Neutral Citation Number: [2020] EWHC 938 (Comm)

Case No: CL-2019-000491

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 21/04/2020

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

IN AN ARBITRATION CLAIM BETWEEN:

PROVINCE OF BALOCHISTAN	**Claimant**
- and –	
TETHYAN COPPER COMPANY PTY LIMITED	**Defendant**

- -
- -

Christopher Hancock QC and Sam Goodman (instructed by **Gresham Legal**) for the **Claimant**
Lord Goldsmith QC and Tom Cornell (instructed by **Debevoise & Plimpton LLP**) for the Defendant

Hearing date: 3 April 2020

- -

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.

....

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 21 April 2020 at 10:30 am.

Mr Justice Henshaw:

(A) INTRODUCTION 2
(B) PROCEDURAL BACKGROUND 3
(C) APPLICABLE PRINCIPLES 9
(1) The 1996 Act 9
(a) Section 1 9
(b) Sections 67 and 68 10
(c) Section 70(3) 11
(d) Section 73 12
(2) Procedural rules and guidance 14
(D) SECTION 73(1): FAILURE TO TAKE OBJECTION BEFORE TRIBUNAL 16
(E) PRECLUSIVE EFFECT OF ICSID DETERMINATION 19
(F) SECTIONS 70(3) AND 73(2): TIME LIMIT 20
(G) POB'S SECTION 68 APPLICATION 21
(H) CONCLUSIONS 22

(A) INTRODUCTION

1. The Claimant ("***POB***") applies for non-standard directions in its arbitration claim commenced on 5 August 2019, which comprises applications pursuant to sections 67 and 68 of the Arbitration Act 1996 in respect of an ICC partial award dated 8 July 2019 *("**the Award**")*. POB seeks to contend that the ICC tribunal lacked jurisdiction because the contract containing the arbitration agreement was void for a number of reasons, one of which is that it was allegedly procured by corruption. POB also alleges serious procedural irregularity in a number of respects.

2. In the underlying ICC arbitration (which has not yet concluded but has been stayed pending the present claim), the Defendant to the present claim ("***TCC***"), an Australian mining company, brings claims against POB, a province of the Islamic Republic of Pakistan ("***Pakistan***"), arising out of a mining joint venture. More specifically, the claims arise out of a contract known as the Chagai Hills Exploration Joint Venture Agreement ("***the CHEJVA***") dated 29 July 1993 and governed by the law of Pakistan.

3. The standard directions for arbitration claims, based on the Part 8 procedure, are contained in §§ 6.2-6.7 of CPR PD 62. The non-standard directions which POB seeks are:

    i) an order that the parties exchange statements of case;

    ii) an order that a CMC be held following the close of pleadings; and

    iii) an order bifurcating the claim so that the section 67 application is determined prior to the section 68 application.

4. TCC opposes POB's application. It contends as follows:

    i) Consistently with sections 70(3) and 73(2) of the 1996 Act, POB's arbitration claim should be limited to the grounds of challenge and supporting evidence originally advanced in and accompanying its claim form, submitted within the 28-day period for filing such a claim. POB's application for non-standard directions is in substance an attempt, eight months out of time, to change the basis of its challenge and introduce an entirely new set of wide-ranging allegations concerning TCC's alleged corruption. POB failed to include in its claim form any of the corruption allegations it now seeks to advance, or to submit any of the voluminous evidence for which it now seeks directions, most or all of which it has had in its possession for many, if not all, of the five years since the ICC tribunal issued its decision on jurisdiction in 2014.

    ii) POB's jurisdictional challenge, insofar as based on alleged corruption, is precluded by section 73(1) of the 1996 Act, because POB did not previously advance it as a jurisdictional objection in the arbitration itself – but, on the contrary, expressly stated that its corruption allegations did not impugn the ICC tribunal's jurisdiction.

    iii) A distinguished ICSID tribunal has already heard, and decisively rejected, the same corruption allegations following extensive litigation in respect of them, a determination which the ICC tribunal subsequently held to be binding on POB in the ICC proceedings. Those allegations could not therefore have been a legitimate basis for POB's section 67 challenge even if they had been included in POB's arbitration claim form.

    iv) POB's request for non-standard directions is in reality an attempt to subvert the 1996 Act by transforming the streamlined and efficient process designed to deal with arbitration claims into a full-blown corruption trial with dozens of witnesses, thousands of documents and allegations spanning nearly three decades.

5. For the reasons elaborated below, the question of which objections POB can properly pursue, consistently with sections 70 and 73 of the 1996 Act, should be resolved first, promptly, before this claim proceeds further. It would be inimical to the proper approach to court intervention in arbitration to permit this claim to turn into a full-blown re-run of POB's corruption allegations if they are *prima facie* precluded by the 1996 Act. I consider that it would also be unjust for TCC to be required to plead a substantive defence to those allegations unless and until it were determined that POB is entitled to pursue them in this claim. I shall therefore give directions as outlined in section (H) below. I have set out my reasoning for these directions in reasonable detail in deference to the arguments of counsel before me, and in case it is of assistance to the court when hearing further stages of this claim.

(B) PROCEDURAL BACKGROUND

6. On 28 November 2011, following a dispute regarding the denial of a mining licence, TCC commenced two arbitrations:

i) an arbitration claim against POB pursuant to an arbitration clause in the CHEJVA, and

ii) an arbitration claim against Pakistan under the Australia-Pakistan Bilateral Investment Treaty.

The arbitration against POB proceeded under the ICC rules ("***the ICC arbitration***") and that against Pakistan under the ICSID rules ("***the ICSID arbitration***").

