Neutral Citation: [2019] EWHC 799 (Comm) Case No: CL-2018-000453

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29th January 2019

Before :

Sir Michael Burton QC
sitting as a High Court Judge

- -

Between :

State A	**Applicant**
- and -	
(1) Party B	**Respondents**
(2) Party C	

- -
- -

Christopher Harris, Sir Michael Wood and Cameron Miles (instructed by **Reed Smith**) for the **Applicant**
David Foxton QC and Edward Ho (instructed by **Jones Day**) for the **Respondents**

Hearing dates: 21-22 January 2019

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APPROVED REDACTED JUDGMENT

SIR MICHAEL BURTON Tuesday, 29th January 2019

(14.01 pm)

SIR MICHAEL BURTON

1. This has been the hearing of an application by the Applicant, State A (Respondent in the arbitration) for an extension of time pursuant to ss.70(3) and 80(5) of the Arbitration Act 1996 ("the Act") of the 28-day limit for an application pursuant to s.67 of the Act to challenge the jurisdiction of the Arbitral Tribunal […].

2. The Arbitrators concluded, by a Partial Award on jurisdiction dated […] 2015, that they had jurisdiction under the […] ("the BIT"), […], so that the arbitration was validly commenced under […] the BIT.

3. There was no s.67 challenge at the time, and the parties, the Applicant and the Respondents (Claimants in the arbitration) […], proceeded to prepare for and conduct a hearing over 12 days in […] 2017 and 2018, from which the final award is still awaited. The Applicant's application for an extension of the 28-day time limit was issued 959 days late, […], and it is vigorously resisted by the Respondents.

4. The jurisdiction hearing which led to the Partial Award took place [in early] 2015. It was preceded by an application by State D who had, as the Applicant and the Arbitrators appreciated (see the Arbitrators' ruling dated […]), been contacted by the Respondents after State D's position was put at issue by the Applicant. The Arbitrators granted the application [in late] 2014 in the following terms:-

[…]

5. State D's Submissions […] included the following:-

> "6. *In order to determine its position with respect to the issue* […], *State D has undertaken a thorough review of its records, including any communications with State A in that respect*." […]

6. These Submissions were accompanied by a substantial number of specially declassified documents. There was only a short period before the hearing, but the Applicant put in a Response in which it said:-

"State D's 'findings and conclusions', even if they were supported by the materials relied upon in the […] Submissions ... could not be conclusive as to the question […]. That question cannot be determined by the subjective view of one party, State D, given in 2014 in the […] Submissions, which was first adopted in the course of the present proceedings and after access to the parties' pleadings. This is particularly the case since State D's 'findings and conclusions' are based largely on its own selection of internal records, records which may or may not be complete and which in any event were not previously known or available to State A. Moreover, in reaching its 'findings and conclusions', State D does not simply let the records speak for themselves, but interprets them in advocacy fashion in an effort to support the conclusion that it (and the Claimants) desire."

7. In post-hearing submissions the Applicant further submitted:-

"In any event, we have no way of knowing whether the documents supplied by State D are all that it has."

8. The Arbitrators addressed the State D Submissions in their Partial Award as follows:-

"*233. Respondent sharply criticized State D's submission, finding it 'based largely on [State D's] own selection of unpublished memoranda and materials,' internal documents […] Notwithstanding Claimants' assertions, State D's supposedly 'thorough review' of its record is not 'an objective exposition of the record.'"*

Then at paragraph 264:

"The Tribunal has carefully reviewed the thirty-three documents drawn from State D's official files that accompanied the submission. Most are internal State D Government communications or, in one case, a letter from a State D official to a State D professor. While these documents were not communicated to Respondent at the time they were created, some provide useful context for exchanges that did take place between the two states. Others indicate or clarify State D officials' understandings or intentions […]. In this regard, State D's non-disputing party submission has made a useful contribution to the proceedings.

265. However, State D's legal analysis, in particular its legal conclusion […], goes to matters that the Tribunal must itself decide on the basis of its own independent appraisal of all relevant facts and legal principles."

