW GEARING QC and SHEILA AHUJA (instructed by **ALLEN & OVERY**) for the **RESPONDENTS**

Hearing dates: 17 and 18 May 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR ROSS CRANSTON SITTING AS A JUDGE OF THE HIGH COURT

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Thursday 09 June 2022 at 10:30am.

Sir Ross Cranston:

INTRODUCTION

1. This is a challenge under sections 68 and 69 of the Arbitration Act 1996 (referred to in the judgment as the 1996 Act) to an award in long-running arbitration proceedings between the parties. The supervisory jurisdiction of this court is available because the seat of the arbitration is London, although the arbitration concerns two production sharing contracts governed by Indian law relating to offshore oil and gas fields in India.

2. The main question of law raised in the application under section 69 is whether the arbitration tribunal was correct to decide an issue of res judicata according to English law because the seat of the arbitration is in London. Specifically at issue is the application of the well-known English law principle in *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313 ("*Henderson v Henderson*"), that a party is precluded from raising in subsequent proceedings matters which were not but could and should have been raised in the earlier proceedings. The matters which the Government were precluded from raising through the application of *Henderson v Henderson* are what were called its threshold matters/objections concerning, in the main, Indian constitutional law principles.

3. The essence of the challenge under section 68 of the 1996 Act is that there is a serious irregularity causing substantial injustice in the award through the failure of the arbitration tribunal to apply these principles of Indian constitutional law. These are in Articles 297 and 299 of the Indian Constitution. Article 297 provides, in summary, that natural resources in Indian waters vest in the Union and are held for the purposes of the Union. Article 299(1) provides for formalities in the execution of Government contracts.[1]

BACKGROUND

4. Reliance Industries Limited ("Reliance") and BG Exploration and Production India Limited (formerly Enron Oil & Gas India Ltd) ("BG") are the claimants in the underlying arbitration. In this judgment they are described as "Reliance/BG". The Union of India ("the Government"), acting by its Joint Secretary (Exploration) of the Ministry of Petroleum and Natural Gas, is the respondent in the underlying arbitration. The arbitration proceedings are being undertaken under the 1976 UNCITRAL Rules. The arbitration tribunal ("the Tribunal") is currently constituted by Christopher Lau SC of Singapore (presiding), Mr Peter Leaver QC, and Justice B. Sudershan Reddy of India (who replaced Justice B.P. Jeevan Reddy).

5. The background to these applications involves two production sharing contracts ("PSCs") concerning a gas field and an oil/natural gas field off the west coast of India. The fields are known as Tapti and Panna Mukta respectively, and the associated PSCs as the Tapti PSC and the Panna Mukta PSC. The PSCs were entered into on 22 December 1994 between the Government, Oil & Natural Gas Corporation Ltd, an entity controlled by the Government, Reliance, and BG. Collectively Oil & Natural Gas

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[1] Article 299 reads: "All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise."

Corporation Ltd, Reliance and BG are called "the Contractor" under the PSCs. Pursuant to the PSCs, the Government granted exclusive rights to the Contractor to exploit the fields for a period of 25 years.

The PSCs

6. The PSCs are in similar, but not identical, terms. I gratefully adopt the outline of PSC terms in the judgment of Popplewell J (as he then was) ("the Popplewell judgment") in *Reliance Industries Ltd & Anor v Union of India* [2018] EWHC 822 (Comm), [2018] 1 Lloyd's Rep. 562, [2018] 2 All E.R. (Comm) 1090, [2018] 1 C.L.C. 648:

> "The PSC terms in outline
>
> 3. Article 7.3 of the PSCs obliges the Contractor to carry out the exploitation of the fields at its sole risk, cost and expense, expeditiously and in accordance with good international petroleum industry practice. The work programmes to be carried out under the PSCs are to be approved by the Management Committee (Article 5.6(a)), a body consisting of representatives of each of the four parties (Article 5.2) with the Government representative having an effective power of veto (Articles 5.7 and 5.13). The initial programme for development (as opposed to exploration or production) was to follow the indicative plan annexed as Appendix G. Appendix G sets out a non-exclusive list of matters which were to be included in the development plan. Article 13.1.2 provides that those plans for development would be revised, subject to Management Committee approval, by the Contractor in a 'Development Plan first submitted pursuant to this Contract'. That initial development plan is also referred to as the 'Initial Plan of Development', or 'IPOD'. Subsequent plans, including variations to previous plans, might then be approved by the Management Committee.
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> 4. Article 13 of the PSCs entitles the Contractor to recover its costs from the total volume of petroleum produced and saved from the fields in each financial year. Article 13.1.2 limits the extent to which Development Costs may be recovered in this way. It provides that the recovery of 'Development Costs' is to be capped by the Cost Recovery Limit or 'CRL'. The CRL is US$545 million for Tapti and US$577.5 million for Panna Mukta. Development Costs incurred by the Contractor in excess of these limits fall to be borne by the Contractor. If, in certain specified circumstances, the CRL is exceeded, it can be increased to reflect those circumstances, either by the Management Committee or, in default of agreement by the Management Committee, by an arbitral tribunal (Articles 13.1.4(c) and 13.1.5)…
>
> 6. The PSCs are governed by Indian law (Article 32.1), save that the arbitration agreement in each of them, found in Article 33, is governed by English law (Article 33.12). The PSCs also state at Article 33.9 that arbitration proceedings are to be conducted in accordance with 'the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) of 1985'; it is common ground that the date was a mistake, and the reference was intended to be to the 1976 UNCITRAL Arbitration Rules. In the event of any conflict between the UNCITRAL Rules and the provisions of Article 33, the provisions of Article 33 are to prevail (Article 33.9). The seat of arbitration was agreed to be London: Article 33.12 originally provided as much, and although the seat was changed to

Paris when the Second Claimant became part of the BG Group, it was then changed back to London on an ad hoc basis for the purposes of the present arbitral proceedings."

7. For present purposes Article 34.2 should also be noted:

"This Contract shall not be amended, modified, varied or supplemented in any respect except by an instrument in writing signed by all the Parties, which shall state the date upon which the amendment or modification shall become effective."

The Awards

8. There are long running arbitration proceedings in relation to the PSCs which are still ongoing. Reliance/BG commenced the arbitration by a Notice of Arbitration dated 16 December 2010. The only point to note is that under "Relief claimed", Reliance/BG sought an order that the CRL in respect of the Tapti PSC be increased pursuant to Article 13.1.4(c).

9. So far, the Tribunal has issued eight substantive partial awards. The position up to 2018 was helpfully summarised in 2018 in the Popplewell J judgment, at [9]):

"(a) A "Final Partial Consent Award" dated 29 July 2011 (the "Consent Award"). This recorded in particular the ad hoc agreement of the parties that London was to be the seat of the arbitration.

(b) A "Final Partial Award on Arbitrability" dated 12 September 2012 (the "Arbitrability Award"). In this award the Tribunal determined that certain specific matters whose arbitrability had been challenged were arbitrable…

(c) A "Final Partial Award on Issues B, C and D of the May 2012 Issues" dated 10 December 2012 (the "CRL Award"). The CRL Award concerned, among other things, how the CRL cap was to operate on recovery of Development Costs by [Reliance/BG] as a matter of the true construction of Article 13.1 of the PSCs…

(d) A "Final Partial Award" dated 12 October 2016…The Award was issued after four hearings, in November 2013, September 2014, November 2014 and October 2015.

(e) A "Final Partial Award" dated 11 January 2018, disposing of disputes relating to certain audit exceptions."

