Neutral Citation Number: [2019] EWHC 1151 (Comm)

Claim No: CL-2018-000704

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/05/2019

Before :

MR JUSTICE ROBIN KNOWLES CBE

- -

IN THE MATTER OF THE ARBITRATION ACT 1996

Between :

(1) MINISTER OF FINANCE (INCORPORATED)
(2) 1MALAYSIA DEVELOPMENT BERHAD — **Claimants**

- and –

(1)INTERNATIONAL PETROLEUM INVESTMENT COMPANY
(2)AABAR INVESTMENTS PJS — **Defendants**

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Luke Parsons QC, Joseph Sullivan and Tom Nixon (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimants**
Ewan McQuater QC, Farhaz Khan and Nathaniel Bird (instructed by **Clifford Chance LLP**) for the **Defendants**

Hearing dates: 11-12 March 2019

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JUDGMENT (in public)

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version may be treated as authentic

MR JUSTICE ROBIN KNOWLES CBE

Mr Justice Robin Knowles:

Introduction

1. The Claimants ("MOF" and "1MDB") are, respectively, established and incorporated in Malaysia. The Defendants ("IPIC" and "Aabar") are incorporated in the Emirate of Abu Dhabi.

2. The parties are, on the face of things, the parties to three arbitration agreements providing for arbitration seated in London.

3. The first of those arbitration agreements was made when the parties became, again on the face of things, parties to a Binding Term Sheet dated 28 May 2015 ("the Binding Term Sheet"). The other two were made when, on the face of things, they became parties to a Settlement Deed and a Supplemental Deed each dated 22 April 2017 (together, "the Settlement Deeds").

4. The Binding Term Sheet and the Settlement Deeds each purported to compromise by agreement, rights and liabilities between MOF and 1MDB on the one hand and IPIC and Aabar on the other hand.

5. An arbitration ("the First Arbitration") was commenced on 13 June 2016 under the arbitration agreement in the Binding Term Sheet. The Settlement Deeds followed 10 months later. In accordance with the terms of those Settlement Deeds, on 9 May 2017 a consent award ("the Consent Award") was made by the arbitral tribunal in the First Arbitration.

6. From 3 April 2009 until 9 May 2018, and including at the date of the Consent Award, Mr Najib Razak ("Mr Najib") was the Prime Minister of Malaysia. In broadest summary, MOF and 1MDB allege that Mr Najib conspired with others to misappropriate in excess of US$3.5 billion and has sought to conceal and prevent investigation of the conspiracy.

7. Although, as appears below, allegations are made against IPIC and Aabar, the victims of the conspiracy are said by MOF and 1MDB to include "IPIC, [Aabar] and/or 1MDB" (Response to Request for Arbitration dated 16 January 2019; see also the witness statement of Mr Richard Little for MOF and 1MDB at paragraph 6).

8. In agreeing the Binding Term Sheet and in due course the Settlement Deeds and the Consent Award Mr Najib furthered the conspiracy, so allege MOF and 1MDB. In providing confidentiality of process, the choice of arbitration is said to be part of the attempts to conceal and prevent investigation of the conspiracy. MOF and 1MDB allege that IPIC and Aabar knew that Mr Najib was acting contrary to the interests of MOF and 1MDB in bringing them about. IPIC and Aabar deny the allegations made against them.

9. The choice of seat for the First Arbitration engaged the supervisory jurisdiction of the English Court. MOF and 1MDB seek to invoke that supervisory jurisdiction in respect of the First Arbitration to challenge the Consent Award. Their challenges

are made using the supervisory jurisdiction found specifically in sections 67 and 68 of the Arbitration Act 1996 ("the 1996 Act").

10. Under section 67 it is said that the tribunal did not have substantive jurisdiction to make the Consent Award. Under section 68 it is said that there was serious irregularity affecting the tribunal, the First Arbitration or the Consent Award. Specifically, invoking section 68(2)(g) of the 1996 Act, it is the allegation of MOF and 1MDB that the Consent Award was procured by fraud or the way in which it was procured was contrary to public policy. In evidence in support of the arbitration claim form that is currently before this court MOF and 1MDB contend that the Settlement Deeds are void and not binding upon them.

11. IPIC and Aabar have responded by commencing arbitrations ("the Second Arbitrations") against MOF and 1MDB under the arbitration agreements in the Settlement Deeds. They have also applied to stay the section 67 and 68 challenges in favour of the Second Arbitrations. They say they are entitled to a stay as of right under section 9 of the 1996 Act or that the court should exercise its case management powers or inherent jurisdiction to grant a stay.

12. In turn MOF and 1MDB have applied for an injunction under section 37 of the Senior Courts Act 1981 against IPIC and Aabar requiring them not to pursue the Second Arbitrations pending the outcome of the section 67 and 68 challenges.

13. This judgment concerns the applications for a stay and for an injunction.

Other applications

14. The arbitration claim form raising the section 67 and 68 challenges was issued outside the time limits provided by the 1996 Act. For reasons given ex tempore on 11 March 2019, I refused an application by IPIC and Aabar to strike out the claim form (an application based on a contention that MOF and 1MDB had not applied to extend time).

15. The application to extend time will itself be heard in May after the parties have completed the preparation and filing of their evidence in that connection. It remains open to the court to postpone the consideration of the extension of time to the substantive hearing of the section 67 and 68 challenges. For now, it must be kept in mind that it is an open question whether time will be extended.