7. On 7 January 2013, the Supreme Court of Pakistan issued an Order declaring that the CHEJVA and related agreements were "*illegal, void and non est*". Full reasons were reserved and given in a judgment on 10 May 2013 ("***the Pakistan Supreme Court Judgment***"). The Defendant's evidence is that that decision reversed a judgment of the Balochistan High Court in June 2007 which, upholding POB's case, held that *"[the] CHEJVA was rightly executed*," that POB had the power to enter into the agreement, and that the 'relaxations' POB granted were "*strictly in accordance*" with the mining rules. However, the Defendant states, POB reversed its position on the petitioners' appeal, after TCC's commencement of the ICC and ICSID arbitrations, telling the Supreme Court that "*If this Honourable Court upholds the CHEJVA and other documentation, then the Memorial will state accordingly and the Government of Balochistan and the Government of Pakistan shall proceed to contest the matter on the merits on CHEJVA and other agreements. On the other hand if this Honourable Court declares CHEJVA void ab init[i]o, then the Government will argue before ICSID that an illegal investment is not protected by BIT and before ICC that arbitrations should end since the agreement from which it derives its jurisdiction has been struck down*."

8. On 21 October 2014, after a four-day hearing, the ICC tribunal (Lord Collins of Mapesbury, Sir David A.R. Williams QC and Dr Michael Moser) issued a Ruling on Preliminary Issues declaring *inter alia* that the arbitration agreement in the CHEJVA was valid, the CHEJVA was valid, TCC had standing to invoke the CHEJVA, and that the ICC tribunal had jurisdiction to consider TCC's contractual and non-contractual claims ("***the Jurisdiction Ruling***").

9. On or around 21 November 2014, the parties agreed that POB's position would not be prejudiced if it did not challenge/review the Jurisdiction Ruling at that time but instead waited until the ICC tribunal had made an award incorporating the Jurisdiction Ruling.

10. On 31 August 2015, POB requested permission to submit an application to the ICC tribunal for the dismissal of TCC's claims on the basis of its allegations of corruption. On 2 September 2015, Pakistan submitted a similar application in the ICSID arbitration.

11. On 10 November 2017, the ICSID tribunal (Dr Klaus Sachs, Dr Stanimir Alexandrov and Lord Hoffman) issued two decisions:

i) a Jurisdiction & Liability Decision, in which the ICSID Tribunal found that POB's denial of TCC's mining lease application breached Pakistan's fair and equitable treatment obligation, constituted an unlawful expropriation of TCCA's investment, and unlawfully impaired TCC's investment; and

ii) a Decision on Pakistan's Application, in which the ICSID Tribunal found that Pakistan had not established its allegations of corruption:

> "For the reasons set out in detail above and based on its review and evaluation of the evidentiary record, the Tribunal concludes that Respondent has not established any of its individual allegation of corruption that would be attributable to Claimant. The Tribunal has found no proven incident of Claimant exercising, or attempting to exercise, improper influence on Government officials aimed at obtaining rights or benefits relating to Claimant's investment in Pakistan" (Decision on Respondent's Application to Dismiss the Claims, dated 10 November 2017, § 1490)

12. On 21 September 2018, TCC filed in the ICC arbitration an application for a ruling that POB's corruption allegations and a range of other issues were precluded by the conclusions of the ICSID tribunal.

13. On 8 July 2019, the ICC tribunal issued the Award, declaring that, pursuant to the doctrine of issue estoppel, findings made by the ICSID tribunal in the decisions referred to in § 11 above would have preclusive effect in the ICC arbitration once those findings had been incorporated (expressly or by implication) into an Award.

14. On 12 July 2019, the ICSID tribunal unanimously issued its own award, awarding TCCA US$ 4.087 billion plus interest from the date of breach (15 November 2011). It is said to have been the second largest ICSID award ever issued. Counsel for POB told me that this award too is being challenged in annulment proceedings. TCC makes the point that the ICSID Proceedings extended over nearly eight years and four phases, during which time the parties submitted more than a thousand pages of written legal submissions, accompanied by more than 3,000 factual and technical exhibits. Further, whilst the respondent in the ICSID Proceedings was the State, represented by the Government of Pakistan, POB's conduct was at issue and the ICSID tribunal attributed POB's conduct to Pakistan, as the ICC tribunal explained in its own Award:

> "…the relationship between Balochistan and Pakistan was at the heart of the ICSID Tribunal's determination of liability, and that Balochistan treated its interest as the same as that of Pakistan. The essence of the ICSID claim and of the Decisions was Pakistan's liability for the acts of Balochistan, a provincial government whose conduct was attributable to Pakistan under international law, and whose acts Pakistan had to defend, using co-ordinated strategy and conduct, with substantially the same lawyers, witnesses and experts, including current or former Balochistan officials."

15. On 5 August 2019 (i.e. within the 28-day time limit in section 70(3) of the 1996 Act) POB issued the present claim. POB's arbitration claim form also included an application for non-standard directions. The arbitration claim form alleged *inter alia* that the ICC tribunal lacked jurisdiction because:-

> "a. In the Supreme Court Judgment, the Supreme Court of Pakistan has determined (i) that the CHEJVA is void; and (ii) that the arbitration agreement is not separable from it, and an issue estoppel arises out of both of those determinations.

> b. Further or alternatively, whether or not any issue estoppel arises out of the Supreme Court Judgment, as a matter of the law of Pakistan the CHEJVA is void for the reasons set out in the Supreme Court Judgment and the arbitration agreement is not separable from it.
>
> c. Further or alternatively, if the arbitration agreement is separable from the CHEJVA then it is governed by the law of Pakistan (either because (i) the parties have made an express choice; or (ii) the parties have made an implied choice; or (iii) the arbitration agreement has its closest connection with Pakistan) and the arbitration agreement is void for the reasons set out in the Supreme Court Judgment.
>
> d. Further or alternatively, if the arbitration agreement is separable from the CHEJVA and it is governed by the law of England and Wales, then it is void because the Government of Balochistan was not a party to the CHEJVA and the Balochistan Development Authority did not have capacity to enter into the CHEJVA.
>
> e. Further or alternatively, if the arbitration agreement is separable from the CHEJVA and it is governed by the law of England and Wales, then TCCA is not a party to the CHEJVA or the arbitration agreement and is not entitled to exercise any rights under the CHEJVA or the arbitration agreement (whether because of the Supreme Court Judgment or a scheme of arrangement or otherwise).
>
> f. Further or alternatively, if the arbitration agreement is separable from the CHEJVA and it is governed by the law of England and Wales, then it is void/unenforceable because it is contrary to the public policy of England and Wales, by virtue of the fact that it is contrary to the public policy of Pakistan, a friendly state."

