Case No: 2000 Folio No. 1250
Neutral Citation Number: [2003] EWHC 10 (Comm)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10TH JANUARY 2003

Before :

MR. MICHAEL CRANE Q.C. SITTING AS A DEPUTY JUDGE OF THE COMMERCIAL COURT

- -

Between :

GOOD CHALLENGER NAVEGANTE S.A.	**Claimant**
- and -	
METALEXPORTIMPORT S.A.	**Defendant**

- -
- -

Duncan Matthews QC and Michael Ashcroft (instructed by Holman Fenwick & Willan) for the Claimant
James Turner (instructed by Lane & Partners) for the Defendant

Hearing dates :

- -

Approved Judgment

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

.....
Mr Michael Crane QC

Mr Michael Crane Q.C. :

Introduction

1. The question at this hearing was whether the Claimants should be allowed to enforce a final arbitration award given in their favour against the Defendants on 15th June 1983.

2. On 25th January 1993 Mr. Justice Saville, on an *ex parte* application under Section 26 of the Arbitration Act 1950, ordered that the Claimants be at liberty to enforce the award in the same manner as a judgment provided that the Defendants were to have 22 days from the date of service on them of the order to apply to set it aside and in the meantime there was to be no enforcement. When this order was made the Claimants were involved in contested proceedings in the courts of Romania for the recognition and enforcement there of the award. On advice from their Romanian legal adviser the Claimants did not serve the order of Saville J. on the Defendants while these proceedings were pending. In the event, the Romanian proceedings proved to be protracted: having been commenced on 27th May 1992, they were concluded in March 1998 with the result, essentially, that the Claimants succeeded in having the award recognised in Romania but failed in their attempt to have it enforced.

3. On 15th November 2000 the Claimants commenced proceedings in this court, attempting to found a cause of action in England on the basis of the judgment of the Romanian courts which had recognised the arbitration award. That venture was later abandoned. It fell foul of the rule that a judgment *in personam* given by a foreign court of competent jurisdiction will only be enforced under English common law if it is a judgment for a debt or definite sum of money. The Claimants then concentrated their attention on the order of Saville J. Because of the time elapsed since the making of this order, it was necessary, before serving it, to apply to lift the stay which had come into force automatically under the 1998 Civil Procedure Rules. On 16th February 2001 Mr. Justice Moore-Bick lifted the stay and allowed the Claimants to serve the order, but directed that no steps be taken to enforce it without the permission of the court. The order had to be served through the usual Foreign and Commonwealth Office channels; and in the event service was not effected on the Defendants until 15th August 2001. The Defendants had not, hitherto, been aware of the order of 25th January 1993.

4. The Defendants now apply to this court for an order setting aside the order of Saville J. or setting aside service of that order, or alternatively for an order staying the proceedings for enforcement of the arbitration award. The two grounds on which that application is made, or at least the two grounds which are still maintained, are that:

   i) proceedings to enforce the award had become barred by limitation by the time of the *ex parte* application to Saville J. under Section 26 of the Arbitration Act 1950; and

   ii) the attempt to rely upon an order made *ex parte* in January 1993, having made no attempt to serve that order until early 2001, is an abuse of process.

The first of these grounds involves two separate arguments. The first is that the Claimants are estopped from denying that proceedings to enforce the award were time barred by January 1993 by a judgment of the Supreme Court of Romania given on that issue in the course of the Romanian enforcement proceedings. The second is that, if the issue is not closed by estoppel, then, on the facts, an action to enforce the award had become barred by limitation by January 1993. The relevant rule of limitation is Section 7 of the Limitation Act 1980 which states:

> *"An action to enforce an award, where the submission is not by an instrument under seal, shall not be brought after the expiration of six years from the date on which the cause of action accrued."*

Two matters were common ground before me. The first was that an application under Section 26 of the 1950 Arbitration Act was, for limitation purposes, an action to enforce an award, the reason for the concession being that the procedure for conversion into a judgment created by the Act operated merely to "short circuit" in procedural terms a formal action for judgment on the award. The second matter of common ground was that an action to enforce an arbitration award accrues, not when the award is issued or published, but when there is a breach by the party by whom the award is payable of his implied contractual promise to satisfy any valid award made against him: see, for example, *Agromet Motoimport Ltd v Maulden Engineering Co. (Beds) Ltd* [1985] 2 AER 436. In most cases, including I think this one, breach of this promise to pay an award will be inferred within a fairly short period of the award's publication. Clearly, in this case the primary limitation period would long since have expired by the time of the application under Section 26 of the Arbitration Act 1950; but, as will become apparent, the question is whether for limitation purposes the cause of action to enforce the award is deemed to have accrued afresh as a result of various part payments and acknowledgments of the claim within the meaning of Sections 29(5) and 30 of the Limitation Act 1980, with the result that the limitation period was still current when the application to enforce was made.

5. The Claimants respond to the Defendants' application by applying for permission to enter judgment pursuant to the order of Saville J. or for permission to enforce that order on its terms, that is to say, by taking steps to enforce the award as though it were a judgment. Thus at issue here is the status of the *ex parte* order of 25th January 1993 and the implications of the Claimants' omission to attempt to serve it until some 8 years after it had been made. The estoppel argument and the contention that any action to enforce the award had become barred by limitation by January 1993 mean that it is necessary for me to set out in some detail the parties' relevant dealings prior to that date along with the history of the Romanian proceedings.

The History

6. The award in question followed a reference to arbitration in London in which the Claimants, as owners of the vessel Good Challenger, claimed demurrage and damages for detention against the Defendants as charterers of the vessel. The Defendants are a Romanian trading company which, at the time, was state owned but which is now owned by private interests. The arbitrators awarded the Claimants US$ 1,757,198.63 as

demurrage and damages for detention along with interest on that sum at the rate of 12.5% from 1st March 1982 until the date of the award. The arbitrators also ordered the Defendants to pay the costs of the award and the Claimants' legal costs. Interest on the total sum awarded has accrued since 15th June 1983 at the judgment rate under Section 20 of the Arbitration Act 1950. It is not necessary for present purposes to describe the underlying dispute other than to say that it arose from prolonged delay in discharging a cargo of steel at Bandar Abbas after a voyage from Galatzi via Constanza.

