Neutral Citation Number: [2015] EWHC 3361 (Comm)

Case No: CL-2015-000272

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/2015

**Before** :

**MR JUSTICE BURTON**

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**Between :**

| | |
|---|---|
| **(1) Pearl Petroleum Company Limited** | **Claimants** |
| **(2) Dana Gas PJSC** | |
| **(3) Crescent Petroleum Company International Limited** | |
| **- and -** | |
| **The Kurdistan Regional Government of Iraq** | **Respondent** |

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**Gordon Pollock QC and Zachary Douglas QC** (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimants**
**Graham Dunning QC and Anton Dudnikov** (instructed by **Wilmer Cutler Pickering Hale and Dorr LLP**) for the **Respondent**

Hearing dates: 28, 29 and 30 October 2015

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 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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MR JUSTICE BURTON

## Mr Justice Burton :

1. The Claimants (whom I shall call Pearl, Dana and Crescent) and the Respondent, the Kurdistan Regional Government of Iraq ("KRG") are engaged in arbitration proceedings under the LCIA Rules, commenced in October 2013, in relation to disputes arising out of a contract ("the Heads of Agreement") dated 4 April 2007. This is an application to the Court by the Claimants, for whom Mr Gordon Pollock QC and Mr Zachary Douglas QC appear, with the permission of the Arbitrators, (Lord Hoffmann, Lord Collins and Mr John Beechey), under s.42 of the Arbitration Act 1996 ("the 1996 Act") for an order by the Court enforcing a peremptory order made against the Respondent by the Arbitrators on 17 October 2014, whereby the Respondent was ordered to pay to the Claimants the sum of US$100 million. The Respondent, for whom Graham Dunning QC and Anton Dudnikov appear, resists that application and cross-applies for a declaration pursuant to CPR Part 11 that it is immune from the jurisdiction of the court by virtue of the State Immunity Act 1978 ("the SIA").

2. The Respondent is a constituent region of the Federal Republic of Iraq, and as such it is common ground that it is not itself a State, but is a *separate entity* within the meaning of s.14 SIA (and no Order in Council has been made giving it immunity as if it were a State pursuant to s.14(5) SIA). By the Heads of Agreement between the Respondent ("*duly represented by the Minister of Natural Resources and the Prime Minister of Kurdistan")* and, initially, Dana (which subsequently transferred 50% of its interest in the Contract to Crescent, following which Dana and Crescent transferred their interests to Pearl, a Special Purpose Vehicle ("SPV") owned between them), the parties agreed to the exploitation by the Claimants of two gas fields known as Khor Mor and Chemchemal, which are situated in the Kurdistan Region of Iraq ("the KRI"), of which the Respondent is the Government. The term of the contract was not less than 25 years. By 2008 the Khor Mor field had been developed and was producing gas and condensate and by 2011 it was also producing LPG.

3. There were the following material provisions of the Heads of Agreement. The recitals included the following:

> "A. *The KRG has entered into a Strategic Alliance Protocol ("SAP") dated 4th April 2007 with Dana and . . .* [Crescent] *(. . . the "Companies") whereby the Companies will carry out optimization of the development and utilization of natural gas resources in the* [KRI].
>
> B. *The KRG wishes to appoint Dana to carry out certain works in the field of Khor Mor . . . and in the field of Chemchemal . . . in the* [KRI]. *The work is urgently required to fulfil energy requirements in the* [KRI] *and in particular to provide urgent gas supplies for use at the power stations under construction at Erbil and Bazian, and thereby help to relieve the electrical power shortage affecting all the people of Iraq.*

> *C.* *The KRG has endorsed a federal draft Oil and Gas Law for Iraq that requires petroleum contracts issued by federal and regional entities, including by the KRG, to meet agreed commercial criteria, in addition to other relevant provisions pursuant to the KRG and the Constitution of Iraq.*
>
> . . .
>
> *F.* *The KRG, desirous of rapid and optimal economic development of the petroleum gas resources of the* [KRI], *gas-related industries, and job creation for the benefit of the people of Iraq and the* [KRI], *has declared its intention to associate and contract with Dana . . . to take the lead in the development of the gas resources of the* [KRI], *both for domestic gas utilization as a priority, as well as for export.*"

The following clauses are of particular relevance:

> "*9.* *The KRG hereby grants Dana the exclusive right during the term of these HoA* [minimum 25 years] . . . *to develop and produce Petroleum within the Khor Mor HoA Area and the Chemchemal HoA Area.*
>
> . . .
>
> *16.* *For the purpose of this Article, "Dispute" shall mean any dispute, controversy or claim (of any and every kind or type . . .*
>
> *If the Dispute cannot be resolved by negotiation within sixty (60) days after the date of the receipt by each party to the Dispute of the Notice of Dispute any party to the Dispute may seek settlement of the dispute by mediation in accordance with the London Court of International Arbitration (LCIA) Mediation Procedure, which Procedure shall be deemed to be incorporated by reference into this Article, and the parties to such Dispute shall submit to such mediation procedure:*
>
> *(a)* *If the Dispute is not settled by mediation within sixty (60) days of the appointment of the mediator, or such further period as the parties to the Dispute may otherwise agree in writing, any party to the Dispute may refer the Dispute to, and seek final resolution by, arbitration under the LCIA Rules, which Rules shall be deemed to be incorporated by reference into this Article.*

> *(b) Any arbitration shall be conducted by three (3) arbitrators.*
>
> . . .
>
> *(e) Arbitration shall take place in London, England. The language to be used in any prior negotiation, mediation and in the arbitration shall be English. During the arbitration procedure and until the arbitral decision, neither entity shall act in a manner that may affect the rights of the other Party under these HoA . . . The arbitral award may include an award of specific performance and may be enforced by any court of competent jurisdiction, including the Kurdistan Region. Any award shall be expressed in US Dollars.*"

There were (inter alia) the following "*Key Commercial Terms*" contained in Annexure 2:

> "▪ *In the event Dana is unable to export and market the LPG's* [or] *Condensates by any act or omission of government (including foreign neighbouring governments) and/or for political reasons beyond the control* [of] *Dana then the KRG shall purchase and lift (or arrange for the lifting by the domestic companies/users) and pay for the liquid petroleum products at international FOB Med market prices as quoted by Platts Oilgram Report or similar journals within 30 days from the month ends.* [Identified by the parties as "Bullet 7"].
>
> ▪ *The KRG waives on its own behalf and that of the KRG any claim to immunity for itself and assets.*"

The history

4. Disputes arose in about 2009 between the parties relating to the nature and extent of the Claimants' rights in relation to the two fields and the prices payable to the Claimants by the Respondent for condensate and LPG produced at Khor Mor and sold to the Respondent. The Claimants contended that by September 2013 the Respondent had underpaid for product produced and lifted in a sum of US$1.12 billion.

5. In 2013 the Claimants initiated mediation proceedings in accordance with clause 16 of the Heads of Agreement, and when the Respondent declined to participate in it, the Claimants commenced arbitration proceedings. The Respondent's response to the mediation and arbitration was that instead of continuing to make relatively regular payments to the Claimants for the product produced and lifted, albeit on the Claimants' case substantially short of what was due under the contract, the Respondent stopped making any payment, whilst continuing to require the Claimants to deliver up product. The structure of the contract was such that a quantity of gas which was produced was supplied free for the benefit of the Respondent, so that the

only source of revenue from which the Claimants could recover their capital investment and their annual running costs was the revenue which they received from their produced condensate and LPG sold and lifted by the KRG, the by-products of the gas production. The sudden cessation of any payment was ascribed by the Respondent to the existence of counterclaims dating back in some cases to 2009.

6. On 21 March 2014 the Claimants applied to the Arbitrators for an interim measures order pursuant to Article 25 of the LCIA Rules, which provided, inter alia, for the Arbitrators to have the power on the application of any party "*(c) to order on a provisional basis, subject to final determination in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including a provisional order for the payment of money or the disposition of property as between any parties*". The application was that the Respondent be ordered to resume payments for product lifted, pending the resolution of the parties' disputes. A major ground of this application was the serious financial damage which the Claimants alleged would be suffered by the Claimants, in the case of Dana involving potential bankruptcy, in the event that the Respondent continued with its refusal to make any payment for product which it lifted. The Claimants' case was that by the making of an order for interim measures the Tribunal should restore the status quo by which the Respondent was paying for the condensate and LPG which it was lifting. I set out relevant passages from the Claimants' application:

> "*2. The Claimants seek an order to compel the Respondent . . . to restore the status quo ante and prevent further escalation of the dispute during the pendency of the present arbitration, by resuming payment for on-going deliveries of condensate and liquefied petroleum gas (LPG) and releasing and/or procuring the release of funds to the Claimants which were withheld by the KRG or on the KRG's instructions following the Claimants' commencement of mediation on 24 July 2013.*
>
> *3. Absent the cash flows from the sale of condensate and LPG to the Claimants until their abrupt curtailment by the KRG with effect from July 2013, Dana . . . which operates the gas processing facilities at Khor Mor jointly with Crescent on behalf of Pearl, will face a cash crisis and is expected to run out of cash by the fourth quarter of 2014. As a consequence, Dana . . . will default on its debt obligations and the company will be forced into insolvency during the pendency of the present arbitration, causing irreparable damage to* [Dana's] *. . . stakeholders, including its over 200,000-strong regional and international shareholder base.*
>
> *4. The insolvency of Dana . . . is likely to result in the KRG's take-over of operations and the destruction of the rights under the Contract that are the subject matter of this dispute.*

. . .