9. The Partial Award is lengthy, and draws fully on the submissions made to the Arbitrators, and the documents put before them. They note that:-

10. […]

11. […]

12. […]

13. […]

14. […]

15. […]

16. […]

17. […]

18. […]

19. There was no challenge to the Award within 28 days or at all. Preparations for the hearing on merits and quantum continued and the parties have expended some $[X] million <u>each</u> on costs. There were 10 pleadings consisting of over 2,100 pages, 13 witness statements and 15 expert reports, and 17 witnesses were cross-examined during the 12 days of hearing […].

20. Meanwhile another arbitration claim under the BIT was brought against the Applicant (the Party E arbitration) […]. The Applicant was represented by different solicitors. Party E filed a 166-page statement of claim in February 2017. It was accompanied by some 190 documents and the total number of pages apparently associated with the filing runs to 22,576.

21. One such exhibit, referred to in two footnotes relating to merits not jurisdiction, was a letter dated […], written to Mr F, the State D Minister […] at the time, by the claimant in that arbitration ("the Company G Letter") and it concluded:-

[…]

22. Those advising the Applicant in that arbitration did not pick up the relevance of this letter until after an order was made in that arbitration […], refusing to bifurcate the arbitration to hear the issue of jurisdiction as a preliminary matter.

23. They identified its potential relevance [3 months later], and decided to seek any response to the letter by an application under the State D freedom of information legislation ("FOI") [the following month].

24. State D responded to the FOI request [4 months later] by producing a redacted copy of a letter of response from Mr F […], with parts of the third paragraph redacted ("the Mr F Letter"). The Applicant's representatives emailed a representative of the State D Government on 30 April, asking for the passages to be unredacted because of their potential relevance in this arbitration, but this was refused […].

25. The unredacted copy was then sought by way of the disclosure process in the Party E arbitration, and an unredacted copy was produced [in] 2018. The paragraph which had in part been redacted was revealed as being as follows:-

" *[…]*."

26. This application was then speedily issued […]. Evidence was then served by both parties and there was also a letter sent to the State A ambassador in State D by the State D […] addressing the Mr F Letter ("the Mr H Letter"). While recording that "*at no point has State A directly requested that State D provide the Letter to it, and at no point has State D ever refused to provide State A with the Letter*" (as opposed to the making and refusing of the FOI request, which it explains) it continues as follows:-

"*Counsel for State A's allegations regarding the incompleteness and inaccuracy of State D's position […] are similarly misplaced. As has been conveyed to State A several times, State D's position on this question […] is based on all of the documents and facts available […]. As discussed in State D's Submissions, State D conducted a thorough review of its records to determine its position […]. The Letter came up in State D's search, and was carefully considered. It was determined that the Letter was not relevant or useful in determining State D's position […] for several reasons. […].*

In the light of the […], State D determined that the Letter did not add anything to its analysis and did not rely on it in its Submission. Indeed, State D viewed and continues to view the Letter as a limited and perfunctory reference to the issue […]."

27. The Applicant, for whom Mr Christopher Harris and Sir Michael Wood, with Mr Cameron Miles, have made able and persuasive submissions, makes its application for an extension, which it accepts is made after an exceptional passage of time, by reference to the receipt of the unredacted Mr F Letter only in […] 2018, and its timeous steps thereafter.

28. They submit that they now have an arguable challenge under s.67 to the Arbitrators' Partial Award of […]. They rely on the principles first enunciated in relation to the grant or refusal of an application for an extension of time by reference to s.80(5) of the Act by Colman J in **Aoot Kalmneft v Glencore International AG**, [2002] 1 All ER 76 ("**Kalmneft**"), approved by the Court of Appeal in **Nagusina Naviera v Allied Maritime Inc**, [2003] 2 CLC 1 ("**Nagusina**") and recently re-enunciated by Popplewell J in **Terna Bahrain Holding Co WLL v Al Shamsi**, [2013] 1 All ER (Comm) 580, ("**Terna**"). If necessary, which they say it is not, but in response to the Respondents' submissions, they contend that the evidence supplied by the Mr F Letter is a 'game-changer', by reference to the cases where fresh evidence is sought to be admitted on an appeal -- per Earl Cairns LC in **Phosphate Sewage Co Limited v Molleson**, (1879) 4 App Cas 801, at 814, namely new evidence which "*entirely changes the aspect of the case*".