7. The validity of the award is not, and never has been, challenged. Notwithstanding this, it was not paid. The result was that in late December 1985 the Claimants arrested in France the vessel Filaret. This vessel belonged not to the Defendants but to Navrom, another Romanian state owned entity. Such a step was possible, apparently, because, in the relevant respects, French law offers an unusually expansive enforcement regime. At the time of her arrest by the Claimants the Filaret was already under arrest at Rouen at the suit of other creditors. This move appears to have prompted an almost immediate response from the Defendants. On about 7th January 1986 US$ 851,000 was paid by an entity called Navlomar to the credit of an account designated by Nicholas G Moundreas Shipping SA ("NGM"). It was common ground before me that, in relation to dealings relevant to the arbitration award and its enforcement, NGM were authorised agents of the Claimants and Navlomar were authorised agents of the Defendants. From the relevant exchange of correspondence it is clear that the payment was made in respect of the claim of the Claimants under the charterparty which had been referred to arbitration. The Claimants rely upon this payment as the first of two part payments in respect of the claim within the meaning of Section 29(5) of the Limitation Act 1980.

8. There was then a series of exchanges between the parties' respective agents regarding payment of the outstanding balance. In the course of these exchanges a further payment of US$ 78,172.47 was made. The sum was paid to NGM by a Mr. Loukedes, who is acknowledged to have been an agent of Navlomar. It is clear from the contemporary correspondence between NGM and Navlomar that $78,172.47 represented the difference between the outstanding balance as calculated by NGM on behalf of the Claimants and $1,949,000, the amount for which Navlomar claimed at the time to have a guarantee of payment approved by their principals. The payment of $78,172.47 was tendered as a demonstration of good faith pending the production of the guarantee. In the event, the guarantee did not materialise, although the $78,172.47 was paid as I have stated on a date between March and August 1986. The Claimants rely on this as a second part payment within the meaning of the Limitation Act 1980 and the related correspondence as an independent acknowledgment of the outstanding claim.

9. In April 1987 the Claimants' then solicitors, Messrs. Hughes Hooker and Co., wrote to President Ceaucescu and various ministers in the Romanian government in an attempt to enlist their support. This approach was not successful, although exchanges directed towards satisfaction of the outstanding debt continued during 1988 and 1989 between Navlomar, representing the Defendants, and the Claimants' agents, NGM. The Claimants rely on two telexes from Navlomar to NGM, sent on 17th February 1988 and 7th March 1989 respectively, as further acknowledgments of the outstanding claim within the meaning of Section 29(5) of the Limitation Act 1980.

10. During 1990 NGM wrote to various ministries in the Romanian government, again trying to solicit their aid in their principal's cause, but no further payment was forthcoming. The parties' representatives did, however, meet for discussions in Piraeus during November of 1990, but this meeting also failed to bear fruit. During 1991 NGM and the Claimants continued to press for payment in correspondence. For present purposes I need only note two features of this correspondence. The Claimants rely on a telex from the Defendants to NGM on 31st August 1991 as a further acknowledgment of the claim for limitation purposes; and on 23rd August 1991 the Claimants themselves wrote to various Romanian government ministries demanding payment as a last step before proceedings. No further payment was made.

The Romanian Proceedings

11. On 27th May 1992 the Claimants, or, strictly speaking, NGM acting on their behalf under a power of attorney, commenced proceedings in the Municipal Court of Bucharest seeking recognition and enforcement of the award. Since 1961 Romania has been party to the New York Convention on enforcement of arbitral awards. On 12th May 1993 the Municipal Court gave judgment in the Claimants' favour in relation both to recognition and enforcement of the award. I should say that, by this judgment, the Claimants also obtained recognition and enforcement of a High Court default judgment for damages to be assessed given in the Queen's Bench Division on 18th February 1983 in relation to the same liability as subsequently gave rise to the award. This judgment, however, is not relevant to the current enquiry: on the appeal from the judgment of the Municipal Court the Claimants disavowed any reliance on it.

12. On 1st April 1994 the Commercial Section of the Court of Appeal of Bucharest allowed the Defendants' appeal against the lower court's order for enforcement, but upheld the decision on recognition. That judgment appears to have rested essentially on the procedural ground that the decision of the lower court in relation to enforcement afforded a remedy wider than that strictly sought by the Claimants' petition before the lower court, the Claimants having apparently sought only recognition with a view to enforcement. The judgment of the Court of Appeal is not said to be relevant to the estoppel issue which I have to decide. The Defendants appealed against the Court of Appeal's decision on recognition, but on 16th November 1994 that appeal was dismissed by the Supreme Court of Romania on the ground that it was filed late.

13. This gave rise to a fresh round of proceedings commencing in February 1995 and concerned solely with the issue of enforcement of the award. Under the domestic laws of Romania, substantive questions relating to the recognition and enforcement of foreign arbitration awards are regulated by The Law No. 105 of September 22nd 1992 on the Settlement of the Private International Law Relations ("Law No. 105/1992"). Section 4 of Law No. 105/1992 contains rules which set out separately the conditions for recognition and enforcement in Romania of "foreign decisions". The papers before me contained an English translation of the relevant sections of Law No. 105/1992 and these rules were spoken to by two experts on Romanian law to whose evidence I will refer later. The conditions for recognition of foreign decisions are set out in Articles 167 and 168. Essentially, Article 167 sets out the attributes which a foreign decision must have before it will be recognised in Romania and Article 168 then describes the circumstances in which such a decision may be rejected notwithstanding that it has the

qualifying attributes. These rules are not dissimilar to English common law rules for recognition of foreign judgements. Thus, under Article 167 a decision of a foreign court or tribunal of the sort in issue here may be recognised in Romania if:

i) it is final according to the law of the state which pronounced it;

ii) the court which pronounced it had jurisdiction to decide the matter under its law; and

iii) there is reciprocity between Romania and the state in which the decision had been given regarding the effects of foreign judgments.

14. Article 167 also provides that if the decision in question was pronounced in the absence of the losing party certain procedural safeguards have to be satisfied to ensure that the losing party had both adequate notice of the hearing and the opportunity to defend himself. Article 168 then describes the instances in which a foreign decision with these qualifying requirements may nevertheless be rejected. Broadly they are when:

i) the decision is the result of a fraud in the applicable procedure;

ii) the decision violates "the public order of Romania" including the exclusive jurisdiction of the Romanian courts in relation to certain matters set out elsewhere in Law No. 105/1992; or

iii) the action in question had previously been determined by a decision of the Romanian courts or was pending before such a court on the date when the foreign decision was notified.

Article 168 also states that, other than in suits concerning the legal status or capacity of Romanian citizens, the fact that the foreign tribunal applied a law other than that which would have been identified by application of Romanian choice of law rules, constitutes no ground for rejection. Article 169 of Law No. 105/1992 states that provided the Article 167 and 168 conditions are verified, the Romanian courts cannot proceed either to examine the foreign decision on its merits or to modify it.