*8. Prior to the initiation of the mediation on 24 July 2013, the KRG was making regular (albeit deficient) payments (either directly or through third parties) for condensate and LPG, which were and continue to be critical to the Contractor's ability to continue operating the gas production facilities at Khor Mor and Dana Gas's ability to service its home office costs and debt obligations.*

*9. In an act of retaliation to the Claimants' commencement of mediation proceedings on 24 July 2013, the KRG deliberately withheld all contractually-due payments it had previously been making on a regular basis for the supply to it of Khor Mor condensate. Moreover, and in order to 'turn off' entirely the tap of the Claimant's revenue streams from the uninterrupted production that it continues to provide, the KRG altered the terms upon which it auctions the right to lift LPG to third parties by diverting payments away from the Claimants. The basis for the KRG's retaliatory action is a set of contrived counterclaims which, despite allegedly amounting to nearly US$5 billion and being based on allegations dating back several years, had never previously been raised, let alone quantified or used as a basis for withholding payments to the Claimants.*

. . .

*11. In the circumstances, and in the light of recent press reports regarding the KRG's intentions to this effect, the Claimants have good reason to believe that the KRG's conduct is part of a concerted strategy to manufacture excuses for a precipitate and unlawful termination of the Contract, take-over of operations and subsequent sale of the valuable exclusive rights under the Contract to a third party, the latter having already been attempted by the KRG in the recent past. The Claimants' belief has been further reinforced by the KRG's constant attempts at obfuscation and delay, first in resisting expedited formation of the arbitral tribunal, and then in its lengthy and repetitive objections to having preliminary issues heard and challenge to the jurisdiction of the Arbitral Tribunal.*

*12. The KRG's recent conduct and resulting alteration of the status quo ante will lead to the collapse of Dana . . . will aggravate the present dispute and will likely result in an expropriation of the subject matter of this*

*arbitration long before the Arbitral Tribunal will have an opportunity to render a final award. To prevent this, the Claimants require assistance from the Arbitral Tribunal in the form of the interim measures set out in Section IV below.*

. . .

*14. In order to address its purported concern all the KRG needs do is to continue what it has been doing in recent years, namely make and/or direct payments to the Contractor for Khor Mor condensate and LPG lifted by it or on its behalf.*

. . .

*50. Article 25.1 of the LCIA Rules does not set out any explicit standards for the grant of interim measures. Nonetheless, in international arbitration practice arbitral tribunals typically take into account the following factors when considering a request for interim measures:*

*(a) whether the applicant has a prima facie case on the merits;*

*(b) whether the application is likely to suffer serious harm if the measures are not granted;*

*(c) whether the request is urgent;*

*(d) whether granting the request would prejudge the merits of a case; and*

*(e) the harm the applicant is likely to suffer in the absence of interim measures as compared with the harm likely to result to the respondent if the measures are granted.*

. . .

*56. Thirdly, many international tribunals require the requesting party to demonstrate urgency, which is closely related to the requirement of serious or substantial harm. The requirement of urgency has been construed sufficiently broadly by tribunals to justify interim measures designed to avoid the aggravation of the dispute that is the subject matter of the arbitration.*

[Citations of various international tribunals' decisions were set out in footnotes].

. . .

> *74. . . . In any event, the fact that Dana . . . is being forced irretrievably to dispose of core assets in distressed sales is sufficiently serious to warrant interim measures of protection from the Arbitral Tribunal.*

. . .

> *76. With Dana . . . unable to fund the Contractor and the latter having run out of funds required to continue operating the Khor Mor facilities, the KRG will likely seek to step in (as it has already threatened to do), leading to the Claimants effectively losing their rights under the Contract, the very subject matter of the dispute.*
>
> *77. Such a scenario, which is entirely avoidable, would not only threaten the procedural integrity of these proceedings but also cause the Claimants irretrievably to lose the benefit of Article 16(e) of the Contract which specifically (1) obliges the parties to maintain the status quo ante during the pendency of an arbitration by not "act[ing] in a manner that may affect the right of the other Party"; and (2) confers upon the parties a right to specific performance of the Contract.*"

7. The Respondent joined issue with these contentions in its Response, and at the outset stated in paragraph 5:

> "*5. First, the Claimants' requested interim measures would fundamentally alter the status quo . . . The Claimants' application proceeds on the premise that there was an established "payment regime" in which it was commonly agreed or understood that the Claimants would continue to receive payments indefinitely on some undefined basis. In reality, however there was no such status quo. The KRG has never accepted or agreed that any of the Claimants would be entitled to the proceeds of the condensates and LPGs that the KRG has sold.*"

Further:

> "*109. The Claimants rely on the financial position of Dana as a basis for interim measures, but, on their own case, Dana has purportedly novated all of its rights or obligations under the HoA (and thus has no existing funding obligations under the HoA). As such, there is no basis for concluding that Dana's financial status is*

> *even relevant, much less decisive, with regard to the purported inability of the Claimants to continue operations.*
>
> . . .
>
> *111. . . . there is no evidence that Pearl will run out of funds required to continue operations in the absence of KRG payments. The Claimants have adduced very little evidence on Pearl's financial condition (which, it is common ground, is the Claimants' burden to prove). Absent such evidence, it is impossible to conclude that the Claimants will be unable to continue operations under the HoA at Khor Mor.*
>
> . . .
>
> *122. . . . the Claimants argue that Dana's "risk of insolvency" constitutes "truly irreparable harm," but this is both unproven and irrelevant. As set out above the evidence submitted by the Claimants does not establish that there is a true risk of insolvency. In any event, insolvency does not prevent the Claimants from pursuing their claims in arbitration, and therefore cannot constitute harm "not adequately reparable" by damages.*"

In paragraphs 160 to 173 of its Response the Respondent contended that the ordering of payments and of a mandatory injunction as an interim measure would prejudicially alter the status quo, and concluded at paragraph 183 that:

> "*Accordingly, the Claimants' Request must be denied because it would entail pre-judgment of both the Claimants' claims and the KRG's counterclaims.*"

8. In their Reply the Claimants contended as follows:

> "***1. Preservation of the dynamic status quo ante***
>
> *95. First, as indicated in the Claimants' Request, the KRG is contractually and legally obliged to maintain the status quo pending determination of this dispute pursuant to Article 16(e) of the Contract and Article 50(Second)(4) of the KROGL. Notwithstanding the Respondent's smokescreen, the undisputed fact remains that the Respondent was making (or authorising third parties to make) regular payments to the Claimants in respect of products delivered over a five year period, whether under the Contract, or otherwise.*

> *96. The Claimants only seek preservation of the commercially important "dynamic status quo" which can be achieved simply by the KRG releasing (or authorising third parties to release) payments for condensate and LPG it is taking from the Claimants.*
>
> *97. The fact remains that, even on the KRG's own case, nothing has changed factually since July 2013 except that the Claimants have initiated mediation and then arbitration proceedings, which have been met by pressure tactics by the Respondent. There is no singular fact which justified the sudden change in the status quo.*
>
> *98. Indeed, restoring the dynamic status quo is commercially imperative in order to ensure the continuation of operations at Khor Mor and thus the supply of electricity to the residents of the Kurdistan Region, continuation of the Claimants' rights under the Contract and the continuation of Dana . . . as a solvent company. It also means protection of value for both parties including because it accelerates the Claimants' cost recovery and Remuneration Fee payments and, therefore, the point at which the Respondent will earn its 90% of the Aggregate Revenues under the Contract.*"

9. Following an oral hearing on 16 May 2014, the Tribunal issued a Ruling on Interim Measures on 10 July 2014 ("the 10 July Ruling"), whereby the Respondent was ordered to make payments as from 21 March 2014 at a rate which was designed to reflect the payments which had been made in the period prior to July 2013, which amounted to some 70% of the Claimants' invoices for condensate and LPG. The Tribunal dealt with the question of the status quo as follows:

> "*21. The relevance of actions which seek to alter the status quo to the advantage of a party is underlined by Article 16(e) of the HoA itself:*
>
> > *"During the arbitration procedure and until the arbitral decision, neither entity shall act in a manner which may affect the rights of the other party under these HoA/Service Agreements".*
>
> . . .
>
> *42. It appears to us unlikely that there will be a hearing followed by an award in this arbitration before the middle of 2015. On the evidence before us, there is an appreciable risk that Dana will become insolvent or at any rate suffer unnecessary loss through distressed*

*sales of assets if payments are not resumed before the award.*

. . .

*45. It is unusual to have an application for provisional measures in which both sides do not claim to be seeking to maintain the status quo and this is no exception. In this case, however, we think that the status quo was that the KRG had for a lengthy period been buying the Claimants' LPPs and paying for them. There may have been a dispute over the price properly payable but payments were being made. By stopping paying, they have altered the status quo, just as someone who cuts off the supply of electricity and plunges the house into darkness.*

. . .

*47. The ultimate question for the Tribunal is: which course of action is more likely to promote justice, in the broadest sense: to grant the provisional measures or to refuse them? We think that there is a greater risk of injustice if the KRG are allowed to continue to receive the Claimants' condensates (or their proceeds) and not pay for them. The KRG claims that the Claimants are free to export and market their liquid petroleum products in accordance with the HoA. If the KRG is able to procure the necessary licences for the Claimants to be able to do so, well and good. No further action as to the future is required. But if they cannot, and continue instead to have them lifted on their behalf, then we consider that pending a final resolution of this dispute they should pay for them.*

*(j)* ***Conclusion***

*48. The practice of the KRG before July 2013 was, we are informed by counsel for the Claimants, to pay about 70% of the invoiced prices (i.e. the international FOB Med prices) of the liquid petroleum products, which were lifted on their behalf. This is a very rough and ready figure, which can be recalculated after a full hearing. In the meanwhile, however, we consider that the KRG should, as from the date of the Claimants' application for interim measures (21 March 2014), pay the Claimants 70% of the international FOB Med prices of liquid petroleum products lifted by them or for their account. If at any time the KRG is able to procure the necessary permits and consents for the*

> *Claimants to export and market these products themselves, they may apply to discharge this order.*"

10. On it becoming immediately apparent to the Claimants that the Respondent was not intending to comply with the 10 July Ruling, on 23 July 2014 they applied to the Tribunal for a peremptory order, both as regards the payment of an immediate quantified sum and as regards future continuing payments; the Respondent then applied to discharge the Ruling.

