Neutral Citation Number: [2006] EWHC 1135 (Comm)

Case No: 2005/991

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/05/2006

Before :

THE HON MR JUSTICE MORISON

Between :

TAJIK ALUMINIUM PLANT	**Claimant**
- and -	
HYDRO ALUMINIUM AS	**Defendant**

Mr Nicholas Stadlen QC and Mr Neil Kitchener (instructed by Herbert Smith) for the Claimant
Mr Nigel Tozzi QC and Alexander Gunning (instructed by Watson, Farley & Williams) for the Defendant

Hearing dates: 26 and 27 April 2006

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON MR JUSTICE MORISON

The Hon. Mr Justice Morison :

Background

1. This matter raises two important issues namely

(1) where a party has unsuccessfully argued before an arbitral panel that it had no jurisdiction, and then applies to this court under section 67 of the Arbitration Act 1996 ['the Act'], what is the court's function and how should it fulfil it?

This issue has a number of aspects to it. Is the court's function to review the decision of the arbitrators, or is there to be a re-hearing? If the latter, is there any limit on the evidence that may be called? For example, is the Court entitled to restrict the oral evidence to that of the witnesses who gave evidence to the arbitrators, or do the parties have an unrestricted right to call any relevant evidence, whether by way of embellishment of previous witness statements, or new witnesses and new experts?

(2) On an application under section 67, in what circumstances, if any, should the court exercise its powers under section 70(7) of the Act to require the losing party to bring into court any money payable under the Award?

2. This case provides a good example of the importance of the issues.

The Arbitral Award [dated 4 November 2005]

3. In a nutshell, the Claimant, whom I shall call 'Tajik', is an aluminium smelter owned by the State of Tajikistan. It is common ground that Tajik and the defendant, whom I shall call 'Hydro', entered into a barter agreement whereby Hydro would supply alumina to Tajik in return for aluminium. Hydro is a Norwegian company owned by the second largest publicly listed company in Norway, with a large shareholding by the Norwegian Government. Barter arrangements were, for the reasons given by the Arbitrators at paragraph 3 of their Award, often entered into because of the illiquidity of the currencies. The first Barter Agreement was made in 1993; this arrangement was interrupted by a civil war in Tajikistan in 1996/7. At that stage Hydro were owed about US$2.5 million. This initial barter agreement was guaranteed by the Tajikistan Government. In 1998, a Guernsey company called Ansol became involved with Tajik. On 30 December 1998 a barter agreement between Tajik and Ansol was entered into whereby Ansol would sell the alumina and equipment which Tajik needed and in return Ansol would receive the aluminium from Tajik. The barter agreement between these two entities was made by a Mr Ermatov on Tajik's behalf. Ansol was, at this time managed by a Mr Shushko. Hydro were anxious to obtain aluminium from Ansol and entered into a contract with their bankers and were thus able to contract, indirectly, for the aluminium in a way which complied with Islamic principles [see paragraph 9 of the Award].

4. During a visit to Tajikistan in March 2000, a representative of Hydro met with a number of Tajik people, including the production manager, Mr Sharipov. In June, Hydro concluded a debt settlement agreement with Tajik and Ansol, whereby the Tajik debt would be repaid by Ansol, with unspecified arrangements to be made between Ansol and Tajik [see paragraph 15].

5. What the arbitrators referred to as the Original Barter Agreement was entered into between Tajik and Hydro in July 2000 and at the same time an aluminium agreement was entered into between Ansol and Hydro. As I understand the position, the effect of these transactions was that Ansol sourced the alumina and received the aluminium which they then supplied to Hydro, although the barter agreement contemplated a direct delivery to and from Hydro. In 2003 Hydro were informed of the involvement of a Russian corporation, Rusal, with Ansol. According to the Award:

"The involvement of Rusal was in the form of an agreement dated 29 April 2003 between Ansol and Elleray Management Ltd ("Elleray"), a company registered in the British Virgin Islands and a company within the Rusal Group. Under that agreement Hamer Investing Limited ("Hamer"), another company registered in the British Virgin Islands and jointly owned by Ansol and Elleray, would initially carry out activities in relation to supply of raw materials to and purchase of aluminium from TadAZ.

An agreement between Hamer and TadAZ dated 25 April 2003 ("TADHAMER 1/2003") which was similar to TADANS 1/1999 and TADANS 1/2000 was signed by Mr Ermatov as Director of TadAZ and Mr V. A. Borodanenko.

On 1 July 2003 Elleray acquired the shareholding in CDH Investments, Corp. ("CDH") a company registered in the British Virgin Islands." [Paragraphs 21 – 23]

6. Hydro entered into a new Barter Agreement with Tajik and a new aluminium agreement with Ansol in September 2003. These agreements were signed in Moscow, with representatives from Rusal in attendance. The Barter Agreement had already been signed by Mr Ermatov on behalf of Tajik.

7. What then appears to have happened is that the Tajikistan Government decided that it would cease doing business with Hydro. Mr Ermatov was removed as director of Tajik and appointed to a Ministerial position and Mr Sharipov was appointed in his place. On 16 December 2004 Tajik entered into a tolling agreement with CDH to supply raw materials to Tajik and to receive processed aluminium. It is not entirely clear who are the ultimate beneficiaries of the shares in CDH. On 28 January 2005, Tajik wrote to Hydro claiming that they were excused performance of the Barter Agreement on grounds of force majeure.

8. In paragraph 244 of their Award, the arbitrators identified the issues. The first issue related to the allegation made by Tajik that the Barter Agreement was entered into and performed as a necessary step in a corrupt and fraudulent conspiracy between Mr Nazarov, the owner of Ansol, Ansol and Mr Ermatov. The nature of the corruption referred to was an allegation that Mr Nazarov provided financial assistance to Mr Ermatov's son, both in relation to his education in the UK and in relation to the purchase of a flat in London for him.

9. Having heard the evidence the Tribunal concluded that they would assume, without finding, that the payments to the son were made as bribes to Mr Ermatov as director of Tajik with whom Mr Nazarov was dealing. They went on:

> "However, whilst on the basis of English law the bribe does not have to be shown to have been paid specifically in connection with a given contract, since a bribe may be given to an agent to influence his mind in favour of the payer generally, the payments in this case cannot, in the view of the Tribunal be said to have been paid in respect of the Barter Contract between Tajik and Hydro without some proof of the connection between the bribe and that contract. The Tribunal has no such evidence and is not satisfied that Tajik has established any connection between the payments made [to Mr Ermatov's son] and the Barter Agreement entered into between Tajik and Hydro." [Paragraph 257].