16. MOF and 1MDB have a further application, on which full argument has not yet been heard, that the section 67 and 68 challenges be heard in public.

The Consent Award

17. The Binding Term Sheet was summarised as follows in a recital to the Settlement Deeds:

> "The Parties entered into [the Binding Term Sheet] in connection with the settlement, release and discharge of all outstanding rights, obligations and liabilities as between the 1MDB Group and the IPIC Group (each as … defined …), in exchange for the creation of new rights, obligations and liabilities between them and [MOF] undertook to procure the satisfaction by 1MDB of all its obligations, to perform those obligations itself and to indemnify and make certain payments to the IPIC Group …".

18. The Binding Term Sheet is described by MOF and 1MDB as "grossly disadvantageous" to them. They say their agreement to the settlement in it was, to the knowledge of IPIC and Aabar procured by Mr Najib in his interests and contrary to the interests of MOF and 1MDB. IPIC and Aabar deny the allegations made against them.

19. In due course, on 13 June 2016, IPIC and Aabar commenced the First Arbitration seeking an award from the arbitral tribunal and against MOF and 1MDB based on the Binding Term Sheet. A distinguished, independent, expert and experienced arbitral tribunal was appointed.

20. The parties had filed statements of case in the First Arbitration by the time of the Settlement Deeds dated 22 April 2017.

21. On 24 April 2017 MOF and 1MDB withdrew counterclaims in the First Arbitration on the basis that that withdrawal was without prejudice to any right to assert those counterclaims in another forum.

22. The claims remaining were then settled under the terms of the Settlement Deeds, which provided for the issue of the Consent Award. MOF and 1MDB describe the settlement set out in the Settlement Deeds as "grossly unfair" to them and say their agreement to the settlement was, to the knowledge of IPIC and Aabar, procured by Mr Najib in his interests and contrary to the interests of MOF and 1MDB. IPIC and Aabar deny the allegations made against them.

23. Under the Consent Award:

    a. The Binding Term Sheet was stated to be valid and binding upon IPIC and Aabar and MOF and 1MDB until terminated by the Settlement Deeds.

    b. MOF and 1MDB were to pay to IPIC by 31 December 2017 approximately US$1.2 billion (and interest) in instalments.

    c. In relation to Deeds of Guarantee executed in May 2012 and October 2012 by IPIC ("the Guarantees") in respect of certain bonds ("the Bonds") it was stated that US$102,725,000 had been paid by IPIC, and that MOF and 1MDB were obligated to indemnify IPIC in respect of all sums which might be paid thereafter by IPIC or any member of IPIC's Group or for which they might become liable under or in relation to the Guarantees up to the full sum potentially falling due under the Guarantees of approximately US$4.7 billion.

    d. The First Arbitration was terminated.

24. No decision on the underlying merits was made by the arbitral tribunal in the First Arbitration.

The Second Arbitrations

25. The Settlement Deeds pursuant to which the Consent Award was made each contained an arbitration agreement in these terms:

> "Any dispute arising from or in connection with this Deed (including a dispute relating to the existence, validity or termination of this Deed or any non-contractual obligation arising out of or in connection with this Deed or the consequences of its nullity …) shall be finally resolved by arbitration under the LCIA Rules which are deemed to be incorporated by reference into this Clause. …The seat of arbitration shall be London, England and the language of the arbitration shall be English. The governing law of this arbitration clause shall be the substantive law of England."

26. The requests for arbitration to commence the Second Arbitrations were made by IPIC and Aabar on 21 November 2018 with MOF and 1MDB serving their responses to those requests on 16 January 2019.

27. The requests for arbitration state that for over twelve months, 1MDB and MOF complied with their obligations under the Settlement Deeds and the Consent Award, with IPIC receiving payment of the US$1.2 billion and 1MDB and MOF paying the interest due under the Bonds so there was no call on IPIC by bondholders under the Guarantees.

28. For their part, 1MDB and MOF highlight that until 9 May 2018, that is, just over 12 months after the Settlement Deeds, Mr Najib continued as Prime Minister and Minister of Finance. He was replaced as both when the Barisan National Coalition lost their majority on 9 May 2018 in the General Election in Malaysia.

29. The Settlement Deeds had included within a definition of "Event of Default" any assertion by any member of the 1MDB Group or MOF that any of them were owed any obligation or liability by any member of the IPIC Group in relation to what were described as any Past Arrangements save for the rights and obligations under the relevant Deed, and any demand, action, claim or proceeding whatsoever by any member of the 1MDB Group or MOF against any member of the IPIC Group made before 31 December 2020, provided that IPIC and Aabar were not in breach of any of the provisions of the Deed. The first of the two Settlement Deeds stated that the Parties agreed that the Consent Award should be a final, binding and non-appealable determination, and that in agreeing such Consent Award, the parties had waived any and all rights they may have to challenge the jurisdiction of the arbitral tribunal, challenge the Consent Award on grounds of jurisdiction or for any other reason, and resist enforcement of the Consent Award for any reason and in any jurisdiction.

30. The requests for arbitration alleged that recently, however, Events of Default had occurred entitling IPIC and Aabar to demand immediate payments of certain sums.

Some of these Events of Default had occurred, it was alleged, because MOF and 1MDB had failed to comply with their obligations under the Settlement Deeds.

31. The requests stated, under a heading referring to challenging the Consent Award, that on 30 October 2018, the Attorney General of Malaysia made a public statement in which he stated that: “The Government of Malaysia will apply to the Courts of England for an order to set aside [the] Consent Award …”. Under a heading referring to claiming the return of the monies paid under the Consent Award the requests stated that the Attorney General’s Statement also stated that the application would claim a right to the return of US$1.46 billion already paid under the Consent Award.

