Neutral Citation Number: [2023] EWHC 2474 (Comm)

Case No: CL-2023-000293

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/10/2023

Before :

THE HON MR JUSTICE BUTCHER

- -

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION

Between :

THE FRENCH STATE	**Claimant/ Respondent in the Arbitration**
- and –	
THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LIMITED	**Defendant/ Claimant in the Arbitration**

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Anna Dilnot KC and Naomi Hart (instructed by **K&L Gates LLP**) for the **Claimant**
Christopher Hancock KC and Alexander Thompson (instructed by **Wikborg Rein LLP**) for the **Defendant**

Hearing dates: 8-9 August 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 6 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives
(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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THE HONOURABLE MR JUSTICE BUTCHER

The Hon Mr Justice Butcher :

1. This action is an arbitration claim, in which the Claimant ('the French State') seeks to appeal two partial awards made by an arbitral tribunal consisting of Dame Elizabeth Gloster DBE pursuant to s. 69 Arbitration Act 1996 ('AA 1996'). Those awards are: (a) a 'partial final award' dated 8 February 2023 ('the First Partial Award'), and (b) a 'second partial award' dated 2 May 2023 ('the Second Partial Award'). Together, I will refer to the two awards as 'the Awards'.

2. The matters which have been argued at the hearing on 8-9 August 2023, and which I now have to resolve are:

   (1) Whether the French State needs and should be granted an extension of time to seek leave to appeal the First Partial Award;

   (2) To the extent that the French State does not need, or is granted, an extension of time, should the French State be granted leave to appeal the Awards; and

   (3) If it is, should the French State's appeals against the Awards succeed.

Background

3. These matters overlap with, and the background to them is in large part the same as the background to, the AA 1996 applications made by the Kingdom of Spain ('Spain') in relation to the Awards of Sir Peter Gross, which I have dealt with in my judgment in relation to those applications which is being handed down at the same time as this one ('the 2023 Spain Judgment'). Given this, I will not set out the common background, which can be taken from that judgment (and from the various judicial summaries of the facts which are referred to in it). I will also adopt the defined terms used in the 2023 Spain Judgment, save to the extent that there are separate defined terms in this judgment.

4. There are, nonetheless, certain particular matters relevant to the French State which need to be specifically mentioned, and which can be summarised as follows:

   (1) The French State was one of the claimants in the Spanish proceedings, who, in about June 2010, made a civil claim against the Defendant ('the Club') under Article 117.

   (2) The Defendant ('the Club') commenced a different arbitration against the French State from that which it commenced against Spain, by notice of arbitration dated 16 January 2012. Mr Alistair Schaff QC was appointed as arbitrator. Mr Schaff issued his award in the arbitration involving the French State on 3 July 2013. In that award he granted substantially the same relief granted to the Club against Spain in his award of 13 February 2013.

   (3) The French State had taken no part in that arbitration. It did, however, resist the Club's s. 66 AA 1996 application in respect of the Schaff award against it, and brought its own application challenging the substantive jurisdiction of the tribunal under s. 67 and/or s. 72 AA 1996. The French State was accordingly a party to and

represented at the hearings before Hamblen J in October 2013, and the Court of Appeal in January 2015.

(4) The Spanish proceedings ultimately resulted in an order of the Provincial Court of La Coruña of 1 March 2019 providing, inter alia, that the French State was entitled to seek enforcement against the Club of up to about €117 million, and that the Spanish State was entitled to seek enforcement up to about €2.355 billion and various other Spanish claimants further amounts, subject to the US$1 billion limit in the insurance contract.

(5) On about 11 January 2019 the Club served a notice or further notice of arbitration on the French State. In the absence of any agreement by the French State, the Club issued an Arbitration Claim Form, seeking the appointment of Dame Elizabeth Gloster as sole arbitrator pursuant to s. 18 AA 1996. On 14 February 2020, that application was heard by Foxton J. The French State did not attend that hearing or make any submissions. Foxton J held that the French State was not immune from the proceedings, by reason of s. 9 State Immunity Act 1978 ('SIA'), because it had agreed in writing to refer the Club's claims to arbitration and the s. 18 AA 1996 application related to the arbitration. Further Foxton J held that the requirements of s. 18 AA 1996 were met, and appointed Dame Elizabeth Gloster as the sole arbitrator in the reference.

(6) In the arbitration, in summary, the Club sought declarations that the French State was in breach of its obligations not to pursue the non-CLC claims other than by way of London arbitration, injunctive relief, and an order that the French State pay to the Club such sums as the Club is ordered to pay to the French State in any jurisdiction in which the Spanish Judgment is recognised or enforced, as well as compensation for its costs of defending the non-CLC claims in Spain.

(7) A hearing in the arbitration took place before Dame Elizabeth Gloster on 6-8 and 19-22 July 2021. The French State participated in this hearing. On 20 June 2022 the CJEU handed down its judgment in the Reference. K&L Gates LLP, for the French State, provided a copy of that judgment to Dame Elizabeth Gloster. On 22 June 2022 she said that, having read the judgment, she did not require submissions from the parties to the arbitration to complete her award. Neither party sought to persuade her otherwise. During July 2022 the parties exchanged submissions on a different authority, *UK P&I Club v Republica Bolivariana de Venezuela (The 'Resolute')* [2022] EWHC 1655 (Comm) and its relevance to the issues before the tribunal. After that there were no further written or oral submissions in the arbitration, and Dame Elizabeth Gloster proceeded to produce her first award.

(8) The French State, unlike Spain, has not sought, or obtained, an order seeking to have the Spanish Judgment registered in England pursuant to the Brussels I Regulation.

5. Dame Elizabeth Gloster produced the First Partial Award on 8 February 2023. In that First Partial Award, in summary, Dame Elizabeth Gloster:

(1) Set out the factual and procedural background (paras. 6-55);

(2) Identified the issues which arose for decision (para. 56). There were six principal issues: Issue I as to her jurisdiction; Issue II as to the effect, if any, of the Club's participation in the Spanish quantum proceedings; Issue III as to whether there should be the grant of declaratory relief in favour of the Club; Issue IV as to whether there could and should be the grant of equitable compensation to the Club; Issue V as to whether she could and should grant injunctive relief restraining the French State from enforcing any of the judgments of the Spanish Courts anywhere in the world outside Spain; and Issue VI as to whether the Club should be granted damages under s. 50 SCA instead of or in addition to an anti-enforcement injunction;

(3) Resolved the jurisdiction issue (Issue I) in favour of the Club (paras 57-62);

(4) Found (in relation to Issue II) that the Club had not submitted to the jurisdiction of the Spanish Courts by its participation in the quantum proceedings there (paras. 63-81);

(5) Held (in relation to Issue III) that she should exercise her discretion to grant declaratory relief to the effect that the French State, by maintaining direct civil claims in Spain and by taking steps in Spain to enforce the order of the Provincial Court of La Coruña of 1 March 2019 was in breach of its obligations in equity not to pursue such claims other than by way of London arbitration; and that if it took further steps, in Spain or elsewhere, to enforce that order, or any other order of the Spanish Courts upholding or enforcing such claims, it would be in breach of its obligations not to pursue such claims other than by way of London arbitration (paras. 81-85);

(6) Concluded (in relation to Issue IV) that she, as the tribunal, had the power to award equitable compensation to the Club in respect of the French State's past and future breaches of its equitable obligation to pursue direct claims only in London arbitration; and that as a matter of discretion she should make such an order (paras 87-149);

(7) Concluded (in relation to Issue V) that she had jurisdiction to grant an injunction restraining the French State from enforcing any of the judgments of the Spanish Courts, and that as a matter of discretion she should grant such an injunction (paras 150-202);

(8) Said (in relation to Issue VI) that she considered it neither necessary nor appropriate to decide on this, as she had already concluded that it was appropriate to make an order for the payment of equitable compensation (including contingently on future breaches by the French State of its equitable obligation) (paras. 203-204).

6. In paragraph 205 of her First Partial Award Dame Elizabeth Gloster set out the relief which, 'subject to hearing further from the parties as to the precise terms of the order', she proposed to grant to the Club. This paragraph contained the following proposed relief:

'(1) A declaration that the Respondent is, by maintaining the direct civil claims brought against the Claimant in Spain other than under the International Convention on Civil Liability for Oil Pollution Damage 1992 (the "Claims"), and by taking steps in Spain and elsewhere to enforce against the Claimant the order of the Provincial Court of La Coruña dated 1 March 2019 (the "Spanish Order"), in breach of its

obligations in equity not to pursue such claims other than by way of London arbitration.