11. Application and cross-application were heard at an oral hearing on 4 September 2014. The Arbitrators delivered a ruling on 17 October 2014 ("the 17 October Ruling"), dismissing the Respondent's application to discharge, and ordering, on the Claimants' application for a peremptory order, that the Respondent pay to the Claimants the sum of US$100 million within 30 days (in the terms of the order below set out). The Arbitrators stated (in material part):

> "*16. At the hearing on 5 September, Mr Partasides (for the Claimant) asked why the KRG did not simply reinstate the previous arrangement with PowerTrans, under which the KRG sold the products through PowerTrans, but accounted to the Claimants for what was assumed to be the price received. The KRG had similar arrangements with other international oil companies in Kurdistan. The answer of Mr Born, on behalf of the KRG, must be quoted in full:*
>
> > *"Finally, the claimants asked repeatedly why doesn't the KRG do what it does with other IOCs? This case is the answer for why the KRG doesn't do what it does with other lOCs. It doesn't have arbitrations for bitter disputes with other lOCs. It does have such a dispute with the claimants."*
>
> *17. It should make no difference to the KRG whether the Claimants sell their products to Quaiwan for the lower price or through PowerTrans at a higher price. In neither case would the KRG be receiving the proceeds. The KRG does not deny that it could reinstate the previous PowerTrans arrangements. But it refuses to do so simply to disoblige the Claimants.*
>
> *18. The Tribunal is not in a position to express any view on the merits of the "bitter disputes" between the parties. It has however expressed the view in its order for provisional measures that justice requires that provisionally and pending a full hearing, the Claimants should not be deprived of the cash flow, which they had been deriving from their products. The KRG is in a position to enable them to do so. Instead, it claims that they are, and always have been, in a*

*position to export their products but for some irrational and quixotic reason have been unwilling to do so. The Tribunal is not persuaded that the Claimants are in practice in a position to export their products. They do not think that any rational producer, having been for over a year been in a position to export their products, would have chosen instead to apply at this stage for an order for interim measures.*

. . .

*23. The Tribunal accepts, first, that the preservation of the status quo requires it to have regard to the position at the time when the KRG ceased payments and that going further back into history would not ordinarily be particularly relevant. It was therefore reasonable to have regard to the position under the arrangements with PowerTrans, which were in place from March to July 2013. Secondly, the Tribunal considers that one cannot calculate the percentage of invoiced price which the Claimants were receiving without knowing the shipments to which those prices related. Invoices may have been sent during the period in question which related to earlier shipments. The calculations of Ernst & Young were not challenged in the earlier proceedings and the Tribunal therefore does not think it was misled by Mr Pollock's figure.*

. . .

*24. The KRG submits that recent events in Iraq have created a political and military crisis in Kurdistan that has changed the balance of convenience. The territory is defending itself against attack and finds itself responsible for the support of large numbers of refugees. It cannot afford to make payments to the Claimants. The KRG also claimed that the financial position of Dana was not as bad as it claimed because a press release of 10 September showed that it had been able to borrow $100 million to finance its UAE gas project. The Claimants replied that this was borrowing for a particular project and distinct from its general corporate debt.*

*25. The Tribunal is of course aware of the difficult circumstances in which the KRG finds itself in the current situation in the area and has great sympathy for the plight of its people and those who have taken refuge it its territory. But it considers that it is in no position to estimate the significance of these*

*momentous events and that they lie altogether outside the matters to which a Tribunal can have regard in considering what is conventionally called the balance of convenience in an interlocutory application. In such a case, the Tribunal's concern is to weigh the effect of granting or refusing the order on the potential outcome for the parties if one or the other should be successful . The purpose of the interlocutory order is to enable the Tribunal's final order to do practical justice between the parties. It does not consider that the effect upon political events in Kurdistan, which the Tribunal is completely unable to calculate, can fall within the matters it can properly take into consideration.*

. . .

*29. The KRG says that they have not failed to comply. They have applied for the discharge of the order and while that application was pending, they were not obliged to do anything. We do not think that is right. Any discharge of the order would not have been on the ground that it should not have been made but on the ground that the KRG had enabled the Claimants to export their products and thereby obtain a revenue stream in substitution for that which had previously been paid to them by or at the direction of the KRG. There was no question of the order being discharged retrospectively. As the Tribunal said in its ruling on provisional measures: "If the KRG is able to procure the necessary licences for the Claimants to be able to do so, well and good. No further action as to the future is required." The KRG has . . . failed altogether to comply with the order for payment for liftings from 21 March 2014 to the present day. The Tribunal therefore has jurisdiction under section 41(5) to make a peremptory order.*

*30. The Tribunal's order for interim measures required payment of 70% of the "the international FOB Med price of liquid petroleum products" on the basis that this was the benchmark employed by the parties in the HoA and should be capable of being employed to calculate the amounts to be paid. It appears however from the submissions at the hearing of this application to discharge that there may be a dispute over what counts as the "international FOB Med price" of condensate and LPG. This dispute may at some stage have to be resolved by the Tribunal but in order to avoid further delay, the Tribunal will fix a provisional*

> *figure for payment which it considers to be the least which would give effect to its order to date.*
>
> *31. The Ernst & Young report to which the Tribunal has referred in paragraph 23 above found that, in respect of the shipments they were considering, the Claimants had received 71% of the invoiced price. Whether the invoiced price had been correctly calculated or not, that was what they were receiving. That was the status quo. The evidence exhibited to the Claimants' application for a peremptory order showed that in the period 21 March to 27 July 2014 the invoiced price of condensate and LNG shipped by the Claimants was US$232,284,453. 70% of this sum is US$162,599,117. The Tribunal considers that an immediate payment of US$100,000,000 should be the subject of a peremptory order. A possible further peremptory order can be considered later. The Tribunal therefore makes an order in the following terms:*
>
> > *"Without prejudice to its order of 10 July 2014, the Tribunal orders that the Respondent shall within 30 days of this order pay to the Claimants US$100 million (to be set off against its liability under the order of 10 July 2014) and if the said sum shall be unpaid after 30 days, makes a peremptory order to the same effect."*"

12. No payment was made within 30 days, and so in accordance with the terms of the 17 October Order the peremptory order took effect. The Claimants sought and obtained, against opposition from the Respondent, the Tribunal's permission pursuant to s.42(2)(b), to make the application now before me to enforce the peremptory order.

13. There have been developments since December 2014 while the parties have been resolving (with the assistance of the Court [2015] EWHC 68 (Comm)) defective service and then re-service, and preparing for, fixing and serving evidence for this hearing. The Respondent between September 2014 and 7 October 2015 permitted the Claimants to enter into local contracts for the sales of condensate and LPG, which thus earned them some income. However there was a Partial Final Award by the Arbitrators dated 30 June 2015, ruling on issues which they had heard between 20 and 24 April, and which reached conclusions as to certain of the rights of the parties, resulting in a finding of liability on the Respondent in respect of the claim, but no monetary award was to be made until after a further hearing, fixed for 21 September 2015, the award from which is awaited, as to whether, as against a sum of approximately US$1.9 billion in the Claimants' favour there could be set off the counterclaims upon which the Respondent relied.

14. The making of this Partial Final Award on 30 June resulted in a letter from the Respondent dated 26 July to the Claimants, notifying them that the Respondent would no longer permit the Claimants to proceed with their arrangements for local sales, and intended to lift the condensate and LPG itself; and, by letter dated 4 September to the

Claimants, the Respondent made clear that it did not accept that the Claimants had any entitlement to payment for the condensates and LPGs which it was to lift, because of the allegation that the Claimants had caused enormous damage to the Respondent through its breaches of the Heads of Agreement, such that it was not "*obliged to pay for all petroleum products it lifts*". Meanwhile the Respondent confirmed, by various letters and public announcements in September 2015, that it was making and authorising payments to other international oil companies in substantial sums, because, as per an announcement by the Ministry of Natural Resources dated 7 September 2015, "*regular payments will be made to allow the exporting companies to cover their ongoing expenses and plan for further investment in the oil field*".

15. No sum has been paid to the Claimants by the Respondent pursuant to the Heads of Agreement, or at all, since 7 October 2015, when the Respondent commenced lifting of, and receiving payment for, product. By letter dated 28 September 2015 sent to the Arbitrators, of which Mr Pollock was vigorously critical, the Respondent said that it would make payment to the Claimants if the Arbitrators agreed not to make an enforceable final payment award prior to the determination of the Respondent's counterclaims:

> "*The KRG undertakes that, if no enforceable final payment award is made prior to the determination of its counterclaim, it will pay the Claimants for liftings of condensates and LPGs delivered to the KRG an equivalent amount per tonne as it pays other IOCs in the Kurdistan Region who currently deliver their petroleum to the KRG. These payments would be provisional and subject to any final award, but would continue until any final award is rendered.*"

No explanation has been given by the Respondent for this letter to the Arbitrators, save that in his second witness statement of 12 October Mr Speller of the Respondent's solicitors referred to that letter as one by which the Respondent "*made clear that, going forward, it would be willing to treat the Claimants no less favourably than other* [international oil companies]".

The Issues

16. The issues before me were as follows:

Issue 1 Was the peremptory order properly made within the jurisdiction of the Arbitrators vested in them by s.41 of the 1996 Act and Article 25 of the LCIA Rules, and therefore does the Court have jurisdiction to make an order under s.42 of the 1996 Act? There were two sub-issues:

a) Was it a requirement of the making of a peremptory order that the Respondent had failed to comply with an order to *do something necessary for the proper and expeditious conduct of the arbitration*, and if so was that its purpose?

b) Was the Respondent given the opportunity to show *sufficient cause* for non-compliance before the making of the Order?