The arbitration claim form stated at § 5:

> "In summary (and without limitation), the Supreme Court Judgment declared that the CHEJVA was void due to (i) the existence of corruption; (ii) the fact that CHEJVA's object was unlawful; (iii) the fact that TCCA had made a mistake of fact when entering into CHEJVA; (iv) the fact that CHEJVA represented an effort to interfere with a public body in Pakistan; (v) fundamental uncertainty; (vi) the fact that certain relaxations of mining rules were granted in excess of authority and ultra vires and void; (vii) the fact that Clauses of CHEJVA violated mining rules or were inconsistent with them; (viii) the CHEJVA was contrary to public policy and/or illegal; (ix) the CHEJVA was entered into for inadequate consideration; (x) the fact that TCCA's licences stood transferred to another company; (xi) the

> fact that relaxations of mining rules were unjustifiably granted without any explanation; and (xii) the CHEJVA contravened section 23 of the Pakistan Contract Act."

16. The arbitration claim form was supported by the witness statement of Mr Gosis, a partner in the law firm, GST LLP, which represents POB in the ICC arbitration. The witness statement elaborated on POB's section 68 application, including the relevance of POB's corruption allegations to the merits of its defence, but did not add to the contents of the arbitration claim form as regards the section 67 application.

17. On 4 September 2019, TCC filed its acknowledgment of service, objected to the use of the arbitration claim form for an application for non-standard directions, and indicated that it would oppose the adoption of any non-standard directions. A consent order of the same date provided that TCC would serve its evidence by 4.30 pm on 9 October 2019.

18. TCC on 9 October 2019 filed the witness statement of Ms Reid, a partner in TCC's solicitors Debevoise & Plimpton ("***Debevoise***"), in response to POB's present claim. The witness statement pointed out among other things that:

> "78. Before the ICC Tribunal, Balochistan relied on a single paragraph in the PSC [Pakistan Supreme Court] Judgment for its proposition that the PSC Judgment invalidated the arbitration agreement. This paragraph states, in full:
>
> > "*As all the key provisions of [the] CHEJVA were made subject to a reliance on relaxations that were illegal and void ab initio, the illegality of the agreement seeps to its root. As such, no operative part of the agreement survives to be independently enforceable and the principle of severability cannot be applied to save any part thereof. The agreement is, therefore, void and unenforceable in its entirety under the law*."
>
> 79. TCCA explained in its preliminary issues briefing that there was, in fact, no holding in the PSC Judgment that purports to invalidate the arbitration agreement; that the PSC's conclusion that no "*operative part*" of the CHEJVA survived did not refer to the arbitration agreement; and that the PSC did not include the arbitration agreement in its list of all the Agreements that it deemed were "illegal, void and *non est.*"
>
> 80. The ICC Tribunal agreed. It recalled its earlier holding that it was "*not bound by the findings of the Supreme Court*" and stated that, "*in any event there is no reason to suppose that in this section the Supreme Court was addressing its attention to the arbitration agreement.*""

19. POB on 16 October 2019 issued a Part 23 application notice, without prejudice to its primary position that an application for non-standard directions can be made on an arbitration claim form, seeking non-standard directions including (i) bifurcation of the

section 67 and 68 proceedings, (ii) formal statements of case in respect of its section 67 and section 68 applications, and (iii) that the court hold a Case Management Conference after the exchange of statements of case, to determine what further evidence is required. The application was served on 21 October 2019. Debevoise had in the meantime written to POB's solicitors pointing out that the period for serving reply evidence under 62PD § 6.3 had expired.

20. On 28 October 2019 and 4 November 2019, TCC proposed that the parties wait to list the hearing of POB's application for non-standard directions until the parties had engaged further about the application in correspondence and the parties' positions in respect of security for costs had become clearer. POB agreed with this proposal. TCC also sought clarification of why POB considered that non-standard directions were required.

21. Also on 4 November 2019, TCC filed in response to POB's Part 23 application the witness statement of Mr Boyne, a partner in Debevoise. POB on 11 November 2019 served in reply the witness statement of Mr Kakkad, a partner in Gresham Legal, who act for POB in the present claim.

22. Debevoise on 22 November 2019 wrote to Gresham Legal that despite the service of Mr Kakkad's witness statement, POB had still not particularised its application. Gresham Legal responded on 10 December 2019 that they were preparing draft pleadings and would revert with POB's proposals on the scope of factual and expert witness evidence.

23. On 14 January 2020 Debevoise suggested that POB's Part 23 application should be listed without delay, with TCC's security for costs application being heard separately if necessary. This suggestion was accepted by POB and steps were taken to list the present hearing shortly thereafter.

24. Gresham Legal on 20 March 2020 provided POB's draft Particulars of Claim to Debevoise and invited TCC to agree to POB's proposed directions. Debevoise responded on 30 March 2020 that the application would be contested. POB's draft Particulars of Claim run to 85 paragraphs. They allege among other things that the Pakistan Supreme Court granted POB declarations that the CHEJVA *"was void as a result of and/or recording that [t]he CHEJVA was tainted by corruption"*; and in any event that (without prejudice to its contention as to the binding nature of the those declarations) POB will rely on factual and/or expert evidence as necessary to establish *inter alia* that the CHEJVA was void under the law of Pakistan because:

> "The extent of corruption and bribery, including as set out in section a. above, meant that corruption was integral to the operation of the CHEJVA and the CHEJVA would not have been performed in the way that it was without corruption. Accordingly (i) the CHEJVA was entered into by BHP/TCCA with the intention of committing illegal acts and one of the purposes of the CHEJVA was to commit illegal acts; and/or (ii) the CHEJVA became a contract with an illegal object."