10. The Tribunal then dealt with the various arguments raised by Tajik and, in paragraph 264, they said that the interposition of Hydro and the Barter Agreement did not change the basic physical arrangements of the supply of alumina by Ansol to Tajik. "The interposition of Hydro enabled [Tajik] to obtain the benefit of 6 months credit before having to pay for the alumina by way of finished aluminium. Hydro was, in effect, providing financing to Tajik in a similar way to the manner in which the Al Rajhi Bank had previously provided finance. The parties directly interested in the pricing of the alumina were Ansol (and later Hamer) and Tajik." [Paragraph 264]. They expressed "considerable doubt" as to how the conspiracy was supposed to cause an overpricing of alumina, since Tajik knew what prices they were paying. They concluded that the Barter Agreement was not "in any sense, tainted by fraud" and that Tajik "has not established any allegation that the Barter Agreement was procured by the bribery of Mr Ermatov by Mr Nazarov" [paragraphs 266 and 267].

11. They next turned to the issue as to Hydro's knowledge of the alleged fraud. Having rehearsed the evidence and arguments, the Tribunal concluded [paragraph 284] that:

> "The Tribunal is bound to observe that having considered the internal documents produced by Hydro and having seen and heard the evidence from the witnesses who were involved at the time, it accepts that there was nothing that did or should have put them on inquiry as to whether the conduct of Mr Ermatov and Ansol was part of a corrupt or fraudulent scheme. In addition, the Tribunal finds

absolutely no evidence of lack of probity on the part of Hydro or Hydro's employees involved in the transactions with Ansol and [Tajik]."

12. The Tribunal then considered the arguments raised by Tajik to impugn the validity of the Barter Agreement. The attack was based, first upon the authority of Mr Ermatov to enter into it, on the grounds that his authority was vitiated or the contract was rendered unenforceable by fraud or corruption, that the contract was procured by undue influence and that he was in breach of his fiduciary duty to Tajik. The second argument related to Tajik's capacity to enter into the Barter Agreement. The arguments under this head ranged from allegations that Government consent was required and not obtained; that the agreement was unlawfully monopolistic, that it was in breach of Tajikistan currency control laws, that it was a sham and had not been performed, and that it was contrary to an export prohibition.

13. Having identified the law which was applicable to the various issues, the Tribunal considered, first, the question of Mr Ermatov's authority. This was an issue governed by the law of Tajikistan and the Tribunal preferred the evidence of Professor Maggs, Hydro's foreign law expert, and concluded that "the alleged fraud and corruption of Mr Ermatov does not vitiate his power as Director to bind [Tajik] to the Barter Agreement" [paragraph 300]. The Tribunal went on to say that they did not consider that their conclusion would have been any different had they analysed the issue, as Tajik had submitted, in accordance with English Law principles of 'apparent authority'. In answer to the question 'whether the reliance of Hydro on the representation that Mr Ermatov had authority to bind [Tajik] was reasonable' they said that Hydro was not aware of facts which put them on notice of the alleged fraud or corruption and that their reliance on Mr Ermatov's apparent authority was reasonable [paragraph 306].

14. The Tribunal identified the alternative basis on which Tajik relied which would prevent Hydro as a matter of English law from enforcing the contract namely that either at the time when the Barter Agreement was made, or subsequently, Hydro was on notice of the fraud or alternatively even were they not on notice it would be inequitable for Hydro to enforce the contract.

15. The Tribunal dealt with this at paragraph 312:

"The tribunal does not consider the dicta of Lord Goff [in the case of *Armagas v Mundogas* [1986] AC 717 at page 745c] to be a firm enough basis on which to hold that a principal can resist enforcement of a contract induced by bribery or fraud of which the other party is entirely innocent simply on the basis that it would be inequitable to enforce the contract. Even if there were such a principle in English Law, the Tribunal does not consider that the facts of the current case come anywhere near establishing the necessary lack of equity even if the Barter

> Agreement was induced by bribery or fraud. It is not asserted by [Tajik] that Hydro has been making or stood to make any windfall or excessive profits out of the Barter Agreement. The case of [Tajik] is that excessive profits were made by Ansol and/or Hamer. **Hydro has paid $125 million for supplies of alumina that have been delivered to [Tajik] but has received no aluminium in return for that investment. Since Hydro is entirely innocent of any bribery or fraud, the Tribunal considers that the equitable course would be to enforce the Barter Agreement."** [My emphasis].

16. In relation to undue influence, the Tribunal stated that for such a defence to 'work', Hydro must have had actual or constructive knowledge of that influence. As they did not, the defence of undue influence was rejected. [Paragraph 317].

17. As to breach of fiduciary duty, and Hydro's alleged knowledge of it, the Tribunal noted that Mr Ermatov's duties were sufficiently similar to fiduciary duties under English Law to give rise to the same consequences in the event of a breach. They concluded [paragraph 325] that

> "If the allegations of fraud and corruption made by [Tajik] against Mr Ermatov had been established then he would clearly have been in breach of his duties to [Tajik]. It is common ground however that this does not affect the enforceability of the Barter Agreement unless Hydro was aware of or should have been aware of the breach. For the same reasons as already set out above, the Tribunal concludes that Hydro was not nor should it have been aware of any breach of duty by Mr Ermatov. This ground of challenge to the enforceability of the Barter Agreement, therefore, fails."

18. The Tribunal next considered the arguments about the alleged incapacity of Tajik to enter into the Barter Agreement. The first allegation was that the Agreement was outwith Tajik's capacity since the purpose of the plant's activities was to obtain optimum profits. Reference was made to Article 198 of the Tajikistan Civil Code and to the opinions of the two experts. The Tribunal concluded that the Article was directed to "the invalidation of activities that are outside the types of activity permitted by an enterprise's founding document or by a licence, rather than the purpose with which that activity is undertaken." [Paragraph 330]. In any event the Tribunal did not find proved the factual allegation that the Barter Agreement failed to secure optimum profit for Tajik [paragraph 332]. The Tribunal next considered the suggestion that the Agreement was void because of lack of Government consent. They concluded that Tajik was a state enterprise in the technical sense; that it was not a treasury enterprise under the operative administration of the Government but rather was a state enterprise which was a unitary enterprise which did not require prior Government approval before it could conclude a contract. The Tribunal relied on the opinion evidence of Professor Maggs and the fact that in other proceedings in Tajikistan, the State Prosecutor had contended that Tajik was a unitary enterprise. The alternative contention that Mr Ermatov was limited by his employment contract so that he could not conclude the Barter Agreement without Government approval

was also rejected. The Tribunal noted that the contract of employment was made subsequent to the Barter Agreement and his lack of authority could only have effect in law if the other party, Hydro, knew or should have known of the limitation of authority in the contract of employment. "It is not suggested by [Tajik] that Hydro knew or should have known of any limitation on Mr Ermatov's authority and any failure by Mr Ermatov to obtain the Government's consent cannot therefore invalidate Addendum 1 to the Barter Agreement."

