Appeal Ref: A4/2019/1243
Claim No. CL-2018-000704

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**COMMERCIAL COURT (QBD)**
**The Honourable Mr Justice Knowles CBE**

Royal Courts of Justice
The Rolls Building
London, EC4A 1NL

Date: 26/11/2019

**Before:**

**SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT**
**LORD JUSTICE NEWEY**
and
**LORD JUSTICE MALES**

**B E T W E E N:**

**MINISTER OF FINANCE (INCORPORATED)**
**1MALAYSIA DEVELOPMENT BERHAD**

**Claimants/Appellants**

**and**

**INTERNATIONAL PETROLEUM INVESTMENT COMPANY**
**AABAR INVESTMENTS PJS**

**Defendants/Respondents**

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**Mr Toby Landau QC**, **Mr Peter Webster** and **Mr Joseph Sullivan** (instructed by **Eversheds Sutherland (International) LLP**) for the **Appellants**

**Mr Mark Howard QC**, **Mr Craig Morrison** and **Mr Nathaniel Bird** (instructed by **Clifford Chance LLP**) for the **Respondents**

Hearing date: 29th October 2019

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# Approved Judgment

**Sir Geoffrey Vos, Chancellor of the High Court (delivering the judgment of the court):**

Introduction

1. This appeal raises an important legal issue as to the primacy of the powers of the court contained in sections 67 and 68 ("sections 67 and 68") of the Arbitration Act 1996 (the "1996 Act"). The judge, Mr Justice Knowles, used case management powers to stay the applications under sections 67 and 68 (the "court applications") made by the claimants, Minister of Finance (Incorporated) of Malaysia ("MoF") and 1Malaysia Development Berhad ("1MDB"). That case management order had the effect of allowing two arbitrations (the "second arbitrations") commenced subsequently by the defendants, International Petroleum Investment Company ("IPIC") and Aabar Investment PJS ("Aabar"), to proceed to decide factual issues relating to the circumstances in which a consent award (the "consent award") was entered into in a first and prior arbitration between the parties (the "first arbitration"). Those factual issues also arise in the court applications. The judge also refused to restrain the defendants under section 37(1) of the Senior Courts Act 1981 ("section 37(1)") from continuing the second arbitrations.

2. The claimants appeal both the grant of a case management stay and the refusal of an injunction.

3. In relation to the stay, the claimants contend that the judge only identified one positive justification for granting the stay of the proceedings under sections 67 and 68, namely to avoid unnecessary duplication.[1] The court process was not of equal status with the subsequent second arbitrations. The judge should have placed greater weight on the structure of the 1996 Act and the provisions of section 4 and schedule 1[2] of the 1996 Act, which make sections 67 and 68 mandatory "notwithstanding any agreement to the contrary". Had he done so, he would have realised that he was either required to allow the court applications to go first or he ought to have done so as a matter of discretion. The defendants submit that the judge made an entirely proper exercise of discretion, and that there is no legal requirement that the issues raised by applications under sections 67 and 68 should be determined entirely by the court. The various possible outcomes of the second arbitrations going first would all result in the issues being decided by the tribunal that the parties had agreed. Moreover, the judge's conclusion was coherent and elegant; it preserved all parties' rights and minimised prejudice.

4. In relation to the refusal of the injunction to restrain the second arbitrations, the claimants contend that the judge failed to apply the correct two-stage legal test adumbrated in *Claxton Engineering Services Ltd v. TXM Olaj-es Gazkutato Kft (No 2)* [2011] EWHC 345 (Comm), [2011] 2 All ER (Comm) 128 at [34] ("*Claxton*"). He did not ask first whether the claimants' legal or equitable rights had been infringed or threatened by a continuation of the second arbitrations, or whether their continuation would be vexatious, oppressive or unconscionable, before considering, secondly, whether the injunction should be granted as a matter of discretion. Had he done so, the judge would have concluded that the claimants' right to have the proceedings under sections 67 and 68 determined first was indeed infringed by the prosecution of the second arbitrations, which were themselves vexatious, and that an injunction ought to

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1 See paragraph 83 of the judgment.

2 Which lists sections 67 and 68 amongst the mandatory provisions of the 1996 Act.

be granted. The defendants submit that the judge did indeed cite and correctly apply the two-stage approach adumbrated by the claimants.

5. The factual background to these issues is complex and hotly contested between the parties. We take the view, however, that only a limited amount of factual context is necessary to allow this court fairly to decide the legal issues arising from the judge's decision. Before the hearing, the court rejected the defendants' application for the appeal to be heard in private. A public judgment was under appeal, and a private hearing had not been shown to be necessary for the proper administration of justice. The court nonetheless invited the parties not to refer in open court to sensitive commercial documents.

Essential factual background

6. We have tried to take our summary of the essential factual background so far as possible from the judge's judgment.

7. MoF is and was wholly owned by the Malaysian Government. 1MDB is a state-owned investment entity, which is a wholly-owned subsidiary of MoF. IPIC is an investment entity indirectly owned by the Government of Abu Dhabi. Aabar is wholly owned by IPIC.

8. Mr Najib Razak ("Mr Najib") was the Prime Minister of Malaysia from 3rd April 2009 to 9th May 2018. The claimants' case is that Mr Najib conspired with others to misappropriate in excess of US$3.5 billion, and that he has sought to conceal and prevent investigation of the conspiracy. They also allege that 1MDB, IPIC and Aabar were victims of that conspiracy.[3]

9. On 28th May 2015, the parties entered into a binding term sheet (the "binding term sheet") containing a London arbitration clause. The claimants allege that the binding term sheet was grossly disadvantageous to them, and that it was, to the defendants' knowledge, procured by Mr Najib to further his interests and to damage their interests.

10. On 13th June 2016, the defendants commenced the first arbitration with its seat in London under the arbitration clause in the binding term sheet.