25. Paragraphs 48-53 of the draft Particulars of Claim set out or refer to the allegations of corruption on which POB seeks to rely. As part of this exposition, paragraph 48 states

that *"[a] dramatis personae in respect of the known bribery and corruption is annexed at Schedule 1 to these Particulars of Claim"*. Schedule 1 lists the names and roles of 40 individuals. Paragraph 48 goes on to set out in general terms the nature of the alleged wrongdoing, most of which is said not to have been before the Pakistan Supreme Court. Paragraph 51 states:

> "In support of its allegations of bribery and corruption POB therefore relies on (1) the factual evidence which has been adduced in various other forums (summarised at Schedule 2 to these Particulars of Claim); and (2) such evidence as will emerge from TCCA's disclosure exercise."

Schedule 2 lists 14 witness statements and a corrigendum adduced in the ICSID proceedings in 2015 and 2016, and 11 witness statements adduced in the ICC proceedings in July 2018.

26. Skeleton arguments for the present hearing were exchanged and filed on 2 April 2020. POB's skeleton argument approaches the present hearing as a short directions hearing, with any substantive issues to be determined at a later stage. TCC's skeleton argument sets out in some detail, over the course of 25 pages, TCC's objections to the course POB now seeks to take, particularly in the light of the draft Particulars of Claim provided on 20 March.

(C) APPLICABLE PRINCIPLES

(1) The 1996 Act

(a) Section 1

27. Section 1 of the 1996 Act provides that:

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

28. Thus Colman J in *Kalmneft v Glencore International AG* [2002] 1 All ER 76 said:

> "… at least in international arbitrations, English arbitration is probably the most widely chosen jurisdiction of all. It is chosen because of the ready availability of highly skilled and experienced arbitrators operating under a well-defined regime of legal and procedural principles in what is often a neutral forum.

> Supervisory intervention by the courts is minimal and well-defined and the opportunities for a respondent with a weak case to delay the making of an award or to interfere with its status of finality are very restricted. Accordingly, much weight has to be attached to the avoidance of delay at all stages of an arbitration, both before and after an interim or final award. If the English courts were seen by foreign commercial institutions to be over-indulgent in the face of unjustifiable non-compliance with time limits, those institutions might well be deterred from using references to English arbitration in their contracts. This is a distinct public policy factor which has to be given due weight in the discretionary balance." (§ 57)

29. The need for expedition when determining arbitration claims was recently confirmed by the Court of Appeal in *Minister of Finance v International Petroleum Company* [2019] EWCA Civ 2080, [2020] 1 Lloyd's Rep 93 § 43:

> "When an application to challenge an award is made under sections 67 or 68, it is prima facie the duty of the court to determine that challenge and to do so as promptly as possible. In so doing the court is not merely giving effect to the agreement of the parties but is performing an important public function …" (§ 43)

(b) Sections 67 and 68

30. Section 67(1) of the 1996 Act provides that:

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

31. It is clear that whatever the "*eminence*", "*high standing and great experience of the tribunal*", the "*tribunal's own view of its jurisdiction has no legal or evidential value...This is so however full was the evidence before it and however carefully deliberated was its conclusion. It is also so whatever the composition of the tribunal*" (see *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763h per Lord Mance JSC at § 30).

32. It is common ground that a challenge under section 67 involves a rehearing by the court rather than a review, with the result that evidence may be adduced that was not before the arbitrators (see Bryan J's recent survey of the key authorities in *GPF GP SARL v Republic of Poland* [2018] EWHC 409 (Comm) at §§ 64-71, White Book vol 2 note 2E-256, and *Dallah*).

33. That is, however, subject to the court's general case management powers, including its power to restrict the introduction of further submissions and evidence: *GPF* (above) §§ 69-71; *Electrosteel Castings Limited v Scan-Trans Shipping & Chartering SDN BHD* [2002] EWHC 1993 (Comm) § 23.

34. Section 68(1) of the 1996 Act provides that:

> "A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
>
> A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3)."

By virtue of subsection (2), "*serious irregularity*" means an irregularity of one or more of specified types "*which the court considers has caused or will cause substantial injustice to the applicant*".

(c) Section 70(3)

35. Section 70(3) of the 1996 Act states:

> "Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process."

36. This short 28-day period was imposed in order to serve the principles of speed and finality in respect of arbitration claims: *Daewoo Shipbuilding Ltd v Songa Offshore Equinox* [2019] 1 All ER (Comm) 161 § 55. Although the Court has the power to vary the period of 28 days (CPR rule 62.9(1)), it is "*important that any challenge to an award be pursued without delay and the Court will require cogent reasons for extending time*" (Commercial Court Guide § O9.2).

37. Cooke J stated in *Leibinger v Stryker Trauma GmbH* [2005] EWHC 690 (Comm) that claimants in arbitration claims should not be permitted to "*undermine and circumvent the statutory time limits provided by Section 70(3) of the 1996 Act by issuing a Claim Form without detailed particulars and without evidence and then making an application to file and serve detailed particulars and written evidence ... after the statutory deadline*" (§ 31). Cooke J held that serving the particulars and additional evidence eight weeks after the statutory deadline was not a "*short period ... in the context of the 28 day period allowed by statute*" (ibid). The judgment does not refer to any explicit request for non-standard directions, though it appears from § 1(i) of Cooke J's judgment that the details of claim attached to the arbitration claim form had been

"*put in short form in order to facilitate compliance with the time limit under Section 70(3) of the Arbitration Act 1996 whilst stating that the claimants would thereafter seek the court's permission to put in more detailed grounds of challenge within such further time as the court might allow*".