10. Subsequent to the Popplewell judgment there have been other awards:

(f) A "Final Partial Award" dated 1 October 2018, in this judgment called the 'Agreements Case Award'. It followed the Popplewell judgment in 2018 remitting matters to the Tribunal. Reliance/BG's Agreements Case was that at Management Committee meetings the Government had agreed that the Contractor could recover Development Costs in respect of certain works in any event, whether by way of either an increase in the CRL or otherwise.

(g) A "Final Partial Award" dated 12 March 2019; and

(h) A "Final Partial Award" dated 29 January 2021, which is the award the Government challenges in these proceedings.

The 2012 CRL Award

11. In outline, the Tribunal decided in this award on the meaning of CRL in both PSCs. By a majority (Justice B. P. Reddy dissenting) the Tribunal concluded that Development Costs incurred in respect of works beyond a certain level of production, which varied between the fields, were outside the CRL and were fully cost recoverable. This was described as Reliance/BG's "upside case". Notwithstanding those conclusions the Tribunal decided that whether Reliance/BG were entitled on the merits either in law and/or on the facts to succeed in their claim for Development Costs as falling outside the CRL depended upon the Tribunal's subsequent determination following further pleadings, evidence, and submissions.

The 2016 Award

12. In general terms this award dealt with issues arising out of the 2012 CRL Award. It found, amongst other things, in favour of the Government that Reliance/BG were estopped from relying on the interpretation of the CRL determined by the 2012 Award. Consequently, their so-called upside case was rejected. The Tribunal determined whether specific development costs fell within or outside the CRL.

13. The Government's case on estoppel by conduct was based on the mutual understanding of the parties to the PSCs of its terms. That understanding was to be found as a matter of Indian law since that was the governing law of the contract. Under Indian law, the Government argued, estoppel was not merely a rule of procedure but could create or defeat rights. The Tribunal determined that, since estoppel under Indian law was a rule of evidence, with London as the seat of arbitration, estoppel was governed by English law. As indicated, it upheld the Government's estoppel case: there was a common understanding that when executing the PSCs, the parties did so on the basis that the CRL cap set out in Article 13.1.2 of the PSCs would apply to Development Costs incurred in respect of works either listed in Appendix G or listed in the IPOD.

The Popplewell judgement on the 2016 Award

14. The Popplewell judgment concerned the 2016 Award. In outline the proceedings before Popplewell J involved challenges by Reliance/BG to findings of the Tribunal. One challenge was advanced under section 69 in relation to alleged errors of law in the Tribunal's findings on estoppel. Applying principles of English law, Popplewell J rejected this: there could be no legitimate criticism of the formulation of the principles by the Tribunal, nor of their application.

15. Reliance/BG also applied under section 68 of the 1996 Act on the basis that there had been a number of serious procedural irregularities. Popplewell J held that there was only one serious irregularity giving rise to substantial injustice i.e., the Tribunal's failure to address whether there had been agreements that additional development costs should be recoverable. This was Reliance/BG's so-called "Agreements Case", which had been advanced before the Tribunal but not determined. The issue was what the Tribunal meant when it had decided that the Agreements Case no longer fell for determination.

16. The Order of the court following the Popplewell judgment ("the 2018 Order") remitted the 2016 Award to the Tribunal to consider the Agreements Case.

The Agreements Case Award 2018 and Robin Knowles J's judgment

17. As a result of the remission, there was a hearing before the Tribunal in July 2018. The Tribunal published in October 2018 the Agreements Case Award. In it the Tribunal allowed Reliance/BG to cost recover approximately US$177m of Development Costs at Tapti. Part of the Panna Mukta Development Costs within the Agreements Case were costs incurred on the so-called Expanded Plan of Development project ("EPOD"). The Tribunal found in favour of Reliance/BG in an amount of approximately US$143m of EPOD costs on various resolutions which the Management Committee had issued after 10 December 2003. However, it denied them some US$259m because it considered that the resolutions which they asserted evidenced agreements for this sum had not been relied upon as part of the Agreements Case prior to the 2016 Award. RIL/BG's claim for this balance sum came to be known as their Balance EPOD Agreements Case.

18. In October 2018 both sides began proceedings before this court under the Arbitration Act 1996. The Government advanced jurisdictional and procedural grounds under sections 67 and 68. One aspect was that the Tribunal relied upon a mechanism for calculating EPOD costs as falling within the CRL which had not been advanced by Reliance/BG as their case.

19. In *Reliance Industries Ltd v The Union of India* [2020] EWHC 263 (Comm), [2020] 1 Lloyd's Rep 489, Knowles J rejected this challenge, along with the other grounds the Government advanced. However, he agreed with Reliance/BG's jurisdictional challenge under section 67 of the 1996 Act. He held that the Tribunal had erred in deciding that it had no jurisdiction on the remission from Popplewell J's decision to consider resolutions which Reliance/BG had not previously referred to in the context of their Agreements Case but were on the record prior to the issue of the 2016 Award.

20. The Order of the court dated 5 March 2020 ("the 2020 Order") consequent on Robin Knowles J's judgment varied the Agreements Case Award under section 67(3)(b) of the 1996 Act by deleting certain words in paragraph 3.22(d) of the award and inserting that the Tribunal did have jurisdiction, in relation to Reliance/BG's case concerning the costs of EPOD ("the EPOD Agreements Case"), to

> "take into account (a) documentary and other evidence which had not previously been referred to by [Reliance/BG] in the context of the EPOD Agreements Case before the [2016 Award], provided that it was evidence which was already on the record in the arbitration prior to the release of the [2016 Award], and (b) submissions in respect of such evidence".

For the avoidance of doubt the Order identified this evidence by reference to paragraphs in Reliance/BG's skeleton for the July 2018 remission hearing and the submissions made in the skeleton argument and orally at the remission hearing.

The 2019 Award

21. The Tribunal's 2019 Award addressed jurisdictional and threshold issues raised by the Government. It was in response to Reliance/BG's claims following the 2016 Award for

an increase in CRL, including what was called the "residual upside" claim. The Government contended that Reliance/BG's statement of claim should be rejected since it did not fall within the scope of Article 13.1.4(c) of the PSCs and consequently Article 13.1.5 could not be triggered. Reliance/BG was seeking to rewrite the PSCs, it submitted, but these *had* been executed in accordance with Article 297 of the Constitution of India which has been interpreted by the Supreme Court of India to contain the 'Doctrine of Trust'. Thus, the Government submitted, any application for an increase of the CRL which did not fulfil the parameters of Articles 13.1.4(c) and 13.1.3(e) of the PSCs would have to be rejected and "entertaining any such plea would amount to gross violation of the constitutional mandate and the law."

22. Alternatively, the Government contended, the claims were either barred by res judicata, constructive res judicata (*Henderson v Henderson* type res judicata), or issue estoppel and/or were outside the scope of Article 33. Reliance/BG, the Government argued, was seeking to reopen issues that had already been determined in the 2016 Award and had attained finality. In its argument, the Government cited *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46, [2014] AC 160 ("*Virgin Atlantic*" or "the *Virgin Atlantic case*") as regards res judicata and abusive proceedings.

23. By a majority the Tribunal determined inter alia that it did not have jurisdiction in respect of Reliance/BG's residual upside case because of res judicata. Reliance/BG could have and should have raised this in relation to the matters they now advanced prior to the release of the 2016 Award.

The 2021 Award

24. This is the award under challenge in these proceedings. It was consequent on Robin Knowles J's judgment and the 2020 Order.

25. The Tribunal had issued directions for pleadings to be filed and a hearing to take place. In June 2020, the Government filed a submission with its defence relating to the EPOD Agreements Case. This contained the Government's so-called threshold matters/objections, mainly under Indian substantive law, and submissions as regards the documents on which Reliance/BG relied. In July 2020 Reliance/BG filed a responsive submission, arguing inter alia that the Government's threshold matters/objections were beyond the scope of the Tribunal's jurisdiction in that they fell outside the 2020 Order or were barred by res judicata or abuse of process.