Issue 2 Does the Respondent have immunity pursuant to the SIA? It is accepted that the burden of proof is on the Respondent to establish this. The sub-issues are:

a) Do the proceedings relate to anything done by the Respondent in the exercise of sovereign authority (s.14(2) SIA).

b) If so, was it *an exercise of sovereign authority* of the State (the Republic of Iraq) or of the Respondent as a *separate entity* see paragraph 2 above. It is common ground that the former is necessary (**BCCI v Price Waterhouse (a firm)** [1997] 4 All ER 108 at 112 and **Pocket Kings Ltd v Safenames Ltd** [2009] EWHC 2529 (Ch)).

c) If so, were *the circumstances such that a State would have been immune* (s.14(2)(b) SIA)? The issues are whether, as a result of s.9 SIA ("*where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, a State is not immune as regards proceedings in the courts of the United Kingdom which relate to the arbitration*") the Respondent is immune to these proceedings under s.42; and whether, by virtue of s.14(3) SIA, the Respondent is entitled to the protection of s.13(2)(a) SIA ("*relief shall not be given against a State by way of injunction*") in respect of the s.42 order:

i) Has the Respondent *submitted to the jurisdiction* within s.14(3) by virtue of s.9, such as to retain the benefit of s.13 SIA?

ii) Even if so, do s.42 proceedings fall within s.9 and are they covered by s.13(2)(a)?

d) Whether the Respondent has waived its immunity in respect of s.14(2) and, assuming it is entitled to such immunity, that granted by s.13(2)(a) by reference to s.13(3) SIA.

Issue 3 Whether in the exercise of the Court's discretion the order sought should be made: it is common ground that the Court does not "*act as a rubber stamp on orders made by the tribunal*" (**Emmott v Michael Wilson & Partners Ltd** [2009] EWHC 1 (Comm) at paragraph 59 per Teare J).

Issue 1: Section 42 of the 1996 Act

17. Mr Pollock's case is that the peremptory order was made by the Arbitrators straightforwardly upon the basis that the Respondent has failed to comply with the 10 July Interim Measures Order without good or any cause. Mr Dunning submits that a s.42 order is only appropriate where the order of an arbitrator sought to be enforced was one which was made for the proper and expeditious conduct of the arbitral proceedings.

18. Mr Dunning's starting point is s.39 of the 1996 Act, whereby:

> "*(1) The parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award.*

> *(2) This includes, for instance, making –*
>
> *(a) a provisional order for the payment of money or the disposition of property as between the parties . . .*"

As set out in paragraph 6 above, as Mr Dunning accepts, by Article 25 of the LCIA Rules, to which the parties have agreed, the Arbitrators had power (inter alia) to make a *provisional order for the payment of money*. Although the heading of s.39 in the statute refers to "Power to make provisional awards", it is not in any doubt that the words of s.39 itself are what is decisive, and plainly give the Arbitrators the power to make an order for interim measures, not simply an award.

19. In the event of non-compliance with an arbitrator's order an arbitrator can make a peremptory order pursuant to the terms of s.41(5):

> "*If without showing sufficient cause a party fails to comply with any order or directions of the tribunal, the tribunal may make a peremptory order to the same effect, prescribing such time for compliance with it as the tribunal considers appropriate* ".

20. Mr Dunning submits however that this is not a sufficient consideration of the context of the 1996 Act. He points to the "*General duty*" of the parties under s. 40:

> "*(1) The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.*
>
> *(2) this includes –*
>
> *(a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal. . .*"

This rubric "*necessary for the proper and expeditious conduct*" of the arbitral proceedings is then expressly repeated in s.41 relating to the "*powers of tribunal in case of party's default*":

> "*(1) The parties are free to agree on the powers of the tribunal in case of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration.*"

Such powers, Mr Dunning submits, are the only powers for the arbitral tribunal which the parties are *free to agree*.

21. Accordingly in the consequential sub-clauses of s.41 which (by virtue of s.41(2)) apply "*unless otherwise agreed by the parties*", powers are given to the tribunal. Consequently, although Mr Dunning did not expressly so submit, it must inevitably be that the words in s.41(5), which I have cited in paragraph 19 above, must be construed as dealing with where "*a party fails to comply with any <u>such</u> order or directions of the tribunal*" i.e. an order to do something "*necessary for the proper and expeditious conduct of the arbitration*".

22. He refers to the words in Parliament (**Hansard 5th series vol 568 cols 761-764** (18 January 1996)) of Lord Fraser of Carmyllie, setting out the intention of the Bill as being to "*curtail the ability of the court to intervene in the arbitral process except where the assistance of the court is clearly necessary to move the arbitration forward or where there has been a manifest injustice*". He also refers to the words of the **Chartered Institute of Arbitrator's Practice Guideline 14**, referring to one of the purposes of the 1996 Act having been to provide that "*once there has been an initial breach of a procedural order without sufficient cause the tribunal may make a 'peremptory order' to the same effect*". He refers to s.41(6) of the 1996 Act, which provides for where a claimant fails to comply with a peremptory order of the Tribunal to provide security for costs and s.41(7), where the Tribunal may take various other steps where a party has failed to comply with any other kind of peremptory order. However it must be noted that such steps are expressly stated to be "*without prejudice to s.42*".

23. As for the fact that there is an express power in s.39(2) to make a provisional order for the payment of money, Mr Dunning, when pressed as to what other payment of money (other than security for costs or interim payment of costs, which are expressly otherwise dealt with in the 1996 Act) would be on his case "*necessary for the proper and expeditious conduct of the arbitral proceedings*", could not think of any. Nevertheless such an express proviso was in his submission required. He pointed to the words of Dyson J in **Macob Civil Engineering Limited v Morrison Construction Limited** [1999] CLC 739, where, in an adjudication covered by Part 2 of the Housing Grants, Construction and Re-Generation Act 1996, the Court was asked, pursuant to s.42, to enforce an adjudicator's decision for payment of money under a construction contract. Dyson J described a s.42 order in such circumstances as a "*mandatory injunction to enforce an adjudicator's decision*" (a description to which I shall return below) and he says (at paragraph 35) that "*it would rarely be appropriate to grant injunctive relief to enforce an obligation on one contracting party to pay the other*". He stated (at paragraph 37) that "*s.42 apart, the usual remedy for failure to pay in accordance with an adjudicator's decision will be to issue proceedings claiming the sum due, followed by an application for summary judgment*." He continued:

> "*38. it is not at all clear why s.42 of the Arbitration Act 1996 was incorporated into the Scheme* [for Construction Contracts]".

I understand that this has subsequently been amended out of the Scheme.

He concluded:

> *It may be that Parliament intended that the court should be more willing to grant a mandatory injunction in cases where the adjudicator has made a peremptory order than where he has not. The court should be slow to grant a mandatory injunction to enforce a decision requiring the payment of money by one contracting party to another.*
>
> *39. . . I am not persuaded that I ought to exercise my discretion in favour of granting an injunction.* "

Mr Dunning submits that, adopting the approach of Dyson J, in this case also the Claimants could and should have followed the course not of applying under s.42, but by way of s.44 of the 1996 Act or s.37 of the Senior Courts Act 1981 for a mandatory injunction.

24. It seems to me clear that Mr Dunning's submissions go too far:

i) As Mr Pollock pointed out, Dyson J was dealing with a case where the adjudicator had concluded that a sum was due under the contract which could have been the subject of an application for summary judgment. That is not the case here. It is plain that this was not a provisional award, nor an interim payment. As was emphatically stated by Mr Pollock, the Arbitrators were not, as Mr Dunning contended, "*enforcing a putative substantive obligation on an interim basis*".

ii) There is no purpose in there having been an application under s.44 or s.37 for a mandatory injunction, when there had been a straightforward order made by the Arbitrators, after considering the matter in great depth and hearing detailed submissions, leading them to make an order by way of interim measures. In any event, from the point of view of enforcing compliance, a Court order under s.42 and an injunction under s.44 would have the same effect (and would lead to identical or similar remedies if not complied with).

iii) Dyson J concluded that he was exercising a discretion not to make a s.42 order, not that he had no jurisdiction to make one.

iv) As is clear from s.41(5), referred to above, it provides for the making of a peremptory order where there is a failure by a party to comply with "*any order or directions of the tribunal*". Mr Dunning sought to point to s.41(1) as giving context. But that ignores s.40, upon which he relies for his argument, the *General duty of parties*. S.40(1) requires such parties to do "*all things necessary for the proper and expeditious conduct of the arbitral proceedings*" but that is then explained in terms in s.40(2), namely that "*this includes complying with . . . any order . . . of the tribunal*" [my underlining].

25. I said above that Mr Dunning seemed to me to go too far. In this case the parties clothed the Arbitrators with a power to enforce their orders, if necessary by a peremptory order, and including an order for the payment of money. Although the *proper and expeditious conduct* of an arbitration would normally include the parties' compliance with any order which the tribunal may make, nevertheless it is clear that, although arbitrators will in fact be making orders which they consider necessary for the proper and expeditious conduct of the arbitral proceedings, not every breach of every order will lead to a peremptory order – there must clearly be room for *de minimis*. I do not however consider that it is a requirement for arbitrators in making every order to spell out either that the order they are making is so necessary, or, once the order is made and a party persists in not complying with it, that it is necessary for the *proper and expeditious conduct* of the arbitration that the party should so comply. There is neither any need for arbitrators to spell out such words, nor (as so often has been said) a need for the Court to be astute to construe detailed reasons such as were here given by the Arbitrators in a context of assuming that experienced arbitrators are in some way failing to comply with their duty.

