Neutral Citation Number: [2019] EWHC 430 (Comm)

Claim No. CL-2017-000548

Claim No. CL-2017-000480

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

IN THE MATTER OF AN ARBITRATION CLAIM

BETWEEN:

ALI ALLAWI

Claimant

-and-

THE ISLAMIC REPUBLIC OF PAKISTAN

Defendant

HEARING ON 15 FEBRUARY 2019 OF:

1. **Claim No. CL-2017-000480 – Claimant's Application to set aside Order of Mr Justice Males dated 1 August 2017**

2. **Claim No. CL-2017-000548 – Claimant's Application for an extension of time to bring a claim under section 68 Arbitration 1996**

3. **Claim No. CL-2017-000548 – Defendant's Application for security for costs**

JERN-FEI NG QC, OWEN LLOYD (Instructed by **Withers LLP**) appeared on behalf of the Claimant

JOE SMOUHA QC, IAIN QUIRK (Instructed by **Allen & Overy LLP)** appeared on behalf of the Defendant

Friday, 15 February 2019

(10.30 am)

APPROVED JUDGMENT

MRS JUSTICE CARR:

Introduction

1. There are three applications listed before me as follows:

a) the application by the Claimant ("Mr Allawi") for an extension of time to challenge the award ("the Allawi award") in PCA case number 2012/23 ("the Allawi arbitration"), pursuant to section 68 of the Arbitration Act 1996 ("the Act"), ("the extension application");

b) Mr Allawi's application to set aside the order of Males J (as then was) dated 31 August 2017 ("the enforcement order"), by which the Defendant ("Pakistan") was granted permission *ex parte* to enforce the Allawi award ("the set aside application");

c) (only if Mr Allawi's application on the extension application is granted), Pakistan's application for security for its costs of the section 68 challenge. Mr Allawi has consented in principle to security for future costs in respect of the hearing of the section 68 challenge on its merits but contests the quantum being sought by Pakistan as disproportionate.

2. The basis of the extension application is Mr Allawi's contention that he had been

categorically assured at a meeting at the Goring Hotel in London on 22 September 2016 ("the Goring Hotel meeting") by Mr Shahid Khaqan Abbasi ("Mr Abbasi"), then Pakistan's Minister of Petroleum and Natural Resources, that the Allawi award pursuant to which costs were awarded to Pakistan against Mr Allawi would not be enforced against him. Mr Allawi submits that he acted reasonably in not bringing a section 68 challenge in reliance on that assurance. He acted promptly upon enforcement being pursued in making the extension and set aside applications as soon as he was served with the enforcement order. Pakistan should have but failed to disclose the Goring Hotel meeting and subsequent correspondence referring to the meeting when making the application to Males J. It was clearly a material fact. The enforcement order should consequently be set aside for breach of Pakistan's duty of full and frank disclosure.

3. The arbitral tribunal ("the Tribunal") awarded costs against Mr Allawi in the sum of £2,741,679.03 and €285,241.38, approximately some £3 million sterling in total, together with compound interest with quarterly rests. Mr Allawi says that he simply cannot afford to pay this sum and would be forced into bankruptcy were he obliged to do so. He will suffer substantial and irremediable prejudice if he is not allowed to challenge the Allawi award. By contrast, Pakistan will not suffer any irremediable prejudice if the extension and set aside applications are granted and the section 68 challenge is allowed to proceed to a hearing on its merits. The only prejudice Pakistan will suffer is one of delay, but Pakistan can hardly be heard to complain about this given that it waited for seven months before applying to enforce the Allawi award. Any prejudice Pakistan might suffer were the extension

to be granted is capable of being remedied by an award of interest.

4. Pakistan resists the application. No assurances as alleged were given at the Goring Hotel meeting and in any event in the light of later exchanges in September 2016 and further communications involving Mr Allawi up to 20 December 2016, when a first extension of time to seek to challenge the Allawi award expired, any reliance on any assurances at the Goring Hotel meeting cannot be said to be reasonable. This is a second application for an extension by Mr Allawi. The delay in question is extensive. There would be prejudice to Pakistan. The merits of the section 68 challenge are hopeless.

5. I acceded to an application by Mr Allawi for cross-examination of the relevant witnesses to the meeting on 22 September 2016 and so heard evidence from Mr Allawi and Mr Abbasi, who were the only attendees at the Goring Hotel meeting, and also Ms Ummekulsum Imam, ("Ms Imam"), an intermediary and friend of both men who facilitated the meeting. Although much of the hearing day was occupied by their evidence, the factual dispute needs to be seen in its proper context. It is only a part, albeit an important part, in an evaluation of the merits of an extension application and in particular the reasonableness of the delay in question.

6. The parties devoted their attention essentially to the merits of the extension application. Mr Allawi accepts that without success on the extension application the Allawi award falls to be enforced against him, but he would nevertheless wish

to challenge the enforcement order, even if the extension application fails on the basis of a lack of full and frank disclosure by Pakistan. Pakistan accepts that the enforcement order falls to be set aside if the extension application succeeds. The security for costs application will be relevant only if the extension and set aside applications succeed. Likewise, this judgment is limited to the extension application. Further submissions can follow as necessary.

Background: the Allawi arbitration and Allawi award

7. Mr Allawi is a distinguished academic, a former Iraqi government minister and author, he is a UK/Iraqi dual national, primarily resident in Baghdad, his main business interests for the past 20 years have been his investment in Progas Pakistan Limited ("PPL"), a company in the liquid petroleum gas (“LPG”) sector in Pakistan.

8. PPL constructed a large import terminal for LPG at Port Qasim, Karachi, Pakistan ("the terminal"). PPL became insolvent following regulatory changes in Pakistan capping LPG prices. The terminal was then acquired by Sui Southern Gas Company Limited ("SSGC"). Pakistan is a 70 % majority shareholder in SSGC.