19. The case on monopoly was rejected on the facts, as the expert witness for Tajik "accepted in evidence that without analysis by economic experts it was not possible to say whether there was an abuse of a dominant position or restriction of competition. No such evidence was adduced by Tajik. The tribunal therefore rejects this ground of challenge to the validity of the Barter Agreement." [Paragraph 343].

20. On the question of currency control, the Tribunal concluded that it was Tajik's obligation to obtain any National Bank permission that was required [paragraph 359] and that it was not open to Tajik to rely on its own failure to obtain permission to justify its failure to perform the Barter Agreement. [Paragraph 362].

21. As to the suggestion that the Barter Agreement was a sham because it was never intended that Hydro would either supply the alumina themselves or directly receive from Tajik processed aluminium, the Tribunal concluded that Hydro's understanding that the arrangements were a "carve out" of the exclusive arrangements which Tajik already had with Ansol

> "makes perfectly good sense. The fact that Ansol were retaining an involvement in the supply of raw materials and the delivery of aluminium is not inconsistent with performance of the Barter Agreement in accordance with its terms. Hydro were not privy to the agreements between Ansol (or Hamer) and [Tajik]. It was not suggested that there was anything inconsistent between the Barter Agreement and the Aluminium Agreement being the two contracts to which Hydro was a party. The Tribunal is satisfied, therefore, that Hydro did intend the Barter Agreement to give rise to the rights and obligations which it gives the appearance of creating. It is not, therefore, necessary to investigate the intentions of Tajik in that regard. The challenge to the validity of the Barter Agreement on the grounds that it is a sham, therefore, fails." [Paragraphs 371 & 372].

22. In the light of their findings so far, the Tribunal turned to the question of their jurisdiction.

23. The relevant arbitration clause in the Barter Agreement is as follows:

> *"The construction, performance, execution and enforcement of the Agreement and any dispute of whatsoever nature arising in connection with the Agreement or performance under it, including any remedy thereof, shall be governed absolutely by the Laws of England without reference to conflict of laws principles. Any dispute or claim arising under the Agreement that is not resolved amicably by or among the Parties shall be submitted to binding arbitration before the London Court of International Arbitration in London, England, in accordance with its rules. Hydro and [Tajik] unconditionally consent and submit to the exclusive jurisdiction of the LCIA for the resolution of any such dispute or claim. ..."*

24. The Tribunal noted that all the challenges to the validity of the Barter Agreement had failed and that it followed that the challenges to the validity of the arbitration agreement also failed "It is, therefore, unnecessary to investigate which challenges to the validity of the Barter Agreement if successful would also affect the validity of the arbitration agreement." [Paragraph 375]. I should add that no argument was advanced to me on this question.

25. There was one additional claim made by Hydro which apparently raised a jurisdiction question, namely what was referred to as the 'Detained Aluminium'. In December 2005 Tajik released approximately 8,500 metric tonnes of aluminium to Hydro, and then subsequently detained it. In fact, part of the tonnage [about 3/8] was for delivery direct to Hydro and part [about 5/8] to Ansol. It was common ground that insofar as the detained tonnage was due to Hydro direct the dispute fell within the arbitrators' jurisdiction; but in relation to the part due to be delivered to Ansol, there was a dispute. The Tribunal concluded that the parties had accepted the Arbitrators' jurisdiction over the whole of the Detained Aluminium. [Paragraphs 378 -387], subject, of course, to the principal challenge to jurisdiction.

26. Next, Tajik disputed that there had been any performance of the Barter Agreement by Hydro. This argument related to the delivery of alumina. It was Tajik's case that all the alumina supplied came from Hamer under a contract between Hamer and Tajik and that it was delivered to Tajik before Hydro purported to purchase it from Ansol. Hydro submitted that there was no requirement under the Barter Agreement that title to the alumina should pass through Hydro to Tajik. They argued that "[s]ince it is not disputed that the alumina was paid for by Hydro, was delivered to Tajik and that Tajik acquired title to that alumina ... it does not matter whether title to the alumina was transferred to Tajik through Hydro or in some other way." [Paragraph 389].

27. The Tribunal did not consider that a detailed analysis of the passing of property in the alumina was required:

"The question is whether [Tajik] has received alumina that has been paid for by Hydro. The Tribunal is satisfied that it has. Hydro has paid Ansol for the alumina and Ansol as the agent of [Tajik] has acknowledged receipt of the alumina by [Tajik]. [Tajik] by the Raw Materials Delivery Reports has itself also acknowledged receipt of the alumina. The fact that other documentation, of which Hydro was unaware, relating to the alumina supplies indicates that the supplies were made by Hamer under the TADHAMER . ... Contract is odd but not necessarily inconsistent with the supplies also being made pursuant to the Barter Agreement. It is not suggested by [Tajik] that it is being asked to pay twice for the alumina both under the Barter Agreement and under the TADHAMER .. Contract.

Further, the Tribunal is satisfied that [Tajik] is estopped from denying that Hydro supplied the alumina. The mode of supplying [Tajik] with alumina had been in place since 2000. The main change in 2003 when the Barter Agreement came into operation was that part of the role of Ansol was taken over, without the knowledge of Hydro, by Hamer. The documentation issued to Hydro by Ansol pursuant to the authority granted to it by [Tajik] under the Barter Agreement and by [Tajik] directly in the form of the Raw Delivery Material Delivery Reports was relied on by Hydro in that Hydro continued to perform the Barter Agreement and to pay for alumina supplies." [Paragraphs 390 & 391].

28. The defence advanced in the arbitration by Tajik that its obligation to deliver aluminium to Hydro under the Barter Agreement was suspended by reason of force majeure is, I think, no longer in play since this has nothing to do with the Tribunal's jurisdiction. However, it does relate to Tajik's good faith and honesty in its arguments before the arbitrators and has some bearing, in my view, on the exercise of the court's discretion under section 70(7) of the Act. I will, therefore, summarise the position shortly.