26. Mr Pollock points out the detailed submissions that were made to the Tribunal prior to the 10 July Ruling by the Claimants and responded to in terms by the Respondent, some of which I have set out in paragraphs 6 to 8 above. The Arbitrators were certainly reminded of **American Cyanamid** principles, and Lord Hoffmann, unsurprisingly, referred to the *balance of justice*. However, it is entirely clear that they were being asked to make, and were considering, an interim measures order to preserve the arbitration and the subject matter of the claims. I refer in particular to paragraphs 12, 76 and 77 of the Claimants' submissions, set out in paragraph 6 above, and paragraph 122 of the Respondent's set out in paragraph 7. The Arbitrators did not spell out a reference to the "*proper and expeditious conduct*" of the arbitration, but they clearly concluded that it was appropriate that the status quo ante, whereby the Respondent paid for what was lifted, should be restored, and that that was necessary for Dana in particular to be able to continue with the arbitration and be in a position to obtain any relief. This was not an order on the basis of an assessment of the eventual outcome, but of a return to the status quo irrespective of the outcome. It is quite clear that clause 16(e) of the Heads of Agreement (set out in paragraph 3 above) was at the very forefront of the Arbitrators' minds (see for example paragraph 9(21) above). Their Order was neither intended to nor did prejudge the merits, as Lord Hoffmann made clear (6 May 2014 Day 1/164), but it was effectively preserving the subject matter of the arbitration, namely the rights under the 25 year contract which the parties were disputing. When that order was not complied with, it is even plainer that a further order was required for the same purpose, and that the order and compliance with it were required for the "*proper and expeditious conduct*" of the arbitration. Lord Hoffmann concluded (21 September 2015 at 101/103) that the Arbitrators had jurisdiction to make the order, and I similarly conclude that this Court has jurisdiction to make a s.42 order to enforce it. The Court is not, as Lord Fraser would describe it, *intervening* in the arbitral process, but *assisting* the Arbitrators to enforce compliance with their orders.

27. The second ground upon which Mr Dunning challenges the making of a s.42 order is by reference to the need within s.41(5) for the Respondent to have been given an opportunity to show *sufficient cause* in respect of non-compliance. This contention is put in two ways:

    i) First that if the order is now to be interpreted as one which required the Arbitrators to have been satisfied that the making of such order was *for the proper and expeditious conduct of the arbitral proceedings* or that the Respondent's failure to comply with it was a failure to do *all things necessary for the proper and expeditious conduct* of the arbitration, that was not spelt out. If the basis for the Arbitrators' conclusion was that if the order were not made Dana could be 'driven from the judgment seat', the Respondent would, and it is suggested could, have addressed that point, or at any rate addressed it differently from the manner in which they made the submissions they did. I am however entirely satisfied that the parties before the Arbitrators knew what the issues were, and knew that the Claimants' case was that if the status quo ante of payment for the products were not restored there could be catastrophic effects, including the inability of the Claimants to proceed with the arbitration and/or the loss of the Claimants' rights under the 25 year contract. Opportunity to make representations to the contrary was fully taken up by the Respondent.

ii) The second contention is by reference to the precise wording of the 17 October Ruling at paragraph 30. It is important to appreciate that the previous order of 10 July 2014 had not been complied with, and remained in force, and what the Arbitrators were attempting to do was to put the Claimants at least in part into the position they would have been in if the earlier order had been complied with. Mr Dunning complains that the order that was made effectively turned into a peremptory order after 30 days, without giving the Respondent any further opportunity to make submissions. However, it is quite clear that what it was, however phrased, was a peremptory order that was effectively suspended for 30 days, to give the Respondent a last opportunity to make payment before it took effect. All the submissions that could possibly have been expected had been made, and the position could only be exacerbated if there had still been no payment (as in fact was the case) after another 30 days. It is quite plain that the Respondent was given the fullest opportunity to show *sufficient cause*.

Issue 2

28. I turn to the question of state immunity, to which the Respondent submits that it is entitled as a *separate entity* (see paragraph 2 above). It consequently denies that the Claimants are entitled to any relief against it and asserts its own entitlement to a declaration pursuant to CPR Part 11. The relevant sections of the SIA are as follows:

i) The starting point is s.14:

> "*(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—*
>
> *(a) the sovereign or other head of that State in his public capacity;*
>
> *(b) the government of that State; and*
>
> *(c) any department of that government,*
>
> *but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued.*
>
> *(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—*
>
> *(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and*
>
> *(b) the circumstances are such that a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune.*

*(3) If a separate entity (not being a State's central bank or other monetary authority) submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2) above, subsections (1) to (4) of section 13 above shall apply to it in respect of those proceedings as if references to a State were references to that entity.*

. . .

*(5) Section 12 above applies to proceedings against the constituent territories of a federal State; and Her Majesty may by Order in Council provide for the other provisions of this Part of this Act to apply to any such constituent territory specified in the Order as they apply to a State.*

*(6) Where the provisions of this Part of this Act do not apply to a constituent territory by virtue of any such Order subsections (2) and (3) above shall apply to it as if it were a separate entity.*"

ii) Arbitration is provided for by s.9:

*"(1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.*"

iii) S.13 provides in material part as follows:

"*(2) Subject to subsections (3) and (4) below—*

*(a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and*

*(b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.*

*(3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.*"

iv) So far as material s.2 provides:

"*(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.*

> *(2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission.*"

29. The first group of questions is as follows:

    i) Was the 25 year Heads of Agreement with the Claimants entered into by the KRG *in the exercise of sovereign authority*?

    ii) Was that *sovereign authority* its own sovereign authority, or that of Iraq (see Issue 2(b) in paragraph 16 above).

    iii) If so, pursuant s.14(2)(a) do these proceedings *relate to anything done by* KRG in the exercise of such sovereign authority?

    I shall take the first two of these questions together.

Sovereign Authority

30. The *locus classicus* for discussion of this question, fittingly in these days in which Latin has, by virtue of the Times Latin crossword, seemingly returned to respectability, is the discussion of the difference between acts '*jure gestionis*' and acts '*jure imperii*', which Lord Wilberforce addressed in **I Congreso del Partido** [1983] 1 AC 244 at 262. He there translated them, in a way which is strangely not quite as helpful in English as in Latin, as the difference between a sovereign or public act and a private act, meaning an act of private law character such as a private citizen might have entered into. Lord Goff returned to what he called Lord Wilberforce's "*authoritative statement*" in **Kuwait Airways Corporation v Iraqi Airways Co** [1995] 1 WLR 1147 at 1158D, a case in which a plainly governmental act, being the expropriation of the Kuwait Airways fleet by the Government of Iraq, was followed by what were concluded to be commercial acts, namely the commercial running of those aircraft. Lightman J in **In re Banco Nacional De Cuba** [2001] 1 WLR 2039 relied upon the analysis by Lord Wilberforce and by Lord Goff, particularly at paragraph 28, where he concluded on the facts of that case:

> "*28. On the other hand BNC and BCC entered into what was in form a private law contract and completed it as such. There is no evidence that the sale was pursuant to any legislative or executive direction. In this respect the agreement is in a quite different position from the rest of the reorganisation which was effected by legislation. In the language of Lord Wilberforce in* ***Congreso del Partido*** *[1983] 1 AC 244, 263, everything was done as between vendor and purchaser: there was no exercise and no need for exercise of sovereign powers. The private law character of the transaction is not discoloured by the context in which the agreement was executed, i.e. the fact that the parties to it regarded the transfer of the shares to BCC as an obvious and necessary sequel to the statutory reorganisation. Nor is its private law character controverted by the purpose or motive behind the transaction of serving the interests of the state in*

> *bringing to fruition the completion of the reorganisation of banking in the final form which it sought. I therefore hold that BCC's entry into the completion of the agreement were commercial rather than governmental (albeit the parties to the agreement were both state-owned entities) and that accordingly BCC enjoys no immunity in respect of the transaction in question.*"

31. In **Koo Golden East v Bank of Nova Scotia** [2008] QB 733 Sir Anthony Clarke MR concluded at paragraphs 40-42 that the Central Bank of Mongolia was a separate entity within the meaning of the SIA and concluded that it entered into the contract with the claimant in the exercise of sovereign authority because "*the purpose of the transactions included the refining of the gold and the placing of a quantity of refined gold on the unallocated account at the bank . . . for the purposes of increasing Mongolia's currency reserves*". Mr Pollock criticises this judgment because neither **del Partido** or **Kuwait Airways**, nor indeed **Banco Nacional De Cuba** were, it seems, cited.

32. Mr Dunning refers inter alia to the Recitals to the Heads of Agreement, including (A), (B), (C) and (F) set out in paragraph 3 above, and above all to paragraph 9 also there set out. Mr Hamlan, the Minister of Finance of the KRI has produced a witness statement, which explains the constitutional background:

> "*9. The Kurdistan Region is governed by the Presidency of the Kurdistan Region and the KRG. The capital city of the Kurdistan Region, and the seat of the KRG, is Erbil. The KRG was formed in 1992 by the Kurdistan National Assembly (later the Kurdistan Parliament), the first democratically-elected parliament in Kurdistan (and in Iraq). The KRG exercises executive power according to the Kurdistan Region's laws, as enacted by the Kurdistan Parliament, and the Iraqi Federal Constitution. The Council of Ministers performs the KRG's executive functions. The Council is composed of the Prime Minister, the Deputy Prime Minister, and 22 further cabinet Ministers. The current government, led by Prime Minister Nechirvan Barzani, took office in June 2014.*
>
> *10. The Iraqi Federal Constitution was negotiated in 2005. The Iraqi people ratified it by referendum on 15 October 2005 and it entered into force in 2006.*
>
> *11. Iraq is a federal state. The Iraqi Federal Constitution describes a federal, de-centralized system of government. Sovereignty is shared between the federal government of Iraq, the KRG (which is recognised in Article 117 of the Iraqi Federal Constitution) and the various provinces or "governorates" of Iraq. . .*
>
> *12. The Kurdistan Region and the KRG have a special status under the Iraqi Federal Constitution. Article 117, First of the Iraqi Federal Constitution provides:*

> *"This Constitution, upon coming into force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region."* . . .
>
> *13. Although the Iraqi Federal Constitution contemplates the creation of further regions as components of the federation, only the Kurdistan Region is recognised in the Iraqi Federal Constitution as a federal region exercising sovereign powers conferred under the Iraqi Federal Constitution.*
>
> *14. The KRG is the lawful, democratically-elected government of the Kurdistan Region. It acts on behalf of the Kurdistan Region and has sovereign powers derived from and conferred by the Constitution. Article 121 First and Fifth of the Iraqi Federal Constitution provide:*
>
> > *"The regional powers shall have the right to exercise executive, legislative, and judicial powers in accordance with this Constitution, except for those authorities stipulated in the exclusive authorities of the federal government."* . . .
> >
> > *"The regional government shall be responsible for all the administrative requirements of the region, particularly the establishment and organization of the internal security forces for the region such as police, security forces, and guards of the region."* . . .
>
> *15. Further, Article 121, Second, states:*
>
> > *"In case of a contradiction between regional and national legislation in respect to a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region.*" . . ."