32. In the Second Arbitrations IPIC and Aabar seek, among other things, declarations from the arbitral tribunal that the Settlement Deeds are “valid and binding and … not liable to be set aside”. In addition to the above statement by the Attorney General of Malaysia, the issue or service of the arbitration claim form currently before this court is also alleged by IPIC and Aabar to constitute an Event of Default under or breach of the Settlement Deeds. Among other things the consequences are said to be an obligation to pay Bond Interest Liability of US$ 714,474,561 calculated as at 20 November 2018.

33. As with the First Arbitration, a distinguished, independent, expert and experienced arbitral tribunal has been appointed in the Second Arbitrations. Without losing sight of the objections of MOF and 1MDB to arbitration as a forum, I note that the tribunal in the Second Arbitrations was appointed after the departure of Mr Najib, and with the availability to all parties of advice from their current legal teams on constituting the membership of the tribunal.

34. As for the First Arbitration, the choice of seat for the Second Arbitrations engaged the supervisory jurisdiction of the English Court.

The central issue on these applications

35. With the benefit of argument (and subject to the point on extension of time), it does not appear there is an issue between the parties that the question whether the Consent Award should be set aside or declared to be non-binding is ultimately a question for the court under its supervisory jurisdiction over the First Arbitration.

36. The central issue between the parties is whether an underlying question should be determined by the court within the section 67 and 68 challenges or by the arbitral tribunal in the Second Arbitrations. The underlying question is whether, as MOF and 1MDB contend, the Settlement Deeds are void and not binding upon them.

37. In saying this I do not seek to oversimplify, or to constrain the proper development of the resolution of the dispute by any of the parties. I am acutely aware of the complexity of the overall dispute, and that there may ultimately be many questions for decision, and that any appreciation of the facts by me at this point may prove at least incomplete.

Party autonomy and the supervisory jurisdiction of the Court

38. The significance of the principle of autonomy of the parties is captured in the well-known passage from Lord Hoffmann in West Tankers (Inc) v RAS Riunione Adriatica di Sicurta SpA and Others [2007] UKHL 4; [2007] 1 Lloyd's Rep 391 at [17] ("The Front Comor"):

> "17. But perhaps the most important consideration is the practical reality of arbitration as a method of resolving commercial disputes. People engaged in commerce choose arbitration in order to be outside the procedures of *any* national court. They frequently prefer the privacy, informality and absence of any prolongation of the dispute by appeal which arbitration offers. Nor is it only a matter of procedure. The choice of arbitration may affect the substantive rights of the parties, giving the arbitrators the right to act as *amiables compositeurs*, apply broad equitable considerations, even a *lex mercatoria* which does not wholly reflect any national system of law. The principle of autonomy of the parties should allow them these choices.

39. Turning in the same context to the role of a court and its supervisory jurisdiction Lord Hoffmann continued at [18]-[20]:

> "18. Of course arbitration cannot be self-sustaining. It needs the support of the courts; …. Different national systems give support in different ways and an important aspect of the autonomy of the parties is the right to choose the governing law and seat of the arbitration according to what they consider will best serve their interests."
>
> 19. … the jurisdiction to restrain foreign court proceedings … is generally regarded as an important and valuable weapon in the hands of a court exercising supervisory jurisdiction over the arbitration. It promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court. …
>
> 20. Whether the parties should submit themselves to such a jurisdiction by choosing this country as the seat of their arbitration is, in my opinion, entirely a matter for them. …"

40. Where, as here, the parties have chosen England and Wales or Northern Ireland as the seat of the arbitration section 2(1) of the 1996 Act applies Part 1 of that Act. Section 1, the first section of Part 1 of the 1996 Act, provides:

> "1 General principles.
>
> The provisions of this Part are founded on the following principles, and shall be construed accordingly—
>
> (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
>
> (c) in matters governed by this Part the court should not intervene except as provided by this Part."

41. By section 4 the provisions of Part 1 are divided between mandatory provisions and non-mandatory provisions. Mandatory provisions (listed in Schedule 1) "have effect notwithstanding any agreement to the contrary". Non-mandatory provisions "allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement". Section 4(3) confirms that the parties "may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided".

42. Sections 67 and 68 of the 1996 Act form part of the court's supervisory jurisdiction. They are listed in Schedule 1 to the 1996 Act as mandatory provisions.

43. Longmore LJ in C v D [2007] EWCA Civ 1282; [2008] Bus LR 843, at [16]-[17] highlighted the way in which it is the parties' agreement that provides the basis of the court's supervisory jurisdiction, saying: "… a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award." He expressed the view that the law had been stated correctly by Colman J in A v B [2007] 1 Lloyd's Rep 237 when Colman J had said:

> "… an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration."

Challenges under section 67 and 68 of the 1996 Act

44. Sections 67 and 68 are in these terms:

> "67. Challenging the award: substantive jurisdiction.
>
> (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court -
>
> (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
>
> (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.
>
> A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.

(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order –

(a) confirm the award,

(b) vary the award, or

(c) set aside the award in whole or in part.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

68. Challenging the award: serious irregularity.

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

(2) 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).

(3) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant -

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(4) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may –

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(5) The leave of the court is required for any appeal from a decision of the court under this section."