11. On 22nd April 2017, the parties entered into a settlement deed and a supplemental deed compromising the issues raised in the first arbitration (together the "settlement deeds"). The settlement deeds provided for the issue of a consent award. The claimants contend that the settlement deeds were grossly unfair to them and that they too were, to the defendants' knowledge, procured by Mr Najib to further his interests and to damage their interests. The settlement deeds contained arbitration agreements providing that "[a]ny dispute arising from or in connection with [the settlement deed] (including a dispute relating to the existence, validity or termination of [the settlement deed] or any non-contractual obligation arising out of or in connection with [the settlement deed] or the consequences of its nullity …) shall be finally resolved by arbitration under the LCIA Rules which are deemed to be incorporated by reference into this clause … The seat of arbitration shall be London, England and the language of the arbitration shall be

[3] See the response to the request for arbitration dated 16th January 2019, and paragraph 6 of Mr Richard Little's witness statement dated 30th October 2018.

English. The governing law of this arbitration clause shall be the substantive law of England". The settlement deeds also contained a series of events of default and provided that the parties waived any right to challenge the consent award "on grounds of jurisdiction or for any other reason". The making or commencement of any "demand, action, claim or proceeding whatsoever" by the claimants before 31st December 2020 (which would seemingly include a challenge to the consent award under sections 67 or 68) was one of the events of default. The settlement deeds provided that, if the defendants certified that an event of default had occurred, interest under the bonds and a US$481 million receivable (totalling just less than US$1.2 billion) would become immediately payable by the claimants to the defendants.

12. On 9th May 2017, the arbitral tribunal in the first arbitration made the consent award, which terminated the first arbitration, stated that the binding term sheet was valid and binding on the parties until terminated by the settlement deeds, provided for the claimants to pay IPIC over US$1·2 billion plus interest by 31st December 2017, and made certain provisions in respect of deeds of guarantee executed in 2012 by IPIC (the "guarantees") and in respect of certain bonds (the "bonds").

13. The defendants contend that, for more than 12 months after May 2017, the claimants complied with their obligations under the settlement deeds and the consent award, including the payment of over US$1.2 billion plus interest.

14. After the departure of Mr Najib as Prime Minister of Malaysia on 9th May 2018, the claimants issued the court applications. Their claim form was dated 30th October 2018, and sought (a) to set aside the consent award on the basis that the arbitral tribunal in the first arbitration did not have substantive jurisdiction to make it because, to the defendants' knowledge, Mr Najib lacked authority (under section 67) and (b) determinations that the consent award was procured by fraud or in a way that was contrary to public policy and should be set aside or declared non-binding (under section 68). The claim form was served on the defendants on 20th November 2018. Mr Richard Little's statement dated 30th October 2018 in support of the claim form described the court applications in paragraph 12 as follows:-

> "12. I understand that this Consent Award should be set aside because:
>
> a. The Consent Award was procured by fraud or the way it was procured was contrary to public policy. The Award formed part of an attempt by Mr Najib to cover up his and his fellow conspirators' fraud (including former senior officers of IPIC and Aabar PJS), contrary to the interests of MOFI, 1MDB and the Malaysian people, in whose interests he was constitutionally bound to act. Moreover, IPIC and Aabar PJS knew that he was acting in this way and were complicit in his fraud: their agents colluded with him in the original fraud, and then both IPIC and Aabar PJS colluded with him again in seeking to cover the fraud up by means of the Award and other agreements. I consider that this was a continuation of the fraud and that the way in which the Award was procured was clearly contrary to public policy. In addition, the settlement agreements upon which the Consent Award is

based are void and would, if they were not void, be unenforceable on grounds of illegality.

b. In any event, the Tribunal only had jurisdiction to grant a Consent Award if it was jointly requested to do so by all of the parties to the arbitration. Mr Najib was acting in a way that was profoundly contrary to MOFI and 1MDB's best interests and therefore was not acting with MOFI or 1MDB's authority. As a result, MOFI and 1MDB did not, in fact, request the Consent Award and IPIC/Aabar PJS was aware of this".

15. The claim form was issued outside the time limits provided by the 1996 Act, but the judge declined to strike it out on 11th March 2019. An application to extend time will need to be determined in due course.

16. On 21st November 2018, the defendants requested the commencement of the second arbitrations, and the claimants responded on 16th January 2019. The defendants alleged that there had been events of default under the settlement deeds entitling the defendants to demand immediate payments. Those events of default included an alleged public statement by the Attorney General of Malaysia on 30th October 2018 about the Government of Malaysia's intention to apply to the English court for an order to set aside the consent award and to recover some US$1.46 billion already paid under the consent award, as well as the claimants' sections 67 and 68 applications themselves. The events of default in the settlement deeds relied upon by the defendants related to the claimants' public challenges to the validity of the binding term sheet, the settlement deeds and the consent award, and to the claimants having reclaimed monies paid under them. The second arbitrations seek declarations that the settlement deeds were valid and binding and not liable to be set aside, and interest under the bonds of some US$714,474,561, together with payment of a receivable of some US$481 million.

17. On 13th December 2018, the defendants applied to strike out the claim form, alternatively for a stay of the court applications under section 9 of the 1996 Act or on case management grounds. On 11th January 2019, the claimants applied for an order under section 37(1) restraining the defendants from pursuing the second arbitrations pending the final determination of the court applications.

18. The hearing of these two applications took place before the judge on 11th and 12th March 2019. On 11th March 2019, the judge delivered an *ex tempore* judgment refusing the defendants' application to strike out the claim form, which had been brought on the basis that the claimants had not applied to extend time in their claim form. The claimants' application to extend time (made in Mr Little's witness statement) was at that stage due to be heard in May 2019, and the judge kept in mind that it was an open question whether time would be extended.

19. The judge delivered his reserved judgment on the two applications identified at [17] above on 8th May 2019. His order was dated 21st May 2019. In broad terms, he refused the defendants' application for a stay of the court applications under section 9, but granted a stay of the court applications on case management grounds until further order. He refused the claimants' application to restrain the second arbitrations. Simon LJ

refused the defendants permission to appeal the judge's ruling under section 9. Simon LJ did, however, on 31st July 2019, grant the claimants permission to bring this appeal.