9. On 4 April 2012 Mr Allawi brought the Allawi arbitration against Pakistan pursuant to the UK-Pakistan bilateral investment treaty ("the BIT"). At the time of the Allawi arbitration, Mr Allawi indirectly held 9.689 % of the shares in PPL. The arbitration was seated in London and conducted pursuant to the 2010 UNCITRAL

Rules ("the UNICITRAL Rules"). Part of Mr Allawi's case was that the regulatory changes and the subsequent acquisition of the terminal by SSGC amounted to a breach of Article 2(2) of the BIT ("Article 2(2)") in relation to fair and equitable treatment, full protection and security, unreasonable or discriminatory measures or the duty to observe obligations entered into with regard to investments of nationals of the other contracting party. Mr Allawi also alleged breach of Article 3 of the BIT with respect to the national treatment standard.

10. Progas Energy Limited, Progas Holdings Limited and Sheffield Engineering Company Limited (together "the Progas claimants") had already brought similar arbitral proceedings against Pakistan ("the Progas arbitration") on 23 December 2011. By consent the Progas arbitration was brought before the same tribunal and heard alongside the Allawi arbitration (collectively referred to as "the arbitrations").

11. On 30 August 2016 the tribunal published the Allawi award and the Progas award. In the Allawi award the tribunal found in favour of Mr Allawi on jurisdiction but dismissed his claim on the merits. The tribunal held that Mr Allawi had not established causation of legally relevant damage for the purposes of the BIT. The tribunal found it unnecessary to determine whether Pakistan had breached its obligations under article 2(2) of the BIT ("the Article 2(2) breach issue"). At paragraph 715 of the award the tribunal said:

> *"In light of the tribunal's conclusions with respect to causation set out above, the tribunal considers it unnecessary to address the claimant's claims under*

article 2 of the treaty in relation to fair and equitable treatment, full protection and security, unreasonable or discriminatory measures or the duty to observe obligations entered into with regard to investments of nationals or companies of the other contracting party."

12. The tribunal ruled that Pakistan was entitled to all of its costs. There was an error in computation by the tribunal of that calculation, an error pursued by Pakistan resulting in a correction to the Allawi award on 7 November 2016 with Mr Allawi's liability for costs being increased to the sums previously identified.

The section 68 challenge

13. Mr Allawi seeks to bring a challenge under section 68 of the Act based on the tribunal's refusal to decide the Article 2(2) breach issue. The question is whether the tribunal's failure to deal with an issue put to it amounts to a serious irregularity within the meaning of section 68(2)(d) of the Act which has caused substantial injustice to Mr Allawi.

14. As indicated above, the tribunal found against Mr Allawi on the issue of causation and ordered costs against Mr Allawi on the basis that he had been "*totally unsuccessful*" in his claims on the merits. The tribunal stated that it "*can see no reason why*" Mr Allawi should not bear the costs of the arbitration. Mr Allawi's position is that if he had prevailed on the Article 2(2) breach issue then he would have been partially successful and not "*totally*" unsuccessful.

15. This directly addresses the tribunal's reasoning in the Allawi award and makes it possible, submits Mr Allawi, that the tribunal would have reached a different decision on costs. Specifically the costs allocation could have been affected in two

ways.

16. First, the number of issues in which the parties were each successful would have been different. Secondly, given the nature of the Article 2(2) breach issue, Mr Allawi would have been in a much better position to receive a favourable allocation in respect of costs. Had Mr Allawi succeeded it would have meant he had a bona fide reason to have commenced arbitration and thus should not have been penalised for commencing unsuccessful proceedings by way of costs. An adverse costs order against a claimant would be inappropriate as it would not give effect to the object and purpose of BITs, namely to ensure that states which have voluntarily submitted their governmental actions to oversight in exchange for an inflow of investments are accountable according to international standards.

17. Thus, submits Mr Allawi, there are two reasons, whether cumulatively or alternatively, that provide a sufficient basis for contending that the tribunal might well have looked past the starting position that costs follow the event under Article 42(1) of the UNCITRAL Rules.

18. It was common ground between the parties in their costs submissions that success is a relative concept. Reliance is placed by Mr Allawi, through Mr Ng QC on his behalf, on a trilogy of cases: *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, 24 July 2008, an arbitration commenced under the ICSID convention; *Lauder v Czech Republic*, 3 September 2001, an arbitration under the UNCITRAL Rules; and *Hesham Talaat M Al-Warraq v The Republic of Indonesia*,

15 December 2014, another arbitration under the UNCITRAL Rules.

Extension and set aside applications

19. As indicated, the basis of Mr Allawi's application is that he had been categorically assured at a meeting at the Goring Hotel in London on 22 September 2016 by Mr Abbasi that the Allawi costs award would not be enforced against him. There is a helpfully agreed chronology. In summary these are the main events.

20. On 30 August 2016, the awards in both the arbitrations were published. On 1 September 2016, Mr Abbasi gave a press release recording the dismissal of the case against Pakistan which was reported in the Express Tribune. The report stated that Progas had filed two claims against the government of Pakistan. Mr Abbasi was reported as saying that Mr Allawi had filed a damages claim of $70 million and other claims amounting to $503 million had been filed by Progas. Further, Mr Abbasi was said to have revealed that the court also ordered the petitioners to pay $11 million to Pakistan to cover the expenses it had incurred during the proceedings.

21. On 11 September 2016 Mr Allawi met Ms Imam at a cafe in London. Between 20 and 22 September 2016, Ms Imam arranged a meeting between Mr Allawi and Mr Abbasi. On 20 September 2016 she emailed Mr Allawi with a subject title "*Minister in town*":

> "*I returned to London for a couple of days because Shahid Abbasi sb is in town. He may be available to meet either this evening or tomorrow.*

I strongly suggest you see him. I think it can only potentially help and not hinder your cause/case. Please let me know if you will be available at short notice."