33. The other relevant Articles of the Constitution, not there expressly referred to, would appear to be as follows:

> "*Article 111:*
>
> *Oil and gas are owned by all the people of Iraq in all the regions and governorates.*
>
> *Article 112:*
>
> *First: The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields, provided that it distributes its revenues in a fair manner in proportion to the population distribution in all parts of the country, specifying an allotment for a specified period for the*

> *damaged regions which were unjustly deprived of them by the former regime, and the regions that were damaged afterwards in a way that ensures balanced development in different areas of the country, and this shall be regulated by a law.*
>
> *Second: The federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment.*
>
> . . .
>
> *Article 115:*
>
> *All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region. With regard to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in case of dispute.*"

34. It is common ground that there has been a dispute between the Federal Government of Iraq ("FGI") and the KRG as to who is entitled to control of Kurdistan's oil and gas resources. Reza Mohtashami, of the Claimants' solicitors, described this in part, in his second witness statement:

> "*23. It is public knowledge that since the coming into force in May 2006 of current Iraq Constitution (approved by national referendum in 2005) there have been important disagreements between the FGI and the KRG as to the control of Iraq's oil and gas resources and how the revenues derived therefrom are to be shared. In summary, the FGI and the KRG disagree on many issues including: (a) the jurisdiction and power of the KRG to award petroleum contracts; (b) the scope of cooperation between the FG1 and the KRG in relation to the management of petroleum fields; and (c) the jurisdiction and power of the KRG to export petroleum produced in the Kurdistan Region. The dispute between the FGI and the KRG is pending before the Federal Supreme Court of Iraq and has been raised in several other legal fora in response to the KRG's attempts since 2014 to undertake petroleum exports independently of the FGI.*
>
> *24. . . the FGI does not recognise the petroleum contracts granted by the KRG and considers the Federal Ministry of Oil and its subsidiary agency and marketing arm, the State Oil Marketing Organisation (SOMO), as the sole entity empowered to export petroleum produced anywhere in Iraq."*

The Claimants have exhibited a letter sent to Crescent by the Iraqi Federal Minister of Oil dated 17 December 2007 asserting that all contracts recently signed with the Ministry of Energy and Natural Resources of KRG without authorisation and approval of the Government of Iraq were "*in violation of the prevailing Iraqi law*".

35. In the context of the dispute between the FGI and the KRG as to who was entitled to the oil fields, an opinion was produced by Professor James Crawford, giving his advice, which was in fact relied upon, as I understand it, by both parties before the Arbitrators. His advice includes the following paragraph:

> "*19. Article 112, First, regulates oil and gas "extracted from present fields". It gives the federal government management powers in relation to that oil and gas, subject to three important qualifications. First, the management is to be undertaken "with the producing governorates and regional governments", which I take to mean jointly and in cooperation with those governorates or governments or at least with their approval. Secondly, the joint management appears to be limited to oil and gas after it has been extracted, on which basis the management of the extraction and production process itself falls outside the federal joint management power. Joint federal power in respect of such oil and gas will be limited, presumably, to processing, transportation and export. Thirdly, revenues from present fields must be distributed in a fair manner, as stipulated in the Article.*
>
> *20. On its ordinary interpretation, the term "present fields" means fields already under production. This is indicated by the word "extracted" and by the reference to "producing" governorates. The clear inference is that Article 112, First, covers oil and gas extracted from fields presently in production. By contrast, areas merely being explored, e.g. by seismic survey, are not "present fields"; indeed they are not fields at all but large tracts of territory, most or all of which will never produce any hydrocarbons. On this basis, fields not producing, developed or even discovered - and the oil and gas yet to be extracted from them - fall outside Article 112, First. They fall under the Constitution to be managed by the relevant regional government alone.*
>
> *21. The time for determining whether a field is "present" or otherwise is the date of the entry into force of the Constitution (viz, 2006). I am instructed that at that date there were no producing fields in the present territory of the Kurdistan Region, i.e. no "present fields" in the sense indicated above. It follows that the provision for joint management under Article 112, First, has no application. On the other hand there are oil and gas contracts with the KRG entered into prior to the coming into force of the Constitution and providing for future exploration, appraisal and, potentially, production. Under Article 141 all such contracts, entered into by Kurdistan since*

> *1992, are considered valid in accordance with their terms (save and to the extent that they contradict some express provision of the Constitution).*"

His Executive Summary includes the following:

> "*(1)* Article 112 *of the Constitution of Iraq gives only a qualified right to the Federal Government to "undertake the management of oil and gas extracted from present fields". This right is to be exercised "with the producing governorates and regional governments", and is subject to a condition of fair distribution of revenue on a basis regulated by law. As to non-producing and future fields, there is under Article 112, Second, no federal right to manage, although regional management of such fields has to respect strategic policies to be formulated by the federal government "with" the KRG.*
>
> . . .
>
> *(3) The KRG is itself bound by Article 111: it is not open to it unilaterally and permanently to take over management of present (i.e. producing) fields in the absence of any arrangements for revenue sharing. As to fields other than present fields, the federal government has no unilateral rights under Article 112, Second, and in the absence of agreed strategic policies, the KRG is entitled to proceed in the exercise of its own constitutional authority and in compliance with its own constitutional duties.*"

36. I reach the following conclusions. The Heads of Agreement relate to the grant for not less than 25 years of the right to operate the gas fields. It is not simply a contract for the sale of gas by a government to a commercial party, but the assignment of rights granted to the KRG under the Constitution to a third party. Mr Pollock submitted that the contract was simply "*designed to ask us, and commercial operators, to carry out drilling, which is entirely a commercial operation, to build pipelines, a commercial operation, to get the gas up and to treat it, a commercial operation*". I note however that in **Svenska Petroleum Exploration AB v The Government of the Republic of Lithuania** [2007] QB 886, upon which both parties rely, Moore-Bick LJ, delivering the judgment of the Court considered, at paragraph 133, that although the first instance Judge (Gloster J) had pointed out that the agreement contained many of the hallmarks of a commercial transaction, "*the fact that it relates to the exploitation of oil reserves within the territory of the state suggests that it involves an exercise by the state of its sovereign authority in relation to its natural resources and so falls outside the realm of activities which a private person might enter into.*" Certainly, as Mr Dunning points out, and as is apparent from the Constitution, the ownership and management of oil and gas is plainly vested in "*the people of Iraq*" and the respective Governments, this is not simply a contract for sale, but a vesting of long-term rights, and the parties themselves thought it necessary to include in the Heads of Agreement

the waiver of immunity clause set out in paragraph 3 above. I am persuaded on balance that KRG entered into this agreement *in the exercise of sovereign authority*.

37. However it is quite clear that this was an exercise of the sovereign authority of the KRG itself, not of Iraq. Professor Crawford's advice creates a powerful case that it was only the "*present fields*", i.e. the fields already producing at the date of the entry into force of the Constitution in 2006 (which applies to neither of these two fields), which vested in the FGI, and that the KRG has consequently at all times been acting in its own right. They would say so, and, because the FGI alleges that the KRG has had no right to do what they have done, the FGI would also assert that what was done was not done by way of exercise of the sovereign authority of Iraq. Consequently, as both parties before me accept that this is a necessary requirement (see paragraph 16 (Issue 2(b)) referred to above), the Respondent, as a *separate entity*, does not have the protection of s.14(2) of the SIA.

38. If I had reached a contrary conclusion in this regard, then I would have needed to have considered whether, within s.14(2), these proceedings *relate to anything done* by KRG in the exercise of sovereign authority. Mr Pollock refers to **NML Capital Ltd v Republic of Argentina** [2011] 2 AC 495. This was a case in which the cause of action relied upon in a fresh proceeding in the English Court was an action on a foreign judgment, being a final judgment in New York, which itself arose out of a commercial transaction. The Supreme Court decided by a majority that proceedings "*relating to a commercial transaction*", within the meaning of s.3 of the SIA, did not extend to proceedings for the enforcement of a foreign judgment which itself related to a commercial transaction, and that the English proceedings for the enforcement of the judgment obtained by the claimant in New York related to that judgment, and not to the debt obligations upon which the New York proceedings were based. The careful logic of the majority is clear from the speech of Lord Mance at paragraphs 85-86. It is plain that he addressed the difference between a cause of action on a foreign judgment, which normally precludes reinvestigation of the facts and law thereby decided, and a claim on a cause of action, which does involve establishing the facts constituting the cause of action; and that the underlying cause of action had merged in the foreign judgment. I am satisfied however that none of that careful logic applies to this case, which is an application to enforce a peremptory order of Arbitrators who are in the process of resolving the dispute relating to the rights of the parties under the Heads of Agreement. Had I concluded that the Heads of Agreement fell within the protection of the SIA, I would have had no difficulty in concluding that the application before me now *relates* to it.