Oral submissions

26. There is no need to explore at length the oral submissions of the parties at the hearing, except in relation to *Virgin Atlantic* and related cases. On 3 November 2020 Mr Ganguli SC for the Government referred to the *Virgin Atlantic case* and submitted that it was distinguishable on the facts. When questioned by the Tribunal about paragraph [17] of Lord Sumption's judgment, set out later in this judgment, Mr Ganguli replied emphatically that none of the issues discussed there were relevant to the present case.

27. Mr Ganguli then took the Tribunal to *Nomihold Securities Inc v Mobile Telesystems Finance SA (No 2)* [2012] EWHC 130 (Comm), paragraph [42], also referred to later in this judgment, that there is a principle in arbitration that a party will not be permitted to raise an issue that could and should have raised in an earlier reference. Applied to

the present case, Mr Ganguli submitted, the Tribunal had decided a case on one agreement, but the six agreements of the Management Committee were independent of this and each other, and were not enforceable because of the Government's threshold matters/objections.

28. After referring to another authority, Mr Ganguli took the Tribunal to (as he put it) "one more" authority, *Canara Bank v N.G. Subbaraya Setty* (2018) 16 SCC 228 ("*the Canara Bank case*"), "since your Lordships will be discussing and applying Indian law, which is now governing the contract between the parties…".

29. In the *Canara Bank case* the Supreme Court of India considered the application of res judicata in relation to court proceedings concerning repayment to a bank. In giving the court's judgment, Nariman J canvassed the law on res judicata in Roman, Hindu and English sources, as well as the Code of Civil Procedure 1908 and an earlier Indian Supreme Court decision, before turning to *Virgin Atlantic* where, he said, the "link between the doctrine of res judicate and the prevention of abuse of process is very felicitously stated...":[4]. R. F. Nariman J quoted paragraph [24] of *Virgin Atlantic* and added:

> "5. Res judicata is, thus, a doctrine of fundamental importance in our legal system, though it is stated to belong to the realm of procedural law, being statutorily embodied in section 11 of the Code of Civil Procedure, 1908. However, it is not a mere technical doctrine, but it is fundamental in our legal system that there be an end to all litigation, this being the public policy of Indian law. The obverse side of this doctrine is that, when applicable, if it is not given full effect to, an abuse of process of the Court takes place. However, there are certain notable exceptions to the application of the doctrine. One well known exception is that the doctrine cannot impart finality to an erroneous decision on the jurisdiction of a Court. Likewise, an erroneous judgment on a question of law, which sanctions something that is illegal, also cannot be allowed to operate as res judicata. This case is concerned with the application of the last mentioned exception to the rule of res judicata."

30. At paragraph [34] of the judgment, the Court summed up the law as follows:

> "34.1 The general rule is that all issues that arise directly and substantially in a former suit or proceeding between the same parties are res judicata in a subsequent suit or proceeding between the same parties. These would include issues of fact, mixed questions of fact and law, and issues of law.
>
> 34.2 To this general proposition of law, there are certain exceptions when it comes to issues of law…
>
> 34.2.2 An issue of law which arises between the same parties in a subsequent suit or proceeding is not res judicata if, by an erroneous decision given on a statutory prohibition in the former suit or proceeding, the statutory prohibition is not given effect to. This is despite the fact that the matter in issue between the parties may be the same as that directly and substantially in issue in the previous suit or proceeding. This is for the reason that in such cases, the rights of the parties are not the only matter for consideration (as is the case of an erroneous interpretation of a

statute inter parties), as the public policy contained in the statutory prohibition cannot be set at naught…"

31. In his submissions to the Tribunal Mr Ganguli highlighted paragraph 33.2.2 of *Canara Bank*, the exception to res judicata regarding a question of law, sanctioning something prohibited by statute. After quoting passages in *Canara Bank*, Mr Ganguli commended the Tribunal to "follow the logic on this case… the public policy is enshrined in all these provisions of law which I have cited and those are the fundamental principles of law laid down under the constitution itself; that is Article 297, 299 and also Article 34.2 of the PSC."

The Award

32. The Tribunal published its unanimous award in January 2021 and found in favour of Reliance/BG in the further amount of approximately US$111m out of the total of approximately US$260m. In this judgment this is called "the 2021 Award" although the parties have named it the "Balance EPOD Award", where EPOD stands for "Expanded Plan of Development".

33. The Tribunal identified 12 issues for determination.

Issue 1: scope of the remission

34. Issue 1 concerned the scope of the remission, in particular whether it was open to the Tribunal to consider the Government's threshold matters/objections. In considering Issue 1, the Tribunal referred to the Government's submission (paragraph 4.2 of the award) that for the Tribunal to accept Reliance/BG's arguments would be contrary to settled principles of law and the public policy of India. The Government had added that it had raised these threshold matters/objections - namely Articles 297 and 299 of the Indian Constitution, Article 34.2 of the PSC and limitation - before the Tribunal, on various occasions, and before the Court. The Government's submission had also referred to what Mr Gearing QC for Reliance/BG had said in the course of submissions in 2012, that contractual variations had to be in writing, in a formal document, as a result of Article 34.2 of the PSC and Article 299 of the Indian Constitution.

35. The Tribunal concluded that it could not consider the Government's threshold matters/objections. In explaining this at paragraph 4.9 of the award it referred to the wording of the 2020 Order, quoted earlier in the judgment. It accepted that the 2020 Order did not expressly prohibit the Government from making submissions, and that under it the Tribunal had jurisdiction to consider "(b) submissions in respect of such evidence". However, after quoting directly from the 2020 Order, the Tribunal said (omitting footnotes):

> "4.9…And whilst it could be said that the threshold matters/objections [the Government] now seeks to raise apply to 'such evidence', they apply equally to the entire Agreements Case [Reliance/BG] had raised prior to the release of the [2016 Award] and which the Tribunal has already determined in the Agreements Case Award. Whilst [the Government] had referred to Articles 297 and 299 of the Constitution of India, Article 34.2 of the PSC and limitation in the course of these arbitral proceedings, it is clear that it did not do so in respect of or in response to the Agreements Case. No good explanation has been provided – and there cannot

> be any justification – for [its] failure (see also paragraph 4.11 below): the same threshold matters/objections [it] now seeks to rely on, at the stage of remission, solely in respect of the Balance EPOD Agreements Case could have been raised prior to the release of the [2016 Award] and the Agreements Case Award. And they should have been raised prior to the release of the [2016 Award] and the Agreements Case Award. This much is clear from the *Henderson v Henderson* rule which has been cited, with approval, by the UK Supreme Court in *Virgin Atlantic*…"

36. At paragraph 4.10 of the award the Tribunal referred further to *Henderson v Henderson* and *Virgin Atlantic* as justifying its conclusion, quoting extensively from the latter's paragraphs [18], [17], [26], and [27]. In paragraphs [17]-[26] Lord Sumption summarised the general principles of res judicata, and all members of the court agreed with his exposition. At paragraph [18], Lord Sumption had quoted from the judgment of Wigram V-C in *Henderson v Henderson*, including the passage that res judicata applied, except in special cases, "not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time..".