(d) Section 73

38. Section 73 provides:

> "(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—
>
> (a) that the tribunal lacks substantive jurisdiction,
>
> (b) that the proceedings have been improperly conducted,
>
> (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or
>
> (d) that there has been any other irregularity affecting the tribunal or the proceedings,
>
> he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.
>
> (2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling—
>
> (a) by any available arbitral process of appeal or review, or
>
> (b) by challenging the award,
>
> does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling."

39. In *C v D1 and Others* [2015] EWHC 2126 (Comm), Carr J said:

> "I remind myself at the outset of the broad policy in play, as identified in *Primetrade AG v Ythan Ltd ("the Ythan")* [2006] 1 All ER 367. As Moore-Bick J said in *Rustal Trading v Gill & Duffus SA* [2000] 1 Lloyd's Rep 14 (at paragraph 19), s.73(1) is designed to ensure that if a person believes he has grounds for objecting to the constitution of the tribunal or the conduct of the proceedings, he raises those objections as soon as he is aware of

them or ought to be aware of them. It would be unfair if he took part in arbitration yet kept an objection up his sleeve and only attempted to deploy it later. Having considered that and other authorities and materials, Aikens J said this in *Primetrade* (at paragraph 59):

> "It is clear that the intention behind s.73 is to ensure that a party objecting to jurisdiction, who has decided to take part in the arbitral proceedings, should bring forward his objections in those proceedings before the arbitrators. He should not hold them in reserve for a challenge to jurisdiction in the court. I agree with Colman J that this intention reflects a principle of "openness and fair dealing" between parties who may, or may not, be bound by an arbitration clause…"" (§ 150)

40. In *JSC Zestafoni G Nikoladze Ferroalloy Plant v Ronly Holdings Ltd* [2004] EWHC 245 (Comm), [2004] 2 Lloyd's Rep 335, Colman J said:

> "64. … The principle of openness and fair dealing between the parties to an arbitration demands not merely that if jurisdiction is to be challenged under section 67 the issue as to jurisdiction must normally have been raised at least on some grounds before the arbitrator but that each ground of challenge to his jurisdiction must previously have been raised before the arbitrator if it is to be raised under a section 67 application challenging the award. This was conceded by counsel and accepted by Mr Richard Field QC then sitting as a Deputy High Court Judge in Athletic Union of *Constantinople v. National Basketball Association* [2002] 1 Lloyd's Rep 305 at p311. That concession was, in my judgment, clearly correct. Were it otherwise, the policy of the sub-section could be frustrated by introducing at the last minute grounds of challenge not hitherto raised and thereby potential causes of delay and disruption of the application to the prejudice of the opposite party.
>
> 65. The only qualification to this requirement is to be found in the words of the sub-section which follow …
>
> 66. Accordingly, the question which arises is whether at all times when Zestafoni took part in the arbitration before Mr Kinnell it did not know and could not with reasonable diligence have discovered the grounds of objection."

41. Aikens J in *Primetrade* elaborated on this point:

> "59. It is clear that the intention behind section 73 is to ensure that a party objecting to jurisdiction, who has decided to take part in the arbitral proceedings, should bring forward his objections in those proceedings before the arbitrators. He should not hold them in reserve for a challenge to jurisdiction in the court. I agree with Colman J [in *Zestafoni*] that this intention reflects a

> principle of "openness and fair dealing" between parties who may, or may not, be bound by an arbitration clause. I also agree with Colman J, therefore, that to fulfil this intention and to accord with that principle, the words "any objection" and "that objection" in section 73 must mean "any ground of objection " and " that ground of objection".
>
> 60. But what does that phrase cover? I think that it is wrong to be prescriptive or try to lay down precise limits in the abstract. It is usually easy to recognise in particular cases whether a party is attempting to raise a new ground of objection to jurisdiction on an appeal. It was obvious in the *National Basketball Association* case and the *Zestafoni* case. Take this case: in my view Primetrade raised two "grounds of objection" to the arbitrators' jurisdiction. They are: that Primetrade was not a holder of the bills of lading at any relevant time; and that it did not make a claim against the Owners; therefore it is not bound by the arbitration clause.
>
> 61. Primetrade raises the same two grounds of objection on this appeal. I accept that it raises different and broader arguments on the first ground. But in my view all those arguments are within the same "ground of objection" to the jurisdiction of the arbitrators. The argument that no right of suit is transferred to Primetrade even if it became a "holder" of the bills under section 5(2)(c) is, in my view, within that first ground."

(2) Procedural rules and guidance

42. CPR 62.3(1) provides that (subject to a non-relevant exception) *"an arbitration claim must be started by the issue of an arbitration claim form in accordance with the Part 8 procedure"*. CPR 62.4(1)(b) provides that an arbitration claim form must *"give details of any arbitration award challenged by the claimant, identifying which part or parts of the award are challenged and specifying the grounds for the challenge"*. It has been stated that the arbitration claim form must serve as the claimant's detailed statement of case unless the court orders otherwise: *Orascom TMT Investments SARL v VEON Ltd* [2018] EWHC 985 (Comm) §§ 4-5; *Exportadora de Sal S.A. de C.V. v Corretaje Maritimo Sud-Americano Inc*. [2018] 1 Lloyd's Rep. 399 § 25.

43. 62PD §§ 6.2-6.7 contain a series of standard directions which apply to arbitration claims "*unless the court orders otherwise*" (see §6.1 of PD62 and O6.1 of the Commercial Court Guide). These directions are based on the Part 8 procedure, including the provisions for filing of evidence set out in CPR 8.5. The standard directions are:

> "6.2 A defendant who wishes to rely on evidence before the court must file and serve his written evidence—
>
> (1) within 21 days after the date by which he was required to acknowledge service; or,

(2) where a defendant is not required to file an acknowledgement of service, within 21 days after service of the arbitration claim form.