The judge's judgment

20. The judge said that the questions of whether the consent award should be set aside or declared to be non-binding were ultimately for the court under its supervisory jurisdiction over the first arbitration. The central issue that he had to decide was whether the court or the second arbitrations should decide whether the settlement deeds were void and/or not binding on the claimants (which he called the "underlying question"). He said that both the court and the second arbitrations had jurisdictions "for which the answer to the underlying question [was] material".

21. The judge then dealt with the salient provisions of the 1996 Act on party autonomy and the supervisory jurisdiction of the court. Then, having mentioned section 4(1) of the 1996 Act and the waiver of rights to challenge the jurisdiction of the first arbitration in paragraph 5(4) of the settlement deed, the judge turned to the question of overlapping and concurrent jurisdiction between the court proceedings and the second arbitrations. He said that, where there was concurrent jurisdiction, the questions of a stay or an injunction of one or other forum might be of high importance.

22. The judge refused a stay under section 9 first. He did not do so because he thought that the court's supervisory jurisdiction over the first arbitration took precedence over the second arbitrations; he thought both had equal priority since both were founded on the parties' agreement to arbitrate under the supervision of the English court. Instead, he founded his decision on the basis that the presence of two concurrent jurisdictions prevented the engagement of section 9 in the first place.

23. In relation to the case management stay, the judge began by saying that the presence of concurrent jurisdiction did not mean that there had to be unnecessary duplication. A case management stay of court proceedings was an available discretionary tool which could be used flexibly. He made clear that a rare and compelling case was required for a stay to be granted, referring to Lord Bingham's *dicta* at page 186 in *Reichhold Norway ASA v. Goldman Sachs International* [2000] 1 WLR 173 ("*Reichhold*"), ultimately concluding that such a case had been made out. The alternative, he thought, was duplication in the investigation and decision on whether the settlement deeds were void or not binding, which invited delay, cost, disorder, and uncertainty, referring to the approach of Blair J at [165] in *Autoridad del Canal de Panamá v Sacyr SA* [2017] EWHC 2228 (Comm), [2018] 1 All ER (Comm) 916.

24. The judge rejected the submission that it was for the court supervising the arbitration to deal with all factual matters raised by the challenges under sections 67 and 68, including the attack on the settlement deeds. He held that that approach was not consistent with the discretionary nature of the stay sought, and elevated the supervisory jurisdiction above the concurrent jurisdiction of the second arbitrations, when both derived from party autonomy. He noted that the public interest of which Mance LJ had spoken at [34] in *Department of Economics, Policy and Development of the City of Moscow v. Bankers Trust Co* [2004] EWCA Civ 314, [2005] QB 207 ("*City of Moscow*") was "to facilitate the fairness and well-being of a consensual method of dispute resolution".

25. The judge considered what a stay would involve, noting that the second arbitral tribunals were composed of distinguished members, had been chosen after Mr Najib had lost control, and that they would consider the facts of the claim that the settlement deeds were void and/or not binding. There was no unfairness about their deciding some issues up to the point of an issue estoppel, because the challenges under sections 67 and 68 remained live, and the court could decide all issues and remedies. The second arbitrations too would be subject to the court's supervisory jurisdiction. He did not think that the court's power to order third party disclosure was a compelling consideration.

26. In relation to the claimants' application for an injunction under section 37(1), the judge said that the court could only act where it appeared just and convenient to do so, and that the power had to be exercised sensitively (see Lord Mance at [60] in *AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] Bus LR 1357). He cited Hamblen J's judgment at [34] in *Claxton*, to the effect that it would "usually be necessary, as a minimum, to establish that the applicant's legal or equitable rights have been infringed or threatened by a continuation of the arbitration, or that its continuation will be vexatious, oppressive or unconscionable … However this may not be sufficient …". He concluded for seven composite reasons that it would not be just and convenient to grant the injunction.

27. The reasons the judge gave were (i) the court retained jurisdiction over the consent award, (ii) the two proceedings shared the same underlying question, and the claimants could not complain if the second arbitrations decided that question against them, (iii) the second arbitral tribunals would be vigilant over their jurisdiction, and (iv) were an independent forum, (v) the defendants alleged that the claimants' commencement of the court applications gave them the right to commence the second arbitrations, and therefore the financial consequences of having done so are consequences of agreements that the parties either have or have not made, (vi) the case management stay would appropriately manage the risks of parallel proceedings, and the claimants had no right to have the court applications under sections 67 and 68 determined first, and (vii) the question of whether proceedings were in private or not was a separate one.

28. The judge concluded by noting that the dispute was of great importance to the parties and, according to the claimants, to the people of Malaysia. He ordered a case management stay of the court applications, allowing the second arbitrations to proceed first, and saying that he would monitor their progress by receiving regular reports.

The issues for determination

29. Against this background, there are, as it seems to us, the following four issues for determination:-

    i) Whether the judge exercised his case management power to stay the court applications on the correct legal basis?

    ii) If not, ought this court to exercise a case management power to stay the court applications?

    iii) Whether the judge exercised his discretion to refuse an injunction under section 37(1) on the correct legal basis?

iv) If not, ought this court to exercise its discretion to grant an injunction to restrain the second arbitrations under section 37(1)?

30. Before dealing with these issues, it is necessary to set out the essential statutory provisions and to summarise some of the applicable authority.

Relevant statutory background

31. Section 1 of the 1996 Act provides as follows under the heading "General principles":

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

32. Section 4 of the 1996 Act provides as follows under the heading "Mandatory and non-mandatory provisions":

> "(1) The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.
>
> (2) The other provisions of this Part (the "non-mandatory provisions") allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement".