45. Although found in statute, as seen above these provisions are still rooted in the parties' agreement.

46. For MOF and IMDB Mr Luke Parsons QC, appearing with Mr Joseph Sullivan and Mr Tom Nixon, emphasises, referring to section 1(b) of the 1996 Act, that the right of a party to invoke the court's supervisory jurisdiction is additionally a statutory right and a "safeguard[] necessary in the public interest". In <u>Department of Economics, Policy and Development of the City of Moscow and Another v the Bankers Trust Co and Another</u> [2004] EWCA Civ 314; [2005] QB 207 at paragraphs [3] and [30], Mance LJ (as he then was) expressly gave section 68 as an example of a safeguard necessary in the public interest.

47. Mr Parsons QC adds that the courts, when called upon to exercise the supervisory role assigned to them in the public interest, are acting as a branch of the state, not a mere extension of the consensual arbitral process. In <u>Department of Economics</u> at [34] Mance LJ put things in this way:

> "The courts, when called upon to exercise the supervisory role assigned to them under the [1996 Act], are acting as a branch of the state, and not as a mere extension of the consensual arbitral process. Nevertheless, they are acting in the public interest to facilitate the fairness and well-being of a consensual method of dispute resolution …."

48. These considerations, contend MOF and 1MDB, support the proposition that the right of a party to invoke the court's supervisory jurisdiction does not rest on party autonomy alone.

49. In one sense that is right. On the other hand, without the exercise of party autonomy by the parties in their choice of (here) England as the seat of the arbitration the supervisory jurisdiction under sections 67 and 68 of the 1996 Act would not engage.

The validity of the arbitration agreements

50. Of course the Second Arbitrations are founded on arbitration agreements that are themselves in the Settlement Deeds. Notwithstanding this location the arbitration agreements are to be treated as separate agreements under the doctrine of separability reflected in section 7 of the 1996 Act.

51. That said, it is still relevant to keep in mind that they are, like the Settlement Deeds, said by MOF and 1MDB to be void and not binding on them, and moreover that in providing confidentiality of process they are said to be part of the attempts to conceal and prevent investigation of the conspiracy.

52. Notwithstanding the latter features, the arbitral tribunal in the Second Arbitrations is, under section 30(1)(b) of the 1996 Act and applying the principle of *kompetenz kompetenz*, to be treated for the present as entitled to rule (first) as to whether the arbitration agreements underpinning the Second Arbitrations are valid. Once the tribunal has ruled, the matter may or may not then come before the court under its supervisory jurisdiction over the Second Arbitrations.

53. At this stage MOF and 1MDB say in their Responses to Arbitration in the Second Arbitrations that in light of the position of 1MDB and MOF as to the wide-ranging scope of the fraud, the arbitral tribunal is likely to have to deal with jurisdictional issues, including whether the arbitration agreements contained with the Settlement Deeds were procured by fraud. 1MDB and MOF reserve all their rights in this regard.

54. MOF and 1MDB do not, at least for present purposes, press the question whether and if so how the decision in Fiona Trust & Holding Corporation and Others v Privalov and Others [2007] UKHL 40; [2007] All ER 951 affects their ability to involve the courts now in a challenge to the validity of the arbitration agreements. In their written submissions, IPIC and Aabar stated that in Fiona Trust "the House of Lords held that the alleged procurement of a contract by fraud … would not invalidate an arbitration agreement contained within the same contract". Put in those terms the statement perhaps does not accommodate the point that in a particular case the alleged fraud may impeach the arbitration agreement directly and specifically, as well as impeaching the contract within which that agreement is contained.

The jurisdiction of the arbitrators in the Second Arbitration and the supervisory jurisdiction of the court in respect of the First Arbitration

55. Section 4(1) of the 1996 Act

MOF and 1MDB do however contend that if matters falling within the court's supervisory jurisdiction are caught by the arbitration agreements, then those agreements have no effect to that extent. This, it is argued, is because of section 4 of the 1996 Act, the section that (as we have seen) makes clear that sections 67 and 68 are mandatory provisions.

56. As noted above, section 4(1) provides for sections 67 and 68 to "have effect notwithstanding any agreement to the contrary". In my judgment this means that whatever the arbitration agreements say (or for that matter whatever the Settlement Deeds say) it is the court that will rule under section 67 whether the tribunal in the First Arbitration did not have substantive jurisdiction to make the Consent Award. So too the court will rule under section 68 whether there was serious irregularity affecting that tribunal, the First Arbitration or the Consent Award. That includes ruling on the allegation of MOF and 1MDB under section 68(2)(g) of the 1996 Act that the Consent Award was procured by fraud or the way in which it was procured was contrary to public policy.

57. This does not amount to saying that the arbitration agreements have, in any respect, no effect. Section 4 is dealing with the continued effectiveness of sections 67 and 68, not with the effectiveness or lack of effectiveness of an arbitration agreement.

58. <u>Clause 5.4 of the (first) Settlement Deed</u>

59. As a separate point, Clause 5.4 of the (first) Settlement Deed states that the parties have waived any and all rights they may have to challenge the jurisdiction of the tribunal in the First Arbitration, challenge the Consent Award on grounds of jurisdiction or for any other reason, and resist enforcement of the Consent Award. Where does this leave the supervisory jurisdiction of the court in respect of the First Arbitration?