29. The events which were said to give rise to this defence were two: first an alleged prohibition against exports imposed as from 8 December 2004 alternatively the prohibition in a letter of 20 January 2005. The earlier prohibition was said to stem from an order by the Prosecutor General addressed to the Head of Customs bearing the date of 8 December. The later one from the Head of Customs was addressed to another Customs department and purportedly dated 20 January 2005. Tajik's case based on these documents was supported by the evidence of Mr Sharipov and others all of whom gave oral evidence. There were also written statements from a number of officials. Hydro did not accept the authenticity of either document although Hydro admitted that Tajik issued a purported force majeure notice on 28 January 2005.

30. The Tribunal, after a thorough review of the evidence concluded that the documents dated 8 December [there were two] "were not sent in that month if at all" and "were written after the dates they bear" and "were created with [Tajik's] assistance so as to provide justification for the suspension of deliveries of aluminium to Hydro prior to 20 January 2005." The Tribunal concluded that "[h]aving examined all the evidence

and listened to the testimony of Mr Sharipov, the Tribunal finds that [Tajik] was involved through its director, in creating a misleading impression of the events that occurred in December 2004 and January 2005." [paragraph 482].

31. Having considered the value of Hydro's claims the tribunal awarded the following sums:

US$127,658,289.67	as damages for breach of the Barter Agreement for non-delivery of 71,383,090 metric tonnes of aluminium
US$ 16,896,377.40	damages in relation to the detained aluminium
US$ 2,600,825.15	interest up to 15 September 2005 and US$16,024.88 interest on a daily basis thereafter
£1,740,119.00	in respect of Hydro's costs of the arbitration.

32. Quite apart from the sum which Tajik was required to pay the LCIA on account of the arbitrators' costs, the total US$ amount which Tajik were required to pay under the Award amount to US$147,155,492.22. And, using the sterling/dollar exchange rate on 4 November 2005, the date of the Award, of 1.75, the total dollar amount due at that date is US$150,200,700.47.

33. For present purposes I summarise what I regard as the important features of the Award:

(1) It is an Award made by three experienced arbitrators and appears to be well-reasoned and thorough. The Arbitral Tribunal heard and saw the witnesses and were able to assess their credibility. Despite the arguments advanced to me on behalf of Tajik, I am of the view that had the Court's leave to appeal been required under section 69 of the Act, I would not have granted it. The principal issues were fact specific: did Hydro have 'express or implied' [my words] knowledge of the bribery of Mr Ermatov. Were the circumstances of the 'carve out' such that Hydro must have been on inquiry? All the arguments now advanced were advanced at the Tribunal and were considered and dealt with by them on the basis of the facts found. Essentially, the result of the case depended on the facts and the impressions the Tribunal formed of the honesty of those who gave evidence before them.

(2) It was not Tajik's case that Hydro were themselves engaged in any fraud; rather that they knowingly assisted the fraud of others. Tajik have received alumina for which Hydro has paid but received nothing in return. Hydro are the victims of arrangements made by Tajik through their officers, which were not ex

facie unlawful. If Hydro did not have the requisite knowledge of the fraud then, effectively, there was no answer to their claim.

(3) In disputing Hydro's claim, Tajik's principal, along with others, dishonestly created documents with a view to misleading the Tribunal and to cause Hydro to lose their claim.

The Chancery Action

34. Before turning to the arguments, I should refer to the claim which is being brought in the Chancery Division, now transferred to this court. It is an action brought by Tajik against a number of entities. The Judgment of Blackburn J. [2005] EWHC 2241, discharging certain orders made without notice by Etherton J., speaks for itself. That court, too, was troubled by the evidence of Mr Shapirov and the role played by Rusal in running the case. He concluded that there was a good arguable case that what lies in the background to this case, is a determination by a Russian group of companies to take control of Tajik's operations and that this is being done using CDH as a vehicle, whereby part of the profits which would otherwise belong to Tajik, are being siphoned away for the benefit of un-named persons. On the Tribunal's findings in the Arbitration, the circumstances in which Hydro's contract was effectively torn up were contrived so as to enable Rusal to take over the supply of alumina and receipt of aluminium: hence, the importance of the Arbitrators' findings of forgery and concoction in relation to the events in December 2004. The findings in the two cases suggest that Tajik's evidence needs to be reviewed with caution.

The Statutory Scheme

35. There are three circumstances under the Act in which an Arbitral Tribunal's jurisdiction may be challenged. The first is in the regime provided by sections 30 – 32 of the Act. Essentially, a Tribunal now has statutory power to rule on its own jurisdiction. Where it does so there is an express right to challenge the decision in any available arbitral process of appeal and in the court. The court may decide a jurisdiction question as a preliminary issue or after the process has started. The second is after the award has been made – section 67. The third is where a person has not participated in the arbitration but wishes thereafter to challenge the Tribunal's jurisdiction – sections 72 and 73. In none of these cases is the right to object without qualification. In the first case, the objection must be made timeously and before any step has been taken; in the second, the award must be challenged timeously and the point must have been raised before the arbitral tribunal.

The nature of a section 67 appeal

36. I start with the first question: namely the nature of the court's review of the Arbitrators' decision on jurisdiction [and I have assumed that there is a jurisdiction issue, although I have grave doubts whether even if Tajik had proved their case it would avoid the Barter Agreement ab initio].

37. It seems to me that that question allows only one answer at this level. The position is accurately summarised by Langley J. in *Peterson Farms Inc v C & M Farming Ltd* [2004] EWHC 121 (Comm).