33. Section 67 of the 1996 Act provides as follows under the heading "Challenging the award: substantive jurisdiction":

> "(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court—
>
> a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
>
> b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.
>
> A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

> (2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.
>
> (3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—
>
> a) confirm the award,
>
> b) vary the award, or
>
> c) set aside the award in whole or in part.
>
> (4) The leave of the court is required for any appeal from a decision of the court under this section".

34. Section 68 of the 1996 Act provides as follows under the heading "Challenging the award: serious irregularity":

> (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
>
> A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
>
> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—
>
> a) failure by the tribunal to comply with section 33 (general duty of tribunal);
>
> b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67); …
>
> g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy; …
>
> (3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—
>
> a) remit the award to the tribunal, in whole or in part, for reconsideration,
>
> b) set the award aside in whole or in part, or
>
> c) declare the award to be of no effect, in whole or in part.

> The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.
>
> (4) The leave of the court is required for any appeal from a decision of the court under this section".

35. Sections 70(1) and (2) of the 1996 Act provide as follows under the heading "Challenge or appeal: supplemental provisions":

> "(1) The following provisions apply to an application or appeal under section 67, 68 or 69.
>
> (2) An application or appeal may not be brought if the applicant or appellant has not first exhausted—
>
> (a) any available arbitral process of appeal or review, and
>
> (b) any available recourse under section 57 (correction of award or additional award)".

Authorities and relevant principles

36. In *C v. D* [2007] EWHC 1541 (Comm), [2007] 2 Lloyd's Rep 367, Cooke J explained the significance of agreeing to the seat of an arbitration, and to an arbitration governed by English law and the 1996 Act, as follows:

> "27. As a matter of construction of the policy and the arbitration provision within it, with its express reference to English law and the 1996 Arbitration Act, I consider that the parties have incorporated the framework of that Act and agreed that it should apply to any arbitration between them with all its mandatory provisions and with its nonmandatory provisions, save to the extent that there is agreement to the contrary. The agreement to the seat and the curial law necessarily imports that, with the result that challenges to any award are governed by the relevant sections of the Act, as amended by the parties' agreement where the Act itself allows it. …
>
> 29. The significance of the "seat of arbitration" has been considered in a number of recent authorities. The effect of them is that the agreement as to the seat of an arbitration is akin to agreement to an exclusive jurisdiction clause. Not only is there agreement to the arbitration itself but also to the courts of the seat having supervisory jurisdiction over that arbitration. By agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made only in the courts of the place designated as the seat of the arbitration".

37. This reasoning was expressly approved by this court on appeal in *C v. D* [2007] EWCA Civ 1282, [2008] 1 Lloyd's Rep 239, where Longmore LJ said:

> "17. It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award. As the judge said in paragraph 27 of his judgment, as a matter of construction of the insurance contract with its reference to the English statutory law of arbitration, the parties incorporated the framework of the 1996 Act. He added that their agreement on the seat and the "curial law" necessarily meant that any challenges to any award had to be only those permitted by that Act. In so holding he was following the decisions of Colman J in *A v B* [2007] 1 Lloyds Rep 237 and *A v B (No. 2)* [2007] 1 Lloyds Rep 358 in the first of which that learned judge said (para. 111):—
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> > '… an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration.'
>
> That is, in my view, a correct statement of the law".

38. The jurisdiction of the court under sections 67 and 68 is therefore founded on the agreement of the parties to an arbitration with a London seat. It is, however, also founded on wider considerations of the public interest.

39. The 1996 Act strikes a balance. On the one hand, court intervention in arbitration proceedings is carefully limited so that the only permitted intervention in matters governed by Part 1 of the 1996 Act is that for which the 1996 Act expressly provides, as section 1(c) of the 1996 Act, in effect, says. Paragraph 19 of the DAC report[4] indicated that the intention was "to support and assist the arbitral process and the stated object of arbitration", which was "to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense", as provided for in section 1(a) of the 1996 Act. On the other hand, the 1996 Act includes mandatory provisions, described in section 1(b) as "such safeguards as are necessary in the public interest", which according to section 4(1) "have effect notwithstanding any agreement to the contrary".[5]

40. The mandatory provisions include, of course, sections 67 and 68. Accordingly, in this case, the claimants had a right, which the defendants had agreed they should have, and which had effect notwithstanding any agreement to the contrary, to challenge the consent award by making court applications under section 67 for lack of substantive jurisdiction and under section 68 for serious irregularity.

41. Not infrequently such challenges lack merit and are nothing more than an attempt by the losing party to put off the day of reckoning. When that is the case the court has

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4 The Departmental Advisory Committee on Arbitration (DAC) Report on the Arbitration Bill 1996.

5 Paragraph 28 of the DAC Report suggests that these provisions "cannot be overridden by the parties".

adequate powers to bring the challenge to a prompt end, including in the case of section 68 dismissing the application on paper.[6] However, it has not been suggested that the claimants' challenge to the consent award in this case falls into that category. The claimants' allegations are firmly denied, but they appear to raise issues which will need careful consideration in the light of what will no doubt be highly controversial factual evidence.

42. In addition, it was not disputed that the grounds of challenge, at least potentially, undermine the arbitration agreement as well as the deeds of settlement in which they were contained. As Lord Hoffmann said in *Fiona Trust & Holding Corporation v. Privalov* [2007] UKHL 40, [2008] 1 Lloyd's Rep 254 at [17]: "if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement".[7]

43. When an application to challenge an award is made under sections 67 or 68, it is *prima facie* the duty of the court to determine that challenge and to do so as promptly as possible. In so doing the court is not merely giving effect to the agreement of the parties but is performing an important public function, as Mance LJ explained at [34] in *City of Moscow*:

> "The consideration that parties have elected to arbitrate confidentially and privately cannot dictate the position in respect of arbitration claims brought to court under rule 62.10.[8] Rule 62.10 therefore only represents a starting point. Such proceedings are no longer consensual. The possibility of pursuing them exists in the public interest. The courts, when called upon to exercise the supervisory role assigned to them under the Arbitration Act 1996, are acting as a branch of the state, not as a mere extension of the consensual arbitration process. Nevertheless, they are acting in the public interest to facilitate the fairness and well-being of a consensual method of dispute resolution, and both the Rule Committee and the courts can still take into account the parties' expectations regarding privacy and confidentiality when agreeing to arbitrate."