37. The Tribunal added that, consequently, parties to an arbitration were required to bring forward their entire case. Unless there were special circumstances, a party could not reopen the same subject of arbitration in respect of the part omitted from its case. The Tribunal then quoted paragraph [17] of Lord Sumption's judgment in Virgin Atlantic. In relevant parts it reads:

> "17. Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right on the judgment…Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties…"Issue estoppel" was the expression devised to describe this principle…Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

38. At paragraph 4.10 of the award the Tribunal said that the Supreme Court in *Virgin Atlantic* had made clear that it was summarising the general principles of res judicata, principles which obviously applied to different factual scenarios, and that Reliance/BG relied on these general principles. At paragraph 4.11 the Tribunal added that it was not persuaded that *Nomihold Securities Inc v Mobile Telesystems Finance SA (No 2)* [2012] EWHC 130 (Comm) showed that the *Henderson v Henderson* principle did not apply to arbitral proceedings.

39. At paragraph 4.13 of the award, the Tribunal said that the Government's reliance on *Canara Bank v N.G. Subbaraya Setty* (2018) 16 SCC 228

> "is misplaced: this arbitration being seated in London, United Kingdom, the matter of res judicata is to be determined applying the laws of England and Wales."

The Tribunal noted at paragraph 4.14 that the Government had raised threshold matters/objections before Knowles J, but he must have found no merit in them since he rejected the Government's challenges. For that reason as well it was not open to the Government to raise the same threshold matters/objections again. At paragraph 4.15 the Tribunal summed up:

> "4.15 It is thus clear that the *Henderson v Henderson* rule…provides a complete answer to [the Government's] threshold matters/objections it now seeks to raise at the stage of remission in response to [Reliance/BG's] Balance EPOD Agreements Case. It is hence not open to the Tribunal to consider [the Government's] threshold matters/objections."

Issues 2-11

40. Notwithstanding its determination on Issue 1, that the Government could not advance its threshold matters/objections, the Tribunal went on to consider them as Issues 2-11. For present purposes the following issues deserve attention:

41. As regards Issue 2, Article 34.2 of the Panna Mukta PSC, the Tribunal concluded that it had no merit. As was clear from the Management Committee resolutions, the parties had agreed that certain items of work were fully cost recoverable. They had never contemplated that this would constitute an amendment of the PSC. It was different from *Videoco Industries v UOI* (2011) 6 SCC 161, where the parties agreed to amend the arbitration agreement in the PSC.

42. Issue 3 concerned the Government's arguments about Article 299 of the Constitution, including that non-compliance with such mandatory constitutional conditions rendered any contract or agreement void and unenforceable - citing *Bihar Eastern Gangetic Fishermen Co-Operative Society Ltd v Sipahi Singh* (1977) 4 SCC 145 at paragraph 6.1(d) - so that questions of estoppel or rectification did not fall for consideration. The Tribunal held that even if it could consider the matter, it lacked merit. The agreements (or common understanding) which the parties reached on full cost recovery of Development Costs incurred in respect of certain works the Tribunal identified in the Agreements Case Award "are not in the nature of separate contracts: all the Parties did in the relevant MC meetings was to reach an agreement or come to a common understanding that certain Development Costs incurred on certain items of work the Contractor would be entitled to fully cost recover within the CRLs and for the CRLs

to be increased in order to achieve full cost recovery of such Development Costs". After quoting with approval a submission by Reliance/BG, the Tribunal went on to say:

> "6.4 [The Government's] argument taken to its ultimate conclusion would mean that any application by the Parties of a contractual provision which was not strictly in accordance with the express terms of that provision would amount to an amendment and such amendment could only be enforceable if it was in writing in compliance with Article 34.2 of the Panna Mukta PSC and signed by the President of India pursuant to Article 299 of the Constitution of India. But if that were so, any exercise by a Government representative (here the representative on the MC) of a power conferred on it under a contract duly executed in terms of Article 299 of the Constitution of India which did not comply strictly with the terms of such contract would be unconstitutional and an estoppel could never apply vis-à-vis the Government in respect of any contract it has entered into. If that was the case, there would be clear legal authority stating so. However, [the Government] has not referred to any. The simple fact is that the Parties, as is clear from the relevant MC resolutions, had agreed or had come to a common understanding that Development Costs incurred in respect of certain items of works (namely those identified by the Tribunal in the Agreements Case Award and in Issue 12 below) would be fully cost recoverable. [The Government] is merely to be held to its agreement and/or is estopped from contending otherwise."

43. Issue 4 concerned the Government's reliance on Article 297 of the Indian Constitution, including the submission that since the natural resources including oil and gas belonged to the people, the Supreme Court had held in construing the article that the Government acted as a trustee of its people under the public trust doctrine. The Tribunal concluded that even if it had been open for it to consider the matter, it had no merit. The simple fact was that the parties had reached agreements or a common understanding through the Management Committee and the Government had to be held to its agreement: [7.3].

44. As to the Government's submission that it could not give away natural resources by executing a contract with third parties except by following a transparent method for its award, "and that too in strict terms of the contract", the Tribunal stated that it was not in dispute that the Panna Mukta PSC was a contract entered into following a transparent method; it was not clear how the phrase just quoted could be related to the award of a contract. As to the suggestion that the Management Committee could only reach an agreement on cost recoverability applying strictly the terms of the PSC, the Tribunal referred back to its findings on Issues 2 and 3: [7.4].

45. Issue 5 was the limitation issue, which was again raised as a public policy issue in the claim. The Tribunal found that given when the cause of action arose there was no difficulty with lateness.

Issue 12: merits

46. The Tribunal then turned to the merits, Issue 12, whether Reliance/BG were entitled to any of the relief sought in respect of their Balance EPOD Agreements Case. One of the Government's submissions was that the Tribunal's jurisdiction was restricted to consider only such claims which fell within the specific terms of the PSC and, since Reliance/BG's Balance EPOD Agreements Case was founded on so called ad hoc agreements come what may outside the terms of the PSC, the same had to be determined

in toto. In response, at paragraph 15.23, the Tribunal determined that, for the reasons set out in paragraph 4.9 of the award, it was far too late for the Government to raise an objection to its jurisdiction in respect of Reliance/BG's Agreements Case (of which the Balance EPOD Agreements Case formed a part). In any event, the Tribunal added, it considered the arbitration agreement in Article 33 of the Panna Mukta PSC to be sufficiently wide to include the determination of the Balance EPOD Agreements Case.

Clarification decision

47. In late February 2021 the Government made a request for clarification and interpretation under Articles 35 and 36 of the UNCITRAL Rules as to whether the Tribunal had in the 2021 Award "applied the principle in *Henderson v Henderson* as a matter of substantive law or procedural law".

48. In its Clarification Decision of 9 April 2021, the Tribunal stated:

> "3.18…The problem with this submission is that the question whether res judicata (i.e., the 'principle in *Henderson v Henderson'*: see paragraphs 4.9 and 4.12 of the Balance EPOD Award) is a question of procedural law or whether it is a substantive rule of law had not been argued before the Tribunal before it issued the [2021 Award]. It is this question [the Government's] request for clarification is directed at. Notably, [it] has not shown, either in [its] Application of 28 February 2021 or [its] Reply of 15 March 2021, that this question was argued before the Tribunal in the Parties' respective written and/or oral submissions on the Balance EPOD Agreements Case and thus had to be determined by the Tribunal…It is difficult to see how the Tribunal could now, in response to a purported request for clarification, effectively decide a matter which had not been argued before it in the first place."

49. The Government had also raised what it characterised as the violation of public policy underlying Article 299 of the Constitution. The Tribunal said that its power under Article 36 of the 1976 UNCITRAL Rules was limited to corrections of "any errors in computation, any clerical or typographical errors, or any errors of similar nature". The Government had not shown that its request in this regard related to such corrections. Whilst the Government asserted that "a patent error that has unfortunately crept into the award" its contention was in effect, the Tribunal said, that it had come to the wrong conclusion and/or misapplied what it said was the law. Article 36 of the 1976 UNCITRAL Rules did not capture that type of error.