29. The Respondents, ably and powerfully represented by Mr David Foxton QC, with Mr Edward Ho, submit that no such application should be entertained after such a massive delay -- more than two years seven months. They do not accept that the Applicant has sufficiently justified the delay prior to June 2018, but in any event assert that the alleged fresh evidence is not a game-changer, not transformational, nor indeed, as would be necessary in the light of a 'colossal' delay such as this, 'seismic'.

The Authorities.

30. Colman J prefaces his conclusions in relation to the discretion to be exercised under s.80(5) as follows in **Kalmneft**:-

"*50. In determining the relative weight that should be attached to discretionary criteria, the starting point must be to take into account the fact that the 1996 Act is founded on a philosophy which differs in important respects from that of the CPR.*

51. Thus, the twin principles of party autonomy and finality of awards which pervade the 1996 Act tend to restrict the supervisory role of the court and to minimise the occasion for the court's intervention in the conduct of arbitrations.

52. ... Further, the relatively short period of time for making an application for relief under ss 67, 68 and 69 also reflects the principle of finality. Once an award has been made the parties have to live with it unless they move with great expedition. Were it otherwise, the old mischief of over-long unenforceability of awards due to the pendency of supervisory proceedings would be encouraged".

He then points to the general principles set out in s.1 to the Act, including the discouragement of "*unnecessary delay or expense*".

Then at paragraph 57 he continues:-

"*... Accordingly, much weight has to be attached to the avoidance of delay at all stages of an arbitration, both before and after an interim or final award. If the English courts were seen by foreign commercial institutions to be over-indulgent in the face of unjustifiable non-compliance with time limits,*

those institutions might well be deterred from using references to English arbitration in their contracts. This is a distinct public policy factor which has to be given due weight in the discretionary balance."

He then concludes in paragraph 60:

"*The relative weight to be given to these considerations in the discretionary balance in any given case is likely to be influenced by the general considerations relating to international arbitration to which I have already referred*".

The "*considerations in the discretionary balance in any given case*" are those he has set out in paragraph 59 as follows:-

"*Accordingly, although each case turns on its own facts, the following considerations are, in my judgment, likely to be material:*

(i) the length of the delay;

(ii) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances;

(iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;

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

(v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred the determination of the application by the court might now have;

(vi) the strength of the application; and

(vii) whether in broader sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined."

I shall call these the “Colman Guidelines”.

31. The Colman Guidelines were expressly approved by the Court of Appeal in **Nagusina** per Mance LJ. Having recited the seven factors in the Colman Guidelines he continued at paragraph 39:-

"*... it is clear that Andrew Smith J* [the judge below] *had well in mind as primary factors the length of the delay, its causation and the reasonableness of both parties' conduct: that is factors (i) - (iii) identified by Colman J*".

And at paragraph 41 he says:-

"*As to factor (vi), it is right that Andrew Smith J did not explicitly refer to the strength, or indeed the weakness, of the claim. Perhaps this was not discussed before him ... On any view, the prospects here were clearly not such as could have affected what was otherwise the judge's view as to the right exercise of his discretion.*"

32. In **Nestor Maritime v Sea Anchor Shipping**, [2012] 2 Lloyd's Rep 144 ("**Nestor**") Eder J said at paragraph 17:-

"*In Nagusina ... Mance LJ, in reviewing the first instance decision, stated that the primary factors among those considered by Colman J in the Kalmneft case were factors (i) to (iii)*".