(2) A declaration that if the Respondent takes any further steps in Spain, or elsewhere, to enforce the Spanish Order, or any other order of the Spanish Courts upholding or enforcing the Claims, against the Claimant, the Respondent will be in breach of its obligations not to pursue the Claims other than by way of London arbitration.

(3) An injunction that the Respondent be enjoined from taking any step to have the Spanish Order, or any other order of the Spanish Courts upholding or enforcing the Claims, recognised or enforced in any jurisdiction worldwide, other than in Spain.

(4) A declaration that, as and when France obtains a final monetary judgment (or any enforcement order to similar effect) against the Club in any jurisdiction [outside Spain] arising out of the execution order of the Provincial Court of La Coruña dated 1 March 2019 or any of the preceding judgments of the Spanish Courts, or obtains satisfaction (in whole or in part) in any country in respect of such judgments, France will immediately be obliged to pay equitable compensation in an equal and opposite amount to the Club and/or give credit for such equitable compensation in the amount of the judgment or satisfaction obtained.

(5) An order that, as and when France obtains a final monetary judgment (or any enforcement order to similar effect) against the Club in any jurisdiction [outside Spain] arising out of the execution order of the Provincial Court of La Coruña dated 1 March 2019 or any of the preceding judgments of the Spanish Courts, or obtains satisfaction (in whole or in part) in any country in respect of such judgments, France will immediately be obliged to pay equitable compensation and/or give credit for such equitable compensation in the amount of the judgment or satisfaction obtained.

(6) An indemnity in respect of any amounts awarded to France in any final monetary judgment (or any enforcement order to similar effect) in any jurisdiction [outside Spain] arising out of the execution order of the Provincial Court of La Coruña dated 1 March 2019 or any of the preceding judgments of the Spanish Courts or any satisfaction (in whole or in part) France obtains in any country in respect of such judgments.

(7) A declaration and order that France shall in any event pay to the Club its costs of defending the Claims in Spain, or any proceedings taken by France to enforce the execution order of the Provincial Court of La Coruña dated 1 March 2019 or any of the preceding judgments of the Spanish Courts, such sums to be determined in a subsequent Award, if not agreed.

(8) I formally reserve jurisdiction in this arbitration to deal with the precise terms of this order; costs; any other outstanding matters arising out of this Partial Award.'

7. After each of the words in square brackets 'outside Spain', Dame Elizabeth Gloster added a footnote, which said, 'I am not clear whether this declaration should include the words "outside Spain". I will hear the parties in relation to this point.'

8. After Dame Elizabeth Gloster had issued her First Partial Award, there was correspondence between the parties. I will need to return to some parts of this in the context of the issue of whether the French State should have, if it needs one, an extension of time. At this point it is sufficient to say that the parties corresponded, and made submissions to the arbitrator, about the terms of relief which she should grant. The particular areas of disagreement were as to (i) whether the words 'outside Spain' should be included; and (ii) whether it should be stated that the French State would not have an obligation to make actual payment of equitable compensation unless and until it obtained satisfaction in respect of an execution order against the Club. After considering the parties' respective positions, Dame Elizabeth proceeded, on 2 May 2023, to issue the Second Partial Award.

9. The Second Partial Award contained 24 Recitals, and then provided as follows:

'NOW I, the said Dame Elizabeth Gloster DBE, having accepted this reference and having carefully and conscientiously considered all the evidence and submissions made to me, DO HEREBY MAKE, ISSUE AND PUBLISH this my SECOND PARTIAL AWARD:

A) I AWARD AND DECLARE that:

1) The Respondent has acted, by maintaining its direct civil claims brought under the Spanish Penal Code against the Claimant in Spain and other than under the International Convention on Civil Liability for Oil Pollution Damage 1992 (the "Non-CLC Claims"), and by taking steps in Spain to enforce against the Claimant the judgment and order of the Provincial Court of La Coruña dated 15 November 2017 and 11 January 2018 and the judgment of the Spanish Supreme Court dated 19 December 2018, those steps having led to the order of the Provincial Court of La Coruña dated 1 March 2019 (the "Execution Order"), in breach of its equitable obligations not to pursue such claims other than by way of London arbitration;

2) if the Respondent takes any further steps, in Spain or elsewhere, to enforce the Execution Order, or any other order of the Spanish Courts upholding or enforcing its Non-CLC Claims, against the Claimant, the Respondent shall be in breach of its equitable obligations not to pursue its Non-CLC Claims other than by way of London arbitration;

3) the Respondent is hereby enjoined from and shall not take any steps to have the Execution Order, or any other order of the Spanish Courts upholding or enforcing its Non-CLC Claims, recognised or enforced in any jurisdiction worldwide, other than in Spain;

4) the Respondent is liable to pay, give credit to, and indemnify the Claimant in Spain in an equal and opposite amount to the sum which the Respondent is entitled to enforce against the Claimant out of the capped total amount of EUR 855,493,575.65 awarded in favour of all claimants under the Execution Order (the "Capped Amount"). That liability is present and existing, but the Respondent shall not be required to make any actual payment to the Claimant in Spain under this paragraph before a Spanish Court has determined the share of the Capped Amount to which the Respondent is entitled. If and when a Spanish Court determines that amount, the

Respondent shall in Spain come under an obligation to make actual payment to the Claimant in respect of its aforesaid liability.

5) if and when the Respondent obtains a final monetary judgment (or any enforcement or other order or determination to similar effect) against the Claimant in any jurisdiction outside Spain in respect of and determining the precise sums awarded to it in the Execution Order, or any of the preceding judgments of the Spanish Courts (a "Further Execution Order"), the Respondent shall in that jurisdiction pay, give credit for, and indemnify the Claimant in respect of an equal and opposite amount to that of the Further Execution Order;

6) if and when the Respondent takes steps to and obtains satisfaction (in whole or in part) in any country in respect of any amounts awarded to it by the Execution Order or any of the preceding judgments of the Spanish Courts, or any Further Execution Order which it may in future obtain, the Respondent shall pay to and indemnify the Claimant in an amount equal to the sum obtained; and

7) to the extent not otherwise recoverable under an final costs order made in respect of the proceedings in question, the Respondent shall pay to and indemnify the Claimant in respect of its costs of defending the Respondent's Non-CLC Claims in Spain and/or any proceedings taken by the Respondent to enforce the Execution Order or any of the preceding judgments of the Spanish Courts, such sums and any claim to interest thereon to be determined (including the principle of whether interest is payable) in a subsequent award, if not agreed, and jurisdiction is reserved for that purpose.

B) I further AWARD AND DECLARE that:

1) the Respondent shall bear and pay the Claimant's costs of this reference (to the extent they are reasonable in amount and reasonably incurred) and the Tribunal's costs of this reference, to the date of this Award, and shall reimburse the Claimant for the Tribunal's costs if they have been borne in the first instance by the Claimant, such sums to be determined in a subsequent award, if not agreed, and jurisdiction is reserved for that purpose.; and

2) the jurisdiction of the Tribunal is otherwise reserved generally.'

10. By email sent on 12 May 2023, the Club provided to the French State, for 'information only', a proposed ex parte application by the Club to enforce the Second Partial Award under s. 66 AA 1996. The s. 66 application did not seek the enforcement of the injunctive relief at (A)(3) of the Second Partial Award.

11. On 30 May 2023, which was within 28 days of the Second Partial Award, but not within 28 days of the First Partial Award, the French State issued an Arbitration Claim Form. It sought leave to appeal four questions of law arising out of the Awards, pursuant to s. 69 AA 1996. Those four questions were identified as follows:

(1) Ground 1: whether the arbitral tribunal had the power to grant an injunction against the French State under s. 48(5) AA 1996;

(2) Ground 2: whether the arbitral tribunal had the power to award equitable compensation for breach of an equitable obligation to arbitrate arising by application of the conditional benefit principle, or whether equitable compensation is otherwise available in these circumstances;

(3) Ground 3: whether an anti-enforcement injunction can be granted where its effect is to restrain enforcement of a foreign judgment which is granted recognition under English law; and

(4) Ground 4: whether equitable compensation can be granted where its effect is to neutralise the effect of a foreign judgment which is granted recognition under English law.