44. It is noteworthy that the judge mentioned this paragraph of Mance LJ's judgment in *City of Moscow*,[9] but cited it only in support of the proposition that the public interest of which he had spoken was "to facilitate the fairness and well-being of a consensual

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6 See, for example, *Midnight Marine Ltd v. Thomas Miller Speciality Underwriting Agency Ltd* [2018] EWHC 3431 (Comm), [2019] 1 Lloyd's Rep 399 at [37] to [39].

7 See also Lord Hope at [34] to [35].

8 Arbitration claims are defined in CPR Part 62.2(1) as meaning, amongst other things, any application to the court under the 1996 Act and "a claim to declare that an award by an arbitral tribunal is not binding on a party".

9 At paragraph 85 of the judge's judgment.

method of dispute resolution". He did not mention that (a) the election to arbitrate could not dictate the position in respect of arbitration claims brought to court under 1996 Act, where the proceedings were no longer consensual, or that (b) the courts exercising their supervisory role under the 1996 Act are acting as a branch of the state, not as a mere extension of the consensual arbitration process. These are, in our view, crucial features of the court's approach to resolution of arbitration claims.

45. It is worth exploring a little further the public interest which is engaged when an award is challenged. It is in the public interest that a valid arbitration award should be recognised and enforced and, in this jurisdiction, such an award may be enforced by making use of the coercive powers of the state to enforce a court judgment.[10] Internationally, an award which is valid in accordance with the law of the seat can be enforced pursuant to the 1958 New York Convention (the "NY Convention"), with only limited grounds on which recognition or enforcement may be refused by the enforcing court.[11] Conversely, it is against the public interest for the powers of the state to be utilised to enforce an award in a case where the arbitrators had no jurisdiction or which is the result of a "serious irregularity". In the latter case, it is as well to bear particularly in mind the high hurdle which an applicant must overcome in order to demonstrate that there has been a serious irregularity, which includes proof of substantial injustice.[12] Thus, when the court is exercising its supervisory jurisdiction under sections 67 or 68, it is deciding whether the award is one which should benefit from the coercive power of the state both in this country and worldwide for its recognition and enforcement.

46. Until a challenge under section 67 or 68 is determined by the court of the seat of the arbitration, the status of the award is uncertain. Some jurisdictions may enforce such an award; others may not. Article VI of the NY Convention gives the court hearing an application to enforce an award a discretion to adjourn its decision when a challenge to the award is pending before the courts of the seat. Evidently, therefore, a decision by the court of the seat to postpone a decision on a court challenge prolongs the period within which the status of the award will be uncertain and gives rise to a risk of injustice, either because an award which is ultimately set aside is enforced or because enforcement of an award which is ultimately held to be valid may be refused or delayed. The scheme of the NY Convention is that it is the court of the seat which will determine the validity of the award. For so long as a challenge remains unresolved, there is a risk that the same issue will be litigated in a number of jurisdictions, wherever enforcement is sought. The need for promptness and finality in dealing with challenges under sections 67 and 68 is underlined by the provision in each of those sections that an appeal may only be brought with the permission of the court hearing that challenge.

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10 See section 66 of the 1996 Act, which provides that "an award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect".

11 See Article V of the NY Convention which sets out those limited grounds.

12 See Lord Steyn's speech in *Lesotho Highlands Development Authority v. Impreligo SpA* [2005] UKHL 43, [2006] 1 AC 221 at [28], where he said that, amongst other things, "a high threshold must be satisfied" and "it must be established that the irregularity caused or will cause substantial injustice to the applicant", the latter requirement being "designed to eliminate technical and unmeritorious challenges". See also *The Magdalena Oldendorff* [2007] EWCA Civ 998, [2008] 1 Lloyd's Rep. 7 at [35].

47. These authorities and matters suggest that a stay of court applications under sections 67 and 68 on case management grounds should only rarely be granted, and that there should be compelling grounds for the grant of such a stay. That was what this court held in comparable circumstances in *Reichhold*, but it applies with particular force in circumstances such as the present case.

48. Moreover, in *Hashwani v. OMV Maurice Energy Ltd* [2015] EWCA Civ 1171, [2015] 2 CLC 800 ("*Hashwani*") at [31], Moore-Bick LJ suggested that it was the court's responsibility to decide a challenge to the jurisdiction of arbitrators. Whilst that was an application under section 72 of the 1996 Act, another of the mandatory provisions, his reasoning is equally applicable to a challenge under sections 67 and 68. He said this:-

> "31. A party who makes an application under section 72(1) of the Arbitration Act 1996 is asking the court to determine whether the tribunal in question has jurisdiction to hear and determine the matters submitted to it. That is a question of law which ultimately admits of only one answer, however difficult it may be to ascertain it, and it is the court's responsibility to decide the question on the basis of the evidence the parties have chosen to put before it, unless there is some justification for not doing so. There is a good reason for that. Although arbitrators have jurisdiction to decide their own jurisdiction, they do not have the final word on the subject, because it is open to the parties to challenge their award under section 67 of the Act on the grounds that they lacked substantive jurisdiction. In simple terms, a party is not bound by the award of a tribunal on a matter that he did not agree to refer to it. It may be that in a few cases there may be practical reasons for allowing the tribunal to reach a decision on its own jurisdiction before the court finally rules on the matter, but such cases are likely to be rare. In the present case a decision by the tribunal might have had some persuasive authority, but could not finally determine the matter before the court. …
>
> 33. … I agree with the views expressed by Lightman J in *Albon v Naza Motor Trading Sdn Bhd* [2007] EWHC 665 (Ch) that it will only be in exceptional cases that a court faced with proceedings which require it to determine the jurisdiction of arbitrators will be justified in exercising its inherent power to stay those proceedings to enable the arbitrators themselves to decide the question".