6.3 A claimant who wishes to rely on evidence in reply to written evidence filed under paragraph 6.2 must file and serve his written evidence within 7 days after service of the defendant's evidence.

6.4 Agreed indexed and paginated bundles of all the evidence and other documents to be used at the hearing must be prepared by the claimant.

6.5 Not later than 5 days before the hearing date estimates for the length of the hearing must be filed together with a complete set of the documents to be used.

6.6 Not later than 2 days before the hearing date the claimant must file and serve—

(1) a chronology of the relevant events cross-referenced to the bundle of documents;

(2) (where necessary) a list of the persons involved; and

(3) a skeleton argument which lists succinctly—

(a) the issues which arise for decision;

(b) the grounds of relief (or opposing relief) to be relied upon;

(c) the submissions of fact to be made with the references to the evidence; and

(d) the submissions of law with references to the relevant authorities.

6.7 Not later than the day before the hearing date the defendant must file and serve a skeleton argument which lists succinctly—

(1) the issues which arise for decision;

(2) the grounds of relief (or opposing relief) to be relied upon;

(3) the submissions of fact to be made with the references to the evidence; and

(4) the submissions of law with references to the relevant authorities."

44. CPR 8.6(1) provides that no written evidence may be relied on at the hearing of a Part 8 claim unless it is filed in accordance with the standard directions, or unless the Court gives permission; and the accompanying White Book note states that *"[i]n the light of the amendment to the overriding objective and r.3.9 it is to be expected that the court will look closely into the reasons for, and consequences of, late served evidence before giving permission pursuant r.8.6(1)(b)"*.

45. It is clear that there will be arbitration claims, including in particular some section 67 applications, where this expeditious timetable is not appropriate. 62PD § 6.1 permits the court to order a different timetable and, of course, when deciding whether or not to do so the court must have regard to the overriding objective of enabling the court to deal with cases justly and at proportionate cost, in the sense detailed in CPR 1.1(2).

(D) SECTION 73(1): FAILURE TO TAKE OBJECTION BEFORE TRIBUNAL

46. TCC contends that POB did not rely on its corruption allegations at all at the jurisdictional stage of the ICC proceedings. It refers to POB's submission *"Respondent's Reply on Preliminary Issues"* dated 14 May 2014, which in § 17 introduced POB's reliance on the findings in the Pakistan Supreme Court judgment that:

> - "The Balochistan Mineral Concession Rules ("BM Rules of 1970") required that, in order for any relaxations of the Rules to be legal, both "hardship" and "special circumstances" had to be shown, and the reasons for any relaxations had to be recorded in writing. Since these tests were not met, the relaxations of the BM Rules of 1970 were ultra vires, void and ineffective.
> - Balochistan did not have the legal power to enter into the CHEJVA or related agreements in the manner in which it purportedly did.
> - All key provisions in the CHEJVA were subject to reliance on relaxations which were illegal and void ab initio, so the illegality of the agreement "seeps to its root", and the principle of severability cannot save any part thereof.
> - Since the CHEJVA was void and illegal, so were the other related agreements."

47. POB particularly relied on the findings of the Pakistan Supreme Court and its conclusion in § 24 of its judgment that:

> "As all the key provisions of [the] CHEJVA were made subject to a reliance on relaxations that were illegal and void ab initio, the illegality of the agreement seeps to its root. As such, no operative part of the agreement survives to be independently enforceable and the principle of severability cannot be applied to save any part thereof. The agreement is, therefore, void and unenforceable in its entirety under the law."

48. POB addressed the question of corruption in paragraphs 137-142 of the same document:

> "137. For the avoidance of doubt, Balochistan does not presently allege that the CHEJVA was obtained by corruption. Of course, corruption, given its nature, is difficult to prove. But Balochistan does not need to demonstrate corruption.
>
> 138. In some countries, at some times, corruption has been rare. Lawyers and courts operating in those circumstances can adopt regulations and conduct themselves on the basis that it is inherently unlikely that any particular public act is the result of corruption. In those circumstances, it is not surprising that strict proof is required of such an allegation (despite the difficulties inherent in obtaining such proof).
>
> 139. Regrettably, however, not all countries have been so fortunate at all times. Where there is a greater likelihood of corruption affecting public acts, the legal system can take a different view of the inherent probability of the involvement of corruption. Its public law may develop differently, in the light of this greater risk.
>
> 140. In Pakistan, the law provides that, if a public servant is found to have greater assets than can be the result of his salary or legally-acquired funds, and he is unable to prove the contrary, corruption is inferred, without the need to prove a particular bribe. It was under that provision that Mr Jaffar was convicted (the former chairman of the BDA who procured the conclusion of the CHEJVA).
>
> 141. In any event, this is the law of Pakistan, and the law on which the Supreme Court reached its decision. In such circumstances, the Supreme Court cannot be criticised for making the statements it did. There was certainly evidence available from which one might infer that corruption was involved (chiefly, of course, that we now know that Mr Jaffar was a corrupt individual, but also his conduct in relation to the conclusion of the CHEJVA).
>
> 142. However, whether or not the Supreme Court was right to refer to corruption is neither here nor there. As the Claimant has rightly accepted, and as the Tribunal has already found in this arbitration, the Supreme Court did not conclude that Balochistan did not have power to make the relaxations or enter into the illegal CHEJVA and related contracts as a result of corruption. Whether or not there was actually corruption is irrelevant to the binding force of the Supreme Court's conclusions."

49. TCC submits that §§ 137 and 142 quoted above, in particular, make clear that POB did not rely on alleged corruption as a ground on which the arbitration agreement was void or the ICC tribunal lacked jurisdiction.