12. The Arbitration Claim Form also contained an application for an extension of time in which to bring the application for permission to appeal. In the Claim Form, and accompanying skeleton argument and witness statement, this application for an extension of time was put on the following grounds:

(1) That until the French State received the Club's application pursuant to s. 66 AA 1996, in which the Club did not seek to enforce the injunctive relief granted by Dame Elizabeth Gloster, it was not reasonably possible or practicable for it to advance its s. 66 AA 1996 application as to do so would risk it losing its entitlement to claim immunity under s. 13(2)(a) SIA. Prior to being notified that the Club was not seeking to enforce the injunction, the French State had intended to assert immunity by issuing a Part 11 application in response to the Club's s. 66 AA 1996 application.

(2) That the French State had acted proactively in seeking the Club's agreement to allow it to proceed without the risk of waiving immunity, and had acted promptly to issue its Arbitration Claim Form once such agreement had been secured.

(3) That in all the circumstances, including the length of delay, the actions of the parties, and the lack of prejudice to the Club, an extension of time was justified.

13. By the time of the hearing in front of me, the French State had added another argument. This was that it did not need an extension of time. The basis for this was said to be that the First Partial Award, because it had contained only Dame Elizabeth Gloster's reasoning, but no dispositive paragraphs, had not been a complete award which required any appeal to be lodged within 28 days. The time for any application for permission to appeal ran, on this argument, only from the date of the Second Partial Award, and the Arbitration Claim Form had been issued within 28 days of that date.

The Issues arising

14. The issues which arise (or may arise) on the present application are therefore those which I identified in paragraph [2] above. I will address them in turn.

Does the French State need an Extension of Time?

15. The French State contended that the First Partial Award was not an 'award' capable of being challenged under AA 1996, including under s. 69 of that Act. The

French State referred to a number of authorities, including *ZCCM Investments Holdings plc v Kasashi Holdings plc* [2019] EWHC 1285 (Comm), *Konkola Copper Mines plc v U&M Mining Zambia Ltd (No. 2)* [2014] EWHC 2374 (Comm), *Selby v Russell* 88 ER 1220, *Emirates Trading Agency LLC v Sociedade De Fomento Industrial Private Ltd* [2015] EWHC 1452 (Comm) and *Re Tidswell* 55 ER 349. It submitted that the First Partial Award lacked the finality required to be amenable to challenge under AA 1996. In it, Dame Elizabeth Gloster had indicated merely the relief which she 'propose[d] to grant', 'subject to hearing further from the parties as to the precise terms of the order'. Accordingly, the First Partial Award: (i) was not a 'complete decision', (ii) consisted of a 'preliminary or tentative view' in relation to the relief granted, leaving 'issues undecided', (iii) involved the tribunal reserving to herself the performance of future acts of a judicial nature, and (iv) did not leave the tribunal *functus officio* in relation to the issues addressed in the First Partial Award. A reasonable recipient would not have regarded it as a complete decision on the issues which it addressed. Furthermore, even if the First Partial Award was an 'award', and the French State was out of time for appealing it, it could challenge the matters decided in that award by way of an appeal under s. 69 AA 1996 in respect of the Second Partial Award.

16. For the Club it was pointed out that the contention that the First Partial Award was not an 'award' was an afterthought on the French State's part. It had not been raised in the claim form, which had sought an extension of time. In any event, the First Partial Award was clearly an award. The Club referred to *ZCCM Investment Holdings*, *YDU v SAB* [2022] EWHC 3304 (Comm) and to *Konkola Copper Mines*. The First Partial Award had all the indicia of an award, and was a final determination in respect of issues referred to the tribunal. The argument that the matters decided in the First Partial Award could be contested by an appeal in relation to the Second Partial Award was 'clearly misconceived.'

17. The essential legal framework is familiar, and may be summarised as follows:

(1) An appeal under s. 69 AA 1996 can only be made in respect of 'an award'.

(2) The meaning of an 'award' is not defined in AA 1996, although s. 52 AA 1996 sets out a number of formal requirements with which, in the absence of contrary agreement, an award must comply, namely that it should be in writing and signed by the arbitrator, that it contains the reasons for the award, and that it states the seat of the arbitration and the date on which it was made.

(3) An award may be one of a number of kinds. Thus it may be a final and unitary award which disposes of all the issues in the reference. But a tribunal does not need to decide all issues at the same time: it may instead make one or more partial awards, which dispose of some issues and leave other issues to be determined subsequently, as provided for (in the absence of agreement otherwise) by s. 47 AA 1996.

(4) Subject to a successful appeal an arbitration award is final and binding on the parties and on any persons claiming through or under them, as is provided by s. 58 AA 1996; and gives rise to an estoppel on the matters decided. The position was summarised as follows in *Emirates Trading* at [22]-[26] per Popplewell J:

22. The Jurisdiction Award was an award which was final and binding on the parties as to the matters it decided. This is the effect of section 58 of the Act …

23. This has two consequences. The first is that absent contrary agreement between the parties, the ability to challenge the validity of such an award in this Court is limited by the rights of challenge and appeal conferred by ss. 67-69 of the Act. If no such challenge is made timeously, or is made and rejected, the finality of the award creates an issue estoppel between the parties which precludes either party challenging it before the tribunal or as a ground of challenge to a subsequent decision of the tribunal: see *Fidelitas Shipping Ltd v V/O Exportchleb* [1966] 1 QB 630 and *Westland Helicopters Ltd v Sheikh Salah Al-Hejailan (No 1)* [2004] 2 Lloyd's Rep 523.

…

26. The second consequence of an award being binding is that, subject to limited exceptions, the tribunal no longer has power to review or reconsider the subject matter of the award. There is a longstanding rule of common law that when an arbitrator makes a valid award, his authority as an arbitrator comes to an end and, with it, his powers and duties in the reference: he is then said to be functus officio (see Mustill and Boyd's *The Law and Practice of Arbitration* 2nd Edition pp. 404–405 and Companion Volume 404-414). This applies as much to a partial award as to a final award: see *Fidelitas* per Diplock LJ at p. 644B-E. Absent agreement of the parties, the tribunal may only reconsider or review its decision if the matter is remitted following a successful challenge to the award in Court, or pursuant to the express powers of correction or reconsideration conferred by section 57 of the Act or by the arbitral rules which the parties have agreed to govern the reference. Otherwise the tribunal has no authority or power to do so. None of these exceptions apply in this case.

(5) If the tribunal makes an award, it must be certain, in the sense that it may be subject to an application under s. 57 AA 1996 and a challenge under s. 68 AA 1996 if it is insufficiently clear in respect of the matters which it decides.

18. The courts have on a number of occasions had to consider the meaning and relevant indicia of an 'award' in order to distinguish between procedural decisions on the one hand and awards on the other. A helpful summary of many of the considerations which are likely to assist in making this distinction was provided in *ZCCM Investments Holdings* at [40] per Cockerill J, as follows:

a) The Court will certainly give real weight to the question of substance and not merely to form: *Emmott* at paragraph 18 (by concession); *Russell on Arbitration* (24th edition, 2015) at [6-003].

b) Thus, one factor in favour of the conclusion that a decision is an award is if the decision is final in the sense that it disposes of the matters submitted to arbitration so as to render the tribunal *functus officio*, either entirely or in relation to that issue or claim: *Cargill* at 5, *The Smaro* at 247; *Enterprise Insurance* at [39].

c) The nature of the issues with which the decision deals is significant. The substantive rights and liabilities of parties are likely to be dealt with in the form of an award whereas a decision relating purely to procedural issues is more likely not to be an award. *Brake* at [25], *The Smaro* at 247; *Emmott* at [19-20], *Cargill* at 5, *The Trade Fortitude* at 175.

d) There is a role however for form. The arbitral tribunal's own description of the decision is relevant, although it will not be conclusive in determining its status: *The Trade Fortitude* at 175 *Emmott* at [19-20].

e) It may also be relevant to consider how a reasonable recipient of the tribunal's decision would have viewed it: *Emmott* at [18]; *Ranko* p 4.

f) A reasonable recipient is likely to consider the objective attributes of the decision relevant. These include the description of the decision by the tribunal, the formality of the language used, the level of detail in which the tribunal has expressed its reasoning: *Emmott* at [19 -20]; *Uttam Galva Steels* at [29]; *The Trade Fortitude* at 175; *The Smaro* at 247.

g) While the authorities do not expressly say so I also form the view that:

i. A reasonable recipient would also consider such matters as whether the decision complies with the formal requirements for an award under any applicable rules.

ii. The focus must be on a reasonable recipient with all the information that would have been available to the parties and to the tribunal when the decision was made. It follows that the background or context in the proceedings in which the decision was made is also likely to be relevant. This may include whether the arbitral tribunal intended to make an award: *The Smaro* at 247, *Ranko* p 4.