60. Mr Ewan McQuater QC, appearing with Mr Farhaz Khan and Mr Nathaniel Bird for IPIC and Aabar, made clear in the course of argument that IPIC and Aabar did not seek to rely on Clause 5.4 to seek to prevent MOF and 1MDB from making their application under section 67 and 68. I mean no disrespect when I say that of course only takes things so far. It says only that an injunction is not sought. It deals only with the position before the court (applying those sections of the 1996 Act), rather than the position before the arbitral tribunal in the Second Arbitrations.

61. Moreover Clause 5.4 (and, for that matter, other clauses of the Settlement Deeds) can operate to deter or to purport to penalise a party who invokes the court's supervisory jurisdiction. There is or may be, for example, a question whether the Settlement Deeds may validly treat a challenge to the Consent Award under the court's supervisory jurisdiction as a breach of contract or visit (by contract) adverse financial consequences on MOF and 1MDB for having commenced that challenge.

62. These are aspects that will likely need to be addressed. In some cases there might be an urgent preliminary question. However in the present case Clause 5.4 is not, at least yet, in practice affecting the ability of MOF and 1MDB to ask the Court to exercise its supervisory jurisdiction. In the present case it is possible to contemplate that at least some of the aspects might be dealt with, at least initially, along with other aspects of what I have termed the underlying question, namely whether, as

MOF and 1MDB contend, the Settlement Deeds are void and not binding upon them.

63. Overlapping or concurrent jurisdiction

Therefore as things stand both the court (by reason of its supervisory jurisdiction over the First Arbitration) and the arbitration tribunal in the Second Arbitrations have jurisdiction and a jurisdiction for which the answer to the underlying question (i.e. whether, as MOF and 1MDB contend, the Settlement Deeds are void and not binding upon them) is material.

64. The possibility of overlapping or concurrent jurisdiction has been recognised on the authorities. Thus in Sheffield United Football Club Ltd v West Ham United Football Club plc [EWHC] 2855 (Comm); [2009] 1 Lloyd's Rep 167 Teare J observed at [40]:

> "There might in some cases, such as the present, be an overlap between the powers of the arbitral tribunal to determine issues of breach between the parties concerning their contractual relationship and the court's supervisory jurisdiction when it is invoked in support of an arbitration agreement. … whilst the parties have agreed that disputes between them should be referred to arbitration they have also agreed, by reason of the seat of the arbitration being England, that the English court is the forum which can exercise a supervisory jurisdiction in support of the arbitration …."

65. In Nomihold Securities Inc v Mobile Telesystems Finance SA [2012] EWHC 130 (Comm); [2012] 1 Lloyd's Rep 442 Andrew Smith J recognised, as he put it (at [51]):

> "… an area of overlapping or concurrent jurisdiction so that matters can fall within the compass both of an arbitration agreement and of a (typically implicit) agreement to supervisory jurisdiction."

66. Both Teare J and Andrew Smith J referred to Raphael, The Anti-Suit Injunction, 2008. Andrew Smith J quoted with specific approval a passage at para 7-38 that includes the following:

> "… by contracting for arbitration in England under English law, the parties have impliedly agreed that the usual ancillary proceedings may be brought before the English court to assist and protect the arbitration. These include claims for an anti-suit injunction, which are therefore not a breach of even broadly worded arbitration clauses. This implied agreement operates as an exception to the general scope of the arbitration clause, and permits the court and the arbitrations to exercise a concurrent jurisdiction."

67. Where there is concurrent jurisdiction, the question whether proceedings before one or other forum should be stayed to allow proceedings before the other to proceed first, or whether the parties should be ordered to desist from proceedings before one or other forum while proceedings before the other proceed first, may be of high importance.

A stay under section 9 of the 1996 Act of the section 67 and 68 challenges

68. Section 9 of the 1996 Act is also listed in Schedule 1 to the 1996 Act as a mandatory provision. It is in these terms:

> "(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> …
>
> (1) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.
>
> (2) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.
>
> (3) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.
>
> (4) If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings."

69. There can in my judgment be no stay under section 9 in the present case. Given the arguments made on either side it is important to be clear why.

70. It is not because the court's supervisory jurisdiction under sections 67 and 68 in relation to the First Arbitration takes priority over the Second Arbitrations. Mr Parsons QC points out that the sections are mandatory provisions, and that they apply in the public interest. But they have these qualities as a result of the parties' (assumed) agreement, and that is an equal (assumed) foundation to the Second Arbitrations. The court's supervisory jurisdiction in relation to the First Arbitration is the result of the parties' agreement to arbitrate under the supervision of the English court, just as much as the Second Arbitrations are the result of the parties' agreement to arbitrate. That equality in foundation militates against according priority to one over the other.

71. There are two reasons why there can be no stay. That IPIC and Aabar recognised the first reason became clear in the course of argument. It is simply that their position is that challenges to the Consent Award itself (rather than the Settlement Deeds) are not what they are seeking to stay under section 9.

72. I prefer to rest on the second reason however. There can be no stay because the presence of the court's supervisory jurisdiction and of the Second Arbitrations as two concurrent jurisdictions prevents the engagement of section 9 on its terms. The words "in respect of a matter which under the agreement is to be referred to arbitration" in section 9(1), do not apply where the matter is one that the parties have agreed can be referred to the court or to arbitration, rather than to arbitration alone.

73. As Andrew Smith J said in Nomihold (above, at [35]):

> "… [The] expression ["to be referred" to arbitration within the meaning of section 9 of the 1996 Act] connotes that the parties agreed that the matters must be referred to arbitration."