22. Mr Allawi replied the same day thanking Ms Imam:

"... irrespective of the outcome I am greatly appreciative of your good offices to mediation."

She replied:

"... I have great respect for you and your work. All I am doing is introducing two friends to each other ... not much effort.
Shahid SB will probably be back in town Thursday. I think it may be better for the two of you to speak bilaterally, please let me know if that is okay."

23. At around 2.00 pm on 22 September 2016, Ms Imam texted Mr Allawi saying that Mr Abbasi was available to meet at 8.00 pm that evening. Mr Allawi responded by text: that was fine, and he asked where Mr Abbasi was staying.

24. Thus it was that later that evening at around 8.00 pm for 55 minutes Mr Allawi and Mr Abbasi met at the Goring Hotel. The contents of that meeting are, as already indicated, in dispute.

25. Later that evening at around 10.00 pm Mr Allawi sent a WhatsApp message to Ms Imam stating that he had had "*an excellent meeting*" with Mr Abbasi, continuing "*inshallah, the issue will be put to rest*". Ms Imam also stated that later that evening Mr Abbasi telephoned her from the airport. It was very unusual for him to call her by telephone. He stated that he just wanted to say that he had had a meeting with Mr Allawi. According to Ms Imam he said to her:

"Please ask Mr Allawi not to forego his legal rights."

26. At around 9.30 am the next day, 23 September 2016, Mr Allawi typed up a note ("the Goring note"). It started with a section headed "*Background*" and moved on to a section headed "*Meeting*". After a lengthy section it read:

> *"He then stated categorically that he had given instructions to his team (lawyers?) not to pursue the enforcement case against myself. But to proceed only against the Progas group of companies. In fact he stated that he had said as much in his press briefing when the award was made, when he had stated that adverse costs awarded of $11 million were made against Progas while pointedly not mentioning the adverse costs awarded against myself.* ***Abbasi reassured me that I should not be concerned at all that the adverse costs award against me would be pursued or enforced****. He reiterated during the conversation that he saw no practical purpose in enforcing the adverse costs award against myself. He said that he saw no point or gain to be made if I was pushed into bankruptcy but I believe he was also motivated by the peculiar outcome of the tribunal's adverse costs award and perhaps that the judgment may not have been fair to me ... after discussing the situation in Iraq and general areas where Pakistan and Iraq could cooperate in the future I rose to leave around 8.55.* ***In parting, Abbasi reiterated once again what he had said. There will be no enforcement of the adverse costs award against me and that he has so instructed his people and I should not concern myself regarding this matter****."*
>
> *(Emphases added)*

27. At around 10.30 am that day, Mr Allawi also spoke to Ms Imam by telephone twice. He said that he furnished her with detail of the assurances. She agreed that they had spoken but did not recall what he had said.

28. On 27 September 2016, at around 8.15 am in the morning, Mr Allawi emailed Ms Imam in the following terms:

> *"Following my talk with Shahid Abbasi last week, and the assurances that he gave me that he will not enforce the adverse costs awarded against me, I have taken an irrevocable measure not to pursue my right to challenge and appeal the tribunal's decision at the High Court in London. I have a right to*

> *do so until today. This will give Pakistan an unchallenged award against me. I have done this because I trusted his representations. If you find it appropriate to relay this matter to him, then please feel free to do so. Personally I think he should know that I acted entirely on the basis of our discussions at the Goring Hotel. I appreciated his candour and I believed his remarks. By following this route of foregoing my right of appeal the two arbitral cases are entirely separate, my case has effectively ended, the arbitral award against me is now unchallenged by me and the matter rests with the good offices of the minister and the government. I am sure inshallah that I have made the right decision."*

29. Ms Imam responded:

> "*Conveyed your thoughts. The feedback is please don't forego your legal right, he will try to ensure only the company and not you personally are pursued*."

30. Mr Allawi responded shortly after 3.20 pm:

> "*Can you please elaborate on this? Is he asking me to pursue the appeal?*"

31. Ms Imam responded:

> *"Yes, his message says: Mr Allawi should not forego his legal right to appeal."*

32. Just after 4.00 pm Mr Allawi thanked Ms Imam for "*this very timely report*". It was timely because on that day, the last date before time would otherwise expire, the Progas claimants were applying to the Commercial Court for an extension of time. That application was made on the express basis that it would enable both a challenge of the awards under section 68 and section 69 of the Act. It was made on a protective basis as time to appeal or challenge the awards would run out before the tribunal had considered what was to be an application for an additional award. Flaux J (as then was) granted the application, extending time to 20 December 2016.

33. In the event, Mr Allawi too joined that application and also the application for

an additional award. During the course of his evidence, I asked Mr Allawi the timing of his instruction to join the application to extend time, without wishing to breach any legal privilege. He could not recall the timing precisely. Mr Ng however indicated that the instruction was given at 3.56 pm on 27 September 2016. After the hearing, Mr Allawi's lawyers provided a heavily redacted chain of email communications to confirm the above. It appears from that chain that as, at 25 and 26 September 2016, Mr Allawi's position was that he would not be joining any appeal as *"he was fully engaged in managing the adverse cost award against him personally; this is of highest priority for him and he does not believe exposing himself to any further costs is wise or desirable"*. He was clear that he "*would take his chances with the Pakistan side trying to enforce the award against him*". Mr Allawi confirmed his instruction not to enter an application at 8.33 am on 27 September. However, at 3.56 pm, and so after the feedback from Mr Abbasi via Ms Imam not to forego his right to appeal, he emailed to say that he had now agreed to reverse his earlier decision and formally requested that his lawyers file an appeal and challenge on his behalf together with the Progas claimants.