19. In the present case, I am in no doubt that the First Partial Award was an ‘award’ for the purposes of s. 69 AA 1996. The following matters are important:

(1) It is called an award, and it purports to be an award.

(2) It complies with the formal requirements for an award in s. 52 AA 1996.

(3) It deals with the substantive rights and liabilities of the parties, and sets out the reasoning of the arbitrator in detail.

(4) In respect of the matters on which she expressed a concluded view, I consider it clear that Dame Elizabeth Gloster’s authority in the arbitration was at an end, in the sense that she could not, having issued the First Partial Award, have revisited the issues which she had decided and reached a different conclusion on them. On those matters, she was not providing a ‘provisional view’, but was rendering a final decision.

(5) The arbitrator left limited issues for later determination, including the terms of the relief and some other, comparatively minor, issues, including costs. This however

meant only that it was, as indeed its title indicated it was, a partial award under s. 47 AA 1996.

(6) I consider that a reasonable recipient of the First Partial Award would have regarded it as an award. Indeed, it is of some significance that the French State does not suggest that either it or its lawyers considered the First Partial Award not to be an award; and in its Arbitration Claim Form it sought to appeal the First Partial Award and an extension of time in which to do so.

20. That the First Partial Award did not have a 'dispositive section' which set out the relief to be granted does not, in my judgment, mean that it was not an award. Partial awards may, and very commonly do, determine particular matters without resolving the entirety of the dispute and without containing the final terms of relief.

21. Nor, in my view, can it be said that the First Partial Award was uncertain. The fact that the exact terms of the relief to be granted was left over did not mean that there was uncertainty as to the matters which were decided in the First Partial Award. On the contrary, the First Partial Award is very clear and certain as to the resolution of a number of issues, including, with the exception of the question of whether there should be an indemnity in respect of the liability of the Club within Spain, the issues which are sought to be raised by the French State by way of appeal.

22. Nor do I accept the argument that even if out of time for an application under s. 69 AA 1996 in respect of the First Partial Award, the French State could, without an extension of time, nevertheless contest issues decided in that award by way of an appeal in respect of the Second Partial Award. If, as is assumed for the purposes of this argument, the First Partial Award was an award, and was not appealed, then that award was final and binding, and gave rise to an issue estoppel between the parties, as set out above. On that basis, the issues decided in the First Partial Award could not be contested on an appeal in relation to the Second Partial Award. Specifically, in the First Partial Award, and with the exception I have referred to, there was a decision on the questions of law which the French State now seeks to challenge under s. 69 AA 1996.

Should an Extension of Time be Granted?

23. On the basis that the First Partial Award was an award for the purposes of s. 69 AA 1996, the French State sought an extension of time in which to bring its s. 69 application.

24. The French State referred to the factors identified in *AOOT Kalmneft v Glencore International AG* [2002] 1 Lloyd's Rep 128. It contended, in summary:

(1) That the length of the delay was not significant in the context of the dispute, and given that the same or related grounds of appeal were being advanced by Spain.

(2) That the French State had acted reasonably in not applying for leave to appeal the First Partial Award within 28 days. It relied on the evidence set out in two witness statements of Mr Meredith. It says that it assumed, reasonably, that the Club would seek to enforce the injunctive relief granted by the tribunal. It wished to preserve its right to assert immunity pursuant to s. 13(2)(a) SIA, and that, in the circumstances, it

had to act with great care. It was mindful that in *The Prestige (No. 2)* it was held that the French State and Spain had, for the purposes of s. 2 SIA, submitted to the court's adjudicative jurisdiction by issuing their own claims under the AA 1996. It also considered that there was uncertainty about whether a State which appeals an arbitration award under s. 69 AA 1996 will be taken to have submitted not only to the court's adjudicative jurisdiction, but also have waived its right to assert immunity against injunctive relief under s. 13(2)(a) SIA. Further there was a need to consult with appropriate persons within the French State. The French State had been proactive in seeking an agreement with the Club which would have enabled it to lodge its s. 69 AA 1996 application and deal with the merits of that application without having waived its immunity under s. 13(2)(a) SIA. It was only on 12 May 2023 that the Club had responded to the French State's suggestion; and it was only on the same day that the French State discovered that the Club was not seeking to enforce, pursuant to s. 66 AA 1996, the injunctive relief granted by the arbitrator.

(3) That the Club had to some extent contributed to the delay, by not giving an undertaking regarding the waiver issue prior to the week of 18 May 2023, and by not indicating before 12 May 2023 that it would not seek to enforce the injunction.

(4) That the Club had not suffered any prejudice from the delay.

(5) That the French State's application for leave, and the appeal itself, have strong merits.

(6) That, looking at the matter more generally, it would occasion substantial injustice to deprive the French State of the opportunity to pursue a meritorious appeal against the First and Second Partial Awards.

25. The Club denied that a consideration of any of the relevant factors justified an extension of time. In particular it submitted that there was no good reason why the French State had not made its application under s. 69 AA 1996 in time; but, rather, it had taken a deliberate decision not to, and it now had to live with the consequences of that decision. It also submitted that there could be an extension of time in respect of certain aspects of the application, and not others; and referred to *Hays v Bloomfield Investments LLC* [2022] EWHC 1648 (Comm), where Henshaw J had granted an extension of time for the bringing of a s. 68 AA 1996 challenge, but not for a s. 67 AA 1996 challenge, largely because of a difference in his assessment of the apparent strengths of each.

26. There was no significant dispute as to the principles applicable to an application for an extension of time such as this. They were set out in *Kalmneft v Glencore* and further elaborated in *Terna Bahrain Holding Company WLL v Al Shamshi* [2012] EWHC 3283 (Comm) where, at [27]-[32] Popplewell J said:

27. The principles regarding extensions of time to challenge an arbitration award have been addressed in a number of recent authorities … from which I derive the following principles:

(1) Section 70(3) of the Act requires challenges to an award under sections 67 and 68 to be brought within 28 days. This relatively short period of time reflects the principle of speedy finality which underpins the Act, and which is enshrined in

section 1(a). The party seeking an extension must therefore show that the interests of justice require an exceptional departure from the timetable laid down by the Act. Any significant delay beyond 28 days is to be regarded as inimical to the policy of the Act.

(2) The relevant factors are:

(i) the length of the delay;
(ii) whether the party who permitted the time limit to expire and subsequently delayed was acting reasonably in the circumstances in doing so;
(iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;
(iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;
(v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration, or the costs incurred in respect of the arbitration, the determination of the application by the Court might now have;
(vi) the strength of the application;
(vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined.

(3) Factors (i), (ii), and (iii) are the primary factors.

28. I add four observations of my own which are of relevance in the present case. First, the length of delay must be judged against the yardstick of the 28 days provided for in the Act. Therefore a delay measured even in days is significant; a delay measured in many weeks or in months is substantial.

29. Secondly, factor (ii) involves an investigation into the reasons for the delay. In seeking relief from the Court, it is normally incumbent upon the applicant to adduce evidence which explains his conduct, unless circumstances make it impossible. In the absence of such explanation, the Court will give little weight to counsel's arguments that the evidence discloses potential reasons for delay and that the applicant "would have assumed" this or "would have thought" that. It will not normally be legitimate, for example, for counsel to argue that an applicant was unaware of the time limit if he has not said so, expressly or by necessary implication, in his evidence. Moreover where the evidence is consistent with laxity, incompetence or honest mistake on the one hand, and a deliberate informed choice on the other, an applicant's failure to adduce evidence that the true explanation is the former can legitimately give rise to the inference that it is the latter.

30. Thirdly, factor (ii) is couched in terms of whether the party who has allowed the time to expire has acted reasonably. This encompasses the question whether the party has acted intentionally in making an informed choice to delay making the application. In Rule 3.9(1) of the Civil Procedure Rules, which sets out factors generally applicable to extensions of time resulting in a sanction, the question whether the failure to comply is intentional is identified as a separate factor from the question of whether there is a good explanation for the failure.

This is because in cases of intentional non compliance with time limits, a public interest is engaged which is distinct from the private rights of the parties. There is a public interest in litigants before the English Court treating the Court's procedures as rules to be complied with, rather than deliberately ignored for perceived personal advantage.