That requirement will not be satisfied if there is concurrent jurisdiction, i.e. the parties also agreed to the supervisory jurisdiction of the court. Thus (at [45]):

> "… by making the arbitration agreements [the parties] also agreed to the supervisory jurisdiction of the English court. So long as [a party's] application seeks relief in accordance with that part of the agreements, [that party] cannot be said to be acting in breach of the arbitration agreements."

74. Teare J observed the (unlikely) consequences for the court's supervisory jurisdiction of any different analysis when he said in Sheffield United:

> "Were it otherwise that part of the court's supervisory jurisdiction referred to by Lord Hoffmann [in The Front Comor] would usually be subject to a stay pursuant to section 9 of the Act."

75. I acknowledge that where, as in the present case, there are two or more arbitrations under two or more arbitration agreements this involves reading the reference to "agreement" in section 9(1) as embracing them all, so that the second arbitration agreement does not stand free from the agreement to the court's supervisory jurisdiction that accompanied the first. But this seems to me a correct reading, for two reasons. First, because the reading has regard to the provisions of section 4 of the 1996 Act (see paragraph 41 above). Second, because the reading correctly accords to the agreement to the court's supervisory jurisdiction a quality akin to that of an exclusive jurisdiction clause (see paragraph 43 above).

76. It is useful to note that Andrew Smith J went on, at [51], to offer a "different route to the same conclusion which some might prefer". This "different route" was an analysis based on definition rather than an analysis based on recognition of concurrent jurisdictions. He described it in this way:

> "If there is no area of overlap, I would consider it necessary in order to give a proper and workable effect to section 9 to define more specifically the "matter" to which it refers. Thus, in this case the "matter" that [one party] contends is to be referred to the arbitrators in the [second arbitrations] is whether in view of the [first arbitration] and the award they should reject the claims on the grounds of the re-arbitration complaints. Correspondingly the "matter" that is the subject of the legal proceedings, [the other party's]

application, is whether in view of the re-arbitration complaints the court should exercise its supervisory jurisdiction in view of the [first arbitration] and the award. …"

77. Andrew Smith J regarded the difference between the concurrent jurisdiction analysis and the definition analysis as "semantic". In the case before him I can see that it was. More generally I respectfully prefer the former analysis. It provides a constant principle, with more certainty and predictability. The latter analysis may lead to debate over the "matter" to which section 9 refers in the particular case.

78. In any event the particular feature of the litigation at issue being litigation pursuant to the court's supervisory jurisdiction was not material to other decisions on section 9 that were cited by Mr McQuater QC, important and valuable though those decisions are in informing the application of the section 9 jurisdiction (or its equivalent in other countries) in the classic case where there is an attempt at litigation and not arbitration when it was arbitration and not litigation that the parties had agreed. The decisions cited included Tomolugen Holdings Ltd and another v Silica Investors Ltd; and other appeals [2015] SGCA 57; [2016] 1 LRC 147 (Court of Appeal of Singapore, Sundaresh Menon CJ); Autoridad del Canal de Panama v Sacyr SA and Others [2017] EWHC 2228 (Comm); [2018] 1 All ER (Comm) 916 (Blair J) and Sodzawiczny v Ruhan and Others [2018] EWHC 1908 (Comm); [2018] Bus LR 2419 (Popplewell J).

79. On the concurrent jurisdiction analysis, in my view parties cannot use section 9 to achieve a stay of the court's supervisory jurisdiction over complaints about one arbitration by starting a further arbitration about those complaints. That does not mean they may not agree to that further arbitration. Just as they may, at least in some circumstancess be free to agree a compromise. It is simply that the court's supervisory jurisdiction will continue. Section 9 is not designed or intended to remove it or stop it.

80. MOF and 1MDB had an additional argument. This was to the effect that by reason of section 4 of the 1996 Act the arbitration agreements on which the Second Arbitrations are based are "inoperative" within the meaning of that word in section 9(4) (the word is also used in the New York Convention) with the consequence that section 9(4) would prevent a section 9 stay.

81. I have earlier expressed my view on section 4. In my judgment it does not make the arbitration agreements inoperative; rather, it ensures that mandatory provisions including sections 67 and 68 continue to have effect.

82. In the event however MOF and 1MDB do not need the additional argument to prevent a section 9 stay.

A case management stay of the section 67 and 68 challenges; inherent jurisdiction

83. The presence of concurrent jurisdiction does not condemn the parties, or the court or the arbitration tribunal, to unnecessary duplication. A tool available to the court in this respect is the case management stay of court proceedings to allow an

arbitration tribunal to proceed first. It is a discretionary tool that can be used flexibly.

84. In Autoridad del Canal de Panama (above) at [156] and [165] Blair J undertook a valuable review of a number of the authorities in this area, and to which I have regard. A compelling case will be required for a stay to be granted (see Reichhold Norway ASA v Goldman Sachs [2000] 1 WLR 173 at 186 (Court of Appeal, Lord Bingham LCJ).

85. Far from there being a compelling case for a stay, MOF and 1MDB contend that a stay should be rejected because it is for the supervisory court to investigate all of the factual matters relevant to the exercise of the supervisory jurisdiction. MOF and 1MDB contend that the public interest of which Mance LJ spoke in Department of Economics (above, at [34]) involves the court taking control of the review of whether something is fraudulent.

86. Mr Parsons QC argues that section 68 of the 1996 Act is talking about a challenge to the award and it is for the court to determine that challenge and any facts relevant to it. If a challenge under section 68 of the 1996 Act on the grounds of serious irregularity includes an allegation that the award was obtained by fraud, the court is obliged, he argues, to investigate those factual matters itself. If, as in the present case that investigation encompasses the Settlement Deeds, the argument holds that it is for the court, in the public interest, and as part of the state, to do the investigation; it is not for the arbitrators, however eminent, to do this and then for their findings to come back to the court.