15. Article 174 is the crucial section of Law No. 105/1992. The English translation before me reads as follows:

> *"Art 174. – The execution of the foreign decision is consented in keeping with the conditions stipulated under article 167 and the following:*
>
> *(a) the decision is executory according to the law of the instance which pronounced it;*

> *(b) the right to request an unwilling execution is not prescribed according to the Romanian law.*
>
> *The provisions under Articles 168 and 169 are correspondingly applicable to the request of consent of the execution as well."*

Thus in order for the decision of a foreign tribunal to be enforced in Romania the requirements of Article 174 have to be satisfied in addition to the conditions for recognition set out in Articles 167 and 168. The Romanian law experts agreed that Article 174 (a) means that the decision is capable of being enforced according to the law of the court which pronounced it. In addition to this requirement it must also be shown under Article 174 (b) that the right to request execution of the decision is not barred under Romanian law by limitation, that is to say, by Romanian rules of prescription. Both limbs of Article 174 have to be satisfied before a foreign decision is enforceable in Romania. It was not in dispute that the date for satisfying the requirements of article 174 is the date upon which the proceedings to enforce the foreign decision in Romania were commenced.

16. The relevant Romanian rules of prescription are contained in Decree No. 167/1958. According to the material before me, Article 6 of that Decree stipulates that the right to claim execution of the judgment of a tribunal becomes time barred after three years. Article 7 of the same Decree states that the prescription period commences when the right to seek execution arises. Article 16 of Decree No. 167/1958 provides for limitation periods to accrue afresh in cases of part payments and acknowledgments. Although it was clear from the evidence that the effect of an acknowledgment or part payment in Romanian law, just as in English law, was to restart the relevant limitation period, what was not clear was whether the attributes of an acknowledgment or part payment necessary in order for it to be effective to restart a period of prescription under Decree No. 167/1958, were the same as those necessary for the purpose of restarting a limitation period under Sections 29(5) and 30 of the Limitation Act 1980. The decisions of judges are not a source of law in Romania: the Romanian law on prescription does not, of course, include, the rulings of the courts on the interpretation of Article 16 of Decree No. 167/1958. Whether the effect of the case law interpreting Sections 29(5) and 30 of the Limitation Act 1980 is that the English approach to finding a sufficient part payment or acknowledgment is more relaxed than that under the Romanian law of prescription is not clear, but the evidence suggested that this is a possibility.

17. What is clear on the evidence is that, in the light of the requirement stipulated by article 174 (a) of Law No. 105/1992, one of the Defendants' arguments after February 1995 at each stage of the enforcement proceedings was that the award had ceased to be enforceable in England because it was barred by limitation under English law. In its form as developed by the time the enforcement issue reached the Bucharest Court of Appeal, the Defendants' argument was a simple one. The Limitation Act 1980 stipulated a limitation period of 6 years for enforcement of an award. The right to enforce an award arose when the award was issued or published. The limitation period had manifestly expired by the date on which the Romanian proceedings were commenced because, by then, more than 6 years had expired since the issue or publication of the award. Therefore, so the argument ran, the Claimants had failed to establish that the award remained "executory" in the state of origin on the date of

commencement of proceedings to enforce the award in Romania and the Claimants had thus failed to satisfy the condition for enforcement stipulated by Article 174 (a) of Law 105/1992. The Defendants also argued at each stage of the enforcement proceedings that Article 174 (b) too was unsatisfied because the 3 year period of prescription stipulated by Article 6 of Decree 167/1958 had expired by the date of commencement of the enforcement proceedings. In due course I will have to describe how the Claimants arguments on Article 174 (a) developed in response.

18. On 16th October 1995 the Municipal Court of Bucharest gave judgment on the enforcement issue in favour of the Defendants. The Court held that the award was capable of being executed as soon as it was published and that the right to execute it had become barred by prescription under Decree 167/1958 on 15th June 1986, that is to say, 3 years after the award's publication to the parties. As to Article 16 of Decree 167/1958, the court held that it had no application to rights of enforcement, as distinct from claims to establish a liability, and accordingly no question of interruption of the prescription period arose. The court made no decision regarding the limitation position under English law. It disposed of the case solely under Article 174 (b) of Law No. 105/1992.

19. The Claimants appealed against this decision. I have already summarised the Defendants' argument in its form as developed by the time of the hearing in the Court of Appeal. It is clear from the evidence that for the purpose of supporting their argument on Article 174 (a) in the Court of Appeal the Defendants filed a copy of the relevant sections of the Limitation Act 1980 along with a Romanian translation. In response the Claimants deposited an opinion from their original solicitors, Hughes Hooker, dated 21st June 1996 and an opinion of Holman Fenwick & Willan, their current solicitors, dated 15th July 1996. Both opinions argued that the award had remained enforceable in England when the proceedings to have the award recognised with a view to enforcement in Romania were commenced in May 1992. The two opinions reached the same conclusion by somewhat different routes. Hughes Hooker argued, somewhat unpromisingly, that the primary limitation period had not then expired because, until shortly before the time at which they commenced the proceedings for recognition and enforcement, the Claimants had continued to believe that the Defendants would in due course perform their implied promise to discharge the award and had continued to hold them to that promise. Somehow or other this was said to have postponed the accrual of the cause of action to enforce the award. Holman Fenwick argued, in more orthodox terms, that the two part payments, which they dated at 1st January and 1st March 1986, caused the limitation period to begin again under Section 29(5) of the 1980 Act. However, they went on to suggest that the limitation period restarted, not at the date of the part payments, but upon the expiry of a reasonable time thereafter. They also pointed to the telex communications between the parties or their respective agents during 1988 and 1989 and stated the opinion that these too would have been effective to restart the limitation period under English law.

20. It is to be noted, however, that the Claimants' primary argument both in the Court of Appeal and later in the Supreme Court was that English limitation rules, as distinct from the Romanian rules of prescription, were irrelevant to enforcement in Romania. Indeed the Claimants' primary argument was that Article 174 (a) of Law 105/1992 simply meant that the foreign award must be final and valid in substance, and thus capable of being enforced, in its State of origin, an enquiry, so the Claimants argued,

which involved no reference at all to the limitation position under the laws of the State of origin.

21. On 6th December 1996 the Bucharest Court of Appeal dismissed the Claimants' appeal and upheld the decision of the Municipal Court. Although there was some discussion of the position under Article 174 (a) of Law 105/1992, the decision was based squarely on non compliance with Article 174 (b). The basis of the decision was stated in the final paragraph of the judgment as follows:

> *"The conclusion we must come to is that the legal requirements are not fulfilled for approving the execution sought since the prescription period for exercising the right to obtain execution had lapsed according to Romanian law the judicial judgment not having been executed within the prescription period allowed and the right of execution thus having been forfeited."*

In contrast to the Municipal Court, the Court of Appeal appears to have treated Article 16 of Decree No. 167/1958 as potentially applicable to claims for enforcement but not applicable on the particular facts of this case. The Romanian law experts agree that this judgment contained no decision regarding expiry of the limitation period for enforcement of the award under English law.