49. In our judgment, this appeal needs to be determined in the light of these principles.

<u>First issue: Did the judge exercise his case management power to stay the court applications on the correct legal basis?</u>

50. The claimants put the matter in alternative ways. First, they say that the mandatory nature of sections 67 and 68 mean that the judge had no discretion to stay the court applications in favour of the second arbitrations. Alternatively, they submit that, even if the defendants are right to submit that there is no rule requiring facts raised by court applications under section 67 and 68 to be determined by the court, the judge ought to

have taken the mandatory nature of the provisions into account, so that his decision on case management grounds was affected by a legal error.

51. The claimants' second main submission was based on a graphical representation of the chronological events demonstrating that, for these purposes, the relevant time at which the parties had agreed to arbitration and to the mandatory provisions of the 1996 Act was when they entered into the binding term sheet, not when they entered into the settlement deeds. Section 4 had the effect that they could not subsequently contract out of those mandatory provisions when they later concluded the settlement deeds.

52. Mr Mark Howard QC, counsel for the defendants, conversely placed great emphasis on the arbitration clauses in the settlement deeds and the importance of the court giving effect to them, notwithstanding the court applications under sections 67 and 68. He submitted that the effect of the judge's decision was that all the issues would be resolved in the forum that the parties had agreed; the underlying fraud and the validity of the arbitration agreement in the settlement deeds would be decided first by the agreed tribunal. If the tribunal decided that there was a fraud, the claimants would have no complaint. If the tribunal decided it had no jurisdiction, then equally neither side could complain. If the tribunal decided it did have jurisdiction and resolved the dispute in the defendants' favour, then the claimants could challenge that decision under sections 67 and 68 on the ground of fraud affecting the arbitration agreements in the settlement deeds. If that challenge failed, then the correct tribunal had decided it; if it succeeded, the decision in the second arbitrations would be set aside, but either way, the correct tribunal would decide the issues that it had been agreed they should decide.

53. The role of an appellate court was explained by Lord Neuberger in *BPP Holdings Ltd v. Revenue & Customs Commissioners* [2017] UKSC 55, [2017] 1 WLR 2945 at [33]:

> "… an appellate judge should only interfere where the decision is not merely different from that which the appellate judge would have made, but is a decision which the appellate judge considers cannot be justified. In the words of Lawrence Collins LJ in *Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427 at [33]:
>
> > 'an appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge'.
>
> In other words, before they can interfere, appellate judges must not merely disagree with the decision; they must consider that it is unjustifiable".

54. This court must then apply that test to the judge's case management decision to stay the court applications. In our judgment, the judge's decision proceeded on a false premise. He held that the claimants' court applications elevated the supervisory jurisdiction above the concurrent jurisdiction of the second arbitrations, when both derived from

party autonomy. But he failed to recognise, as we have sought already to explain, that: (a) the claimants had a right, which the defendants had agreed they should have, and which had effect notwithstanding any agreement to the contrary, to challenge the consent award under sections 67 and 68, (b) the grounds of challenge affected Mr Najib's authority to enter into the deeds of settlement at all and would, therefore, undermine the arbitration agreement contained within them, (c) it is the responsibility of the court to determine challenges under sections 67 and 68, and to do so as promptly as possible, (d) the election to arbitrate could not dictate the position in respect of challenges under sections 67 and 68, which were no longer consensual, (e) courts exercising their supervisory role under the 1996 Act do so as a branch of the state, not as a mere extension of the consensual arbitration process, and (f) the court exercising its supervisory jurisdiction under sections 67 and 68 must do so quickly to avoid uncertainty and injustice in the enforcement process.

55. Accordingly, we are satisfied that the judge exercised his case management power to stay the court applications under sections 67 and 68 on the wrong legal basis. He viewed the application from the wrong starting point and this court can and should reconsider whether a stay is appropriate.

Second issue: If not, ought this court to exercise a case management power to stay the court applications?

56. The judge correctly identified the test that had to be applied, namely whether this was one of the rare cases where a compelling case had been shown for a stay to be granted.[13]

57. It is important first, in our judgment, to consider precisely what the defendants are seeking to stay. The parties contracted for the limited supervisory jurisdiction of the English court for which the 1996 Act provided, when they entered into the binding term sheet, which included an agreement to arbitration with an English seat. The defendants were asking the court to stay the court applications challenging under sections 67 and 68 the consent award made in the first arbitration. Those challenges were, first, as to the first arbitral tribunal's jurisdiction to make the consent award, because of Mr Najib's alleged lack of authority to enter into the settlement deeds at all. It is alleged that the defendants were fully aware of that lack of authority. Secondly, there was a challenge under section 68(2)(g) to the effect there was a serious irregularity in the consent award, because it was procured by fraud or in a way that was contrary to public policy. It is alleged that the defendants were fully aware of that fraud and were complicit in it.

58. The defendants were, therefore, seeking to bring a halt to the court applications challenging the consent award in the first arbitration on the basis that the settlement deeds had included further exclusive arbitration agreements. The defendants had, however, already submitted to the supervisory jurisdiction of the English court in relation to the first arbitration when they entered into the binding term sheet, and before the settlement deeds were themselves entered into. There are, therefore, no circumstances in which the court will not need to determine the court applications under sections 67 and 68. Mr Howard can point, as he has, to a number of possible outcomes that would accord with the parties' agreement in the settlement deeds. He cannot,

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[13] Lord Bingham in *Reichhold*: "It will very soon become clear that stays are only granted in cases of this kind in rare and compelling circumstances".

however, deny that if the second arbitrations decide the underlying facts as to Mr Najib's authority and as to the alleged fraud against the claimants, they will have been, at least partially, deprived of what they undoubtedly contracted for under the binding term sheet, namely the English court's supervision of the first arbitration. There might or might not be questions of issue estoppel at that stage, but, if the court applications are stayed, the court's determination will have been delayed and possibly made much more complicated. Allowing the court proceedings to take their normal course would, on the other hand, allow the parties' original expectations under the undisputed first arbitration agreement to be completely fulfilled.