> *"There is a dispute as to the nature of the hearing itself. Mr Foxton, for Peterson, submits that an application under section 67 is a re-hearing of the jurisdiction issue. Mr Marriott QC, for C&M, submits it is only a review. Notwithstanding that submission and understandably, Mr Marriott made submissions on the wider basis as well. Indeed C&M served evidence on Arkansas law from a Ms. Stewart for this appeal which was not before the tribunal. Peterson responded with a witness statement from a Mr Hollingsworth. Both are well qualified practising lawyers in Arkansas. Neither party sought to or did serve any further factual evidence.*
>
> *18. RE-HEARING OR REVIEW*
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> *19. In Gulf Azov v Baltic Shipping [1999] 1 Lloyd's Rep 68 Rix J held that a challenge to jurisdiction under section 67 was a re-hearing. He pointed out that the court should not be placed in a worse position than the arbitrator in determining the issue which in a given case might turn on contested issues of fact. It is also to be noted that cases within section 32 of the 1996 Act (where a jurisdiction issue may be referred to and determined by the court and not the tribunal) or section 72(2)(a) (where a person alleged to be a party to an arbitration takes no part in it but challenges an award under section 67) would plainly require a full hearing whereas the Act does not appear to draw any distinction between these situations and it is not easy to see why in principle there should be any distinction. The ultimate arbiter of jurisdiction is not the tribunal itself.*
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> *20. Rix J's judgment in Gulf Azov has found approval with David Steel J in Astra SA Insurance v Sphere Drake Insurance [2002] 2 Lloyd's Rep 550; with Colman J in Aoot Kalmneft v Glencore International AG [2002] 1 Lloyd's Rep 128; with Gross J in Electrosteel Castings v Scan-Trans Shipping [2002] EWHC 1993 (Comm); with Tomlinson J in Zaporozhye Production Society v Ashly Limited [2002] EWHC 1410 (Comm) and with Thomas J in Peoples' Insurance Co of China v Vysanthi Shipping Co [2003] EWHC 1655 (Comm). The only contrary voice (if it can be so described) to which Mr Marriott referred the court was Toulson J in Ranko Group v Antartic Maritime SA [1998] LMLN 492 in a judgment delivered a month after Rix J's judgment which was plainly not cited to Toulson J. I think the law is now clearly established as Rix J stated it and I should follow it even if I did not, as I do, agree with it. The fact that the court is concerned with a re-hearing does not of course mean that it has no control over the evidence, if any, it should permit to be adduced. In this case the nature of the hearing involves no great extra burden. But I am satisfied that as Gross J put it in Electrosteel Castings at paragraph 22 "the question for the court is ...*

not whether [the tribunal] was entitled to reach the decision to which [they] came but whether [they were] correct to do so".

38. I remain unconvinced by the argument that there is no reason in principle why the court should deal with a section 67 application differently from applications under the other two sections. The nature of the challenge and the circumstances in which it is made should, in my view, determine the nature of the review which the court carries out under section 67. Here, the parties exercised their right to have the arbitrators decide the jurisdiction question. In this case that question was entirely dependent on the Tribunal's findings of fact and was inextricably entwined with an essential plank of the defence to the claim. There has been a full trial of that question. Parties who opt for arbitration in this jurisdiction would not, I think, envisage that they might be faced with two trials of the same issue, and if the law is as stated by Langley J., then the general principle in section 1(a) of the Act has been breached. What is contemplated in this case is a full trial extending over 12 days in February 2007 [the earliest date which the court could accommodate for such a lengthy hearing] with extensive factual and expert evidence, trying to shore up, I suspect, such weaknesses as the arbitrators have identified, hoping that a Judge would assess issues of credibility differently from the arbitrators and reach different conclusions on what are likely to be essentially the same facts. Were the Judge to arrive at a contrary conclusion, then the arbitral proceedings were a waste of time and money.

39. In the other two cases, the position is, largely, different. If the Court is asked to make a preliminary ruling on jurisdiction [section 32] then there would be no overlap; no two bites at the cherry. If the substantive jurisdiction argument only emerged during the arbitral process then the way the Tribunal proceeds depends upon the parties' agreement. Thus the parties can control whether there is to be a

(1) determination by the court [section 31(5)],

(2) determination by the Tribunal of the jurisdiction question as a separate matter [section 31(4)(a)] or

(3) determination of all issues together.

40. It would only be in the third situation that there could be an overlap between merits and jurisdiction and an Award based upon the arbitrators' findings of fact. This third case is essentially no different from the position in the present case where the parties have implicitly agreed that the Arbitrators and not the Court should decide issues of jurisdiction and all other issues on the merits in the one award. Where parties have agreed to leave the jurisdiction issue to the arbitrators, to be dealt with in a single award, I do not consider that it can have been Parliament's intention that thereafter there should be a second trial of the jurisdiction issue. Rather, it seems to me, the Court's function is to review the decision of the Tribunal, as it would on a section 69 application, albeit the 'appellant' would not require the court's permission to appeal the Award on the jurisdiction point. The significance of what for shorthand I shall call a combined award is that it is enforceable as such; whereas an award on jurisdiction would not be. If parties agree to a Tribunal determining all the facts and the law and producing an enforceable Award, then it seems to me that the Court's rights can be served by a review of the Award to determine whether, on those facts,

the Tribunal were entitled to conclude that they had jurisdiction to make their Award. In other words, if parties agree that the jurisdiction objection should be dealt with in the award on the merits, then they are 'stuck' with such findings of fact as the Tribunal were entitled to make. In this case, Tajik never suggested that the Tribunal should do other than deal with their jurisdictional challenge in their Award "on the merits"; they consented to a 'combined award'.

41. The Courts have referred to the DAC report. In paragraph 143 it is said:

> *"A challenge to jurisdiction may well involve questions of fact as well as questions of law. Since the arbitral tribunal cannot rule finally on its own jurisdiction, it follows that both its findings of fact and its holdings of law may be challenged. The regime for challenging such awards is set out in Clause 67."*

42. The question is how are the facts to be challenged? It seems to me that the answer to this question depends on the circumstances in which the jurisdiction question has been dealt with. In my judgment, along with Toulson J., I would, unconstrained by authority, have decided that where the parties have asked the arbitrator to deal with the facts [and thus to decide jurisdiction] and make an Award, the challenge which this court should embark on is essentially no different from the way the Court of Appeal itself deals with appeals on fact and law. In my view, it is not a re-trial; the court's role is to examine the findings of fact made by the arbitrators to ascertain whether any finding was unsupported by evidence or was against the weight of the evidence, in the light of the Tribunal's assessment of the credibility of the witnesses.

43. In relation to the party who does not participate in the arbitration, the position is different. Although the attending party will have had to 'prove' their case, the absence of opposition from the other party will be likely to shorten the hearing. There has been no 'trial' in the full sense.