22. On 10th March 1998 the Supreme Court dismissed the Claimants' appeal against this decision. It is this judgment which is said to give rise to an estoppel on the question whether the application under Section 26 of the Arbitration Act 1950 was barred by limitation under English law when it was made in January 1993. Both parties put in their own English translations of the various Romanian judgments on enforcement, but it was not, I think, suggested that the translations differed in major respects. Having referred to the two distinct stages of recognition and enforcement and having acknowledged that the courts had found for the Claimants under stage one, that is to say, on the question of recognition, the Supreme Court went on to deal as follows with the enforcement issue. I quote from the English translation to which the experts were most frequently referred in their evidence.

> *"In the second stage, the courts found that the claimant's request is not admissible, because the right to request approval of forced execution was terminated by prescription, since at the date when the request was filed, May 27, 1992 (file no. 2231/1992 of the Bucharest Municipal Court), the general 3-year prescription term provided by Decree no. 167/1958 was largely exceeded, given the fact that the foreign decision was pronounced and became executory at the date of June 15, 1983.*
>
> *Indeed, according to the provisions of art. 174 of Law no. 105/1992 regarding approval of forced execution, it is required that, in addition to fulfillment of the requirements of art. 157 of said law (which in our case were found to be fulfilled by the final decision of recognition), one must also fulfill the conditions provided under letter "a", namely that the foreign decision be executory according to the law of the court that pronounced it*

> *and, respectively, the condition under letter "b" by which it is provided that the right to request forced execution should not be prescribed according to Romanian law.*
>
> *However, based on the above considerations, it is obvious that the right to request forced execution was terminated due to prescription, as the action was filed 9 years (June 15, 1983, date when the foreign decision was pronounced – May 27, 1992, date when the request was filed) after the date when the foreign decision became executory (at the date when it was pronounced), and therefore the courts were justifiably rejected the claimant's request for approval of forced execution of the arbitral award of June 15, 1983.*
>
> *Moreover, the courts justifiably rejected the appellant's allegations that, in reality, through partial payments or recognitions of debt in specific documents, effected by the defendant, prescription would have been interrupted in the current case, because at the dates of such payments (which were not even proved to be related to the amounts to which the defendant was obliged by the foreign decision), the right to request forced execution was already prescribed, as well as at the date when it is alleged that the defendant recognized its debt, and, given this situation, one may no longer raise the issue of prescription interruption regarding a right that had already been prescribed.*
>
> *On the other hand, according to the evidence submitted in the file, the general prescription term under British law is 6 years, and consequently, as the claimant exercised its right to request forced execution at a date exceeding this term (which expired on June 15, 1989), it means that the foreign decision lost its executory title, which makes relevant for our case the provisions of art. 174, letter "a", of Law no. 105/1992, which entitle courts to refuse the approval of forced execution of such decision which is no longer executory according to the law of the court that pronounced it.*
>
> *Consequently, we acknowledge that the solution of rejection of the approval of forced execution of the foreign decision is the result of a good judgment of legal provisions applicable to the case and to the evidence of the file, and for this reason the appeal filed in this case shall be rejected as unsubstantiated."*

In the other translation the word "Moreover" replaces the words "On the other hand" at the beginning of the penultimate paragraph. The reference to Article 157 in the second paragraph is a mistake in transcription: the reference should be to Article 167.

23. Thus the Supreme Court upheld the Court of Appeal's ruling on Article 174 (b) of Law 105/1992 by finding that the right to request forced execution had been terminated by prescription under Romanian law by the time the enforcement proceedings were

commenced on 27th May 1992. On the Supreme Court's interpretation of Article 174 this finding was sufficient to dispose of the appeal, but the Court went on to decide that the Claimants had also failed to satisfy Article 174 (a). The express basis of the latter finding was that the award had lost its "executory title" in the State of origin by 27th May 1992, that is to say, was no longer capable of being enforced there by that date, because the general, or usual, English limitation period of six years had expired on 15th June 1989, six years after publication of the award.

Estoppel

24. Mr. James Turner, who appeared for the Defendants, argued that this latter finding of the Supreme Court of Romania necessarily involved a decision to reject the Claimants' argument that, as a result of a series of part payments and acknowledgments, the limitation period had not expired on 27th May 1992 when the Romanian proceedings were commenced.

25. He pointed out, correctly, that both parties had filed arguments as to whether the English limitation period had expired by this date. The issue of part payments and acknowledgments under sections 29(5) and 30 of the Limitation Act 1980 was also raised by the Claimants in support of their contention that the right to enforce the award in England had not by then become barred by limitation. The undisputed evidence was that the Supreme Court would have had before it the entire file of materials served for the purpose of the argument in the Court of Appeal along with any additional submissions made for the purpose of the hearing before the Supreme Court. I have already summarised the Claimants' arguments to the Court of Appeal as to why the limitation period under the 1980 Act remained current on 27th May 1992. In their Grounds of Appeal to the Supreme Court, dated March 1997, the Claimants restated as their principal argument the proposition that the limitation position in the state of origin was irrelevant to enforcement of the award in Romania; but they also referred to the opinions of Hughes Hooker and Holman Fenwick & Willan in arguing that, if they were wrong on this, the limitation period in English law had not, in the event, expired.

26. Mr. Turner submitted that the Supreme Court must, therefore, be taken to have decided the issue of interruption by part payment and acknowledgment against the Claimants. But he also argued that even if it could properly be inferred that the Supreme Court had omitted to deal with the particular question of part payment and acknowledgment, the result was the same: that court had decided that an action to enforce the award in England had become barred by limitation under English law by 27th May 1992 and for the purposes of estoppel it was immaterial whether this decision was right or wrong or, if wrong, whether the error was attributable to the court having overlooked the question of discontinuance by part payment and acknowledgment or to having addressed it and got it wrong.

27. Against this background Mr. Turner contended either for a *cause of action estoppel*, the argument being that the decision of the Supreme Court had determined against the Claimants any action to enforce the award, or for an *issue estoppel*, that argument being that the decision had necessarily resolved the question whether an action to enforce the award had become time barred in England on a date earlier than January 1993. Finally,

Mr. Turner argued that, in so far as it might be said that the question of interruption of the English law limitation period had not been raised or not raised with sufficient clarity before the Supreme Court, the Claimants were now barred from raising it in these proceedings in England by operation of the well known principle formulated in *Henderson v Henderson* [1843] 3 Hare 100.