34. Mr Smouha QC for Pakistan identifies that the procedural position is unsatisfactory. Concerns are raised over the completeness of the review exercise carried out by Mr Allawi's lawyers, waiver of privilege and the extent of redaction. Mr Allawi would have been cross-examined on the communications, albeit that a request to recall Mr Allawi is expressly not pursued.

35. As indicated, Mr Allawi also joined the Progas claimants in applying to the tribunal

for an additional award pursuant to UNCITRAL Rule 39, alleging that the tribunal had failed to deal with the lawfulness of Pakistan's actions.

36. On 28 September 2016, Pakistan requested a correction of the Allawi award pursuant to article 38 of the UNCITRAL Rules, increasing the amount of costs to be ordered against Mr Allawi. The tribunal acceded to this request in a correction which it published on 7 November 2016.

37. On 15 November 2016 the tribunal dismissed the application by the Progas claimants and Mr Allawi for an additional award.

38. A week later, on 23 November 2016, Allen & Overy LLP ("Allen & Overy"), acting for Pakistan, wrote to Quinn Emanuel LLP ("Quinn Emanuel"), Mr Allawi's former lawyers, copied to other lawyers for Mr Allawi, requesting payment of the costs awarded to Pakistan forthwith and seeking the destruction or return of confidential information. The letter stated in terms:

> *"For the avoidance of doubt, if payment is not made forthwith, the respondent will pursue all available remedies for enforcement (through the appropriate court(s)."*

39. Mr Allawi responded directly on 3 December 2016 acknowledging receipt of this letter. He stated that Quinn Emanuel no longer acted for him and went on:

> "*I am unable to pay costs in this matter, I did not take out nor do I hold any form of adverse costs insurance. Please note that I live in Iraq and address any further communication to my attention personally at my email address above.*"

40. On 27 February 2017, Mr Allawi emailed Ms Imam:

> " *... on a more personal level I am grateful that minister Shahid Abbasi has been faithful to his representations. I for my part have desisted from joining with others in a formal appeal against the ruling. I would like to thank you again for your vital efforts in arranging the meeting that brought us together.*"

41. On 27 July 2017, Pakistan applied for permission to enforce the Allawi award pursuant to section 66 of the Act. Males J (as he then was) granted that application on 1 August 2017.

42. The enforcement order was served on Mr Allawi on 16 August 2017. On the same day, Mr Allawi wrote to Mr Abbasi, who by now had just been elected Prime Minister of Pakistan, as follows:

> *"... if you recall, during our meeting on 22 September 2016, at the Goring Hotel in London, you affirmed that the government of Pakistan would not pursue the adverse costs awarded against me in the Progas arbitration case. You further explained that this decision was the reason I was not named in your press release on costs in this matter. In reliance on your assurance I did not pursue the appeal against the arbitration tribunal's decision alongside the other claims. Almost a year has since passed, during which time no action for enforcement has been taken against me and the spirit of our discussion has at all times been maintained which substantiated the outcome of our meeting. This morning however while I was on vacation in London I was served with a UK court order filed by Allen & Overy on behalf of Pakistan to enforce the adverse costs claim against me. I cannot understand what has prompted this move as it runs directly against your assurance and the spirit of our discussions ... I would in the circumstances request you to take suitable steps to uphold your assurances which have at all times been upheld until their recent and regrettable development. I of course have no means for meeting the adverse costs demand which I believe to be grossly unfair ... I therefore request respectfully that this matter is reconsidered in the spirit of our discussions in London last year."*

43. On 17 August 2017, Ms Imam texted Mr Allawi as follows:

" *... got a msg saying he received your letter & doesn't know how it started, he will look into it*."

44. Mr Allawi wrote to Mr Abbasi in similar vein on 20 and 25 August 2017, referring to Mr Abbasi's assurances and seeking an amicable and consensual resolution. He received no response, chasing through Ms Imam.

45. On 25 August 2017, Mr Allawi's solicitors wrote formally to Allen & Overy referring to "*a clear violation of the agreement*" reached between Mr Allawi and Mr Abbasi. Allen & Overy responded on 5 September 2017 denying that any assurances had been given. On 6 September 2017, Mr Allawi issued the current extension of time application.

Extension application: the law

46. Mr Allawi seeks an extension of time pursuant to CPR rule 62.9 to the time fixed by section 70(3) of the Act to bring a section 68 challenge. The relevant principles on such an application were helpfully summarised by Popplewell J in *Terna Bahrain Holding Company WLL v Bin Kamil Al Shamsi* [2012] EWHC 3283 (Comm), [2013] 1 Lloyd's Reports ("Terna"), at [27] to [34] as follows:

a) the length of delay;

b) whether the party who permitted the time limit to expire and was subsequently delayed did so reasonably in the circumstances;

c) whether the respondent to the application caused or contributed to the delay;

d) whether the respondent would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were to proceed;

e) whether the arbitration has continued during the period of the delay;

f) the strength of the application

g) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined.

47. These principles were drawn from a series of authorities which included *Nagusina Naviera v Allied Maritime Inc* [2002] EWCA Civ 1147, [2003] 2 CLC 1 which (at [39]) appears to be the source of the further comment in *Terna* (at paragraph 27(iii)) that the first three factors identified above are the "*primary factors*". In *Naviera* at [39] Mance LJ (as then was) had commented that Andrew Smith J had had well in mind in that case as "*primary factors*" the first three factors. For my part I do not read that judgment as authority for the proposition that the first three factors are necessarily of more significance than any others. What weight each factor is to be attributed will depend on the facts of each case. All factors are relevant for consideration.