44. As it is, unless the Court of Appeal says otherwise I must allow the case to proceed without constraint. Although Judges [Langley J. in *Peterson* and Aikens J. in a recent case *Primetrade A.G. v Ythan Ltd* [2005] EWHC 2399] have emphasised that despite a re-trial on the evidence the court retains case management powers, I do not understand that to mean that the court has a right to restrict the evidence to that given before the Tribunal. Either the power to challenge the facts means that all relevant evidence can be adduced; or it means that the right to challenge is prescribed in the way suggested. It seems to me that there is no halfway house. The power to manage cases does not give the court a discretion to exclude otherwise admissible evidence. In this case that means that Tajik are entitled to pursue legitimate requests for further disclosure, beyond that directed by the arbitrators, and to rely on further and better expert evidence which, for some unexplained reason, was not adduced before the arbitrators.

The discretion under section 70(7).

45. Section 70 of the Act applies to any application under sections 67, 68 or 69.

> *"The Court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or*

appeal, and may direct that the application or appeal be dismissed if the order is not complied with."

46. Mr Tozzi QC for Hydro, in a careful submission, traced the origin of the subsection. He pointed out that it was first to be found in the 1934 Act following the Report of Committee on the Law of Arbitration [cmnd 2817], chaired by MacKinnon J., which recommended the power as a means of diminishing the opportunities for delay on the part of the unsuccessful party. This provision was carried forward to the 1950 Act [section 23(3)]. Lord Denning in *Alexandria Cotton & Trading Company (Sudan) Ltd v Cotton Company of Ethiopia Ltd* [1965] 2 Lloyd's Rep 447, in upholding the decision of Mocatta J. who described such an order as *unusual*. Under the 1979 Act the court had power to order arbitrators to state their award in the form of a special case and to order payment into court of the amount of the award as a condition of making such an order. In *The Maira* [1982] 1 Lloyd's Rep 257 Lord Denning stated:

> *"The power of imposing conditions is undoubtedly useful. In a proper case I do not see why there should not be a condition making the whole sum in dispute payable. Rather like we do in some cases under Order 14. But when there is a clear cut, fully arguable point of law, which it is very proper for a party to raise and on which a great deal of money depends, it seems to me that it would be over harsh to put upon him the condition that he should bring the sum of money into court. On an RSC O.14 case we never make a condition that the party should bring the whole sum of money into court unless there is practically no defence – when it is so shadowy that there is nothing in it. It is only in a very exceptional case that the whole sum should be ordered to be paid."*

47. The stating of a special case system of review of Awards was replaced in the 1979 Act by the court having a discretion to grant leave. The 1978 Report chaired by Donaldson J. recommended that the court should be free to impose conditions upon the parties seeking leave *"such [as] a requirement that... the sum in dispute should be secured."* Under section 1(4) of the 1979 Act the court was empowered to impose conditions. In debate in the House of Lords Lord Diplock explained that what was important was that *"the court is given wide powers to impose conditions on leave to appeal on a question of law."*

> *"Such conditions, which I expect will be frequently imposed, are that there should be payment into court of the whole or part of the claim, or payment into a joint account, or the provision of security for the amount of the award, and I anticipate with every confidence that the power will be exercised robustly by the court in any case where there are grounds for suspicion that the appeal is intended for the purpose of delay."*

48. The first reported case on the power of a court to order a payment into court of the amount of the award as a condition for leave to appeal was *Mondial Trading Co GmbH v Gill & Duffus Zuckerhandelsgesellschaft GmbH* [1980] 2 Lloyd's Rep. 376 at page 380. There, the Judge, Robert Goff J., said that the jurisdiction to impose conditions was unfettered and it was not useful to search for analogies in the exercise of this discretion in other circumstances. He referred, by way of example, to cases where a point of law was dubious or the court inferred that the appeal was being pursued for the purposes of delaying tactics or where the argument was flimsy [note

that where the argument was flimsy permission would not be given: *The Nema* [1982] AC 724 at 739.].

49. At paragraph 380 of the 1996 DAC Report, it was noted that

> "[T]he power to order security or bring the money payable under the award into court only extends to applications under clauses 67 or 68 [of the draft Bill]. This should be extended so that the Court can impose these requirements as a condition of granting leave to appeal under Clause 69. This is a tool of great value, since it helps to avoid the risk that while the appeal is pending, the ability of the losing party to honour the Award may (by design or otherwise) be diminished."

50. Mr Tozzi QC then referred to what he submitted was an equivalent jurisdiction, namely the power of the court under Article VI of the New York Convention to adjourn an application to enforce an award, on terms that the applicant "*give suitable security*". In *Soleh Boneh International Ltd v Government of the Republic of Uganda and National Housing Corporation* [1993] 2 Lloyd's Rep 208, Staughton LJ emphasised first the strength of the argument that the award was invalid and secondly

> "*.. the court must consider the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult, for example, by movement of his assets or by improvident trading, if enforcement is delayed. If that is likely to occur, the case for security is stronger; if, on the other hand, there are and always will be sufficient assets within the jurisdiction, the case for security must necessarily be weakened.*"

51. The extent to which the 'merits' were a determining factor was put in doubt by the Court of Appeal in *Soleh Boneh in Dardana Ltd v Yukos Oil Co. and Petroalliance Services Co Ltd* [2002] 2 Lloyd's Rep. 326 at paragraph 34.

52. The only case reported in which the discretion conferred by section 70(7) of the Act has been considered is the *case of Peterson Farms v C&M Farming Ltd* [2003] EWHC 2298. The judgment of Tomlinson J. was *ex tempore*. The arguments and decision are illuminating. There was an ICC Arbitration. A jurisdiction issue arose as to part of the claim. Had the losing party been a party to the contract which contained the arbitration clause in respect of that part?

> "*21 ... Mr Foxton's primary submission, however, as I indicated a few moments ago, is that the court should be very slow to require the giving of security as a condition for the making of an application under section 67, which is made as of right. Mr Foxton points to the fact that there are a number of different means pursuant to which a party to arbitration may mount a challenge to the jurisdiction. The part of the Act which is relevant to this begins at paragraph 30 under the rubric "Jurisdiction of the arbitral tribunal", whereby it is enacted at section 30:*
>
> *"Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, but that any such ruling may be challenged by any available*

arbitral process of appeal or review, or in accordance with the provisions of this part."

The provisions of this part which are relevant are both sections 32 and 67. Thus, under section 32:

"The court may, on the application of a party to arbitral proceedings, determine any question as to the substantive jurisdiction of the tribunal as a preliminary point."

To that end, it is provided in section 31(5) that:

"The arbitral tribunal may, in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32."

Furthermore, under section 32(4) it is provided:

"Where an objection is duly taken to the tribunal's substantive jurisdiction, and the tribunal has power to rule on its own jurisdiction, it may rule on the matter in an award as to jurisdiction or deal with the objection in its award on the merits."