APPEAL UNDER SECTION 69

50. Initially the Government advanced three questions of law under section 69 but having considered Reliance/BG's submissions it accepted that their first two questions could be encapsulated in what is now Question 1. Accordingly, the two questions of law on which the Government seeks permission to appeal are:

> Question 1: Was the Tribunal correct to determine that the specific questions of res judicata with which it was concerned should be decided according to English law, merely because the seat of arbitration is London?
>
> Question 2: If the answer to Question 1 is yes, is the doctrine applicable to earlier phases in the same arbitration proceedings (as opposed to separate proceedings)?

51. Section 69(3) of the 1996 Act provides that leave to appeal on a question of law arising out of an award can be given only if the court is satisfied:

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

1. Was the Tribunal's decision obviously wrong/at least open to serious doubt: s.69(3)(c)?

Question 1: res judicata/Henderson v Henderson as a matter of English law?

52. At paragraph 4.13 of the 2021 Award, the Tribunal concluded that the matter of res judicata was to be determined applying the laws of England and Wales, which is the law of the seat of the arbitration. At paragraph 4.15 it went on to determine that the *Henderson v Henderson* principle was a complete answer to the Government's response to Reliance/BG's Balance EPOD Agreements case. In other words, the Tribunal's approach meant rejecting the Government's threshold matters/objections, including those relating to the Indian constitution.

53. In its submissions on error of law the Government contended that the doctrine of res judicata, including the *Henderson v Henderson* principle, is one of substantive English law. On its case there was therefore an issue as to whether the *Henderson v Henderson* principle could apply in an arbitration pursuant to a contract whose governing law is Indian law, without demonstrating that the relevant principles are identical in the two systems of law. The wrongful adoption of English law to determine an issue in arbitral proceedings, it continued, could constitute an error of law, citing *CGU International Insurance plc v AstraZeneca Insurance Co Ltd* | [2005] EWHC 2755 (Comm), [2006] Lloyd's Rep 409. The Government accepted, however, that if the Tribunal applied the *Henderson v Henderson* principle as a matter of procedural law its position in relation to the difference between English and Indian law fell away because procedural matters are ordinarily determined according to the law of the seat of the arbitration (as we have seen, English law), regardless of the governing law of the contract.

54. There is no need for a lengthy review of the authorities concerning whether the *Henderson v Henderson* principle is procedural or substantive law. Lord Sumption canvassed the authorities in *Virgin Atlantic*. First, in paragraph [17] of his judgment, quoted earlier, he identified five strands of res judicata, before turning to examine the fifth, *Henderson v Henderson* and its treatment in the authorities. In that regard he referred at paragraph [19] to how Lord Kilbrandon for the Privy Council had classified

Henderson v Henderson as part of the law relating to abuse of process in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581. At paragraphs [23]-[24] Lord Sumption rejected a submission regarding the impact on the law of *Arnold v National Westminster Bank plc* [1991] 2 AC 93, stating that the principle in *Henderson v Henderson* has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before. With reference to *Johnson v Gore-Wood & Co* [2002] 2 AC 1, Lord Sumption said that there was nothing there to the effect that abuse of process could not also be part of the law of res judicata: at [25]. Significantly, Lord Sumption added:

> "25…Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in *Arnold v National Westminster Bank plc* [1991] 2 AC 93, 110G, "estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process."

55. From paragraph [27] on Lord Sumption applied these principles to the circumstances of the case before him.

56. Lord Sumption returned to the *Henderson v Henderson* principle in *Takhar v Gracefield Developments Ltd* [2019] UKSC 13, [2020] AC 450, where the court held that it was not an abuse of process for a claimant to bring a fresh claim seeking to have a judgment set aside on the ground that it was fraudulently obtained by relying on evidence not available at the original trial. In a judgment with which Lords Hodge, Lloyd-Jones and Kitchin agreed, Lord Sumption said that the rule in *Henderson v Henderson.*

> "62…is commonly treated as a branch of the law of res judicata. It has the same policy objective and the same preclusive effect. But, it is better analysed as part of the juridically distinct but overlapping principle which empowers the court to restrain abuses of its process…Whereas res judicata is a rule of substantive law, abuse of process is a concept which informs the exercise of the court's procedural powers. These are part of the wider jurisdiction of the court to protect its process from wasteful and potentially oppressive duplicative litigation even in cases where the relevant question was not raised or decided on the earlier occasion. Since the decisions of the House of Lords in *Arnold v National Westminster Bank plc* [1991] 2 AC 93 and *Johnson v Gore Wood & Co* [2002] 2 AC 1 it has been recognised that where a question was not raised or decided in the earlier proceedings but could have been, the jurisdiction to restrain abusive re-litigation is subject to a degree of flexibility which reflects its procedural character. This allows the court to give effect to the wider interests of justice raised by the circumstances of each case."

57. Lord Sumption then proceeded from paragraph [63] on to apply these principles to the circumstances of the case before him.

58. The decisions of Lord Sumption in *Virgin Atlantic* and *Takhar v Gracefield Developments Ltd* are clear. The principle in *Henderson v Henderson* is a procedural

power, rather than a matter of substantive law. It is there to protect against wasteful and potentially oppressive duplicative proceedings. In this case the seat of the arbitration is London, England. In relation to the Government's threshold matters/objections the Tribunal exercised a procedural power in its decision on Issue 1. In doing so it applied English law, not Indian law. It was not obviously wrong, nor was it open to serious doubt for the Tribunal to do this.

59. The Government had three responses to this conclusion. First, it submitted, Lord Sumption's characterisation of the principle in *Henderson v Henderson* as procedural in *Virgin Atlantic* and *Takhar v Gracefield Developments Ltd* (if that were the case) was *obiter* and thus not binding on me. That has to contend with Lord Sumption's application of his analysis in paragraph [27] and the following paragraphs in *Virgin Atlantic*, and from paragraph [63] on in *Takhar v Gracefield Developments Ltd*. But even if it were the case that Lord Sumption's remarks were *obiter*, it is fanciful to suggest that this court would not follow the reasoned decisions of a judge of the Supreme Court in two different decisions, supported on both occasions by other members of the court. As a result English law is plainly that the *Henderson v Henderson* principle is properly characterised as procedural. Because it is a procedural rule, in the case of an arbitration the seat governs its exercise, whatever the proper law of the contract.

60. The second point the Government advanced was one of public policy. It submitted that arbitration's consensual nature meant that the *Henderson v Henderson* principle and abuse of process have a limited purchase compared with court proceedings.

61. To my mind it is clear that the *Henderson v Henderson* principle applies in the conduct of both arbitral and court proceedings. Albeit that they differ in various ways, in both there is a need for a procedural power to guard against abusive and duplicative proceedings. That power might derive from procedural rules or be inherent in the nature of the process. Under the 1996 Act it has a basis in the duty of a tribunal in section 33(1)(a) to act fairly by giving the parties a "reasonable" opportunity to put their case and to deal with that of their opponent, and section 33(1)(b) to adopt procedures avoiding unnecessary delay or expense. The principle of *Henderson v Henderson* is encapsulated in the section, especially the second limb, section 33(1)(b). It could well be a breach of that duty for a tribunal to allow a party to advance a claim, a defence or an argument that could have and should have been argued at an earlier phase of an arbitration or in an earlier proceeding. Reliance/BG highlighted that while the governing principle for arbitration under the 1996 Act is party autonomy, the section 33 duty was mandatory, a position justified in the public interest: Departmental Advisory Committee on Arbitration (DAC), *Report on the Arbitration Bill*, February 1996, para. 155.