48. I turn then to the first factor. On any view the delay is extremely lengthy. The normally permitted time for challenge is 28 days. Mr Allawi's present application was made a year from expiry of the normal time limit and over eight months from the extension granted by Mr Justice Flaux. Section 1(a) of the Act provides that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. As Popplewell J emphasised in *Terna* at [27(i)]:

> *"Section 70(3) of the Act requires challenges to an award under section 67 and 68 to be brought within 28 days. This relatively short period of time reflects the principle of speedy finality which underpins the Act and which is enshrined in section 1(a). The party seeking an extension must therefore show that the*

interests of justice require an exceptional departure from the timetable laid down by the Act, any significant delay beyond 28 days is to be regarded as inimical to the policy of the Act."

49. At [28] Popplewell J confirmed that the length of delay is to be judged against the yardstick of 28 days; thus a delay measured even in days is significant. A delay measured in many weeks or in months is substantial (see also *Daewoo Shipbuilding & Marine Engineering Company Limited v Songa Offshore Equinox Limited and another* [2018] EWHC 548 (Comm) at [78]).

50. Additional features here beyond the period in question include the ease with which Mr Allawi could have pursued a challenge - simply by remaining joined with the Progas claimants - and his full awareness of the relevant time limits and the importance of compliance with those time limits.

51. The fact that Pakistan did not take steps to enforce for seven months is nothing to the point. There is no fixed time period within which an award creditor must apply to enforce. For Mr Allawi it was suggested that the timing could be explained by a change of personnel within the Pakistani government at relevant ministerial level leading to a change of heart away from Mr Abbasi, who would have been aware of the assurances given to Mr Allawi in September. There is no evidential basis for this sort of inference. Pakistan pointed to the ongoing challenge by the Progas claimants during this period. The date of Pakistan's application to enforce, 27 July 2017, was the same date as that on which Pakistan issued its application for summary dismissal of the Progas claimants' challenge under section 68 of the Act on the basis that it stood no real prospect of success.

52. It is not appropriate to speculate on reasons for the timing of Pakistan's application to enforce against Mr Allawi. None of it affects in any way the onus on a party who wishes to challenge to challenge in time.

53. I turn then to the second factor. On the facts, the question is the extent to which Mr Allawi acted reasonably in not joining the Progas claimants' section 68 challenge on 20 December 2016, being the last day prior to expiry of the applicable time limit. The test of reasonableness is an objective one to be applied to the facts and circumstances as I find them to be.

54. This brings into play the factual dispute between the parties and specifically the dispute as to what was said at the meeting in the Goring Hotel in the evening of 22 September 2016. There is little common ground between the parties on this meeting, except its date and timing.

55. I make the following broad findings of fact sufficient for the purpose of this application. It is not necessary for me to resolve every disputed fact that has been raised.

56. As is often the case, the truth lies somewhere between the parties' competing version of events. Although the witnesses' reliability has been called into question, no one has suggested that any of the witnesses have been deliberately untruthful in any way. There are simply genuine differences of recollection or interpretation.

Mr Allawi was a well-prepared witness ready to argue his case. He appeared nervous, which is how Ms Imam also described him at their meeting on 11 September 2016 and understandably anxious. Mr Abbasi was a calm and composed witness. Ms Imam was also composed, though clearly somewhat uncomfortable with the position in which she found herself, placed in between two men, both of whom she regards as a friend. She repeated her respect for Mr Allawi on several occasions.

57. As for the purpose of the meeting, certainly Mr Allawi's anxious purpose was to discuss the award with Mr Abbasi. Given the timing of the meeting so soon after the award and the fact that Mr Abbasi knew that Mr Allawi really wanted to see him during his short visit to England, I find it unlikely that Mr Abbasi thought that the meeting was just to discuss Mr Allawi's "*writings and speeches in particular on Shia/Sunni and Pakistani/Iraq relations*". Mr Abbasi knew about the Allawi award, albeit at a high level of generality only, as evidenced by the press release. He knew from Ms Imam that Mr Allawi really wanted to see him. (I should add that whilst Mr Allawi sought to portray Mr Abbasi as having an in depth knowledge of the arbitration proceedings, for example from his attendances at the arbitral proceedings, I do not accept that Mr Abbasi did have such knowledge. In fact Mr Abbasi had only attended once to support the former Prime Minister for a partial day whilst the latter was giving evidence.)

58. Thus I find that Mr Abbasi understood that the purpose of the meeting at least might be to touch on the Allawi award. He did not however have any cause to

anticipate that he might be called upon to make any sort of firm assurance or guarantee to Mr Allawi in relation to the Allawi award at this meeting or to prepare for such an eventuality. He only had a few hours' notice of meeting. Ms Imam was quite clear that she did not go into any details, either with Mr Allawi or with Mr Abbasi, in advance of meeting. It was not her place. She did not think that she would have told Mr Abbasi, even in gist, that the meeting was to relate to Mr Allawi's costs liability under the Allawi award. She would typically only text Mr Abbasi and communications were generally very brief. She had spoken to Mr Abbasi about Mr Allawi in the past in general terms. She did not think that anything of any substance was said by her to Mr Abbasi in advance. She probably just said that Mr Allawi really wanted to see Mr Abbasi, would Mr Abbasi have time?

59. It is common ground that the Allawi award was discussed at the meeting. Mr Abbasi denies that the question of settlement was discussed. I find it, however, likely that Mr Allawi did raise the question of possible settlement, building on his idea of charitable contribution to the health sector. This was something that had been clearly on his mind, as evidenced by his discussion with Ms Imam on 11 September 2016. It was part of his plan.