31. Fourthly, the Court's approach to the strength of the challenge application will depend upon the procedural circumstances in which the issue arises. On an application for an extension of time, the Court will not normally conduct a substantial investigation into the merits of the challenge application, since to do so would defeat the purposes of the Act. However if the Court can see on the material before it that the challenge involves an intrinsically weak case, it will count against the application for an extension, whilst an apparently strong case will assist the application. Unless the challenge can be seen to be either strong or intrinsically weak on a brief perusal of the grounds, this will not be a factor which is treated as of weight in either direction on the application for an extension of time. If it can readily be seen to be either strong or weak, that is a relevant factor; but it is not a primary factor, because the Court is only able to form a provisional view of the merits, a view which might not be confirmed by a full investigation of the challenge, with the benefit of the argument which would take place at the hearing of the application itself if an extension of time were granted.

32. The position, however, is different where, as has happened in the current case, the application for an extension of time has been listed for hearing at the same time as the challenge application itself, and the Court has heard full argument on the merits of the challenge application. In such circumstances the Court is in a position to decide not merely whether the case is "weak" or "strong", but whether it will or will not succeed if an extension of time were granted. The Court is in a position to decide whether the challenge is a good or a bad one. If the challenge is a bad one, this should be determinative of the application to extend time. Whilst it may not matter in practice whether the extension is allowed and the application dismissed, or whether the extension is simply refused, logical purity suggests that it would be wrong to extend time in those circumstances: there can be no justification for departing from the principle of speedy finality in order to enable a party to advance a challenge which will not succeed.

27. Having considered all the circumstances of the case, and in particular the factors identified in *Kalmneft* and *Terna*, I have concluded that there should be an extension of time for the French State to bring its s. 69 application in respect of its Grounds 1 and 2, but not 3 and 4. My reasons follow.

28. In relation to the first '*Kalmneft* factor', the delay in this case was significant. It amounted to almost three months over the period of 28 days from the date of the First Partial Award. As pointed out in *Terna* the benchmark is the period of 28 days as provided by AA 1996. The length of time for which proceedings have been continuing in relation to the sinking of the M/T Prestige is not relevant in this context. The existence of proceedings involving Spain is of relevance to the consideration of the overall justice of the grant or refusal of an extension of time, but is of little relevance in assessing the length of the delay.

29. In relation to the second '*Kalmneft* factor', which involves a consideration of the reasons for the delay, I do not consider that it can be said that the French State acted reasonably in permitting time to expire, although I accept that the reasons why it occurred are not fully described as a deliberate tactical decision.

30. In this regard, I do not consider that the fact that the decision-making process within the French State involved taking instructions from a number of officials and was of some rigidity is in any sense a good reason or satisfactory explanation for the delay. In the first place, I do not consider that the evidence the French State has put in is sufficiently specific to identify what periods of time were attributable to the instruction-giving procedures of the State. Secondly, the fact that an applicant is a State is not usually a good reason for its not acting within the 28 days, which is a well-known time limit: see *Process and Industrial Developments v Federal Republic of Nigeria* [2018] EWHC 3714 (Comm) at [56], *STA v OFY* [2021] EWHC 1574 (Comm) at [23]. A State, just as any other party, should put in place procedures which allow the time limit to be adhered to. In the present case, where there was a substantial interval between the hearings in front of the arbitrator and the delivery of the First Partial Award, there was ample time for such procedures to be put in place.

31. As to the French State's reliance on its concerns as to potential waiver of its immunity under s. 13(2)(a) SIA, I do not consider that these form a basis for saying that it acted reasonably in letting the 28 day period expire. This is because there was not, and there could not reasonably have been considered to have been, a real risk that the issuance of an application under s. 69 AA 1996, which would have been an invocation of the court's adjudicative jurisdiction, would have involved a waiver of its immunity from the distinct enforcement jurisdiction of the court, of which s. 13(2)(a) SIA is a part. The distinction is clear from the terms of s. 13(3) SIA; and is emphasized in *ETI Euro Telecom International NV v Bolivia* [2009] 1 WLR 665 at [110]-[114] per Lawrence Collins LJ, and [127] per Stanley Burnton LJ. It is to be noted that the French State itself now contends that this is the position; and, in my view, that it is the position which was or should at all relevant times have been apparent.

32. As to the third '*Kalmneft* factor', which involves consideration of whether the respondent or the arbitrator contributed to the delay, it is not suggested that Dame Elizabeth Gloster contributed to the delay. The French State contends that the Club did contribute to the delay, by failing to give an undertaking that it would not make any argument that the making of a s. 69 AA 1996 application waived the French State's immunity under s. 13(2)(a) SIA until the week of 18 May 2023, and did not tell it, before 12 May 2023, that it would not seek enforcement of the injunction granted by Dame Elizabeth Gloster.

33. I do not consider that there is any force in the French State's contention that the Club contributed to the delay. After the First Partial Award had been rendered on 8 February 2023, the Club's solicitors wrote to the French State's solicitors on 14 February 2023 asking whether the French State intended to challenge the award, and suggesting that if it did, the most procedurally efficient way of dealing with this would be to coordinate the disposal of such applications with those involving Spain. There was a purportedly without prejudice conversation between Mr Volikas (for the Club) and Mr Meredith (for the French State) on 15 February 2023. There is a difference between their accounts as to whether there was a mention of the Club's giving an undertaking that it would not assert a waiver of state immunity. What I

consider to be clear is that, if there was any mention of such a possibility, it was in very general terms, it was not explained that the immunity with which the French State was concerned was that embodied in s 13(2)(a) SIA, and there was no actual request for the giving of such an undertaking by the Club. There was then no further communication on behalf of the French State with the Club or its solicitors on this subject until well after the 28 day period had expired; and, as I find, no clear and concrete request for an undertaking by the Club that, if the French State were to make an application under AA 1996, the Club would not argue that it had lost its right to claim immunity under s. 13(2)(a) SIA, until 17 May 2023. When that request was made, Mr Volikas on behalf of the Club confirmed that it would not take a point that the French State, by reason only of having made AA 1996 applications, had waived its right to argue that it had immunity under s 13 SIA.

34. In these circumstances, I do not see that it can be said that the Club contributed in any material way to the delay.

35. As to the fourth '*Kalmneft* factor', namely whether the Club will have suffered irremediable prejudice by reason of the delay, I consider that it will not do so, and the Club did not suggest that it would.

36. Neither party contended that the fifth '*Kalmneft* factor' was of significance.

37. As to the sixth '*Kalmneft* factor', I consider that, given that the application made by the French State is, in the first instance, for permission to appeal, an assessment of the strength of the merits of its application must be as to the strength of its application for permission, and not as to whether, if permission is given, the appeal would be allowed. In the present case, as this has been a rolled up hearing, I am in a position to form a clear view as to the merits of the application for permission to appeal. In this regard, the Club itself accepts that, if an extension of time is granted, there should be permission to appeal in relation to Grounds 1 and 2, as being points of general public importance where the arbitrator's conclusion is at least open to serious doubt. The Club, however, contends that there should not be permission to appeal in relation to Grounds 3 and 4, and, as will appear, I agree with it.

38. As to the seventh '*Kalmneft* factor', which is a consideration of whether it would be unfair to the applicant to be denied the opportunity of having the application determined, this appears to me, in the present case, to be a matter of some significance. There are a number of aspects to consider here. In the first place, this is the first case which either party has identified in which, absent a State's written consent, an English-seated arbitral tribunal has granted an injunction against a foreign State. Secondly, if the French State were denied the extension, the position would be that Spain, against which Sir Peter Gross did not grant injunctive relief, would be able to raise arguments as to the impermissibility of such relief, but the French State, which is the subject of such an order, would not. This would be unsatisfactory. Thirdly, the main arguments in relation to the availability of equitable compensation and injunctive relief are already before the court on Spain's application. Once again, it seems to me that it would be unsatisfactory if they were not also determined by the court as between the Club and the French State.

39. In the light of a consideration of all those factors, and bearing in mind the different strength of the s. 69 AA 1996 applications as between Grounds 1 and 2 on the one

hand, and 3 and 4 on the other, I consider that it is in the interests of justice for there to be an extension of time for the French State to bring its Grounds 1 and 2. I do not consider that the same applies to Grounds 3 and 4. As appears below, I consider that permission to appeal should not be granted for those Grounds; and the interests of justice do not, in my view, and in all the circumstances of the case which I have referred to, require an extension of time to bring an application which will fail.

Should permission to appeal be granted?

40. I turn to the applications for permission to appeal.

41. As already set out, if an extension of time is granted, the Club does not resist permission to appeal in relation to Grounds 1 or 2. I will give such permission.