50. The ICC tribunal did not consider that the Supreme Court of Pakistan had, in any event, made any relevant finding based on corruption: the tribunal said:

> "Although the Supreme Court said (at para 116) that the record showed "extensive irregularities and corruption" it made no finding, and did not invalidate the Agreements on this ground. No separate arguments or evidence have been put before this Tribunal, and therefore the Tribunal makes no ruling on this question." (Rulings on Preliminary Issues, § 396)

The final sentence quoted above indicates that POB did not seek to advance any distinct argument, or adduce any evidence, of corruption when challenging the ICC tribunal's jurisdiction.

51. After the ICC tribunal's jurisdictional ruling in October 2014, POB sought to introduce allegations of corruption as being relevant to the merits of the claim in the arbitration, but apparently not to any issue of jurisdiction. In its Supplemental Counter-Memorial dated 11 January 2016 (submitted on its behalf by Allen & Overy), POB said in a section entitled *"TCC's Corruption and its Legal Consequences"*:

> **"11.1 Jurisdiction**
>
> 207. There is well known precedent, in the form of Judge Lagergren's 1963 award, for an ICC tribunal to hold that the existence of bribery can lead to a finding that a tribunal does not have jurisdiction. Nevertheless, contemporary arbitral practice has moved away from finding that corruption has an impact on the jurisdiction of a tribunal and has instead given effect to the doctrine of separability. This doctrine is enshrined in the laws and rules applicable to these proceedings.
>
> 208. An exception to this practice exists, as a matter of English law, where "bribery impeaches the arbitration clause in particular". The GoB does not seek to pursue the argument that the arbitration agreement in the CHEJVA is vitiated by TCC's corruption. Accordingly, the GoB accepts that the Tribunal has jurisdiction to determine TCC's claims."

52. Based on these materials, and having regard to the authorities referred to in section (C)(1)(d) above, TCC appears to have at least a *prima facie* case that any objection to the effect that the ICC tribunal lacked jurisdiction because the CHEJVA was procured by means of corruption is precluded by section 73(1) of the 1996 Act.

53. POB submitted that the point could not fairly be dealt with at the hearing before me, because the point had been raised so late i.e. in TCC's skeleton argument dated 2 April 2020. POB argued that any section 73(1) issue should be dealt with at a later date, following the service by TCC of its Defence. Against that, it might be objected that (a) the point was at least implicitly raised by the evidence referred to in § 18 above, and (b) if the point was raised late, that was in turn because it was only upon provision of POB's draft Particulars of Claim on 20 March 2020 that it became clear that POB was

seeking to mount a challenge to the ICC tribunal's jurisdiction based on the argument that the CHEJVA was procured by corruption.

54. Although there is some force in these latter points, in all the circumstances I do not believe it would be fair to resolve the section 73(1) issue at this stage, in the context of a hearing of an application whose scope is limited to the question of whether or not non-standard directions should be given, and where the section 73(1) objection was explicitly raised only in TCC's skeleton argument. However, the section 73(1) issue should in my judgment be resolved promptly and before the claim proceeds further. It is clear from the features of the draft Particulars of Claim referred to in §§ 24-25 above that the corruption allegations, if allowed to go forward, would have major implications for disclosure, evidence and trial in this claim. It would be inconsistent with the considerations outlined in section (C)(1)(a), and unjust to TCC, for the allegations to be litigated all the way to a final hearing – at the expense of great cost and delay – before deciding whether they can properly be advanced in the first place. It seems likely that even to require TCC to plead to the corruption allegations would be onerous and time-consuming. Consequently, the appropriate course is for the section 73(1) issue to be resolved first, in effect as a kind of preliminary issue.

(E) PRECLUSIVE EFFECT OF ICSID DETERMINATION

55. TCC argues that the ICSID Tribunal's dismissal of the corruption allegations has preclusive effect in these proceedings in the same way that it had preclusive effect before the ICC tribunal. It says that (as the ICC tribunal found) POB is estopped from raising these allegations again.

56. Although at first blush this might appear to be a short point that could usefully be decided (if necessary, in light of the decision on the section 73(1) point) at a preliminary hearing, I am provisionally of the view that it will probably turn out to be too complex/inconclusive because (a) issues may arise as to governing law (cf the POB submission mentioned in § 67 below), (b) POB contends that the ICSID tribunal had no jurisdiction over POB and (c) counsel for POB told me at the hearing that the ICSID award would itself be subject to annulment proceedings. As a result, though I will hear any further submissions the parties might wish to make in this regard, I am currently of the view that it should not be included in the (or a) preliminary issue hearing.

57. TCC also contends that to permit POB to advance its corruption allegations as a jurisdictional objection would in effect permit POB impermissibly to challenge the ICC's decision on the merits of the claim before it. TCC refers to the statement of Carr J in *C v D1 and Others* that a claimant cannot challenge an arbitral tribunal's findings on the merits as part of a section 67 challenge: *"[i]n the absence of a challenge to that finding, the finding is final and binding, enforceable under s.66 of the 1996 Act and under the New York Convention internationally. Any challenge under s.67 of the 1996 Act has to be to a finding on jurisdiction"* (§ 84).

58. This point appears to be closely linked to TCC's section 73(1) argument and to be suitable for determination as part of the preliminary issue hearing envisaged in § 54 above.

(F) SECTIONS 70(3) AND 73(2): TIME LIMIT

59. Relying in particular on the procedural provisions and case law summarised in sections (C)(1)(c) and (C)(2) above, TCC submits that it is too late for POB to advance certain of the allegations in its draft Particulars of Claim, or to seek to adduce further evidence in support of them. This submission has two main strands.

60. First, as regards the corruption allegations at least, TCC says POB did not put them forward in its arbitration claim form and therefore cannot do so now. The claim form states *inter alia* that (a) the Supreme Court of Pakistan declared the CHEJVA void due to the existence of corruption and (b) the ICC tribunal lacked jurisdiction because *"as a matter of the law of Pakistan the CHEJVA is void for the reasons set out in the Supreme Court Judgment and the arbitration agreement is not separable from it".* However, TCC submits, the Supreme Court of Pakistan did not in fact find the CHEJVA void on the grounds of corruption (see §§ 48-50 above), and so the cross-reference in POB's arbitration claim form to the reasons for that court's findings is insufficient to bring within the claim form the corruption allegations POB now seeks to advance.