59. Against that background, this court has to consider whether there should be a stay of the claimants' court applications to allow the second arbitrations to determine the facts upon which those court applications are founded. There are, in our judgment, no compelling reasons to grant such a stay.

60. First, the principles of the 1996 Act make it clear in section 1(b) that the parties should be free to agree how their disputes are resolved, subject to the safeguards that are necessary in the public interest. As we have explained, however, the right to commence and progress properly brought court applications under sections 67 and 68 is necessary in the public interest. The court is performing an important public function in resolving such disputes. The principles explained above militate against the grant of a stay in this case.

61. Secondly, it is clear from the requests for arbitration in the second arbitrations that the defendants' commencement of the arbitrations was a reaction to the claimants' court applications. That is not a matter of simple timing, but one of substance. Even though the requests for arbitration were made one day after service of the claimants' court applications, they were clearly prepared earlier. The events of default in the settlement deeds, on which the defendants rely, are mostly founded on the claimants' own court proceedings. The principal relief sought by the defendants is the mirror image of the claimants' case in their challenge to the consent award. Moreover, the claimants' alleged liability for very substantial sums is said to have been triggered by the making of their court applications. In circumstances where the second arbitrations are a reaction to the claimants' court proceedings, and where the claimants have a statutory right to bring those proceedings, which cannot be ousted by contract, it would be illogical to give precedence to the second arbitrations unless there were other strong reasons to do so.

62. Thirdly, we do not accept that the judge was right to think that a stay would avoid unnecessary duplication. The question of duplication will depend on whether decisions in the second arbitration give rise to issue estoppels which are determinative of the court applications. If they do not, and if the decision in the second arbitrations is adverse to the claimants, nothing will have been achieved except for delay. The court applications will have to proceed with at least the risk of conflicting decisions by the court and the arbitrators. Moreover, as the arbitrators in the second arbitrations cannot conclusively determine their own jurisdiction, there would at least be the possibility of further court proceedings challenging the awards in the second arbitrations. On the other hand, if the second arbitrations do give rise to issue estoppels, and assuming that those awards successfully withstand further court challenge under sections 67 and 68, the result will be that the court's decision on the existing court applications will in effect have been

delegated to the arbitrators in the second arbitrations. A powerful justification would be needed for the court to allow such a possible outcome.

63. Fourthly, the principle of party autonomy, relied upon by the defendants, also points against the grant of a stay. It is true that the wide arbitration clauses in the settlement deeds expressly extend to "a dispute relating to the existence, validity or termination of" the settlement deeds themselves. But, as Moore-Bick LJ pointed out in *Hashwani*, the arbitrators cannot finally determine their own jurisdiction.[14] Accordingly, the choice which confronted the judge was between (a) a case management stay which would enable the arbitrators to reach what could be no more than a provisional decision under the doctrine of *kometenz-kompetenz*,[15] and (b) allowing the court applications to continue so that the court could reach a binding decision which would finally determine the status of the consent award. As we have said, the claimants can properly invoke the parties' agreement in the binding term sheet to the supervisory jurisdiction of the English court under sections 67 and 68. In such circumstances, and bearing in mind the heavy burden on the defendants to justify a case management stay, we regard it as clear that the proceedings should have been allowed to continue.

64. Fifthly, the result of imposing a stay is that, in order to continue their court applications challenging the consent award, the claimants must first defend themselves against large financial claims in the second arbitrations. If those claims were to succeed, the defendants would no doubt seek to enforce the awards in their favour in any jurisdiction where the claimants may have assets, and would seek to do so before the determination of either (a) the claimants' existing court applications, or (b) any applications which they might make to challenge the awards in the second arbitrations. That possible outcome would be inappropriately burdensome for the claimants. It is a factor that should be taken into account in exercising the court's discretion.

65. In the circumstances, it is not necessary for us to say much more about the judge's exercise of his discretion. We should, however, mention that the judge imposed a stay on the basis that the court would exercise a form of continuous supervision over the second arbitrations by means of regular reports on their progress. The court does not, however, have any such jurisdiction under the 1996 Act. Its powers to intervene are strictly limited in accordance with the provisions of the 1996 Act and, in these circumstances, arise only in relation to the issue of the consent award. Moreover, the claimants have invoked the court's jurisdiction over the first arbitration, whilst the continuous supervision for which the judge opted purported to exercise jurisdiction over the second arbitrations. He was not, we think, justified on any basis in adopting that course.

66. For the reasons we have given, we would not exercise a case management power to stay the court applications.

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[14] Moore-Bick LJ said at [31]: "Although arbitrators have jurisdiction to decide their own jurisdiction, they do not have the final word on the subject, because it is open to the parties to challenge their award under section 67 … on the grounds that they lacked substantive jurisdiction".

[15] The ability of the arbitral tribunal to rule on the question of whether it has jurisdiction before intervention by national courts.

Third issue: Did the judge exercise his discretion to refuse an injunction under section 37(1) on the correct legal basis?

67. It is common ground that the court has jurisdiction to grant an injunction to restrain the pursuit of arbitration proceedings, but that such an injunction will only be granted in exceptional circumstances, the relevant test being that set out by Hamblen J in *Claxton* at [34] as follows:

> "In order to establish exceptional circumstances, it will usually be necessary, as a minimum, to establish that the applicant's legal or equitable rights have been infringed or threatened by a continuation of the arbitration, or that its continuation will be vexatious, oppressive or unconscionable, these being the principles which govern the grant of injunctions to restrain proceedings in a foreign court: see the *Elektrim* case [2007] 2 Lloyd's Rep 8 at [56]. However this may not be sufficient as the *Elektrim* decision illustrates: see [74] and [75]".[16]

68. The claimants contend that, although the judge cited that test, he did not properly apply it, whilst the defendants say that, on a proper analysis, he did just that. We confess that we find paragraphs 96-109 of the judge's judgment somewhat hard to follow, because he seems to deal with three separate questions in an integrated manner. The three questions are (a) whether the claimants' rights have been infringed or threatened by a continuation of the second arbitrations, (b) whether continuation of the second arbitrations would be vexatious, oppressive or unconscionable, and (c) whether it would be just and convenient under section 37(1) to grant an injunction restraining the continuation of the second arbitrations.