60. However, on the critical question of fact, and despite the able submissions of Mr Ng to the contrary, I find it unlikely that Mr Abbasi expressly and unequivocally assured Mr Allawi at this meeting that the Allawi award would not be enforced by Pakistan against Mr Allawi. I find that he did not. Even if he knew

that the Allawi award might be discussed, it is difficult to imagine that Mr Abbasi viewed himself as having authority on the spot effectively to make such an unequivocal and important assurance, something which he said would have required cabinet approval. On any view, the costs award against Mr Allawi was for a substantial amount of money. No one appears to have believed that the Progas claimants were going to be good for any recovery. Mr Ng suggested that the motivation may have been Mr Allawi's political influence with Iraq, which could have benefited Pakistan. But this was speculation. This was the first time that Mr Abbasi had ever met Mr Allawi and then only in a short meeting which covered a large number of areas, including Mr Allawi relating the history of the Progas project and his involvement.

61. Equally and relatedly, it is most unlikely that Mr Abbasi told Mr Allawi at the meeting that he had already instructed his team not to pursue enforcement against Mr Allawi, given how recent the award was and the limitations of Mr Abbasi's knowledge. Again, I find that he did not and that no such instruction had been given, either then or before the press release of 1 September 2016. It is wholly inconsistent with what happened later that month and subsequently. In particular I have in mind Pakistan's letter of 28 September 2016 asking the tribunal to correct the costs award against Mr Allawi by increasing it. There is no suggestion that Mr Allawi was unaware of this step. Whilst Mr Allawi's evidence was that the advice given to him on 27 September 2016 not to forego his legal rights was just a "belt and braces approach" by Mr Abbasi/Pakistan, that can hardly be said of the step of aggression taken by Pakistan on the cost award the next day.

62. Mr Allawi's evidence and his note of the meeting states that Mr Abbasi went on to say that this was why the press release, of which Mr Allawi was no doubt aware at the time, had referred only to the costs award of $11 million which on the figures did not include the costs award against Mr Allawi. On this thesis, Pakistan would have had to decide within 24 hours or so of the publication of the award that it would unequivocally not enforce against Mr Allawi. Again this seems unlikely. Mr Abbasi would also have had to be aware of this line of reasoning by the time of meeting. I do not accept that Mr Abbasi was so intimately involved either in terms of the content of the press release, which he said was a statement of the type routinely handed out to the minister to be read in public and prepared by the permanent secretary to the government, or the Allawi award. Moreover, the press release itself does not reveal that the $11 million figure excludes the costs award against Mr Allawi. On the contrary, it states that that was the figure ordered against "the petitioners" all together. Mr Abbasi said that he did not see the full Allawi award itself until the day of the hearing before me.

63. I find it more likely that, as Mr Abbasi said, no promises were made but that he did say that he would see what if anything he could do for Mr Allawi but he could not make any promises. This finding is consistent with Mr Abbasi on a very general level being sympathetic to Mr Allawi. Moreover and importantly, Mr Allawi confirmed in his evidence that he would construe a statement to that effect as being consistent with the categoric assurance that he says he received. Thus he viewed Ms Imam's message to him on 27 September that Mr Abbasi "*will try to ensure*

only the company and not you personally are pursued" as consistent with the agreement. It was put to him that this was very different from a promise but he said not; if he had thought otherwise he would have responded. For him it was a further confirmation.

64. Mr Allawi therefore appears to have interpreted Mr Abbasi's words incorrectly as a categoric assurance. If he did so, it was unreasonable.

65. In reaching these conclusions I have of course considered carefully the Goring note on which Mr Ng for Mr Allawi places heavy reliance. He submits that it is the only virtually contemporaneous written record of the meeting. It is of course an important document (see for example *Terry v Watchstone Limited* [2018] EWHC 3082 at [51] to [53]).

66. However, the Goring note is a self-serving and highly subjective document. It is certainly not an attendance note in traditional style. There are some odd inaccuracies, for example recording Mr Abbasi saying to Mr Allawi that Mr Abbasi had sought out a meeting with Mr Allawi after the Allawi award. It is littered with Mr Allawi's interpretations, for example as to what to make of Mr Abbasi's silence and body language, alongside statements of belief, for example that Mr Abbasi "*strongly implied*" that the award against Mr Allawi was unfair or incorrect. Mr Ng makes the fair point that where the note records the assurances said to have been made by Mr Abbasi however it does so as a matter of “hard” fact. But those “hard” statements reflect Mr Allawi's interpretation of what was said, an interpretation that

will have been influenced by his "soft" conclusions elsewhere as to Mr Abbasi's beliefs and the inferences he chose to draw.

67. Moreover, the Goring note is not the only document. There are recorded communications around the meeting, both before and after, from which inferences may legitimately be drawn. Those communications do not undermine but rather are consistent with or support my conclusions.

68. Mr Allawi informed Ms Imam almost immediately after the meeting that it had been an "*excellent*" meeting but it had been an excellent meeting for Mr Allawi who had gained support from Mr Abbasi.

69. Mr Abbasi's call to Ms Imam on 22 September after the meeting is consistent with the concern on Mr Abbasi's part that Mr Allawi might be reading too much into Mr Abbasi's indication that he would see what he could do to help Mr Allawi. It is powerful evidence of Mr Abbasi's good faith and concern for Mr Allawi. It also demonstrates that Mr Abbasi knew on the critical day for present purposes that he could not guarantee any result for Mr Allawi. Absent bad faith, which is not alleged, this points strongly against the giving by Mr Abbasi of any absolute guarantees.

70. I consider next the first email of 27 September 2016 from Mr Allawi. Mr Ng says this is effectively another contemporaneous note of the meeting. I disagree. It is a curious message - certainly it was not correct to the extent that it indicated that

Mr Allawi had taken an irrevocable decision. He knew that he had not, which is exactly why he was writing just before the deadline on 27 September 2016. He was seeking to create some sort of documentary record, but did not succeed in doing so. The mere fact of the message reveals a degree of uncertainty and doubt at least in Mr Allawi's own mind as to his position.