42. As to Grounds 3 and 4, my decision to refuse an extension of time in relation to them depended in large part on my view of the merits of the application for permission to appeal. In my judgment that application would fall to be refused, on the basis that Grounds 3 and 4, while they can be said to raise questions of general public importance, were ones on which Dame Elizabeth Gloster's decision was not open to serious doubt. That means that, had I granted an extension of time for the French State to make an application for permission to appeal in respect of these two Grounds, I would have refused permission.

43. As it appears to me the more convenient course, I will set out my reasons why I do not consider the arbitrator's decisions in relation to these two points to be open to serious doubt after I have considered the two Grounds on which I will give permission to appeal, namely Grounds 1 and 2.

Should the appeal succeed: Grounds 1 and 2?

Ground 1: Injunction against the French State

44. As I have set out, Dame Elizabeth Gloster concluded that she, as the arbitral tribunal, had the power, by virtue of s. 48(5) AA 1996, to grant an injunction against the French State, and that s.13(2) SIA did not preclude this.

45. Her reasoning may be summarised as follows:

(1) She agreed with the view expressed by Henshaw J in *The Prestige (No. 3)* that s. 13(2) SIA governs the exercise but not the existence of the court's power to grant an injunction against a State (para. 170);

(2) An arbitral tribunal is in a significantly different position from a court, and the *par in parem* principle is not applicable to the former (para. 173);

(3) S. 48(5) AA 1996 confers on arbitrators the same 'types or classes' of powers as the court has, but not subject to the same restrictions (para. 174);

(4) The courts could, before the passage of SIA, grant injunctions against States; and the wording of s. 13(2) SIA, being cast in terms of 'relief shall not be given', and the terms of s. 13(3) SIA, recognise a power in the court but curtail its exercise (para. 175);

(5) That an arbitral tribunal's powers to grant an injunction may be more extensive than a court's is exemplified by the fact that, in relation to anti-suit injunctions restraining proceedings in other EU Member States, an arbitral tribunal could, but a court could not, have granted such relief (para. 176).

46. The French State contended that Dame Elizabeth Gloster had been wrong in relation to her decision on her power to grant an injunction against it, in circumstances where, as was not in dispute, it had not given written consent within s. 13(3) SIA. The Club contended that she had been correct and the s. 69 AA 1996 appeal in this regard should be dismissed.

47. This being an issue which also arises between Spain and the Club, the arguments which each of the French State and the Club addressed to me were, unsurprisingly, essentially the same as those which were addressed to me by Spain and the Club in Spain's challenge to Sir Peter Gross's Awards. Furthermore, Mr Young KC for Spain, in its proceedings, adopted such strands of argument as Ms Dilnot KC advanced on the issue which he had not put forward himself, and I took those arguments into consideration in reaching the conclusions which I have in relation to Spain's s. 69 AA 1996 application, and which I have expressed in the 2023 Spain Judgment.

48. For the reasons which I give in the 2023 Spain Judgment, and which I adopt here, I consider that Dame Elizabeth Gloster did not have the power to grant an injunction against the French State. This is subject, in this case as it is in Spain's, to the Club's point raised in its Respondent's Notice, based on *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2019] AC 777, that s. 13 SIA is to be read down, so as to deprive the restriction in s. 13(2) SIA of effect. As in the case of Spain, I defer a decision on that point until after the determination of the Court of Appeal in the *Resolute* case. If for some reason the appeal in the *Resolute* case does not proceed in accordance with current expectations, the parties can apply to the court for the matter to be dealt with anyway.

49. I should add some limited supplementary points, to deal with the particular way in which the issue was argued in the present action.

50. One point which was raised on behalf of the French State, by reference to the discussion in Merkin's *Arbitration Law* (2023 ed), para. 18.55, was that the decision of Lightman J at first instance in *Kastner v Jason* [2004] EWHC 592 (Ch) is an illustration of the fact that restrictions on the court's powers will limit the powers conferred on an arbitral tribunal by virtue of s. 48(5) AA 1996. In that case, Lightman J reasoned at [27], *obiter*, as follows: (1) that one reason why s. 48(5) AA 1996 was inapplicable to confer on the arbitral tribunal in that case the power to grant a freezing order was that s. 48(5) conferred only the 'same powers as the court'; (2) 'the court' is defined in s. 105 AA 1996 as including the High Court and the county court; (3) only the High Court and designated county courts had jurisdiction to grant freezing orders; (4) that 'the same powers as the court' must mean powers conferred on all courts falling within the definition and did not include powers exercisable by some but not others; and (5) therefore, no power to grant a freezing order could be conferred on an arbitral tribunal under the sub-section.

51. It is to be noted that, since the decision in *Kastner*, the County Court Remedies Regulations 2014 (SI 2014/982) have revoked the County Court Remedies Regulations 1991, which were in force when it was decided. Under the more recent Regulations, county courts may grant freezing orders. Accordingly, if it ever was, the limitation on the powers of the *county court* in this respect are not a reason why s. 48(5) confers no default power on an arbitral tribunal to grant a freezing order.

52. While it is not essential in the present case to decide whether the reasoning in *Kastner* to which I have referred was correct, I am of the view, with respect, that it was not. That reasoning is based on the definition of 'court' in s. 105 AA 1996. That section provides, however, that court 'means the High Court **or** a county court subject to the following provisions…' (emphasis added). Given that definition, I do not consider that s. 48(5) AA 1996 can be read as conferring only powers which the High Court **and** all county courts can exercise. Furthermore, I can see no good reason why the default powers conferred on arbitrators under s. 48(5) AA 1996 should be limited by reference to the limitations on the powers which Parliament has conferred on some but not all county courts.

53. With all that said, however, I considered that the French State did derive some support in its argument from a consideration of *Kastner* and the legislative provisions relevant to it. This is because the restriction on the powers of the court which Lightman J considered relevant was that contained in s. 38(3)(b) County Courts Act 1984, which provides that the county court shall not have 'power' to make an order of a kind which might be prescribed by regulation, coupled with Reg 3 of the 1991 Regulations, which provided that a county court 'shall not grant prescribed relief [which was defined in Reg 2]'. This is an indication that the legislature treats the 'power' of a court as being limited by a provision which takes the form of a prohibition on the grant of particular relief. That lends some support to the French State's contention that the prohibition in s. 13(2) SIA on the grant by the court of injunctive relief against a state is to be regarded as a restriction on the power of the court for the purposes of s. 48(5) AA 1996.

54. The second aspect is that some emphasis was put by the Club on, and Dame Elizabeth Gloster made reference to, the power of the courts to grant injunctions against States prior to the enactment of the SIA. Reference was made, in this regard, to *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 and *Hispana Americana Mercantil SA v Central Bank of Nigeria* [1979] 2 Lloyd's Rep 277. The position prior to the passage of the SIA may be of significance in relation to the arguments founded on *Benkharbouche* and which were and will be considered in the *Resolute* case, but it did not appear to me to be of any real assistance in relation to the disputed points as to the interpretation of the SIA and s. 48(5) AA 1996.

55. The third aspect relates to the comment made by Dame Elizabeth Gloster in paragraph 167 of the First Partial Award that 'in international arbitration, injunctions have frequently been ordered against States in relation to commercial transactions where, expressly or otherwise, they have agreed to arbitrate in relation to commercial transactions.' For Dame Elizabeth Gloster to have said this was, the French State submitted, 'extraordinary', and 'seriously irregular.'

56. In circumstances where the arbitrator did not identify what cases she was referring to, I do not consider that, in making my decision on the s. 69 AA 1996

appeal, I can place any weight on the statement in para. 167 which I have quoted. There are, of course, circumstances in which an injunction can be awarded against a State by arbitrators, even if the French State is correct as to the position under s. 48(5) AA 1996. Thus, arbitrators would have such a power if it has been agreed to by the State as part of the institutional rules of the arbitration; or if the State has otherwise agreed in writing that the arbitral tribunal should have that power. It might also be the case that an arbitral tribunal would have such a power if the curial law were not English law. Or the State might not have challenged the grant of an injunction. Without knowing the precise circumstances in which the injunctions referred to by Dame Elizabeth Gloster were granted, it is not possible to know whether they are really relevant to the debate which has been had in this case. For present purposes it suffices to say that the French State (and Spain) and the Club were at one in not having been able to identify any case in which an injunction had been granted by an arbitral tribunal against a State, in circumstances where the State had not agreed in writing that an injunction could be granted.