62. The consensual nature of arbitration may impose some limits. Andrew Smith J canvassed some in *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm), [2012] Bus LR 1289, [42]. However, he recognised a principle in arbitration that a party will not be permitted to raise an issue that it could and should have raised in an earlier reference. He traced this principle back to *Smith v Johnson* (1812) 15 East 213, so antedating *Henderson v Henderson*, albeit that *Smith v Johnson* was based on the rule of abandonment: [42]-[43]. Nothing said at paragraph [44] of *Nomihold Securities* detracts from Andrew Smith LJ's finding that the principle of *Henderson v Henderson* applies in the context of arbitration: see also *Merkin and*

Flannery on The Arbitration Act 1966, 6th edition, p.21. In any event there is now additional authority about the application of the principle of *Henderson v Henderson* to arbitration in *Daewoo Shipbuilding and Marine Engineering Company Ltd v Songa Offshore Equinox Ltd* [2020] EWHC 2353 (TCC).

63. Thirdly, the Government submitted that the principle in *Henderson v Henderson* must be substantive if it can be used as a defence to a claim. That submission, in my view, goes nowhere when a procedural power can be used as a defence. In *Virgin Atlantic* and *Takhar v Gracefield Developments Ltd* Lord Sumption regarded *Henderson v Henderson* as a power which could be used in relation to matters generally – and that means claims, defences and arguments: see *Virgin Atlantic*, at [17]. Moreover, in referring in *Johnson v Gore-Wood & Co* [2002] 2 AC 1 to *Henderson v Henderson* abuse of process, Lord Bingham considered that it included raising a defence in later proceedings: at 31A-B.

64. The upshot is that the Government has not established that the Tribunal's determination concerning Question 1 was wrong or at least open to serious doubt. In my view there can be no question about the correctness of the Tribunal's approach. That being the case there is no need to address the issue of general public importance in section 69(3)(c)(ii).

Question 3: Application of Henderson v Henderson to all stages of process

65. In *Daewoo Shipbuilding and Marine Engineering Company Ltd v Songa Offshore Equinox Ltd* [2020] EWHC 2353 (TCC), Jefford J held that the principle in *Henderson v Henderson* applies in an arbitral context to earlier stages of the same reference: [128]. In reaching that conclusion Jefford J canvassed a number of authorities in support. She pointed out that the one authority to the contrary, Jackson J's judgment in *Ruttle Plant Hire Ltd. v Secretary of State for the Environment, Food and Rural Affairs* [2007] EWHC 1773 (TCC), was decided per incuriam of the Court of Appeal decision in *Tannu v Moosajee* [2003] EWCA Civ 815.

66. The Government submitted, correctly, that the decision of *Daewoo Shipbuilding and Marine Engineering Company Ltd v Songa Offshore Equinox Ltd* on this point was *obiter* since Jefford J decided the appeal under section 69 on an unrelated ground: at [60], [61] and [85]-[87]. The Government also contended that, in any event, none of the authorities Jefford J cited were precisely on point. *Tannu v Moosajee* [2003] EWCA Civ 815 was concerned with the application of the *Henderson v Henderson* principle to new claims sought to be introduced into existing proceedings; Coulson J's remarks in *Seele Austria GmbH Co v Tokio Marine Europe Insurance Limited* [2009] EWHC 255 (TCC), and those of Andrew Baker J in *Gruber v AIG Management France SA* [2019] EWHC 1676 (Comm) were concerned with the application of the *Henderson v Henderson* principle to the later stages of the same court proceedings; and in *Kensell v Khoury* [2020] EWHC 567 (Ch) Zacaroli J was concerned with whether a claimant would be permitted to amend her claim after having an alternative claim struck out.

67. Accordingly, the Government submitted, there was no authority under English law whereby a respondent to an arbitration claim (not a claimant) had been debarred in an ongoing reference, by application of the principle in *Henderson v Henderson*, from raising plainly arguable defences, merely because it could and should have raised those defences at an earlier stage of the proceedings. Here the Government was facing claims that it thought it would not have to face. Fairness required that it be entitled to take a

fresh look to see what arguments it might make, if the context of it having to face those claims was a remission of the award to the Tribunal.

68. While in my view the Government might be correct in its analysis that there is no binding precedent, it is obvious that there is substantial judicial support for the proposition that the *Henderson v Henderson* principle can apply to all stages of the same proceedings, to defences as well as claims, and in an arbitration as well as litigation. The scope of a remission in arbitration is not limitless. The basis of the *Henderson v Henderson* principle is to limit abusive and duplicative proceedings, however they might arise. Finality is a goal in both court and arbitral proceedings.

69. In any event, I accept the submissions of Reliance/BG that the 2021 Award was not the first occasion that their Agreements Case was considered. Between 2014 and 2016 their Agreements Case was set out with documentary and witness evidence as one of the many issues before the Tribunal. There was no unfairness in the Tribunal's approach. Nor was the 2021 Award one where the Government was defending claims that it thought it would not have to face. All that was happening was that there were new documents, already on the record, to support an existing claim.

2. Was the Tribunal asked to determine the questions: s.69(3)(b)?

70. In its Clarification Decision about the 2021 Award the Tribunal was emphatic that whether the principle in *Henderson v Henderson* was a question of procedural law or a substantive rule of law was not argued before it. That is almost an end of the matter. Nonetheless, the Government submitted that the Tribunal was asked, if not expressly, certainly impliedly, to decide the issue. That is because the applicability of the principle in *Henderson v Henderson* as a matter of English law was clearly "in play" before the Tribunal and so susceptible to an appeal under section 69, citing HH Judge Humphrey Lloyd QC in *Gbangbola v Smith & Sheriff Ltd* [1998] 3 All ER 730, 785, and *Merkin and Flannery on The Arbitration Act 1966*, 6th edition, §69.9.2.

71. A tribunal may be said to have been asked to determine a question of law even if the court struggles to identify precisely how it was put, or precisely what question the tribunal was asked to determine: *A v B* [2018] EWHC 2325 (Comm), [2019] 1 Lloyd's Rep. 385, [95]. From what was set out earlier there is no doubt that the issue of res judicata (including *Henderson v Henderson*) was before the Tribunal at earlier stages and that the parties returned to it on several occasions. The Tribunal had in previous phases of the arbitration already determined that procedural matters ought to be determined by English law. Indeed, it had applied the principle in *Henderson v Henderson* in the Government's favour with the 2019 Award. As Reliance/BG submitted, this weighs heavily against the Government being blind-sided by the 2021 Award and not having the opportunity to put the issues before the Tribunal. In particular, the Government could have done so in the lead up to, or at the 2020 hearing itself.

72. It is difficult to see that the issue in Question 1was ever broached, i.e., whether the res judicata issue should be decided according to English not Indian law because the seat of the arbitration was London. There was nothing from the Government to the effect that it did not accept that English law applied to matters of res judicata or that it thought the matter was substantive, not procedural law. The nearest the Government comes to making the case that these matters were adduced turns on Mr Ganguli's submissions to

the Tribunal on 3 November 2020, referred to at some length earlier in the judgment. However, I cannot accept that Mr Ganguli suggested to the Tribunal that it should apply Indian law in preference to English law on the matter with his citation of the *Canara Bank case*. That was cited after English cases as "one more authority". Moreover, as described earlier, the judgment of the Supreme Court in *Canara Bank* treats English law as being along very similar lines to Indian law, citing approvingly Lord Sumption's judgment in *Virgin Atlantic*. There was nothing from Mr Ganguli that Indian law was different and should apply to the issue instead of English law.

73. As to Question 3, the Government could not point to any passage where the Tribunal was asked to decide the issue, even implicitly. At most it was said to be in play because it followed logically on Question 1. That is insufficient to satisfy the statutory threshold.