28. Mr. Duncan Matthews Q.C., who represented the Claimants, took issue with these arguments on, essentially, two grounds. His first argument was that, before a final decision of a foreign court could give rise to an estoppel regarding an issue arising subsequently between the same parties in English litigation, the English court had to be satisfied that the foreign court had determined the identical issue "on the merits", within the meaning of that expression as explained by the House of Lords in *Carl Zeiss Stiftung v Rayner & Keller Ltd. (No. 2)* [1967] 1 A.C. 853 and in *The Sennar (No.2)* [1985] 1 WLR 490. Mr. Matthews contended that, on the evidence, this court could not be satisfied that the issue in question had been decided at all by the Supreme Court of Romania or alternatively, that if it had been decided implicitly, that the decision had not been "on the merits" within the true meaning of that expression. For the purpose of these arguments Mr. Matthews characterised the issue between the parties as being whether the part payments and other communications relied upon were effective as acknowledgments under Sections 29 (5) and 30 of the Limitation Act 1980 with the result that an action to enforce the award had not become time barred by January 1993.

29. The Claimants' second argument was that, even if the Supreme Court of Romania had decided the issue in question on its merits, that decision was not "necessary and fundamental" to its judgment within the sense of that expression as explained by the Court of Appeal in *Re State of Norway's Application (No.2)* [1988] 3 WLR 603.

30. Finally, the Claimants advanced a subsidiary argument that the decision of the Supreme Court of Romania could not be treated as "final" on the issue, because a procedure existed under Article 322 point 5 of the Romanian Civil Code which, in exceptional circumstances, enabled a party to seek to have a judgment revised when it came into possession of relevant documents which had been undisclosed in the possession of the opposing party or which had otherwise not been reasonably available to the applicant when the original judgment had been made. In this context, it was said that a judgment of this court to the effect that an action to enforce the award was not time barred under English law in January 1993, would constitute fresh material within the meaning of Article 322 which had not been reasonably available to the Claimants when the Supreme Court of Romania gave judgment.

31. This last argument seems to me to be plainly without merit and I can dispose of it briefly. On the evidence of the Claimants' Romanian law expert, Professor Sitaru, it seemed to me clear that the procedure in question contemplated the revision of an otherwise final decision in circumstances where relevant evidence or other material had been denied to the court either because a party in possession of the information had withheld it or because it could not, with reasonable diligence, have been obtained by the party that would have relied on it. This procedure does not contemplate a later decision on the same issue by a foreign court. Furthermore, it was entirely the Claimants' choice not to obtain a decision of the English courts on this issue prior to March 1998 when the Supreme Court of Romania gave judgment. Had the Claimants chosen to serve the

order of Saville J. shortly after it had been made, but in any event while the Romanian proceedings were current, it is probable that the English law limitation issue would have been raised and decided on an application to set aside that order. Thus even if the judgment of an English court on the issue could in principle constitute relevant material for the purpose of a "revision" under article 322 of the Romanian Civil Code, it can hardly be said to be material which was not reasonably available to the Claimants before March 1998.

32. Some of the other arguments on estoppel raise questions of some difficulty. In *Carl Zeiss Stiftung*, a majority of the House of Lords decided that the judgment of a foreign court could in principle give rise to an *estoppel per rem judicatam*. For an estoppel to arise on this basis four conditions must be satisfied (1) the judgment must be given by a foreign court of competent jurisdiction (2) the judgment must be final and conclusive on the merits (3) there must be identity of parties; and (4) there must be identity of subject matter. In the case of issue estoppel this last condition means that the issue decided by the foreign court must be the same as that arising in the English proceedings. Similarly, where a cause of action estoppel is asserted it must be shown that the cause of action determined by the foreign judgment is the same as that which is being relitigated in the English proceedings.

33. Although the Defendants argued both for a cause of action and for an issue estoppel, there is no doubt that their arguments of substance were directed to the latter. There seems to me to be no question of a cause of action estoppel arising in this case. The action in Romania consisted in proceedings to have the award recognised and enforced in Romania. The action here is to have the award enforced as a judgment given in England. Although the two sets of proceedings may involve overlapping issues, they are different causes of action. Thus whether this award can be enforced in Romania under the laws of Romania requires proof of matters which do not arise in proceedings under section 26 of the Arbitration Act 1950. It follows that a decision adverse to the Claimants in the Romanian enforcement proceedings is not necessarily fatal to an action in England to enforce the award as a judgment of the English courts.

34. There was no dispute that conditions (1) and (3) were satisfied in this case. As I have stated earlier, I am also satisfied that the judgment of the Supreme Court of Romania was a final decision on the matters which it determined in the sense that it cannot be varied, re-opened or set aside. Thus the real dispute between the parties is whether the issue in question was determined on its merits by the judgment of the Supreme Court and, if so, whether that decision was fundamental to the judgment.

35. It is clear from the speeches of the majority in *Carl Zeiss Stiftung* that the principle of *res judicata* is founded upon the twin principles that there should be an end to litigation and justice demands that the same party shall not be harassed twice in the same cause. It is also apparent that the principle is to be applied where the ends of justice require it and not mechanistically; and in the case of an estoppel based upon the judgment of a foreign court, where uncertainties might arise through differences in procedure and as to the precise identity of the issues decided by the foreign court, particular caution is required. As Lord Upjohn stated at page 947:

> *"All estoppels are not odious but must be applied so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind."*

As to issue estoppel arising from a judgment of a foreign court and the difficulties peculiar to this area of law, Lord Wilberforce at page 967 said this:

> *"As a matter of principle (and we are really thrown back upon principle), whether the recognition of judgments is based upon a recognition of vested rights, or upon considerations of public interest in limiting relitigation, there seems to be no acceptable reason why the recognition of foreign judgments should not extend to the recognition of issue decisions. From the nature of things (and here it is right to recall Lord Brougham's warning) this, in the case of foreign judgments, may involve difficulties and necessitate caution. The right to ascertain the precise issue decided, by examination of the court's judgment, of the pleadings and possibly of the evidence, may well, in the case of courts whose procedure, decision-making technique, and substantive law is not the same as our own, make it difficult or even impossible to establish the identity of the issue there decided with that attempted here to be raised, or the necessity for the foreign decision. And I think that it would be right for a court in this country, when faced with a claim of issue estoppel arising out of foreign proceedings, to receive the claim with caution in circumstances where the party against whom the estoppel is raised might not have had occasion to raise the particular issue. The fact that the court can (as I have stated) examine the pleadings, evidence and other material, seems fully consistent with its right to take a broad view of the result of the foreign decision. But with these reservations, where after careful examination there appears to have been a full contestation and a clear decision on an issue, it would in my opinion be unfortunate to exclude estoppel by issue decision from the sphere of recognition."*

In a passage of his speech at page 918 Lord Reid identified similar reasons for proceeding with particular caution in relation to issue estoppel arising from a foreign judgment.