87. I cannot accept that the court is (as MOF and 1MDB contend) obliged to use its powers in a way that will ensure that it, rather than an arbitral tribunal, investigates all of the factual matters relevant to the exercise of the supervisory jurisdiction. That approach is not consistent with the discretionary nature of a stay. It also elevates the supervisory jurisdiction rather than, as examined above, recognising that two concurrent jurisdictions - the supervisory jurisdiction of the court in relation to the First Arbitration and the jurisdiction of the arbitrators in the Second Arbitrations - both derive from party autonomy. I note that the public interest of which Mance LJ spoke is "to facilitate the fairness and well-being of a consensual method of dispute resolution ...".

88. There is no question that the court will exercise control. There is no question of the court abrogating its duty, or (as Mr Parsons QC put it graphically) merely "rubber stamping" the remedy at the end. The seriousness of what is at issue is a material consideration for the court in deciding whether and how to use its case management powers. So too is the fact that the court proceedings are pursuant to its supervisory jurisdiction.

89. What is also required is consideration of what a stay would involve. An arbitral tribunal, would likely be first to examine the facts and (in addition to any question of its jurisdiction) what I have termed the underlying question whether, as MOF and 1MDB contend, the Settlement Deeds are void and not binding upon them.

90. The distinction, independence, expertise and experience of the tribunal in question is of the highest possible order and that is obviously of real objective comfort in the

context. It is also the case that the tribunal was recently selected, at a time when Mr Najib's period of alleged control was over.

91. If as a result some issues are decided to the point of an issue estoppel (just as some may be agreed), there is no unfairness in principle about that. The section 67 and 68 challenges remain live, subject to the question of extension of time. The court will decide whether and where an issue estoppel is made out, what can or should be reheard on a section 67 or 68 hearing, as well as what else it needs, and whether to grant the remedies sought from it including what should happen to the Consent Award. The Court will decide what within its supervisory jurisdiction is to be in public and what is to be in private. And throughout the Court can of course lift or adjust the stay at any point.

92. It is relevant to reflect that it is in the nature of a supervisory jurisdiction that a court will intervene where and to the extent needed. I add, without any disrespect to the arbitral tribunal, that their work too will be subject to the court's supervisory jurisdiction, engaged by the seating of the Second Arbitrations in England.

93. A further point raised by MOF and 1MDB was that the court has powers to compel third party disclosure that the tribunal does not. I did not find this a compelling consideration in the present case. It was not well supported by examples that would cause me to think that in practice it would make a major difference, having regard to the considerable material that will be available to the parties (including in other parts of the world) and which have already enabled MOF and 1MDB to develop and articulate the allegations they do.

94. Having considered carefully all that the parties have put to me, I have reached the conclusion that this is one of the rare and compelling cases where a temporary case management stay is appropriate for the time being, and subject to review at any appropriate point.

95. The alternative is duplication in the investigation and decision on whether the Settlement Deeds (with the arbitration agreements within them) are void or not binding. That invites delay, cost, disorder, and uncertainty. I further respectfully draw on the approach expressed by Blair J in Autoridad del Canal de Panama (above, at [165]):

> "In circumstances in which an international commercial dispute involves arbitration as well as court proceedings, it makes good commercial sense for the court to have regard, where appropriate, to the orderly resolution of the dispute as a whole, if necessary by granting a temporary stay in favour of arbitration. A coherent system of commercial dispute resolution has to take into account the fact that various different tribunals may be involved, each of which should aim to minimise the risk of inconsistent decisions and avoid unnecessary duplication and expense."

An injunction in respect of the Second Arbitrations; section 37(1) Senior Courts Act 1981

96. It is not in issue that the court has jurisdiction under section 37(1) of the Senior Courts Act 1981 to grant an injunction restraining a party to arbitration from proceeding with that arbitration. The court may only act where it appears to the court just and convenient to do so. The general power provided by section 37 of the 1981 Act "must be exercised sensitively": Ust-Kamesogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35; [2013] 1 WLR 1889 at [60] per Lord Mance.

97. All parties referred to Claxton Engineering Services Ltd v TXDM Olaj-es Gazkutato Kft (No 2) [2011] EWHC 345 (Comm); [2011] 2 All ER (Comm) 128 at [34] where Hamblen J (as he then was) held that:

> "… it will usually be necessary, as a minimum, to establish that the applicant's legal or equitable rights have been infringed or threatened by a continuation of the arbitration, or that its continuation will be vexatious, oppressive or unconscionable … However this may not be sufficient …"

98. MOF and 1MDB contend that where there is an attempt to cause arbitrators to decide the very matters which fall within the court's supervisory jurisdiction first, "so that the court will not be able to investigate those matters", that is a breach of MOF and 1MDB's contractual and statutory rights to have their section 67 and 68 challenges determined by the court, and if appropriate determined in public.

99. The present case is described by MOF and 1MDB as a rare and exceptional case, because, as they put it, the very breaches which IPIC and Aabar allege give them the right to arbitrate relate to the commencement of the section 67 and 68 challenges; the invoking by MOF and 1MBD of their contractual and statutory rights and of the supervisory jurisdiction of the court is said to be the breach of contract.