3. Will the Tribunal's determination substantially affect a party's rights: s.69(3)(a)?

74. The Government submitted that the determination of Question 1 substantially affects its rights since it could show that the choice of Indian law might have led to a different result. That was because *Canara Bank v N.G. Subbaraya Setty* (2018) 16 SCC 228 would be a complete answer to the *Henderson* point in that any species of res judicata as a matter of Indian law would be trumped by the constitutional requirements of Articles 297 and 299 of the Indian Constitution as explained at paragraph 34.2.2 of the judgment in that case. Alternatively, the determination of Question 1 would substantially affect the Government's rights in that the Tribunal's rulings on the key Indian law threshold issues amounted to a serious procedural irregularity under section 68 of the Act.

75. Until the oral hearing before me, the Government had accepted that it had to show that the choice of Indian law would, not might, have led to a different result. It was also suggested that need for a substantial effect in respect of the rights of the parties was the same as the test of substantial injustice under section 68(2). There is no support for that submission when the statutory language of the two provisions differs. To my mind it follows from the statutory language of section 69(3)(a) that an applicant for leave to appeal needs to demonstrate that the higher barrier is surmounted, in other words determination of the question would lead to a different result. For present purposes, however, it does not matter whether the lower threshold applies.

76. Before the Tribunal the Government seemed to premise its submissions on the basis that there was an overlay of English and Indian law in relation to the principle in *Henderson v Henderson*. There was no suggestion that the *Henderson v Henderson* principle in the Indian Code of Civil Procedure might lead to a different outcome to the position under English law. As we saw earlier, the Supreme Court of India in the *Canara Bank* judgment appeared to regard Indian and English law as following very similar lines. In addition there was the Indian Supreme Court's endorsement of Lord Sumption's approach in *Virgin Atlantic*. Before the Tribunal Mr Ganguli did underline the exception in paragraph 34.2.2 of the *Canara Bank* decision, but there was no detailed analysis of the import of this exception in the circumstances of this case. It is impossible to say how res judicata as a matter of Indian law would be trumped by the constitutional requirements of Articles 297 and 299 of the Indian Constitution. The Tribunal's conclusion at paragraph 4.13 of the award is unsurprising. In my view the statutory requirement in section 69(3)(a) has not been met.

77. As to Question 3, given its consequential character the same conclusion applies.

78. On the Government's alternative case, whether the determination would have a material outcome is dependent on the issues arising under section 68 being determined in its favour; my conclusion later in the judgment is that there is no relevant triggering procedural irregularity under section 68.

4. Is it just and proper for the Court to determine the question: s.69(3)(d)?

79. A wide range of considerations can fall under section 69(3)(d). Importantly, prior to the 2021 Award the Tribunal had applied the *Henderson v Henderson* principle. We saw that most strikingly in the 2019 Award where the Government successfully advanced res judicata to defeat Reliance/BG's residual upside case. Against that background it is not appropriate for the Court to determine the questions and to allow the Government to take an inconsistent approach to that it has advanced in the arbitration. The Government sought to argue that for the 2019 Award the issue arose differently; the fact is that it invoked the *Henderson v Henderson* principle as a matter of English law.

THE SECTION 68 CHALENGE

80. There were difficulties in the way the section 68 challenge was advanced. In the claim form the Government's argument seemed to focus on serious procedural irregularity causing substantial injustice in relation to *Henderson v Henderson*. None of this was elaborated in the Government's skeleton argument for the hearing before me, which was almost silent on section 68. Instead, Mr Ganguli made oral submissions, in the main exploring the background to the 2021 Award but also the merits of the Government's arguments on Articles 297 and 299 of the Indian Constitution and the implications for the 2021 Award.

81. At the hearing Mr Flannery QC supplemented these submissions: the section 68 case involved first, s.68(2)(a), unfairness, namely, the Tribunal's shutting out through invoking *Henderson v Henderson* of defences not previously run in the context of the Agreements Case whilst permitting reliance on documents not used in that case; second, s.68(2)(d), the Tribunal's failure to deal with issues, specifically, Articles 297 and 299 of the Indian Constitution and the limitation point; and third, s.68(2)(g), the 2021 Award was contrary to Indian public policy.

The legal principles

82. The legal principles governing section 68 are well-known. Recently they were helpfully gathered by Moulder J in *Islamic Republic of Pakistan v Broadsheet LLC (in liquidation)* [2019] EWHC 1832 (Comm), [2019] Bus LR 2753. At paragraph [17] the general principles are stated:

> "(i) Section 68 imposes a high hurdle for applicants— *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221, para 26: "a major purpose of the new Act was to reduce drastically the extent of intervention of courts in the arbitral process";
>
> (ii) there will only be a serious irregularity if what has occurred is "far removed from what could reasonably be expected from the arbitral process": Field J in

Latvian Shipping Co v Russian People's Insurance Co (ROSNO) Open Ended Joint Stock Co (The Ojars Vacietis) [2012] 2 Lloyd's Rep 181, para 30;

(iii) the importance of upholding arbitration awards has been repeatedly stressed: Bingham J *in Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 (cited in *The Ojars Vacietis*, para 34)…

(iv) The requirement of "substantial injustice" in section 68 is additional to that of a serious irregularity and an applicant must establish both: *Terna Bahrain Holding Co WLL v Al Shamsi* [2013] 1 All ER (Comm) 580, para 85(vi)."

83. Moulder J then referred to Colman J's judgment in the *Margulead Ltd* case [2004] 2 All ER (Comm) 727, a challenge under section 68(2)(d), with its implication that a deficiency of reasons is not capable of amounting to a serious irregularity under section 68 having regard to the remedy under section 70(4) of the court ordering reasons in sufficient detail: [23]. Moulder J also cited *ABB AG v Hochtief Airport GmbH* [2006] 1 All ER (Comm) 529 and Teare J's decision in *UMS Holding Ltd v Great Station Properties SA* [2018] Bus LR 650 as further support on this point: [26], [31]-[32].

84. Finally, Moulder J held that the approach of the courts is not modified because one of the parties is a state and therefore funded by its citizens. There was no authority provided to support that submission. She said: "In circumstances where the parties have voluntarily chosen to submit their disputes to arbitration rather than the courts, the parties have elected to abide by the rules which pertain to that arbitration and must be taken as a consequence to have accepted the limited supervisory role afforded to the courts by the law": [47].

Mr Ganguli's oral submissions

85. After taking me to provisions in the 2010 Notice of Arbitration, the PSCs, the 2012 CRL Award, and the 2016 Award – outlined above - Mr Ganguli underlined the way Reliance/BG were by 2018 advancing its case. In addition to keeping well in mind the contractual background, they were submitting that their Agreements Case was an alternative to their upside case, and that the Tribunal was entitled to find an ad hoc agreement or common understanding that costs were recoverable come what may. In other words, Mr Ganguli contended, the Reliance/BG Agreements Case was not confined to the contract, but could fall outside the contract, and that was the way it was put to the Tribunal. Mr Ganguli took me to several of the Management Committee resolutions in support, where costs were expressed as recoverable under both the provisions of a PSC and the terms of a resolution. That was what gave rise, in Mr Ganguli's submission, to the constitutional bar. That turned on Articles 297 and 299 of the Constitution.

86. With respect to Article 299 Mr Ganguli cited *Bihar Eastern Gangetic Fishermen Cooperative Society Ltd v Sipahi Singh* (1977) 4 SCC 145, a case where a state government had extended a party's fishery rights beyond the period they had been awarded. The Supreme Court held that there was no binding and enforceable contract since the mandatory requirements in Article 299 were not complied with. For the court Jaswant Singh J said that failure to comply with these conditions nullified the contract and rendered it void and unenforceable: [8]. There was no question of estoppel or ratification in a case where there was a contravention of the Article; the policy was to

safeguard against unauthorised contracts: [9]. The doctrine of promissory estoppel could not be pressed into service in the case, the court held, since it was well settled that there could not be any estoppel against the government in the exercise of its sovereign functions: [13].