36. The passage from the speech of Lord Wilberforce which I have just cited suggests that for an issue estoppel arising from a foreign judgment to apply, the court must be satisfied on the evidence that there had been "a full contestation and a clear decision" on the issue in question. This observation is echoed in the speech of Lord Brandon in *The Sennar (No.2)* where, in the context of explaining the meaning of the expression "decision on the merits", he said this (page 499):

> *"In my opinion, this argument is based on a misconception with regard to the meaning of the expression "on the merits" as used*

> *in the context of the doctrine of issue estoppel. Looking at the matter negatively a decision on procedure alone is not a decision on the merits. Looking at the matter positively a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned. If the expression "on the merits" is interpreted in this way, as I am clearly of the opinion that it should be, there can be no doubt whatever that the decision of the Dutch Court of Appeal in the present case was a decision on the merits for the purposes of the application of the doctrine of issue estoppel."*

37. In this area of the law a decision "on the merits" is treated as the antithesis of a decision on a matter of procedure. Section 3 of the Foreign Limitation Periods Act 1984 provides that the determination of a foreign court on a matter relating to limitation under English or any other system of law shall be deemed to be a determination of the matter on its merits. This section reverses the common law rule that matters of limitation were to be regarded as procedural only, but it does not, of course, dilute the requirement that, for the purposes of issue estoppel, there has to have been a full contestation and a clear decision on the issue in question. If, but only if, these requirements are met it will not be open to a party to relitigate an issue of limitation in England on the ground that a prior judgment of a foreign court on the same issue was "procedural" in nature. I should say, however, that I do not think that Lord Brandon would have intended his description of a decision "on the merits" to be applied rigidly, that is to say, as setting out a list of formal characteristics which a decision of a foreign court must manifest before it is capable of giving rise to an estoppel. The judgments of foreign courts, particularly those of civilian jurisdictions, commonly have the virtue of being brief. This is not to say that an issue, even if not expressly resolved, cannot have been obviously decided by necessary implication from the conclusion expressed after a full contestation. In the *The Sennar (No. 2),* at page 494 b, Lord Diplock explained the meaning of a decision on the merits in terms which were somewhat less demanding:

> *"It is often said that the final judgment of the foreign court must be "on the merits." The moral overtones which this expression tends to conjure up may make it misleading. What it means in the context of judgments delivered by courts of justice is that the court has held that it has jurisdiction to adjudicate upon an issue raised in the cause of action to which the particular set of facts give rise; and that its judgment on that cause of action is one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate Jurisdiction although it may be subject to appeal to a court of higher Jurisdiction."*

38. Since *Godard v Gray* [1870] L.R. 6 Q.B. 139, it has been established that a judgment in personam of a foreign court of competent jurisdiction cannot be questioned by the parties on the merits when recognition or enforcement of the judgment is sought in England notwithstanding that it may have been wrong either in fact or law. This

principle applies even where there is an error of English law apparent on the face of the judgment. Thus if it is clear on the evidence that the Supreme Court of Romania, after a full contestation, decided the issue which the Claimants now seek to litigate in this court, it is immaterial that the Supreme Court might have decided that issue in error on the basis of a mistaken appreciation either of English law or other aspects of the evidence.

39. What is the result of applying these principles to the present case? Both Romanian law experts called by the parties advanced opinions as to whether the Supreme Court addressed and decided the question of discontinuance of the limitation period under Section 30 of the Limitation Act 1980. Professor Florescu, the Defendants' expert believed that the Supreme Court decided this issue as a necessary inference from the fact that it expressly decided that the award had ceased to be enforceable in England six years after the date of its publication, that is to say, on 15th June 1989. Given that the Claimants had argued as their alternative case that the six years limitation period in English law had accrued afresh as a result of various part payments and acknowledgments, that argument must necessarily have been rejected in reaching this conclusion. In contrast, Professor Sitaru, who was called on behalf of the Claimants, believed that the Supreme Court had not dealt at all with the question of discontinuance of the English law limitation period. He pointed to Article 261 (5) of the Romanian Code of Civil Procedure which states that the decision of the court should include "the reasons in fact and on law that formed the conviction of the court, along with those for which the claims of the parties have been rejected." He maintained that it was clear from its judgment that the Supreme Court addressed discontinuance of the limitation period only in the context of considering the question of prescription under Romanian law in connection with Article 174 (b) of Law No. 105/1992.

40. While I am indebted to both experts for their valuable help in identifying the materials and arguments put before the Romanian courts and for explaining the relevant provisions of Romanian law, the question whether the Supreme Court addressed and decided the particular question of discontinuance of the limitation period under English law as a result of part payments and acknowledgments, is ultimately, one for me. In so far as it matters for present purposes, I am not satisfied that the Supreme Court did address the question whether the limitation period of six years in English law had been discontinued as a result of part payments and other acknowledgments within the meaning of Section 30 of the Limitation Act 1980. Indeed, for the reasons which follow I think it more likely than not that it did not address or decide this particular question.

41. The question of interruption of the prescription period is addressed only in the fourth of the six paragraphs of the judgment which I have quoted. It seems to me likely that this paragraph is directed solely to interruption of the three year period of prescription under Article 16 of Decree No. 167/1958: it is only on this basis that the court's statement that the right to request execution was already prescribed by the date of the part payments, is meaningful. In the course of the proceedings in Romania the Defendants had apparently asserted that the first of the two part payments to which I have referred had been made before the award was issued. The date of the second payment is not clear on the documents: it could have been made as early as March or as late as August 1986, the earlier date being the more probable. Thus, on one, albeit mistaken view, of the facts, neither of the two part payments fell within the period of three years following

publication of the award. But whatever the position under Romanian law, on no view could it be said that the part payments, or even the two telexes of 17th February and 7th March 1989 respectively, were made after the six year English law limitation period had expired. Conversely, if one asks whether a three year period of prescription had been interrupted, it is quite clear that all the alleged telex acknowledgments were sent after the right to claim execution had become prescribed. The only part of the judgment in which English law limitation is addressed is in the fifth of the six paragraphs which I have quoted. The natural interpretation of this paragraph is that, because the limitation period fixed by English law is six years, the award ceased to be enforceable on 15th June 1989, six years after its publication, and no claim to enforce the award had been made by then. The question whether that six year limitation period had been interrupted under English law is not mentioned.

42. It is to be noted that in the Romanian proceedings the Defendants did not advance any arguments as to whether the alleged part payments and acknowledgments were effective under section 30 of the Limitation Act 1980. Their position was that the legal opinions filed by the Claimants' solicitors on this matter were inadmissible for a variety of reasons one of which was that Romanian law does not recognise legal opinions which are not based upon legal texts (statutory codes) as a source of law. The result, according to the Defendants, was that the Claimants had failed to discharge the burden of proving that at the date enforcement proceedings commenced in Romania the award remained capable of enforcement in its country of origin. The Supreme Court may well have accepted this submission; after all, the opinions filed by the Claimants were not fully consistent with each other and, taken together, could hardly be said to have presented a clear picture.