22. *Thus, at the outset, there is the possibility that the court may be asked, if it is otherwise appropriate, to rule upon the jurisdiction of the tribunal, and of course it is obvious that the court has no express power under section 70 or under any other provision pursuant to which the court could impose, as a condition of the making of such a challenge, the bringing into court or the securing of the amount in dispute, or any other amount.*

23. *I should have said that equally relevant is section 72 of the Act, which provides that:*

"A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question whether there is a valid arbitration agreement, whether the tribunal is properly constituted, or what matters have been submitted to arbitration in accordance with the arbitration agreement, by proceedings in court for a declaration or injunction or other appropriate relief."

By definition, that is a resort to the court which will take place after an award has been issued in circumstances where the party challenging the jurisdiction has taken no part in the proceedings, and again if resort is had to that subsection no express power is given by the Act to require the posting of security, since the power under section 70(7) is applicable only to applications under sections 67, 68 or 69 and, of course, subsection (2) of section 72 goes on to provide in terms that a party who may apply for declaratory or injunctive relief also has the same right as a party to the arbitral proceedings to challenge an award either under section 67 or under section 68.

24. *Which course is taken by a party challenging jurisdiction will of course depend upon the nature of the proceedings and of the circumstances as they apply in the particular case, but, as Mr Foxton pointed out, Peterson Farms were only challenging a part of the jurisdiction of the arbitrators, or perhaps I should say*

they were not challenging the basic jurisdiction of the arbitrators to determine the dispute as between Peterson Farms Inc and C & M Farming Limited, but were only challenging the jurisdiction of the arbitrators to include within their consideration and within their award claims to recover losses which had been suffered by companies other than C & M Farming Limited itself. In such circumstances, it would certainly not have been appropriate for Peterson simply to take no part in the arbitral proceedings and then to resort to its rights under section 72(1). Nor, ordinarily, would it be regarded as really very satisfactory to make an application pursuant to section 32 for the determination of a preliminary point in circumstances where the arbitration was in any event to proceed in respect of the greater part of the dispute, and in circumstances where it would obviously be convenient for the arbitrators to deal with the entirety of the dispute with the partial objection to jurisdiction being reserved, dealt with by the arbitrators in the first instance, possibly to the satisfaction of the party raising the objection, but with the ability to ventilate the matter in court under section 67 in due course if that were appropriate.

25. *What that review of the various different approaches which can be taken to an objection to jurisdiction demonstrates is that it may be a matter of accident, or at any rate a matter of happenstance, whether, in any given case, an objection to jurisdiction is brought pursuant to section 67, or pursuant to section 32, or pursuant to section 72(1). It is only in relation to section 67 that the court has the express power conferred by section 70(7), and it would, on the face of it, be somewhat surprising if certainly as a matter of course the court were to exercise its powers to require security to be posted under section 70(7) in relation to a section 67 application when it was purely as a matter of good housekeeping or sensible approach to the arbitration that the challenge had been mounted in that fashion as opposed to at an earlier stage or in a different manner.*

26. *Furthermore, Mr Foxton points out that there is of course a conceptual difference between a challenge under section 67 and a challenge under sections 68 and 69. An award which is challenged either under section 68 as having been made in the wake of a serious irregularity, or an award which is alleged to be wrong in law under section 69, has a presumptive validity, unless and until set aside. The same is not true of an award challenged under section 67, as to which it is only possible to say of it either that it was made with jurisdiction or that it was not.*

27. *One can well understand why it is that it might be thought appropriate to require the posting of security in circumstances where a section 68 challenge is made, because if the parties have chosen to arbitrate their dispute it may be said that they have elected a procedure which will not necessarily contain all of the same formalities and safeguards which might be thought to attend proceedings in court.*

.....

35. *It seems to me that, in most cases, it is likely that demonstration by the party against whom the jurisdictional challenge is made that the challenge is flimsy or otherwise lacks substance is likely to be regarded as a threshold requirement for the court's consideration whether in all the circumstances it is appropriate to*

require, as a condition of proceeding under section 67, that money payable under the award shall be brought into court or otherwise secured pending the determination of the application. That being the case, the threshold is not, in this case, crossed by C & M, and I would, for that reason alone, decline to grant the relief sought. I would, however, go further, which is to indicate that in the circumstances of this case, having regard to the evidence which has been placed before me, I would in any event not regard it as an appropriate exercise of my discretion to make an order which, on the basis of the evidence, partially unsatisfactory though it may be, would have the effect of requiring Mr Peterson himself to put up security in relation to the liability of the company Peterson Farms Inc. Particularly is that so in circumstances where C & M has itself initiated enforcement proceedings in the United States, which, if they are successful, will in any event enable that company to proceed immediately to enforce the entirety of the award without regard to the pending section 67 application. As I understand it, as recently as 28th August the Arkansas court heard C & M's motion to confirm, which included a hearing of Peterson's stay application pending the section 67 challenge, and in relation to which the Arkansas court has reserved judgment. If C & M are wholly successful in their arguments in that application, they will be in a position to proceed to enforce the award against such assets as they are able to find. So far as concerns the assets which are the subject of the lis pendens, i.e. the assets in relation to which Mr Peterson has filed a financing statement and a mortgage, Mr Peterson is, in any event, now precluded by the lis pendens from raising further sums on the security of those assets.

35. All of those factors, as it seems to me, militate against exercising my discretion to require the posting of security in this jurisdiction as a condition for the making of a challenge to the jurisdiction, which is brought both as of right by Peterson and at an appropriate stage in the proceedings, and upon grounds which I do not regard as lacking substance. For all those reasons, therefore, I decline to make the order sought.

53. Mr Stadlen QC submitted that this case showed the need for the court to decide first whether Tajik's case could properly be described as 'flimsy'. This was a pre-condition to making an order under section 70(7) when a section 67 challenge was made. It was a necessary but not a sufficient condition. The court should consider why such security should be ordered. It is to protect the respondent to the appeal from a dissipation of assets between the time when the appeal is heard to the time when it is decided. In this case there was no evidence to support an allegation that Tajik, a Government owned company whose production lay at the heart of the country's GDP, was going to dissipate its assets. It was a plant in continuous production [no such plant can stop its process otherwise it becomes 'clogged up' (my words)] on land which it did not own. As an asset it comprised machinery and furnaces which had to remain in constant production. He also submitted that Tajik did not have the funds to make a payment of US$150 million. The accountants' reports suggested that it was worth about $30 million and the Government itself did not have the necessary funds to make the payment.