If there was state immunity, has it in any event been lost by virtue of s.9 SIA?

39. S. 9 SIA:

i) The first question is whether the s.42 application is a proceeding in the Courts of the United Kingdom which *relates to* the arbitration. Direct assistance can be drawn from the judgment of Moore-Bick LJ in **Svenska Petroleum** referred to above. The question in that case specifically referred to an application to enforce an award as a judgment:

> "*117. Arbitration is a consensual procedure and the principle underlying section 9 is that, if a state has agreed to submit to arbitration, it has*

> *rendered itself amenable to such process as may be necessary to render the arbitration effective . . . In our view an application . . . for leave to enforce an award as a judgment is . . . one aspect of its recognition and as such is the final stage in rendering the arbitral procedure effective. Enforcement by execution on property belonging to the state is another matter, as section 13 makes clear.*"

Mr Dunning refers to **ETI Euro Telecom International NV v Republic of Bolivia** [2009] 1 WLR 665, where an application was made pursuant to s.25 of the Civil Jurisdiction and Judgments Act 1982 for a freezing order in support of the bringing of an arbitration in New York. The Court of Appeal upheld the defendant's immunity because (per Lawrence Collins LJ):

> "*. . . it is plain that there is nothing in section 9 which overrides the prohibition in section 13. Proceedings for a freezing order to preserve the position pending execution of an award are within section 13, and are not 'proceedings which relate to the arbitration' for the purposes of section 9.*"

It is plain however that, although the Court noted that there might have been, but was not, an application under s.44 of the 1996 Act, these were proceedings external to the arbitration. The proceedings in this case however, initiated with the permission of the Arbitrators and pursuant to the 1996 Act and in order to enforce an order of the Arbitrators, plainly do *relate to the arbitration*.

ii) Has the Respondent submitted to the Courts of the United Kingdom? This is only relevant to a sophisticated argument between the parties with regard to the effect of s.14(3). If the Respondent has submitted to the jurisdiction, as provided for by s.14(3), then though a *separate entity*, it is entitled to the protection of s.13. Mr Dunning submitted that it has submitted and Mr Pollock that it has not: he submitted that s.9 does not operate by virtue of any submission to the jurisdiction, but simply records a loss of immunity, as with ss. 5, 6, 7 and 8 SIA. If Mr Pollock be right, then s.14(3) does not engage, and thus, given that by virtue of s.9 SIA the Respondent has lost its immunity, and it is not a State, and so is thus not automatically entitled to s.13 protection, it would seem that as a *separate entity* in such circumstances it would not have the benefit of s.13. There is no direct authority on this point, and the silent assumption that s.13 would apply even where s.9 applies in, for example, **Svenska Petroleum** can be explained by the fact that the defendant in that case was a State, not a *separate entity*. However Mr Dunning draws my attention to academic authority that consent to submit to arbitration constitutes a submission to any proceedings brought in the United Kingdom Courts in relation to such an arbitration (**Fox & Webb The Law of State Immunity** (3rd Ed) 188 and **Dickinson: State Immunity** at 4.069). It seems to me clear that it cannot have been intended to exclude a *separate entity* agreeing to arbitration from the protection of s.13, and I have no doubt that s.14(3) should be so construed.

S.13(2) SIA

40. The next question is whether, if I had found that the Respondent was entitled to state immunity but for its submission within the meaning of s.9, but was entitled to the protection of s.13, it could have claimed such protection. It is common ground that the present case does not relate in any way to s.13(2)(b): this is not an application to enforce an award. The question is whether, when s.13(2)(a) provides that "*relief shall not be given against a State* [or, on the assumptions found above, a *separate entity*] *by way of injunction*", this application for an order of the Court under s.42 is for an injunction. It is obviously common ground that if there had been application under s.44 of the 1996 Act, that would have been for an injunction:

    i) Mr Dunning relies on the words of Dyson J in **Macob**, which I have set out in paragraph 23 above. Dyson J described a s.42 order as a *mandatory injunction* in paragraph 35 and in paragraph 38 (3 times), and in paragraph 36, although he contrasted a s.42 order with an injunction granted pursuant to s.37 of the Supreme (now Senior) Courts Act 1981, he again described a s.42 order as a "*mandatory injunction to enforce a payment obligation*". He plainly deprecated the use of such an order in the field of building contracts adjudication, not least in carrying with it the potential for contempt proceedings and, as I have said in paragraph 23 above, I understand that a s.42 order is no longer available within the Scheme for Construction Contracts. It is not clear whether there was any argument before him based upon any distinction between a s.42 order and a mandatory injunction. None appears in the course of his judgment: all that is said in paragraph 33 is that "*there was some limited discussion as to whether, s.42 apart, the appropriate procedure was by way of writ and an application for summary judgment, or by way of a claim for a mandatory injunction*", so that it at least looks as though in the course of argument a s.42 order was not being equated with a mandatory injunction. However such was the decision of a Judge who was then in charge of the new Technology and Construction Court, albeit a first instance Judge.

    ii) Mr Pollock however relies upon the decision of the Court of Appeal, **Soleh Boneh International Limited v Government of the Republic of Uganda** [1993] 2 Lloyd's Law Rep 208 CA, in which Staughton LJ gave the judgment, with which Neill and Roach LJJ agreed. The Ugandan Government complained that an order requiring them to provide security of US$5 million, in return for obtaining an adjournment of enforcement proceedings, was an injunction, and relied upon s.13(2)(a). Its Counsel had pointed out that a copy of the order was endorsed with a penal notice, directed at the High Commissioner of Uganda in the United Kingdom personally. Staughton LJ accepted at 213 the Defendant's contrary "*robust*" submission that the order was "*plainly not an injunction*". He concluded that "*in the context of s.13(2)(a). . . I would not hold that a simple order for the payment of money from no specified source is an injunction*". In case he was wrong, he varied the order, but his conclusion was in my judgment a binding finding of the Court of Appeal, and one directly applicable to this case.

41. I conclude that an application for a s.42 order is not an application for an injunction, such that s13(2)(a) would not have applied.

Waiver

42. The third question relates to waiver. If there was statutory immunity and if s.13(2)(a) would otherwise apply, contrary to my findings in those regards, has the Respondent waived immunity by reference to the clause set out in paragraph 3 above? I repeat it here:

> "*The KRG waives on its own behalf and that of the KRG any claim to immunity for itself and assets*"

It seems clear that the second reference to *KRG* must be a reference to KRI. These words, though concise, are robust. It is common ground that a waiver must be construed strictly and sensibly, and, as is stated in s.14(3) a written consent "*may be expressed so as to apply to a limited extent or generally*". There is no issue between the parties that this waiver of immunity clause removes from the Respondent any *adjudicative immunity*, as it was referred to in the course of the hearing, nor was any issue raised at this hearing (though KRG reserved its position), because of the reference to *assets*, as to any immunity against execution. But what Mr Dunning submits is that it does not waive the immunity against injunctive relief (if that is, contrary to my conclusions above, what s.42 constitutes) or indeed against the other forms of relief specified in s.13(2), specific performance and recovery of land or other property. Therefore the question for me is whether the wording of the waiver in this case would exclude immunity against what one might call '*s.13(2)(a) relief*', including relief by way of injunction:

i) Mr Pollock refers to the decision of Saville J in **A Company Ltd v Republic of X** [1990] 2 Lloyds Law Rep 520. In that case there was a waiver to the effect: "*The Ministry of Finance hereby waives whatever defence it may have of sovereign immunity for itself or its property (present or subsequently acquired)*". A Mareva injunction was sought against the defendant, which claimed sovereign immunity. Saville J concluded that the waiver "*does amount to the agreement and consent of the State that its property can be made the subject of a Mareva injunction*" (at 523). Mr Pollock submits that this is directly persuasive. Mr Dunning points out: (i) that Saville J may have been affected by the fact that, as he specifically stated at 523, the contract of which this waiver formed part was "*undoubtedly a commercial bargain between the parties*": (ii) that a Mareva injunction does have an obvious impact upon a defendant's *property*, such that it could be said to fall expressly within the wording: (iii) that Saville J said (also at 523) "*it is not, of course, necessary to decide whether clause 6 does amount to consent to other forms of injunction*".

ii) Mr Pollock refers to **Sabah Shipyard (Pakistan) v Pakistan** [2002] EWCA Civ 1643. The waiver clause there provided that the defendant "*waives any right of immunity which it or any of its assets . . . now has or may in the future have in any jurisdiction . . . and . . . consents generally in respect of the enforcement of any judgment against it . . . to the giving of any relief or the issue of any process in connection with such proceedings (including without limitation, the making, enforcement or execution against or in respect of any of its assets)*". In that case the Court of Appeal upheld an anti-suit injunction "*to maintain the status quo pending judgment*" (paragraph 23). Again this was

a clause contained in what Waller LJ described as "*an ordinary commercial transaction*"; it is plain however that the Court concluded that, albeit not specifically mentioned in the relatively long list of examples, there was waiver of immunity in respect of an anti-suit injunction. Mr Dunning refers however to **Arab Banking Court v International Tin Council** [1986] Int LR 1 where the Defendant was found to be immune from a Mareva injunction. There was there a very general clause submitting to the jurisdiction of the English Courts, and Article 6(1)(a) of the International Tin Council (Immunities and Privileges) Order of 1972 provided that the Council was immune from suit and legal process except to the extent that "*it shall have expressly waived its immunity in a particular case*". By reference to the then wording of **Dicey & Morris, The Conflict of Laws** (10th Ed) Vol 1 p. 176 to the effect that "*waiver of immunity from jurisdiction in civil or administrative proceedings does not imply waiver of immunity in respect of execution of the judgment, for which a separate waiver is required*", Steyn J concluded that what he called the "*narrower construction*" of the jurisdiction clause should be accepted.