43. If, as in my view is probably the case, the Supreme Court of Romania did not ask itself whether the alleged part payments and acknowledgments were effective to restart the limitation period under section 30 of the Limitation Act 1980, the question arises whether its judgment nevertheless included a decision "on the merits" on the issue which the Claimants now wish to raise in this court. In my judgment it does.

44. The issue in question here is whether an action to enforce the award in England had become barred by limitation by January 1993. For the purpose of issue estoppel it does not matter whether the Supreme Court addressed and decided or inadvertently overlooked the question of interruption of the limitation period. Alternatively, the court might have accepted the Defendant's arguments that the legal opinions filed by the Claimants on the matter were inadmissible or simply unconvincing and of little weight. It is probably idle to speculate as to quite what the Supreme Court made of the two legal opinions filed by the Claimants on the English law of limitation, but, with respect, I think it unlikely that the court simply overlooked them. Whatever the case, there was a clear finding on the issue which the Claimants now seek to relitigate, namely, whether as at 27th May 1992 (and thus as at January 1993), the right to enforce the award in England had become barred by limitation. A foreign court has to identify English law as a question of fact: if, in establishing the relevant English law on limitation the Supreme Court of Romania overlooked or, as is more probable, rejected the Claimants' evidence on sections 29 (5) and 30 of the Limitation Act 1980, then it may have made its decision on a wrong, or at least a too simple, view of English law. Be that as it may, it nevertheless decided after a full contestation of the issue that the award had ceased to be

enforceable in England six years after its publication. It also set out, albeit briefly in the fifth paragraph of the judgment which I have quoted, the legal and factual basis for that decision. There is no doubt that it had jurisdiction to decide that issue as between the parties. Whether the conclusion was right or wrong, or, if wrong, why it was wrong, seems to be immaterial for present purposes.

45. But even though the Defendants have demonstrated to my satisfaction that the Supreme Court of Romania decided on the merits the issue which the Claimants now wish to litigate at this hearing, this does not necessarily mean that the Claimants are estopped from doing so. In *Re State of Norway (No.2)* The Court of Appeal cited with approval the following passage at paragraphs 210-211 of the Second Edition of *Spencer Bower & Turner, Res Judicata*:

> *"Even when in one way or another it can be demonstrated that the court has **expressly** determined, in the earlier proceeding, the same issue as is now in dispute, an issue estoppel will not by any means always be the result. Only determinations which are necessary to the decision – which are fundamental to it and without which it cannot stand – will found an issue estoppel. Other determinations, without which it would still be possible for the decision to stand, however definite be the language in which they are expressed, cannot support an issue estoppel between the parties between whom they were pronounced."*

The context in which this passage was approved by the Court of Appeal was an appeal by witnesses to set aside letters of request for their oral examination obtained by the State of Norway. In a previous hearing the Court of Appeal had set aside previous letters of request against the same witnesses on the ground that they were too wide. But although finding for the witnesses on this basis, the court had ruled against them on another issue, namely, whether the letters of request had been sought in the course of "proceedings in any civil or commercial matter" for the purpose of the Evidence (Proceedings in Other Jurisdictions) Act 1975, that being a jurisdictional requirement for granting letters of request under the Act. The State of Norway subsequently issued new letters of request in narrower terms and the question on the second hearing in the Court of Appeal was whether it was open to the witnesses to challenge the finding by the Court of Appeal at the previous hearing that the letters had been issued in "proceedings in any civil or commercial matter". This involved two distinct questions (i) whether the decision of the first court was binding under the doctrine of precedent; and (ii) whether the witnesses were estopped from disputing an issue decided against them at the previous hearing.

46. The Court of Appeal decided that the previous court's decision on the interpretation of "proceedings in any civil or commercial matter" formed no part of the ratio of its judgment, that court having found for the witnesses notwithstanding the adverse ruling on that point. It is clear from the judgments of the second Court of Appeal that their approach to determining whether the determination of an issue had been "fundamental" to a decision for the purpose of issue estoppel, was very similar to the process of identifying the binding ratio of a judgment for the purposes of precedent. Thus Lord Justice May said at page 623 g:

> *"In my opinion similar considerations arise on this question of issue estoppel as they do on the question of precedent"*

When turning to the question of issue estoppel Lord Justice Balcombe said, at page 631 e to f:

> *"In my judgment the same considerations which preclude the judgments of the first Court of Appeal from constituting a binding precedent also preclude their constituting an issue estoppel by which the witnesses are bound."*

This was the context in which the Court of Appeal cited with approval the passage which I have quoted from *Spencer Bower & Turner*. The court also observed that while the ability to appeal a decision was a useful guide in establishing whether that decision was sufficiently fundamental to a judgment to be capable of giving rise to an issue estoppel, it was not an absolute test. The basic requirement, as stated by May L.J., is that "*the earlier determination relied on as raising an issue estoppel shall have been fundamental to the decision first arrived at. The matter is fully dealt with in…*" May L.J. then went on to cite the passage from *Spencer Bower & Turner* which I have quoted.

47. Applied literally, the passage from *Spencer Bower & Turner* would preclude an issue estoppel from arising whenever, viewed from an English standpoint, there was more than one ratio for a judgment because, in such a case, it could not be said that the determination of any one issue was fundamental in the sense that, without that determination, the judgment could not stand. This problem did not arise in *Re State of Norway* where there was no question of an adverse decision on the meaning of "civil or commercial matter" being a ratio of a judgment that found in favour of the witnesses on another point. The Defendants argue, however, that the problem does arise in the present case where, they say, the Supreme Court's decision that the award had ceased to be enforceable in England by 27th May 1992 was one of twin bases for its judgment that the award was unenforceable in Romania.

48. I do not read the judgments of the Court of Appeal in *Re State of Norway (No. 2)* as rigidly aligning the doctrines of precedent and issue estoppel as a matter of principle, although in that case the two matters gave rise to the same questions. Indeed, if the passage from *Spencer Bower & Turner* is applied in its full rigour, no judgment that, to English eyes, derives from more than one ratio could give rise to an issue estoppel, albeit it could be binding under the doctrine of precedent. It is hard to see why a determination which forms the primary basis of a foreign judgment should not give rise to an estoppel on the issue in question, notwithstanding that the judgment was also reached on an alternative basis. Fortunately, this problem in its acute form does not arise in this case. In the present case the Supreme Court's finding, that the right to claim execution in Romania was barred by prescription under the laws of Romania, upheld the decision of the Bucharest Court of Appeal under Article 174 (b) of Law No. 105/1992 and was enough to dispose of the Claimants' appeal. This was the "fundamental" or "essential" determination on which the judgment refusing execution

of the award in Romania was based. The finding in relation to Article 174 (b) of Law 105/1992 was the primary basis for the decision and involved most of the legal reasoning. The additional finding, that the Claimants had also failed to make out a case under Article 174 (a), was unnecessary and was not essential to this conclusion. It may have been for this reason that the Supreme Court felt able to deal with the question of English law limitation in a single short paragraph.