I do not actually think that Mance LJ said that, but rather that (in circumstances there explained) those were the primary factors considered by Andrew Smith J below. Certainly Eder J continued at paragraph 18 by citing with approval the words of Akenhead J in **L Brown & Sons Limited v Crosby Homes (North West) Limited** [2008] BLR 366 ("**Brown**") as follows:-

"*At para 32, Akenhead J said this in relation to the strength of the section 68 application ' ... (c) The weight to be given to factor (vi) (the strength of the section 68 application) is not a primary factor. However, an intrinsically weak case will count against the application for extension whilst a strong case would positively assist the application. An application which is neither strong nor weak will not add significant weight to the application for extension of time'*."

33. Finally there is Popplewell J in **Terna**. At paragraph 27 he repeats the seven factors from the Colman Guidelines, though adding the rider, not in my view justified by the words of Mance LJ, "*Factors (i), (ii) and (iii) are the primary factors*". He then adds four observations of his own, of which the first and fourth are most relevant:-

"28. *I add four observations of my own which are of relevance in the present case. First, the length of delay must be judged against the yardstick of the 28 days provided for in the 1996 Act. Therefore a delay measured even in days is significant; a delay measured in many weeks or months is substantial."*

Then, in the context that he was holding a 'rolled-up' hearing of an application for an extension of time and the application itself, he said:-

"*Fourthly, the court's approach to the strength of the challenge application will depend upon the procedural circumstances in which the issue arises. On an application for an extension of time, the court will not normally conduct a substantial investigation into the merits of the challenge application, since to do so would defeat the purposes of the 1996 Act. However if the court can see on the material before it that the challenge involves an intrinsically weak case, it will count against the application for an extension, whilst an apparently strong case will assist the application. Unless the challenge can be seen to be either strong or intrinsically weak on a brief perusal of the grounds, this will not be a factor which is treated as of weight in either direction on the application for an extension of time. If it can readily be seen to be either strong or weak, that is a relevant factor; but it is not a primary factor, because the court is only able to form a provisional view of the merits, a view which might not be confirmed by a full investigation of the challenge, with the benefit of the argument which would take place at the hearing of the application itself if an extension of time were granted.*"

In the circumstances that he himself was carrying out a ‘rolled up’ hearing, he did of course proceed to consider the merits.

35. It is worth noting, in the light of the emphasis by all three judges, Colman J, Mance LJ and Popplewell J, as to the significance of the passage of time or delay that, of the authorities before me, none have involved anywhere near the delay or passage of time in this case, and in many of them delays were measured in days, and only in one case (**Chantiers de L'Atlantique SA v Gaztransport & Technigaz SAS** [2011] EWHC 3383 (Comm) ("**Chantiers**") a case of alleged fraud by the claimant)

was the extension granted, and that was where there was a 'rolled-up' hearing, and the application was in the event dismissed:-

Kalmneft. 11 weeks. Refused.

Nagusina. 3 months. Refused.

Brown. 66 days. Refused.

Chantiers. 150 days. Granted (but see above).

Nestor. 6 months. Refused.

Terna. 17 weeks. Refused.

S v A [2016] 1 Lloyd's Rep 604. 102 days. Refused.

Squibb Group Limited v Pole 2 Pole Scaffolding Limited [2017] EWHC 2394. 84 days. Refused.

Telecom of Kosovo JSC v Dardafon.Net LLC [2017] EWHC 1326 (Comm). 18 days. Refused.

Daewoo Shipbuilding Ltd v Songa Offshore Equinox Ltd [2018] 1 Lloyd's 443. 24 days. Refused.

Broda Agro Trade Ltd v Alfred C Toepfer GmbH [2010] 1 Lloyd's 533. 14 months. Refused.

This emphasises the very exceptional nature of this application.

The Parties' Submissions

36. I deal first with the parties' submissions in relation to the factors other than strength or weakness of the merits. There was little dispute about factors (i), (iii), (iv) and (v). The length of the delay, or passage of time, was admitted. It was not suggested that the Respondents or the Arbitrators caused or contributed to the delay. Even if it could be said, as Dr Harris contended, that State D had contributed to the delay by not referring to the Mr F Letter originally, assuming that it had any duty to do so, that could not be ascribed to the Respondents or the Arbitrators. The arbitration has continued during the period of delay, to an extent which the Respondents submit now makes it inappropriate to re-open the question of jurisdiction, but subject to the issue that the wasted costs of both parties would total some $[X] million, that could be done.