43. There is no reported authority which suggests that which Mr Dunning was effectively submitting, namely what one might describe as 'trifurcation' of the question of immunity, by way of construing a waiver clause to see whether it covers what is now suggested to be three different matters, adjudication, *s.13(2)(a) relief* and execution. He referred to the passages in **Fox & Webb** and **Dickinson,** to which I have made reference above, and they all address the same point as was made by Steyn J by reference to the then edition of **Dicey & Morris**, namely a careful distinction between immunity from suit and immunity against execution. Plainly on any sensible construction of the waiver clause in the present case, it will be sufficient for that purpose. However Mr Dunning refers to the latest edition of **Dicey, Morris & Collins: The Conflict of Laws (15th ed)** at 345, which reads as follows:

> "*The immunity from injunctive relief and execution is distinct from immunity from suit, and applies even if one of the jurisdictional exceptions applies. Thus, even though a State is not immune as respects proceedings relating to a commercial transaction, the State cannot be enjoined from breach of the contract. But the immunity from injunctive relief and execution is subject to two important exceptions. First, such relief may be given or process may be issued with the written consent (which may be contained in a prior agreement) of the State* [Footnote reference is made to the Tin Council case and to Sabah where *"waiver of immunity in a contractual submission to the English jurisdiction was held to extend to an anti-suit injunction restraining proceedings in Pakistan"]. It has been held that a waiver of immunity in relation to property will allow a freezing injunction to be made against a foreign State, but that a contractual waiver of immunity from execution will not be regarded as extending to diplomatic premises.*" [There is a footnote reference to Saville J's judgment in **A Company**, with a note that on the latter (but not the former) point there was criticism by FA Mann in 1991 107 LQR 362].

44. I do not conclude that it is necessary for a waiver to spell out consent in respect of *s.13(2)(a) relief*, which, although this is not addressed by **Dicey** extends, as set out in paragraph 42 above, considerably wider, beyond simply injunctive relief, to other kinds of 'suit'. I conclude that if the Respondent had been otherwise entitled to state immunity (which I have, as set out above, concluded it is not) the clause here in question would have been sufficient to amount to a waiver of immunity from suit, including an injunction, if I had not reached the conclusion I did in paragraph 41 above.

Issue 3

45. I turn finally to the question of my discretion, which both parties accept I have (see Issue 3 at paragraph 16 above), as to whether to make the order. Mr Dunning emphasises the view of Dyson J in **Macob** that a s.42 order for the payment of money should be rare – certainly in the field of building construction. Mr Pollock does not suggest that such an order should be frequent, but underlines that the particular facts of this case, and what he submits to be the egregious nature of the failure by the Respondent to comply with the orders of the Arbitrators in an ongoing arbitration, makes this exceptional.

46. Both counsel referred to the words of Teare J in **Emmott**, where he gives examples, at paragraph 62, of matters which the Court may consider, when exercising its discretion as to whether to enforce the Arbitrators' order:

    i) Mr Pollock submits that the Court should be supportive of the Arbitrators and not frustrate their intention. Mr Dunning, mindful of his arguments which I have addressed in Issue 1 above, submits that this should only be where the Arbitrators have acted for the purpose of *the proper and expeditious conduct* of the arbitration. As appears above, I am in any event satisfied that that was indeed the purpose of the Arbitrators.

    ii) Both sides accept that, subject to the question of change of circumstances, the court should not re-visit the argument before the Arbitrators provided that, as I am satisfied that they did here, the Arbitrators have addressed the correct questions. Mr Pollock submits that reconsideration should only arise where there has been an error of law or a serious irregularity by the Arbitrators i.e. something analogous to where the Court could intervene by reference to ss.67 or 68 of the 1996 Act. That does not seem to me to put the point in any different way.

    iii) I am entitled to consider any material change of circumstances.

47. I accept that other matters can be considered by the Court, such as have been canvassed before me (iv) the issue of sovereign immunity – now dealt with, (v) questions of the utility of any order, (vi) if appropriate, Act of State, (vii) comity.

48. I can deal shortly with (i) and (ii). I see no ground to interfere with or revisit the very carefully expressed reasoning of the Arbitrators and see no sign of any error or irregularity: I have already concluded that they addressed the correct questions.

49. With regard to (iii), and (vi), which I include here because it was not live before the Arbitrators:

i) It is suggested that there has been a change of circumstance by virtue of the fact that the Respondent's counterclaims have been considered to be sufficiently arguable to be the subject of debate at the 21 September hearing as to whether they amount to or constitute a set-off. It is clear however that, not least because the Arbitrators had previously concluded that the counterclaims were sufficiently arguable not to be disposed of summarily, there has been no material change in the approach of the Arbitrators in accordance with their conclusions in the 10 July Ruling and the 17 October Ruling. The question which the Arbitrators resolved was the restoration of the status quo, irrespective of the defence of set-off, i.e. the requirement that the previous arrangement of the Respondent paying for what was lifted should be restored.

ii) Mr Dunning submits that, on the evidence before me, there has been a change of circumstance in relation to the circumstances of the Claimants. I am satisfied, however, that the evidence before me does not show any improvement in the financial position of Dana (or of the SPV, Pearl). Indeed it seems clear that such financial position is more precarious because since the 17 October Ruling, as appears in paragraphs 14 and 15 above, the Respondent has shut off the source of payment to the Claimants which it had temporarily permitted.

iii) Mr Dunning also relies on the position of the Respondent. The Respondent, which appears to continue to be deprived of resources from the FGI, has a continuing, and, no doubt, increasing, responsibility for arming the Peshmerga, its military arm, and coping with an increasing flood of refugees, quite apart from a budget deficit. Mr Dunning refers to paragraph 25 of the 17 October Ruling (set out in paragraph 11 above) in which the Arbitrators, while sympathising with the plight of the KRG, considered that they were "*in no position to estimate the significance of these momentous events*", and that they lay outside the matters to which the Tribunal could conventionally have regard. The issue is whether, then or now, there are financial circumstances, possibly deteriorating such circumstances, which either the Arbitrators should have taken, or I should now take, into account. Mr Dunning places reliance on an Order dated 24 August 2015 by the Prime Minister of Kurdistan, which recorded a determination by the Council of Ministers that, in the light of the "*strong and competing demands on the Kurdistan Region's financial resources and the limitations on the financial resources available to the KRG*", the absence of a budgetary law for the two years of 2014 and 2015, the volatile national security situation and the continued budgetary dispute between the KRG and the FGI, "*there are no funds available to allocate*" to payment of the peremptory Order, and that "*funds could not be paid to the above named companies without prejudicing the urgent demands on the KRG's financial resources and priorities*". This, Mr Dunning submits, is a change of circumstance, equivalent to a subsequent Act of State, such as is referred to by Lord Hope in **Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)** [2002] 2 AC 883 at 1108, being a "*legislative or other governmental act . . .*

> *of a recognised foreign state or government within the limits of its own territory* [which] *the English Courts will not adjudicate upon, or call into question*". I agree however with Mr Pollock that he is not inviting me to take either of those courses. The Respondent's Council of Ministers has concluded that there "*are no funds available to allocate to the Payment*". The Arbitrators however plainly took notice, as do I, that in fact, had it so chosen, the Respondent could have secured payment to the Claimants without actually laying out any money themselves (see paragraphs 16 and 17 of the 17 October Ruling, set out in paragraph 11 above). The fact remains that, as set out in paragraph 14 above, since the 17 October Ruling and indeed since the Order by the Prime Minister of 24 August 2015, the Respondent has made and authorised very substantial payments to other international oil producers, but not to the Claimants. It is also noteworthy that the Respondent plainly was in a position to pay substantial monies to the Claimants in September 2015 when, as set out in paragraph 15 above, stating that it was only prepared to make payments if the Arbitrators agreed to the unorthodox step there proposed. There is no basis for any case, whether by way of change of circumstances or otherwise, for my taking a different view about the balance of justice in relation to the Respondent than was taken by the Arbitrators.

50. As to (v) utility, the Respondent says that it is apparent that the purpose of the Claimants is to seek to issue contempt proceedings, based upon a failure to comply with a s.42 order, if I make it, and that that would not lead anywhere because there will be no remedy available upon a committal for such contempt, and/or the individual, Dr. Hawrami, who it is suggested may be amenable to the jurisdiction of this Court, would be entitled to diplomatic immunity. In the absence of any likely available remedy on a contempt application, Mr Dunning submits that this is simply illegitimate pressure by the Claimants.

51. Mr Pollock however submits as follows:

    i) Now is not the time to speculate as to what remedy may be available on a contempt application, if such becomes necessary.

    ii) No assumption should be made at this stage that the Respondent will in fact fail to comply with an order of the Commercial Court as done in relation to the orders of Arbitrators.

    iii) This is the only way to enforce the Arbitrators' orders, which will otherwise remain uncomplied with.

    iv) He submits that it is more than likely that a public declaration by this Court of failure to comply and of non-payment will be of effect upon the Respondent, given its role and profile internationally.

52. Finally (vii) comity. Mr Dunning points to the fact that the Respondent is a friendly nation and an ally of this country, of whom, for good reason, laudatory things have been said by the House of Commons Foreign Affairs Committee. Comity is not usually used in this context: it is more usually applied in a situation in which the Court is pleased to pay deferential regard to the decisions of the Courts of other countries. It seems to me that this Court must do justice between the parties, and if a

foreign State, or a foreign corporation, is friendly to this country, but is adjudicated by this Court to owe money or to have failed to comply with the order of an arbitrator or a Court, and not to have immunity, the political status of that defendant cannot stand in the way of justice.

Conclusion

53. For the reasons I have set out, the Respondent does not have state immunity in respect of the order sought, and I have jurisdiction to make that order, and in the exercise of my discretion I do so.