69. We do not think that we need to decide whether the judge properly addressed his mind to the first two of these three questions, since he certainly seems to have thought he was exercising his discretion in answering the third question on the mistaken basis that it had been appropriate to grant a case management stay of the court applications, which we have decided was the wrong course.[17]

70. It seems most likely that the judge thought that the answer to the first two questions we have set out was in the negative, though he never expressly said so. If that was his answer, of course, he did not need to address the question of discretion, which he undoubtedly purported to answer in paragraph 109 where he said that it did not appear to be "just and convenient to grant the injunction sought". In any event, even if the judge did decide that the first two questions should be answered in the defendants' favour, for reasons that we explain in the next section of this judgment, we do not agree with that conclusion.

71. Accordingly, in our judgment, the judge exercised his discretion to refuse an injunction under section 37(1) on the wrong legal basis. He should have directly answered the

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[16] See also Rix LJ in *Star Reefers Pool v. JFC Group* [2012] EWCA Civ 14, [2012] 2 All ER (Comm) 225 at [2] and [26].

[17] See paragraph 107 of the judgment, where the judge said that: "the use of the case management stay will appropriately manage the risk of parallel proceedings and costs and possible 'rush to judgment'".

first two questions we have set out in order to determine whether there was a basis for holding that the necessary exceptional circumstances existed for the grant of such an injunction. He should then, if exercising a discretion, not have done so on the basis that a case management stay was being granted.

72. We, therefore, hold that it is open to this court to reconsider whether an injunction should be granted to restrain the pursuit of the second arbitrations.

Fourth issue: If not, ought this court to exercise its discretion to grant an injunction to restrain the second arbitrations under section 37(1)?

73. In order to determine whether the required exceptional circumstances exist, the first and second questions are whether either the claimants' rights have been infringed or threatened by a continuation of the second arbitrations and/or whether continuation of the second arbitrations would be vexatious, oppressive or unconscionable. In our judgment, both these conditions are satisfied in this case because the defendants are pursuing the second arbitrations in which they contend (a) that the pursuit of the court applications are themselves events of default under the settlement deeds,[18] and (b) that the events of default in question trigger the claimants' substantial and immediate financial liability. Those claims infringe and threaten the claimants' undoubted legal right to pursue the court applications under sections 67 and 68, and are vexatious and oppressive.[19] We refer in this regard to the principles explained above as to the public interest in allowing parties that have agreed to an English seat of arbitration to pursue the limited supervisory remedies permitted under the 1996 Act. It is not legitimate for the defendants to seek to enforce the clauses of the settlement deeds that attempt to suppress the court's review of the consent award, to which the parties specifically agreed in the binding term sheet. Mr Howard was prepared to accept that there may be arguments as to whether the terms of the settlement deeds which have this effect are void as being penal or otherwise contrary to public policy. We are sure that such arguments could be advanced, but what matters for present purposes is that the defendants are contending vigorously in the second arbitrations that the terms in question are valid and enforceable. They cannot in such circumstances sensibly say to this court that no harm may be done because the arbitrators may rule that the terms are unenforceable. The defendants will, on their own case, be seeking to persuade the arbitrators that the terms are enforceable. If they succeed, the defendants will no doubt contend that the decision is not subject to review by the court because, even if the arbitrators are wrong, any error is one of law and the parties have excluded an appeal under section 69 of the 1996 Act which would be the only means of putting the error right.

74. As matters stand, therefore, the terms of the settlement deeds represent a clear attempt to fetter the claimants' exercise of their statutory right to challenge the consent award

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[18] See, for example, paragraphs 3.16-3.18 of the defendants' amended requests for arbitration where they contend that the issue and/or service of the court applications constituted an event of default under clauses 1.1 and/or 5.4 of the settlement deed. Clause 23.2 of the settlement deed provided that "[t]he Parties hereby waive any right to refer any question of law and any right of appeal on the law and/or merits to any court", and clause 5.4 provided that the parties waive any and all rights to challenge the consent award on grounds of jurisdiction or for any other reason.

[19] See the Privy Council judgment of Lord Sumption in *Stichting Shell Pensioenfunds v. Krys* [2014] UKPC 41, [2015] AC 616 at [18]-[25] on anti-suit injunctions generally.

in the first arbitration under sections 67 and 68. The pursuit of the second arbitrations seeks *in terrorem* to impose a large financial penalty on the claimants for having sought to exercise their agreed legal rights.

75. Once these conclusions on the first and second questions are reached, it is necessary to address the third question set out above as to the court's discretion. In the circumstances of this case, however, the only appropriate exercise of discretion is to grant an injunction to restrain the pursuit of the second arbitrations. The court applications will proceed to determine the validity of the consent award, and it is just and convenient that the second arbitrations should not proceed until that has been determined. The injunction will bring the defendants' vexatious conduct to an end. It will also ensure the objective which the defendants and the judge have sought to achieve, namely to avoid what the judge described as "the risk of parallel proceedings and costs and [a] possible 'rush to judgment'".

Conclusions

76. For the reasons we have given, therefore, we will allow the appeal. We will remove the stay on the claimants' court applications under sections 67 and 68, and grant an injunction to restrain the pursuit of the second arbitrations until the final determination of those applications. The decision as to the continuation of that injunction thereafter will, if necessary, need to be considered by a judge of the Commercial Court at that stage in the light of the circumstances prevailing at that time.