Ground 2: Equitable Compensation

57. Dame Elizabeth Gloster reached the conclusion that she had jurisdiction to grant equitable compensation in a case such as this. Her reasoning was detailed. It was essentially the same as Sir Peter Gross's on the same point. The arguments before me on the point were likewise very much the same as the arguments addressed to me by Spain on the point, and, as I have said, Spain also adopted the French State's arguments on this issue to the extent that there was a difference.

58. For the reasons I have given in the 2023 Spain Judgment, and which I adopt here, I am of the clear view that equitable compensation is available in a case such as the present, and that the French State's s. 69 AA 1996 appeal in this respect must be dismissed.

59. Again, I add certain limited further points, in light of the particular points emphasised in argument in this case.

60. In the first place, in the present case it was not open to the French State to argue on the present appeal that it was not in breach of an equitable obligation to arbitrate. In front of Dame Elizabeth Gloster, there had been an argument as to whether a declaration to that effect should be granted. The French State made it clear that, subject to its arguments of waiver and submission by the Club to the jurisdiction of the Spanish Courts, it made no separate objection to the grant of such a declaration. Dame Elizabeth Gloster resolved the waiver and submission points against the French State and there was, and could be, no appeal from her findings on those points. The declaration is therefore unassailed.

61. Insofar as there was a suggestion by the French State that, as a result of the CJEU Judgment, EU law was to the effect that it could not have been in breach of its equitable obligation to arbitrate, such an argument was in my judgment not open to it on this appeal, for the reason I have given and because such a case as to EU law was not a question which the arbitrator was asked to determine for the purposes of s. 69(3)(b) AA 1996.

62. The effect of the French State's submissions is that the Club could obtain no effective remedy in respect of the established breach: a declaration might clearly not have an effect, and, on the French State's argument, the Club could obtain neither monetary compensation nor an injunction. That would be a result which I would have arrived at only if constrained to do so. In fact, as I have said in the 2023 Spain Judgment I do not see any valid objection to the availability of equitable compensation.

63. Secondly, the French State argued that the recognition of a right to claim equitable compensation for breach of an equitable obligation to arbitrate might have undesirable and unintended consequences. The French State submitted that it would open the door to individuals and consumers, permitted under the law of the place where they reside or where the harmful event occurred to sue insurers, and who might be ignorant of an arbitration clause, finding that they were liable to compensate the insurers for not arbitrating.

64. In my view, it is not possible to say that this is a real concern. As a matter of English law, and as established in *The Prestige (No. 2)*, a case concerning a direct action right under a foreign law will involve a question of its characterisation. It may be that the proper characterisation is that the third party is seeking to enforce a contractual obligation derived from the contract of insurance; but it may be that the third party is advancing an independent right of recovery under the relevant statute. This involves a consideration of the nature of the right as a matter of the relevant foreign law. If the right is one which is independent of the contract, then the incidents of the contract will not (at least normally) be applicable or enforceable against the third party. I am not in a position to judge how many cases would involve the former rather the latter type of right, and how many of such cases might concern individuals and consumers.

65. In any event, I do not see how the putative injustice which might arise to individuals and consumers in other cases provides any sound basis for not recognising a remedy which is, to my mind, just in the present case, and in accordance with principle.

66. Thirdly, the French State argued that it would be wrong to grant equitable compensation which would have the effect of negating the effect of a foreign judgment entitled to recognition. This is in substance the point which is sought to be raised by the French State's Ground 4. I will explain below, and in relation to that proposed Ground, why I do not consider it has force.

67. Fourthly, the French State argued that there was a distinction to be drawn between, on the one hand, injured third parties, who have claims under a direct right statute but who have no nexus with the contract of insurance and, on the other, assignees and subrogees, and that equitable compensation should not, at least, be available to an insurer in the case of the former.

68. Dame Elizabeth Gloster dealt with this argument in detail at paragraphs 95-99 of the First Partial Award. What she said was:

'[95] … I see no logical, or principled, argument which could be derived from *Airbus*, or the cases which preceded it, to support Ms Dilnot's thesis that a distinction should

be drawn between, on the one hand, the obligations of B1, who is exercising "transferred" rights of action against A pursuant to a direct action statute and, on the other hand, the obligations of B2 who is exercising "transferred" rights of action against A, pursuant to rights of subrogation or assignment. In my judgment the distinction drawn is clearly unfounded, since the same point applies: on Ms Dilnot's approach the third party would be taking the benefit of the contract (to which he is not a party) without its burdens. Moreover, Ms Dilnot was not able to provide any logical, or principled, explanation as to why, where there was an equitable obligation, there was no correlative obligation to comply with relief sought for breach of that obligation. In the circumstances, it is not surprising that the cases have treated the two classes of "derived rights" interchangeably, drawing on the earlier case law without distinction. Indeed, direct action statutes are often referred to as a form of "*statutory subrogation*", which in a sense they are.

…

[98] Nor do I think that Ms Dilnot derives any support for her argument from the decision in *Yusuf AS (The 'Yusuf Cepnioglou')* [2016] EWCA Civ 386… On the contrary, the passages … at 47-49 are contrary to her argument that there is a distinction between derived rights obtained through assignment or subrogation and rights obtained under a direct action statute. In the emphasised passages below from [*Yusuf AS*], Moore-Bick LJ (with whose judgment MacFarlane LJ also agreed) clearly rejected the argument that there is a distinction between the two types of cases:

47. **Mr. Lewis sought to distinguish the position of a person who becomes entitled to enforce an obligation by virtue of an assignment or other transfer (as was the case in the *'Jay Bola'*) from that of a claimant who obtains a statutory right to recover damages direct from an insurer. In my view, however, there is no real distinction.** As was made clear in the *'Jay Bola'*, the arbitration agreement becomes binding on the claimant because it forms an integral part of the contract giving rise to the obligation, a circumstance which is not affected by the manner in which the claimant obtained the right to enforce it. Accordingly, if it becomes necessary to enforce the obligation by proceedings, that must be done by arbitration. Although the *'Jay Bola'* was not cited in either the *'Hari Bhum' (No.1)* or the *'Prestige' (No. 2)*, the principle that a claimant seeking to enforce a claim direct against an insurer must comply with an arbitration clause in the contract of insurance was recognised and applied in both cases.

Are there sufficient grounds for granting an anti-suit injunction?

48. In the light of the decision of this court in *Aggeliki Charis Compania Maritima S.A. v Pagnan S.p.A. (The 'Angelic Grace')* [1995] 1 Lloyd's Rep. 87 Mr Lewis accepted that in the ordinary way it is right for the court to grant an injunction to restrain a claimant from seeking to enforce by proceedings abroad an obligation subject to an English arbitration agreement. He submitted, however, that a distinction is to be drawn between a party to a contract containing an arbitration agreement who seeks to enforce that agreement by proceedings abroad and a party in the position of the claimant, which has not entered into an

agreement to arbitrate and whose conduct in commencing proceedings in its own jurisdiction pursuant to its own domestic legislation could not properly be regarded as vexatious or oppressive so as to support the grant of an injunction.

49. In my view the distinction which Mr Lewis sought to draw between the position **of an original party to an arbitration agreement and that of what might be called a "remote" party (i.e., a claimant who has become entitled to enforce an obligation but is not a party to a contract of any kind with the defendant), is not well founded, because the basis for the court's intervention is the same in each case.** In the *'Jay Bola'* Hobhouse LJ and Sir Richard Scott V-C explained, in the passages to which Longmore LJ has referred, why the court will intervene by granting an anti-suit injunction to restrain the claimant from enforcing the obligation by proceedings abroad instead of by arbitration. **It will do so, not because the claimant is party to a contract containing an arbitration agreement (which it is not), but because enforcement by arbitration alone is an incident of the obligation which the claimant seeks to enforce and because the defendant is therefore entitled to have any claim against him pursued in arbitration. It is the right not to be vexed by proceedings otherwise than in arbitration that equity will intervene by injunction to protect.'** (bold emphasis supplied by Dame Elizabeth Gloster)

69. This reasoning of the arbitrator is, in my judgment, entirely correct.

70. Thus, as I have said, I will dismiss the French State's appeal under s. 69 AA 1996 on Ground 2.

71. In light of this conclusion, I do not need to consider the points raised in the Club's Respondent's Notice as further or alternative grounds on which the arbitrator had the power 'to make an award of damages/compensation'. In the Club's Skeleton Argument, para. 90, these points are expressly made contingent on the rejection of the Club's primary case, which I have accepted, that the arbitrator had the power to grant equitable compensation.