61. Moreover, TCC submits, the Supreme Court's decision related to the CHEJVA as a whole, not the arbitration agreement. It was not asked to rule on the ICC tribunal's jurisdiction, and in any event the separability of the arbitration agreement is a question of English law because the tribunal is seated here. The ICC tribunal recorded that it was common ground between the parties that the (alleged) invalidity of the CHEJVA and related agreements did not automatically lead to the invalidity of the arbitration agreement contained therein, and that the validity of the arbitration agreement depends on the law governing the arbitration agreement (ICC Ruling on Preliminary Issues, § 186). That view is also supported by *National Iranian Oil Company v Crescent Petroleum Company International* [2016] EWHC 510 (Comm) (see in particular §§ 7-15).

62. This contention will become relevant only if POB's corruption allegations are not precluded by section 73(1) of the 1996 Act. If it does arise, it will involve a question of construction of the scope of the arbitration claim form, read alongside the Pakistan Supreme Court Judgment and (possibly) consideration of which law governs the separability issue. Like the section 73(1) issue itself, it is not a question that can fairly be resolved now but, in my view, can and should be considered at the same time as the preliminary issue referred to in § 54 above.

63. Secondly, in relation to both POB's corruption allegations and the remainder of its case, TCC submits that there is no justification for making non-standard directions that would permit POB to adduce further evidence over and above the short witness statement served with its claim form. It says the arguments POB seeks to advance are not new ones, and POB has had approximately 5 years to prepare its case: the time between the ICC tribunal's jurisdictional decision in October 2014 and the deadline for challenging the Award in August 2019.

64. This point should in my judgment be considered at the same time as the first one mentioned above. It would be inappropriate to consider it in the abstract until the section 73(1) issue and the question mentioned in §§ 60-62 above has been considered, because the nature and scope of the allegations POB is *prima facie* entitled to pursue may have a bearing on whether non-standard directions are appropriate and whether

POB should be disallowed from seeking to adduce written evidence over and above that set out in or accompanying its arbitration claim form. For example, if POB is entitled to allege that the ICC tribunal lacked jurisdiction because the CHEJVA was procured by corruption, it may be unrealistic to take the view that it ought to have served all its witness statements, documentary evidence and any expert evidence with its arbitration claim form (without the court controlling the former or having given permission for the latter). Whilst in one sense POB had five years in which to prepare its jurisdiction challenge, it is arguable that (as POB submits) it would not be reasonable to expect it to have prepared a case until the outcome of the Award were known – after all, POB might have succeeded on the merits of the issues determined in the Award.

65. Even if POB is not entitled to pursue the corruption allegations, there are other parts of its claim which may make non-standard directions appropriate. For example, an important part of its case (and one which appears to have been central to the findings of the Supreme Court of Pakistan) is that the CHEJVA is void because certain 'relaxations' of mining rules were granted in excess of authority and *ultra vires* (arbitration claim form § 5(vi)). That issue seems likely to require evidence of foreign law, and in those circumstances it is arguable that non-standard directions are appropriate.

66. I consider the appropriate course would be to consider these issues in the context of the outcome of the preliminary issues referred to in §§ 54, 57-58 and 60-62 above.

(G) POB'S SECTION 68 APPLICATION

67. POB submits that this application also gives rise to a number of complex issues, such as questions of private international law raised in section III of the arbitration claim form about whether applying the English law concept of issue estoppel in the ICC arbitration to certain issues determined in the ICSID arbitration (which is governed by a hybrid of laws including international investment law, US law and public international law) is consistent with the parties' agreement to apply the law of Pakistan to the substance of their dispute in respect of the CHEJVA. POB suggests that an exchange of pleadings to identify the precise issues in dispute is likely to be of real benefit to the parties and the court: otherwise there is a risk that, if the case proceeds on the basis of the three or so relevant pages of the arbitration claim form and the three or so relevant pages of the responsive witness statement of Ms Reid, the parties will fully understand the detail of each other's cases only when they exchange skeleton arguments just before the final hearing.

68. POB proposes bifurcation, with the section 68 application being dealt with, if necessary, after the outcome of its section 67 application, in order to save resources and court time. Although that would delay the section 68 determination in the event that the section 67 application fails, POB submits that the clear benefits of bifurcation outweigh its costs.

69. In my view the bifurcation issue is best considered when the shape of the section 67 application has been determined, and it should therefore be considered after the issues referred to in §§ 54, 57-58, 60-62 and 63-66 above have been resolved.

(H) CONCLUSIONS

70. I shall hear from the parties as to the appropriate form of order. However, for the reasons given above I conclude that before TCC is required to serve a Defence or the arbitration claim proceeds further, there should be a hearing in the near future to determine (in substance) the following issues:

    i) whether POB's allegation to the effect that the ICC tribunal lacked jurisdiction because the CHEJVA was procured by corruption (or any other of POB's allegations) is/are precluded by section 73(1) of the 1996 Act (§ 54 above);

    ii) whether POB's allegation to the effect that the ICC tribunal lacked jurisdiction because the CHEJVA was procured by corruption seeks impermissibly to challenge the ICC tribunal's decision on the merits of the claim before it (§§ 57-58 above);

    iii) whether POB cannot pursue its jurisdiction objection based on corruption on the basis that it was not included in its claim form (§§ 60-62 above);

    iv) as regards POB's claim in general, (a) what directions (if any) are appropriate; and in particular (b) whether directions should permit POB to adduce further evidence over and above the witness statement and exhibits served with its claim form (§§ 63-66 above); and

    v) whether POB's section 68 application should be deferred to be dealt with only after its section 67 application has been determined (§§ 67-69 above).