87. As regards Article 299 of the Constitution, Mr Ganguli directed me to a passage in the judgment of Sathasivam J in *Reliance Natural Resources Ltd v Reliance Industries Ltd* (2010) 7 SCC 1, where he said that the constitutional mandate was that the natural resources belonged to the people of the country, and the word “vest” invoked the public trust doctrine: [114]. Reliance Industries’ right of distribution was based on the PSC, which was derived from the power of the Government under the constitutional provisions. Moreover, in his judgment Sudershan Reddy J had stated that Article 297 meant that a contractor or agency could not extract and distribute resources without the explicit permission of the government pursuant to a rationally framed utilisation policy: [250].

88. Against that background Mr Ganguli contended that the Tribunal had been wrong in relation to Issue 3 of the award, when it had decided, as outlined earlier in the judgment, that Articles 297 and 299 of the Constitution had no purchase. The proper law of the contract compelled the Tribunal to apply the contract, consistent with those sections of the Constitution. Mr Ganguli pointed out that in its submissions to the Tribunal the Government had highlighted how it had regularly raised its threshold matters/objections, so there was no need to repeat them “ad nauseum”, not least because counsel for Reliance/BG had explicitly recognised in May 2012 that any variation of the contract had to be by formal document, as required by article 34.2 of the PSC and Article 299 of the Constitution. The threshold matters/objections had been raised again before Knowles J.

89. Notwithstanding this, Mr Ganguli submitted, the Tribunal had reached the conclusions it had at paragraph 4.9 and paragraph 15.23 of the 2021 Award. The Management Committee agreements were outside the terms of the PSC. Therefore, the question arose: could these resolutions be at all enforced consistent with the constitutional bar? The conclusion in paragraph 7.4 of the 2021 Award (referred to earlier in the judgment) was made in the teeth of the constitutional provisions. Mr Ganguli asked rhetorically, did the fact that the seat of the arbitration was in London absolve the Tribunal from applying these constitutional mandates when the governing law is Indian law? He cited *Ralli Bros v Compañia Naviera Sota y Aznar* [1920] 2 KB 287 and judicial approval there to a passage in *Dicey’s Conflict of Laws*, 2nd ed, that a contract was in general invalid is so far as its performance was unlawful by the law of the country where the contract was to be performed.

Analysis

Unfairness under s.68(2)(a)

90. In my view there was no unfairness as required under section 68(2)(a) in the Tribunal prohibiting the Government from advancing what it characterised as defences. The fact that Reliance/BG were able to rely on documents not previously used in the Agreements Case makes no difference. Nor does it matter, as Moulder J held in *Islamic Republic of Pakistan v Broadsheet LLC (in liquidation)* [2019] EWHC 1832 (Comm), [2019] Bus

LR 2753, that one of the parties is a sovereign state, and that its case is based on mandatory provisions of the Indian Constitution.

91. First, the remission following Robin Knowles J's judgment was narrow in scope: he rejected various challenges by the Government to the Agreements Case Award 2018 but required the Tribunal to consider additional documentary evidence. In effect the 2020 Order left the findings and principles of the Agreements Case Award in place. The Tribunal properly interpreted the 2020 Order to mean it was confined to submissions in respect of those documents alone and not general submissions as with the Government's threshold matters/objections. With Issue 12 the Tribunal considered the ramifications of those documents for Reliance/BG's EPOD Agreements Case. Secondly, as the Tribunal held at paragraph 4.9 of the 2021 Award, it was prevented by the principle in *Henderson v Henderson* from considering the Government's threshold matters/objections. Thirdly, it follows that I accept Reliance/BG's submission that it is wrong to characterise the Government's threshold matters/objections as defences and that somehow the Government was being shut out from defending itself.

Failure to deal with issues under s. 68(2)(d)

92. The Government's challenge under section 68(2)(d) was what it said was the Tribunal's failure to deal with the essential issues: *Fidelity Management SA v Myriad International Holdings BV* [2005] EWHC 1193 (Comm), per Morison J, citing *World Trade Corp Ltd v C Czarnikow Sugar Ltd* [2004] EWHC 2332 (Comm), per Colman J. The Government's submission in this regard was that although the Tribunal recorded meticulously the parties' submissions on every point, it did not in practice grapple with the issues. An example, the Government submitted, was that although it placed the *Canara Bank case* centre stage, the Tribunal dismissed it out of hand with a one-liner. Andrew Baker J's judgment in *Orascom TMT Investments Sarl (formerly Weather Investments II Sarl) v Veon Ltd (formerly VimpelCom Ltd)* [2018] EWHC 985 (Comm), [2018] Bus. L.R. 1787 was cited in support. The issues arising from Articles 297 and 299 of the Constitution were central and decisive, the Government submitted, but in the award were treated as incidental and peripheral.

93. In my view the Government cannot succeed under the section 68(2)(d) head given the very high threshold. The three steps Andrew Baker J identified in the *Orascom TMT Investments case* are first, was there a relevant issue, second, was the issue put, and third, was the issue dealt with in the award. As regards the first, the Tribunal found in effect that the Government's case based on Articles 297 and 299 was not relevant. *Canara Bank v N.G. Subbaraya Setty* (2018) 16 SCC 228 was dealt with at paragraph 4.13 of the 2021 Award during the discussion of Issue 1; however cursory, that was sufficient, not least because it had been presented as "one more authority".

94. In fact the Tribunal went on to address the issues which Mr Ganguli advanced for the Government, in particular the constitutional issues as Issues 3 and 4. In doing so the Tribunal set out but rejected the Government's arguments: as explained in paragraph 6.4 of the award, quoted earlier, the Tribunal concluded that Article 299 did not apply since the agreements or common understandings reached were not separate agreements. Nor, given the PSCs, was Article 297 applicable, as the Tribunal explained in paragraphs 7.3-7.4. The Tribunal also dealt with the authorities Mr Ganguli cited on Articles 297 and 299. *Bihar Eastern Gangetic v Sipahi Singh* (1977) 4 SCC 145 featured at paragraph 6.1(d), and the point about India's natural resources in *Reliance*

Natural Resources Ltd v Reliance Industries Ltd (2010) 7 SCC 1 was referred to in paragraph 7.4 (although the name of the case was not mentioned). Albeit briefly, the Tribunal did in fact deal with the constitutional points. There is no basis to argue that the Tribunal failed to deal with them so as to constitute a serious irregularity. In light of that there is no need to consider whether substantial injustice occurred.

Contrary to public policy under s.68(2)(g)

95. The Government's challenge under section 68(2)(g) of the 1996 Act, that the Award is contrary to public policy, goes nowhere. The provision is not an avenue to reargue the merits, which on occasions seemed to be the import of some of the submissions before me. In *PT Transportasi Gas Indonesia v Conocophillips (Grissik) Ltd* [2016] EWHC 2834, [2017] 1 All ER (Comm) Sir Jeremy Cooke held that this ground of challenge was not engaged where it was said that a tribunal had erred in its application of Indonesian law; that did not engage English public policy: [67]. In this case an appeal does not lie under section 68(2)(g) on the ground that the Tribunal got it wrong on points of Indian public policy enshrined in the Indian Constitution. Similarly, there is no foothold for *Ralli Bros v Compañia Naviera Sota y Aznar* [1920] 2 KB 287 under this head. There is merit in Reliance/BG's submission that the sub-section was never intended to allow parties to attack the conclusions of arbitration tribunals on matters of foreign law under the auspices of public policy, since to do so might open the floodgates to challenges.

CONCLUSION

96. For the reasons given the applications are refused.