71. I do not lay any significance on Mr Abbasi's failure to respond directly in terms to that message contradicting the allegations of assurances. First, the communications were being conducted through Ms Imam and so carry a layer of communicative complication in terms of transmission. These were also not formal communications between lawyers. Secondly, Mr Abbasi's response was effectively one of denial. The advice not to forego his legal rights demonstrated that Mr Allawi's position was not guaranteed. Moreover a correction was advanced: Mr Abbasi would try to ensure that Mr Allawi was not pursued personally.

72. Further uncertainty is revealed in Mr Allawi's position after 22 September and up to 27 September. He told his lawyers that he was "*fully engaged in managing*" the adverse costs award and that he would "*take his chances*". This is inconsistent with any agreement with Mr Abbasi that Pakistan would not enforce against him, of which Mr Allawi also does not appear to have informed his lawyers. It is consistent with Mr Abbasi informing Mr Allawi that he would see what he could do to help him.

73. When Mr Allawi was told not to forego his legal rights, Mr Allawi did not respond

with an exclamation of surprise or even outrage, indicating that such a step could hardly be necessary in the light of the agreement reached with Mr Abbasi at the meeting on 22 September.

74. I have already referred to Pakistan's request to the tribunal of 28 September 2016. As already indicated, this is inconsistent with any decision having been taken by Pakistan not to pursue Mr Allawi and inconsistent with any assurance to the contrary having been given by Mr Abbasi.

75. The enforcement letter from Allen & Overy of 23 November 2016 is also consistent with my findings. Mr Allawi said that he saw this just as a paper exercise to close the file. That begs the question why he chose to reply at all as he did, taking care to identify his correct address for any further communications. He did not in the face of the clear threat of litigation refer to any binding commitment on the part of Pakistan not to enforce; it would have been the obvious time to do so.

76. The statement in Mr Allawi's email of 27 February 2017 to Ms Imam that Mr Abbasi had been faithful to his representations does not of course specify the representations in question. The lack of enforcement steps to date was consistent as well with Mr Abbasi having stated that he would simply try to see what he could do to help Mr Allawi. In any event, insofar as Mr Allawi's references were references to unequivocal assurances by Mr Abbasi, they rested on Mr Allawi's original misinterpretation.

77. I do not consider Mr Abbasi's response to Mr Allawi's letter of 16 August 2017 to be inconsistent with my findings either. Again, the response was conveyed through a text message from Ms Imam and was very brief. His response that he would look into the enforcement proceedings is wholly consistent with Mr Abbasi saying that he would see what he could do to help Mr Allawi. Mr Abbasi was newly elected, and not engaging with the detail of the letter.

78. For all these reasons I find that Mr Abbasi did not give any unequivocal assurance as alleged by Mr Allawi at the meeting on 22 September 2016. But even if he had been given such assurances, there are material developments thereafter and up to 20 December 2016 to consider.

79. In considering the reasonableness of Mr Allawi's failure to progress his challenge in time at the end of December 2016, I bear in mind the earlier context as set out above and assume for present purposes against my findings that Mr Abbasi had given oral assurances as alleged. I nevertheless would conclude that it was not reasonable for Mr Allawi to drop his challenge as he did. On any view, by the end of the year Mr Allawi knew that his position was at risk and he was not guaranteed anything. He had been told explicitly not to forego his legal rights. He then joined the Progas claimants in seeking an extension of time. There was Pakistan's request of 28 September, the tribunal's resulting correction and finally the 23 November 2016 letter from Allen & Overy.

80. Mr Allawi states that he did not understand the advice not to forego his legal right

to be contradicting the assurance he had been given at the Goring Hotel meeting. He said he understood it to be no more than a belt and braces approach of ensuring that he would not have to pay the $3 million in costs awarded against him. This is a little difficult to understand but even if true does not explain away Pakistan's request of 28 September or Allen & Overy's letter of 23 November. Mr Allawi's response to that letter is not consistent with a belief that it was just a formal letter containing no genuine expressions of intent and if he did genuinely hold the belief that there was no real threat of enforcement proceeding because of that letter, then that simply was not a reasonable position to take, even after making all due allowances for context. Having seen that it was necessary or at least desirable for him to seek the extension of time in September, there was no good reason for him then abandoning that protection in December. There is no reasonable basis for a change of position. The position is *a fortiori* even stronger if no assurances were made in the first place.

81. In summary, in my judgment Mr Allawi did not act reasonably in permitting the time limit to expire in December 2016.

82. In the light of these findings, turning to the third factor, it cannot be said that Pakistan through its relevant minister Mr Abbasi materially caused or contributed to the delay in question.

83. As for the fourth factor, Mr Allawi submitted that the only prejudice that Pakistan would suffer would be one of delay, about which it could not sensibly complain in

the light of the delay in seeking enforcement. Any such prejudice could be remedied in interest and Mr Allawi had agreed in principle to providing security for costs. I do not accept that there would be no meaningful irremediable prejudice to Pakistan. Given what Mr Allawi says about his financial position, Pakistan would in all probability be put to further costs which it would not recover, any award of security for costs would be unlikely fully to cover Pakistan's costs, nor would an award of interest compensate for delay if Mr Allawi is impecunious.

84. Mr Ng suggested there was a real possibility of Mr Allawi ending up not only in an improved position on costs but in a position where there was no costs award against Mr Allawi at all by reference to the trilogy of cases cited on his section 68 challenge. It is not helpful to carry out a minute examination of the facts of each case, but even at first blush there are differences which could justify different costs results. For example in those cases multiple breaches were established and/or there was a failed counterclaim or the claimant, though unsuccessful, was found to have been justified in commencing the proceedings against culpable procedural conduct on the part of the respondent. The cases certainly do not establish some principle whereby whenever a breach of investment treaty is established but not causation and damage the appropriate order is one of no order as to costs.