Grounds 3 and 4

72. These two grounds are to the effect that there should be no grant of an injunction to prevent enforcement, and no equitable compensation to neutralise the effect, of a foreign judgment entitled to recognition under English law. The key point sought to be added by these Grounds to those covered by Grounds 1 and 2 is that it is said to be inconsistent and incoherent for the English court to recognise a foreign judgment and at the same time for the tribunal to grant an injunction to restrain the enforcement of that judgment or to grant equitable compensation which will in effect neutralise the foreign judgment.

73. In my judgment these points are unfounded. The basis for the Club's claim to an injunction and to equitable compensation is that the States have obtained a judgment in Spain which they should not have obtained, because they should have pursued any claim in London arbitration. The fact that that judgment might be capable of recognition does not mean that that breach is effaced, or should be insusceptible of remedy. The French State's argument fails to distinguish between the rules relating to the jurisdiction of national courts to entertain proceedings and the recognition of

judgments rendered in such proceedings, on the one hand, and, on the other, the private law obligations of the parties which dictate whether a party is obliged not to invoke the jurisdiction of that court.

74. This distinction is explained in Briggs: *Civil Jurisdiction and Judgments* (7th ed) at paragraphs 29.01 to 29.08. At para. 29.06 Prof. Briggs says this:

> 'In this sense the mutual obligations assumed to each other are separate and quite distinct from the external, jurisdictional impact of the contract. The fact that a court is called upon to recognise a judgment, whether under the Convention, Regulation, or otherwise, is irrelevant to the separate question whether the party who obtained that judgment, whether or not it is entitled to recognition, did so in breach of contract.'

75. The absence of incoherence between a recognisable judgment in favour of one party and a liability on that party to pay damages in the amount of the judgment is further explained by Lord Neuberger in *The 'Alexandros T'* [2013] UKSC 70 at [132], where he said:

> 'I accept that, if they were successful, the English indemnity and damages claims could be fairly said to neutralise, at any rate in commercial terms, any benefit to Starlight and OME of a judgment in the Greek claims. However, crucially in my view, success for LMI and CMI in the English indemnity and damages claims would not be logically inconsistent in any way with success for Starlight in the Greek claims. It is not inconsistent (although it is commercially pointless) to say that a defendant is liable to pay a claimant a sum by way of damages, while the claimant is bound to indemnify the defendant in respect of the whole of that sum (or is bound to pay an equivalent sum to the defendant). Indeed, the indemnity is not merely logically consistent with the liability: it is positively meaningless without the liability for damages, and the liability for damages, though rendered nugatory by the indemnity, is not logically inconsistent with the indemnity.'

76. Dame Elizabeth Gloster dealt with the argument that there should not be an award of equitable compensation in the amount of a foreign judgment in the following terms (at paragraphs 114-115 of the First Partial Award):

> '[114] Nor am I impressed by Ms Dilnot's argument that "there has never been an award of equitable compensation… in the amount of a foreign judgment". As Mr Hancock rightly submitted, a claim for equitable compensation in a case such as the present is the equitable equivalent to the claim in contract for damages for breach of an exclusive jurisdiction or arbitration clause. In the contractual context, damages have been awarded in the amount of, or by way of an indemnity in respect of, a foreign judgment obtained in breach of an exclusive jurisdiction or arbitration clause: see e.g. *The Alexandros T* [2012] 1 Lloyd's Rep. 162 (Burton J); [2014] 2 Lloyd's Rep. 544 (CA); *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2009] 1 Lloyd's Rep 213 (where Burton J upheld an award of damages in Hyundai's favour, made by the arbitrators in respect of inter alia the judgment sums which it was ordered to pay, and did pay, in the French proceedings to CMA, together with compensation in respect of lost management time and their own French legal costs, and interest); and *Compania Sud Americana de Vapores v Hin-Pro International Logistics* [2015] 1 Lloyd's Rep 301 [AB5/58], [37]-[40]

> where damages were awarded in respect of judgment sums awarded against the claimant in the foreign proceedings, but also in respect of sums which it might yet have to pay…'

77. That reasoning appears to me to be entirely correct. Dame Elizabeth Gloster proceeded to quote more extensively from Cooke J's decision in *Compania Sud Americana de Vapores v Hin-Pro International Logistics*. The part of that decision which is to the effect that, in the case of breach of a choice of forum clause which results in liability on the part of the non-breaching party in the 'wrong' forum, the damages which that party can obtain are assessed without reference to what would have happened had suit been brought in the 'right' forum, is more controversial. That, however, is not an issue which matters in the present case, as it is known what would have happened (and did happen) had suit been brought in the relevant forum, namely London arbitration.

78. In relation to injunctive relief, I have already held that, for other reasons, the arbitrator did not have the power to grant this. If, contrary to my view, the arbitrator did have that power pursuant to s. 48(5) AA 1996, I do not consider that the fact that what might be enjoined was the enforcement of a judgment capable of recognition provides of itself a reason why no injunction could or should be granted. The logic of *The 'Alexandros T'* and the other cases cited applies equally to the grant of an injunction. If the arbitral tribunal had the power to grant injunctive relief then, in my judgment, it must have been able to award an injunction to prevent the enforcement of a judgment which had only been obtained by virtue of the breach of the equitable obligation to arbitrate, just as it could award compensation for the breach. The only difference would be one of remedy.

79. This is supported by the fact that there are a number of decisions of the Court of Appeal, which were cited to and addressed by Dame Elizabeth Gloster in her First Partial Award, which have recognised that a court or tribunal may grant an anti-enforcement injunction, viz one to restrain enforcement of a judgment on the merits rendered elsewhere: see *Ellerman Lines Ltd v Read* [1928] 2 KB 144; *Bank of St Petersburg OJSC v Arkhangelsky* [2014] 1 WLR 4360; *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309; and *SAS Institute Inc v World Programming Ltd (No. 2)* [2020] EWCA Civ 599.

80. In my judgment, there was no jurisdictional bar or rule of law which meant that Dame Elizabeth Gloster could not grant injunctive relief by reason of the fact that the Spanish Judgment might be capable of recognition here. Whether the arbitrator should in this case grant an injunction (assuming I am wrong as to Ground 1) would be a matter for the discretion of the arbitrator. In deciding to grant an injunction, she relied in particular on the breach by the French State of its equitable obligations and on the proceedings in Spain having been vexatious in circumstances where matters had already been determined in England and where the French State had submitted the relevant questions to the English Courts (in 2013-15). On the basis that I am wrong as to Ground 1, and that she had a discretion to exercise, the way in which she exercised that discretion is not open to challenge under s. 69 AA 1996.

81. For these reasons, I do not consider that the arbitrator's decision on the points raised in Grounds 3 and 4 is open to serious doubt.

82. There is one further point which I should, however, specifically address. This is the French State's complaint that it was particularly objectionable that Dame Elizabeth Gloster had made the relief granted in §A(4) of the Second Partial Award applicable so that the French State was under an obligation to pay, give credit and indemnify 'in Spain'. The French State said that this was 'particularly egregious given that it purports to neutralise the Spanish Execution Order within the jurisdiction of the very court which made the Order'.

83. Insofar as this is treated as a discrete point, I do not consider that it is one on which there should be permission to appeal under AA 1996 s. 69. I am not persuaded that it, considered as a distinct point, substantially affects the rights of the parties. Furthermore, I am not persuaded that it is a point of general public importance. I do not regard the arbitrator's conclusion on the point to be obviously wrong. I consider that there is at least a good argument that this facet of the relief granted simply seeks to make it effective by imposing an obligation in Spain thus neutralizing the effect of a judgment there which should not have been obtained; and that it does not amount to a particular affront to comity, because it simply gives appropriate relief for an established breach of the French State's equitable obligation.

Overall Conclusions

84. For the reasons given above, I conclude:

(1) That the French State requires an extension of time to bring its s.69 AA 1996 application in respect of matters decided in the First Partial Award;

(2) That there should be an extension of time for the French State to bring its application on Grounds 1 and 2, but not on Grounds 3 and 4.

(3) That there should be permission to appeal on Grounds 1 and 2, but there would not have been such permission on Grounds 3 and 4.

(4) Subject to the *'Resolute'* point, on which I will defer my decision until after the decision of the Court of Appeal in that case, that in relation to Ground 1 that Dame Elizabeth Gloster did not have jurisdiction to grant an injunction against the French State.

(5) That the appeal on Ground 2 is dismissed.

85. In the absence of agreement, I will receive submissions on the form of the order which should be drawn up to embody these conclusions.