37. As for prejudice (factor iv), the Applicant submits that it has not been asserted by the Respondents that the waste of such costs would be an intolerable burden, and points out that, if there had not been bifurcation, the same costs could have been at risk if there had been a timeous challenge within s.67 to such award after it. The wasting of such costs would in my view amount to a prejudice to the Respondents (see **S v A** paragraph 39, **Squibb** paragraphs 28-9), as would the costs of a s.67 application, although security for costs has been offered by the Applicant. However, prejudice caused by yet further delay, or by a stay on enforcement if the final award is set aside, must be seen in the context of the time that has already passed since the dispute arose […], and the fact that, if no extension is granted, the Applicant will have lost its chance to challenge the award; and may face other challenges under the BIT, such as in the Party E arbitration, with the uphill task, even if there be strictly no *res judicata*, [the point] in another arbitration, against the background of a known decision by the Arbitrators in this case, although that of course blends into factor (vii).

38. There was a battle between the parties in relation to factor (ii), the taking of reasonable steps by the Applicant in not issuing this application – i.e. not discovering the Mr F Letter, if that indeed justifies such issue – until […] 2018. The Respondents identified three stages at which they submit that the Applicant could have taken further action which renders the delay culpable or means that the Applicant cannot rely on the passage of time by reason of its own failure to take reasonable steps.

39. The first stage would be in this arbitration itself, after the receipt of the State D Submissions, which the Applicant immediately concluded to be inadequate, as set out in their submission at the time to the Arbitrators (see paragraphs 6 and 7 above). The Respondents accept that, as State D was not a party to the arbitration, the Applicant could not have sought an ordinary order for disclosure from the Arbitrators against State D, and there was in any event a very short time from the arrival of their Submissions on […] to the hearing on […].

40. However, the Respondents submit that the Applicant could have, either prior to the hearing or even after it, given the existence of post-hearing briefs, applied either to the Arbitrators or directly to State D

for more documents, on the basis that, if they were refused, then the State D Submissions should not be permitted to be relied upon, or that any failure to respond would yet further affect the weight, which they had already assailed, to be attached to the Submissions.

41. I conclude that there is no basis for such criticism of the Applicant. The Applicant did rely on the selectivity of the Submissions as affecting their weight, and the Arbitrators to some extent took that into account. However, in any event I am satisfied that no application to the Arbitrators or to State D itself would have succeeded:-

(i) Any such application of course would not have been directed to the Mr F Letter, of which they had no knowledge, and can only have been an application for any further relevant documents (as opposed to all documents, which plainly would never have succeeded so shortly before the arbitration hearing, and from a non-party).

(ii) Given that State D had, we now know, considered whether to disclose the Mr F Letter and concluded that it was not relevant, no such application, even if granted, or such request, even if made, would have elicited it.

42. The next stage relates to the Party E arbitration. Criticism is made of the Applicant's failure to pick up the existence of the Company G Letter (or the lack of response to it), and to make a speedy application for disclosure in that arbitration, rather than proceed by way of an FOI application. It does seem to me, despite the substantial number of exhibits, and the fact that the letter was not referred to by reference to jurisdiction but to merits, that the Applicant's advisers should or could have picked up the relevance of the letter earlier than […] 2017. However, in order to justify an early application for disclosure, in accordance with the relevant arbitration rules, they would have had to have shown good cause, and thus relevance to the proposed jurisdiction application, which was no longer live after [X] 2017, when bifurcation was refused. I am unable to say that there was relevant lack of reasonable diligence relating to that relatively short period. As for the FOI application, no excuse is put forward

for the delay of a month between [X] 2017 and the making of it on [X] 2017, but in the overall scheme of things it would have made very little, if any, difference.

43. As for the Respondents' criticism of a failure to use diplomatic channels to obtain either more documents generally, prior to the identification of the Company G letter, or the Mr F Letter subsequent to such identification, it does seem to me that an attempt ought to have been made. However, I consider it very unlikely that it would have been successful in achieving the Mr F Letter:-

(i) State D had made a decision that it was not relevant.