85. I consider the submission to be a farfetched proposition on the facts of this case, given the approach of this tribunal to the question of costs in circumstances where Mr Allawi's Article 2(2) claim was not the only allegation of breach but one of several and in circumstances where his monetary claims have failed on causation

and so failed all together.

86. The fifth factor has no bearing in this case, since the arbitration has not continued.

87. As for the sixth factor, I am not persuaded that the section 68 challenge itself is strong. Rather it is weak, a factor militating against the granting of the extension sought. I am quite prepared to accept for present purposes that the outcome on the issue of breach may have been relevant to the question of costs, see the approach in *Vee Networks Limited v Econet Wireless International Limited* [2004] EWHC 2909 (Comm), [2005] 1 Lloyd's Report 192 at 209, even though Mr Allawi might face an uphill struggle in that regard given the tribunal's approach to the question of costs (in particular looking at what it said at paragraphs 782 and 783 of the Allawi award). The tribunal was always going to be best placed to assess the correct outcome on costs. It was aware of all the issues and those which it had and had not decided.

88. What I find very difficult to accept is that the tribunal was accordingly obliged to reach a conclusion on the question of breach. As I put it during the course of the hearing, this would be to allow the tail to wag the dog. No court or tribunal is ever obliged to determine every issue raised or issues which it decides do not arise in the light of other findings: see *HBC Hamburg Bulk Carriers GmhH & Co KG v Tangshan Haixing Shipping Company Limited* [2006] EWHC 3250 at [10], *Petrochemical Industries Company (KSC) v The Dow Chemical Company* [2012] EWHC 2739 (Comm) and *Secretary of State for the Home Department v Raytheon*

Systems Limited [2014] EWHC 4375 TCC at [33g)].

89. Mr Ng accepted that in simple cases, perhaps involving private law rights, it would be permissible for a tribunal to ignore certain issues, deciding only those necessary for it to reach an overall outcome. But he submits that the nature of a breach of a bilateral investment treaty obligation by a contracting state is "*special*" because it "*underpins investment treaty arbitration*". I could not identify any principled basis for a different approach requiring a tribunal to determine an issue for the purpose of costs arguments. No authority was cited in support and there certainly is no general statement to that effect in the three cases relied upon by Mr Allawi.

90. Additionally, as Mr Smouha submitted, this is not a situation where the tribunal wholly "*failed to deal*" with the issue of the alleged Article 2(2) breach; it expressly addressed it in paragraph 175 of the Allawi award. As Mr Justice Flaux, as he then was, put it in *Primera Maritime (Hellas) Limited v Jiangsu Eastern Heavy Industry Company Limited* [2014] 1 Lloyd's Reports 255 at [40], provided the tribunal has dealt with it, it does not matter whether it has done so "*well, badly or indifferently"*.

91. Mr Ng drew my attention to the separate pleaded claim for a declaration of breach recorded at paragraph 419 of the Allawi award and made reference to the order of Phillips J on 18 October 2017, when he dismissed Pakistan's attempt to dismiss the Progas claimants' application to set aside the challenge under section 68. *Inter alia* Phillips J stated that it seemed at least arguable that the Progas claimants were

entitled to determination of their claim for declarations. I was told that there was no equivalent to paragraph 715 in the Allawi award in the award in the Progas proceedings. It is difficult to say more without a fuller understanding of the arguments and submissions in the Progas arbitral proceedings.

92. I have not been taken to anything to suggest that the pleaded claim for a declaration by Mr Allawi added anything in terms of substantive outcome on the overall merits. Mr Allawi's claim for very substantial damages failed in any event. Nor have I been taken to any material which suggests that the claim for declaratory relief was an important self-standing element of the claim bringing with it particular or material consequences beyond costs such that the tribunal was obliged to resolve it.

93. In any event, the tribunal dealt with the claim for declaratory relief. As the tribunal commented when dismissing the UNCITRAL Rule 39 application, the tribunal in fact decided at paragraph 797(b) of the Allawi award that the claimant's case failed in its entirety. It went on to address all other claims at paragraph 797(g) as follows:

"All other claims and requests for relief by both parties are dismissed."

94. The tribunal recorded that there were no claims left undecided by the Allawi award. It seems to me that Mr Allawi's complaint is in reality more naturally classed either as a complaint about the dismissal of the claim for declaratory relief, which has not been raised, or as a complaint about the costs order made in circumstances where there had been no determination on the issue of breach. That neutral outcome on

that issue should, it could be said, have been reflected in the tribunal's costs order but that again is not how it has been put nor would the cost order of course be susceptible to appeal under section 69 of the Act.

95. I should add for the sake of completeness that even if the proposed challenge could not be said to be intrinsically weak, it can certainly not be said to be strong.

96. Again, for the sake of completeness and in any event, given the delay in question, and the absence of good reason for it, I would ultimately have exercised my discretion in the same way whatever the merits of the underlying section 68 challenge.

97. As for the final factor, I consider fairness in the broadest sense. Stepping back, it would not in the broadest sense be unfair to Mr Allawi were he to be denied the opportunity of bringing a section 68 challenge. I recognise that he believes that this would cause him prejudice, indeed what he describes as irremediable and substantial prejudice likely to lead to his bankruptcy. However, for the reasons set out above, there has been excessive delay without good reason. The substantive challenge is weak or at least cannot be said to be strong. There would be prejudice beyond delay to Pakistan were the extension to be granted. A consideration of all the relevant factors leads in my judgment to the clear conclusion that the extension application falls to be dismissed and I dismiss it accordingly.