100. This is also a case of vexatious conduct, contend MOF and 1MDB, in that they are threatened or faced with parallel proceedings (and attendant costs and a possible "rush to judgment"), with penal claims for accelerated payments for exercising its contractual and statutory rights, and with the risk that instead of having the matter determined by this court under its supervisory jurisdiction, it will be determined by arbitrators.

101. In my judgment the position is as follows, pulling together some of the points made in the course of this judgment.

102. First, the question whether the Consent Award should be set aside or declared to be non-binding remains a question for the court under its supervisory jurisdiction over the First Arbitration.

103. Second, the section 67 and 68 challenges and the Second Arbitrations share an underlying question (whether, as MOF and 1MDB contend, the Settlement Deeds are void and not binding upon them). In the end what is being decided is whether MOF and 1MDB are bound by agreements with IPIC and Aabar. If they are so bound then there can be no complaint of quality by MOF and 1MDB that the findings to that effect were made by (on this outcome, the agreed forum of) the tribunal in the Second Arbitrations under the supervisory jurisdiction of this court

as the court of the seat. If they are not so bound then there need be no complaint that the findings were made by the tribunal. I fully appreciate that MOF and 1MDB prefer that, as between the court and the tribunal, the court decide the underlying question but the merits of that course assume in their favour the knowledge of fraud they seek to prove against IPIC and Aabar; if that knowledge of fraud is not proved then IPIC and Aabar will have been deprived of the forum (i.e. the tribunal, rather than the court) for which they had validly contracted.

104. Third, at all points the parties can be confident that the tribunal (appointed after the departure of Mr Najib, and with the availability to all parties of advice from their current legal teams) will be vigilant on the question of its jurisdiction. And at all points the supervisory jurisdiction of the court (in this respect over the Second Arbitrations) will be available to the parties.

105. Fourth, MOF and 1MDB suggest that the court will not be able to investigate matters if the tribunal decides them first. That is not necessarily so. However what is important is that matters are investigated (in the sense of being subjected to scrutiny and challenge through, here, an adversarial process) by an independent forum, and that is what is available to all parties within the framework summarised in the first three points above. It is not yet possible to say how large a part the court will ultimately take, but it will do its best to take whatever part is ultimately appropriate, consistently with its supervisory responsibilities.

106. Fifth, the fact that the breaches which IPIC and Aabar allege give them the right to arbitrate are breaches that relate to the commencement of the section 67 and 68 challenges, and the fact that MOF and 1MDB are threatened with significant financial consequences for commencing those challenges, are consequences of agreements that the parties either have or have not made. If the Settlement Deeds are found to be void or of no effect as against MOF and 1MDB then that may be the end of the argument about those consequences, whether the finding is that of the tribunal or the court. I express no view at this stage on whether what MOF and 1MDB term penal claims would be enforceable even if the Settlement Deeds are valid.

107. Sixth, the use of the case management stay will appropriately manage the risk of parallel proceedings and costs and possible “rush to judgment”. MOF and 1MDB’s contractual and statutory right to have their section 67 and 68 challenges determined by the court is not a right to have them determined first.

108. Seventh, the question whether the section 67 and 68 challenges should be determined in open court or in private is a question that should be considered separately and which involves wider considerations. I expect to address it in early course on MOF and 1MDB’s application once I have heard full argument. I believe it will be understood by all parties that it is a question that may attract a different answer in different respects or at different stages.

109. It does not appear to the court just and convenient to grant the injunction sought.

Conclusions

110. I am fully aware that the dispute between the parties is of the highest order of importance, to them and more widely, and financially as well as more broadly. I have weighed carefully what has been said by MOF and 1MDB in their evidence about the importance of the dispute, and the amounts involved, to the people of Malaysia. I have equally weighed carefully all that has been said by IPIC and Aabar, including for example their concerns over ensuring that the Bonds they guarantee continue to be paid.

111. My decision is that I will as a matter of case management stay the section 67 and 68 challenges for the time being, to allow the Second Arbitrations to proceed first. Specifically, the court envisages that the parties should be free to address with the tribunal in the Second Arbitrations any question of the jurisdiction of that tribunal and (subject to that) what I have termed the underlying question whether, as MOF and 1MDB contend, the Settlement Deeds are void and not binding upon them.

112. I emphasise that this stay, as a case management stay, is temporary albeit that it is of indefinite duration at this point. The court will expect to deal substantively with the section 67 and 68 challenges to the Consent Award in due course albeit that it may do so in light of any findings and award made in the Second Arbitrations.

113. The court will remain ready to lift the stay and take forward the section 67 and 68 challenges at any future point in light of the circumstances then prevailing (including in relation to the Second Arbitrations). For that purpose there will be a liberty to apply to both parties.

114. Further I will discuss with counsel the suitability of the court requiring from the parties a short written report on the progress of the Second Arbitrations at regular intervals. This would give the court a structured opportunity to consider periodically whether on its own motion, consistent with its supervisory jurisdiction and its case management responsibilities, it should convene the parties for consideration of the stay and of further case management directions.

115. I will also direct that should there in due course be any challenge under the 1996 Act in respect of the Second Arbitrations, that challenge is so far as practicable to be listed for an initial hearing alongside the current section 67 and 68 challenges in respect of the First Arbitration.

116. I refuse IPIC and Aabar a stay under section 9 of the 1996 Act, and I refuse MOF and 1MDB an injunction under section 37 the Senior Courts Act 1981.

117. I am very grateful to all concerned, counsel and solicitors, for the argument that I read and heard.