(ii) The attitude to its disclosure is stated in the […] 2018 letter, when refusing the unredaction of it pursuant to the FOI request.

(iii) Even in the Mr H Letter the statement is not made that if the Mr F Letter had been sought it would have been supplied in unredacted form.

44. Subject, therefore, to any further consideration of factors (iv) and (vii), to which I have referred, I turn to factor (vi), the strength of merits of the application.

45. The Applicant submits that consideration of the merits is, on the authorities, not a ‘primary factor’, and does not require much investigation. A s.67 application, if permitted to proceed, would be a rehearing, at which the conclusion of the Arbitrators would then be at best "*of interest, but they have no legal or evidential weight*" (per Bryan J in **GPF GP Sarl v Republic of Poland** [2018] Bus LR 1203, at paragraph 64, referring to earlier authorities) and fresh evidence is permitted (Males J in **The Kalisti** [2014] 2 Lloyd's Rep 449 at paragraph 29). The Applicant’s application only has to be arguable on the merits, and factor (vi) is satisfied. If necessary, however, they contend that they do have a strong case, such that the Mr F Letter is a game-changer, is 'seismic', in showing the State D Submissions to be unreliable, and of itself showing that, contrary to the conclusions of the Arbitrators, there had been [X], and hence not at any material time.

46. The Respondents do not accept that factor (vi) is not a 'primary factor'. Even if Mance LJ's words can be so interpreted, or Popplewell J's words are correct in that regard, in any event the words of Akenhead J, as approved by Eder J, show that weakness of an applicant's case can be determinative. In any case, Mr Foxton formulated a further factor said to be relevant where fresh evidence is relied upon in a s.80(5) application. He submits that where an applicant seeks to re-open any ground of objection to jurisdiction already argued, in reliance upon fresh evidence, such evidence must wholly change the case from that which was previously addressed.

47. The Respondents rely upon various analogies in relation to their case on fresh evidence. Mr Foxton points to the 1950 Arbitration Act, under which there was the availability of remission of an award reliant upon fresh evidence, a remedy not retained by the Act, but, if allowed, it would have been dependent upon the **Ladd v Marshall** [1952] 1 WLR 147 test for admissibility of fresh evidence, effectively as per **Phosphate Sewage**. He submits that both because the Act was intended to be more restrictive in that regard, and by reference to the restricted nature of s.73 of the Act -- no raising of later objections -- either there cannot be any raising of the same ground on fresh evidence once the time limit for objecting has expired, or it should only be on the basis of a prescriptive test for further evidence.

48. He suggests that the appropriate test would relate to 'added value'. The Applicant did not challenge the Partial Award. They must therefore have concluded that, on the basis of what was before the Arbitrators, the Arbitrators were entitled to find that the "*great weight of the evidence compels*" the conclusions they reached. Does the Mr F Letter totally overturn that, or is it simply just another example of (later) evidence to add to the 'Possible Contrary Indications' listed by the Arbitrators at paragraphs 328 to 343 of their Award? Mr Foxton suggests the latter. This would comply with the view of Aikens J in **Elektrim SA v Vivendi Universal** [2007] 1 Lloyd's Rep 693 at 80 of the "*general ethos of the Act, which is to give the courts as little chance to interfere with arbitrations as possible*".

49. The Applicant submits that Mr Foxton, by relying upon s.73, ignores the provisions of s.73(1) and (2) themselves, which expressly permit the Court (pursuant to s.80(5)) to extend time, and hence the only requirement is to satisfy the Colman Guidelines.

50. I turn then to the strength of the merits of the application. The Applicant submits that the Mr F Letter is a powerful refutation of the conclusion by the Arbitrators […]:-

(i) It casts doubt on the reliability of the State D Submissions.

(ii) It shows the view of State D, […].

(iii) It is on official notepaper, signed by the or a relevant Minister, after a period of five months to respond to a specific question.

(iv) It is not *'perfunctory'*.