54. I take a slightly different view of the power to order security under section 70(7) from that taken by Tomlinson J. It seems to me that this question is indirectly linked to the

other main issue. In my judgment it is not mere happenstance whether a jurisdiction case arises under section 30-32 or section 72, in the sense used in the judgment. As I have already tried to explain, there is a difference between a Tribunal making an award on the merits and jurisdiction which gives rise to an unfettered right to make a section 67 application, and other cases where there has been no trial by consent of the parties of all the issues in the case. The parties will choose to follow the most convenient and acceptable course. In this case, it would have been open to the parties to agree that the court should deal with the jurisdiction issues. But in this case, because of the overlap between the facts and the jurisdiction arguments, that would have meant that their chosen method of dispute resolution would have been taken away. For good reason, and not chance, the parties chose, instead, that the Tribunal should decide these matters. It is not surprising, therefore, that Parliament should have confined section 70(7) to those jurisdiction cases where the parties had elected to have the Tribunal produce an Award after determining the facts and their impact on jurisdiction. The position is different when either there has been a one sided trial by a Tribunal, or where 'merely' preliminary jurisdiction issues are determined. The fact that section 70(7) does not apply in all circumstances says nothing about whether it should apply in the present case; indeed, it provides some support for the view which I take of it.

55. The statute contains an unfettered discretion. There is no threshold requirement. With respect to Mr Tozzi QC, I agree with Mr Stadlen QC that analogies with the past and with provisions of the New York Treaty are not apposite or helpful. There is a distinction between an 'appeal' process where leave is required and where the appeal is of right. In this case the following features seem to me to be most relevant:

(1) The only defence to Hydro's claim is that they were 'mixed up' with the fraud of others such that they can no longer recover what was unquestionably due to them. Tajik are not the victims of fraud, they have been the perpetrators of it in this litigation. Hydro are victims and it has never been suggested that they were themselves dishonest in any way. The Tribunal has firmly rejected the allegations made by Tajik against Hydro, as the language of the Award makes clear.

(2) Tajik has been involved in deliberate attempts to mislead the Tribunal and have committed acts which in this jurisdiction are serious crimes [forgery and attempting to obtain a pecuniary advantage by fraud]. Their conduct has also been criticised by Blackburn J. in the other litigation, and the truth of the assertions made in that case as to what happened in December 2004 led him to express his grave misgivings [see paragraphs 178 – 184]. In short, Tajik and those behind them cannot be trusted. The attempt by Tajik to argue the merits through Mr Bushell's [Herbert Smith] witness statements do not carry the matter further. I regret to note that his witness statements do not properly disclose who told him various things which he appears to assert are within his own knowledge. It is especially important, having regard to Rusal's role [see paragraph 191 of the judgment of Blackburn J.] and the credibility of various persons behind Tajik, that Mr Bushell properly complies with the rules when making his statements and identifies precisely who has told him what. But that apart, at the moment I see no reason to suppose that the factual assessment made by the Tribunal was other than correct. If ever there was a flimsy case, this is it,

whatever the nature of the hearing on the section 67 application. Flimsiness is not, I think, a necessary condition to the exercise of discretion under section 70(7); otherwise it would never be used in a section 69 case, where there is a high hurdle. This emphasises the flexibility of the discretion. It is to be applied having regard to all the circumstances, including 'flimsiness'.

(3) I do not accept that Tajik and its backers are unable to put up the money. The case for alleged impecuniosity is not made out. Apart from anything else, Tajik have had the benefit of alumina paid for by Hydro for which Hydro has received no value. The Barter Agreement made in 2003 was referred to in Tajik's audited accounts; it was not concealed from the Government nor from the Russian interests who were present when it was signed. If Tajik themselves do not have the funds then that may be because, as was suggested in argument, Rusal's BVI company has been creaming off the profits for the benefit of people whose identities are as yet unknown. Tajik is backed by Rusal and there is no evidence to suggest that they could not put up the money. In my view, if there is to be an appeal, whether in the form of a re-hearing or otherwise, then the money should be put up. I reject Mr Stadlen's contention that the risk of dissipation is the dominant factor but it is certainly a factor. When dealing with an untrustworthy party who has resorted to forgery, it cannot legitimately be said that steps will not be taken between now and January next year to frustrate the enforcement of the Award, if the challenge fails. Tajik's approach to litigation demonstrates a contempt for the normal constraints which control parties' conduct in highly charged adversarial proceedings. I infer that there is a risk that some steps will be taken to frustrate the enforcement process and time will enable them to take those steps. As Mr Stadlen QC was pointing out, there will always be a problem in enforcement of the judgment in Tajikistan.

Conclusion

56. Accordingly I answer the two questions posed above in this way.

57. I am constrained by the weight of authority at my level in the judicial hierarchy to hold that an appeal under section 67 involves a complete re-hearing and the parties are free to add to or embellish the evidence which was presented to the Tribunal. Had I not been so constrained, I would have held that a section 67 appeal from an Award on the merits and jurisdiction, such as this, was to be an appeal without evidence but conducted as though the Court of Appeal was hearing an appeal against the decision of a puisne judge in fact and law.

58. As to the discretion under section 70(7), this is unfettered and in the exercise of my discretion, for the reasons I have attempted to give, I order that Tajik provide security in the sum Awarded namely, in round figures, US$150 million within 28 days.

59. I indicated during argument that I would give both parties permission to appeal. I also indicated that pending the outcome of the appeal, the order in relation to section 70(7) should be suspended, provided that the appeal is promptly pursued.

60. Mr Stadlen QC said that Mr Tozzi QC had not argued that an appeal under section 67 could take place without evidence. That is true. I raised the point because I and other Judges in this Division have some concern about the nature of a section 67

hearing. Anecdotally, it appears that there is an increase in these appeals whilst at the same time a decrease in appeals under section 69, where the gateway is narrow. Mr Tozzi QC was aware of the weight of authority at this level and felt constrained to argue for the use of case management powers to limit the extent of the evidence, rather than to argue that no evidence should be permitted; but he was kind enough to indicate that he would wish to argue the section 67 point in the Court of Appeal. In my view he has not disentitled his clients from arguing the point in the Court of Appeal Mr Stadlen QC reserved his position. The Commercial Court would welcome any guidance which the Court of Appeal may give on the two questions.