(v) It fits with the view of [the former legal adviser], and hence casts doubt on the conclusions of the Arbitrators as to his article.

51. The Respondents contend as follows.

(i) It casts no doubt on the State D Submissions, which omitted it because, as the Mr H Letter explains, it was not 'temporally' relevant. In any event, the Arbitrators did not reach their conclusions on the basis of the State D Submissions but, as they explained, and for the reasons they give, independently of them.

(ii) The ostensible view of Mr F falls to be set against that of Mr J [the other Minister], upon which in any event the Arbitrators did not place great weight (as indeed the Applicant had submitted they should not) but only as part of other indicia (paragraph 325-7). Other State D views […] accorded with that of Mr J.

(iii) The delay of five months in replying is of no relevance. As the Mr H Letter explains, the letter of Mr F is incorrect, […].

(iv) The comments in the Mr F Letter did not 'cross the line' and cannot overbear the documents which the Arbitrators considered […], which did 'cross the line' between State D and State A, in the 'exchanges' to which the Arbitrators refer.

(v) The [former legal adviser] article was fully considered by the Arbitrators. It did not say […], and was concluded by the Arbitrators, particularly by reference to the closing conclusions of his article, to be consistent with […].

Conclusions

52. I do not accept Mr Foxton's suggestion that there should be a specially formulated Factor to address fresh evidence. There might be an application for an extension made only days or weeks out of time where seismicity or transformation in relation to the fresh evidence would not be necessary, where the fresh evidence was not so strong and yet an extension of time could be given, on balancing all the Colman Factors or Guidelines.

53. However, I am persuaded by Mr Foxton's submissions that there should be provision and leeway in the Colman Guidelines for relativity. The longer -- the more 'colossal' -- the delay or passage of time, the more transformational or seismic must be the fresh evidence sought to be relied upon. It may be that, in a case in which there is a short delay and the parties have not, as they have in this case, steam-rollered through at enormous expense to a further hearing, then the strength of the case required for an extension may be less, or the role of factor (vi) may not be 'primary'. However:-

(i) The very fact that, if permitted to proceed, a s.67 application would be a rehearing, and allow fresh evidence underlines the greater need for a proper threshold, a sensible and properly controlled gateway, before it can be allowed to go further.

(ii) In my judgment, factor (vi) must be one of the primary factors where there has been substantial delay, and Mance LJ's dicta in **Nagusina** should, in my judgment, be so interpreted. To that extent I would disagree with the words of Eder J and Popplewell J.

54. In my judgment, in this case where the delay has been 'colossal' and there would undoubtedly be prejudice to the Respondents by virtue of the costs which would be wasted, the strength of the case must be the greater, and the fresh evidence must indeed be transformational.

55. I do consider that it was misguided of State D not to have included any reference to the Mr F Letter in its Submissions. There was no breach of duty, no non-compliance with the order or the request of the Arbitrators, certainly no suppression, but they did not need to limit their disclosure of documents to the period ante-dating […], nor in fact did they do so. And if post-[…] documents were to be produced, it would have been sensible to have produced also the Mr F Letter, together with the explanation now given in the Mr H Letter. In my judgment, had they done so, the Arbitrators would have reached the same conclusion that they did. Put another way, the Mr F Letter does not, seismically or otherwise, totally change the aspect of the case. The impressive logic and reasoning of the Arbitrators remains, and would have remained unchanged, […], as appears from contemporary, public documents which Mr F may have ignored or not known about. The Mr F Letter would simply have been included, together with the Mr I article, […], in the Possible Contrary Indications, which the Arbitrators would, in my judgment, have retained in just those terms.

56. The Applicant's case with the fresh evidence may be arguable but, in my judgment, in the circumstances of this case, the fresh evidence is not so strong that it would justify the opening up after all this time, after the colossal delay and expenditure of cost that has occurred in this arbitration, such as to allow the extension. It would need to be a game-changer, and it is not. The Arbitrators' Award survives despite it and consequently stands as it is.

57. I dismiss the application.

(15.25 pm)