49. Paragraph 205 of the Third Edition of *Spencer Bower, Turner & Handley* contains the following statement of principle:

> *"A decision of fact or law against the party who succeeded will not found an estoppel because it cannot be fundamental to the decision. It would be unjust to make such a decision the foundation of an estoppel, for no appeal is available to the person against whom it was given. A similar argument applies where several factual grounds are advanced as alternative bases for a cause of action and the court finds more than one in favour of the party who succeeds. No estoppel can be founded on any of the separate findings, for the party failing on such issues cannot appeal any of them separately. To succeed on appeal he must succeed on all the issues, and if the finding on one is good, this will be fatal. There will be a cause of action estoppel, but the separate issues will not ground issue estoppels because none was fundamental to the decision."*

This paragraph is particularly relevant to the instant case. Article 322 point 2 of the Romanian Code of Civil Procedure enabled the Claimants to seek a revision of the Supreme Court's judgment within one month failing which it became final, subject to the exceptional power to revise under Article 322 point 5 to which I have referred earlier. The Defendants argue that the Claimants' failure to avail themselves of this procedure in relation to the Supreme Court's finding under Article 174 (a) while, at the same time, attempting to dispute that decision in this court, is an abuse of process. The position was, however, that it would not have availed the Claimants to seek revision of the Supreme Court's ruling in relation to the English limitation ruling (Article 174(a)) unless they also succeeded in achieving a revision of its primary ruling on prescription under Romanian law (Article 174(b)). This is a strong indication that the Supreme Court's decision on English law limitation was not conclusive in the sense of being fundamental or essential to its judgment. It also suggests to me that it would be unjust to shut out the Claimants from arguing the limitation question in proceedings in England.

50. In the result, therefore, although the Supreme Court of Romania reached a decision on the merits on the issue which is now in dispute, it was not conclusive in the sense of being fundamental or essential to its judgment. Given the Supreme Court's primary finding on Article 174 (b), it was certainly not a necessary determination. The Claimants are not, therefore, estopped from reopening that question now. I should also say that, because the Claimants raised in the Romanian courts the point on part payments and acknowledgments which they wish to raise now, the principle in *Henderson v Henderson* has no application. Accordingly, it becomes necessary to

decide whether an action to enforce the award was barred under the Limitation Act 1980 by January 1993 when the Claimants made their *ex parte* application under Section 26 of the Arbitration Act 1950.

Part Payments and Acknowledgments

51. Sections 29 (5) and 30 of the Limitation Act 1980 provide as follows:

> *"(5) Subject to subsection (6) below, where any right of action has accrued to recover -*
>
> *(a) any debt or other liquidated pecuniary claim; or*
>
> *(b) any claim to the personal estate of a deceased person or to any share or interest in any such estate;*
>
> *and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it the right shall be treated as having accrued on and not before the date of the acknowledgment or payment.*
>
> …
>
> ***Formal provisions as to acknowledgments and part payments***
>
> *(1) To be effective for the purposes of section 29 of this Act, an acknowledgment must be in writing and signed by the person making it.*
>
> *(2) For the purposes of section 29, any acknowledgment or payment -*
>
> *(a) may be made by the agent of the person by whom it is required to be made under that section; and*
>
> *(b) shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made."*

For the purposes of sections 29 (5) and 30 of the Act the Claimants allege two part payments made in January and March 1986 respectively and four separate acknowledgments made respectively by telexes sent on 10th January 1986, 17th February 1988, 7th March 1989 and 30th August 1991.

52. The alleged part payments are those to which I have referred in paragraphs 7 and 8 of this judgment. By a telex sent on 3rd January 1986 to the Defendants' agents, Navlomar, NGM gave details for the payment of the sum of $851,000 "TO BE PAID AS AN ACCOUNT PAYMENT AGAINST THE CLAIM OF MV GOOD CHALLEGER UNDER CP DATED 1.4.81". This telex, therefore, clearly identified the proposed payment as being on account of the liability arising under the charterparty which had been referred to arbitration and which had led to the award. The bank account details given in the telex included the following:

> "FOR THE CREDIT TO GOOD FAITH SHIPPING CO. S.A. (USA) INC FOR MV GOOD CHALLENGER CP DATED 1.4.81."

By telex dated 7th January 1986 Navlomar replied to NGM as follows:

> "RE GOOD CHALLENGER
>
> KINDLY BE ADVISED THAT USD 851,000 PAID TO ACCOUNT INDICATED BY YOU …"

53. The sole issue in relation to this payment is whether, given the directions by NGM, as the Claimants' agent, for payment to the credit of an account in the name of Good Faith Shipping, the part payment can be said to have been made to the person, or to an agent of the person, whose claim is being acknowledged. The evidence is that Good Faith Shipping were the managers of the vessel Good Challenger; but the Defendants say that there is no evidence that they received this payment in their capacity as agents of the Claimants (the vessel's owners) as distinct from on their own account as creditors of the Claimants. For the purpose of the Act I do not think this matters. Even if the correct inference is that Good Faith Shipping received this payment on their own account so as to discharge or reduce a liability incurred to them by the Claimants, the payment was made by the Defendant (or its agents) as debtor at the direction and request of the Claimant (or its agents) as creditor so as to reduce or extinguish a liability owed by the creditor to a third party. This is a payment at the request and for the benefit of the Claimant, as creditor, and, therefore, is a payment made to the Claimant for the purpose of the Act. If any authority were needed for this conclusion it is to be found in *Worthington v Grimsditch* 7 QB Reps 478 (ER Vol CXV) in which payments made by a defendant to a third party creditor of the plaintiff, at the request of the plaintiff and so as to reduce pro tanto a debt owed by the defendant to the plaintiff, were treated as capable of taking the plaintiff's claim outside the statute of limitation.

54. Thus the six years limitation period for an action to enforce the award commenced afresh on or about 7th January 1986 when this part payment was made on account of the debt constituted by the arbitration award. This is, of course, not enough to enable the Claimants to show that an action to enforce the award was not time barred when they made their application under section 26 of the Arbitration Act 1950 in January 1993. To do this they need to establish one of the further acknowledgements alleged by them to

have been made in 1988, 1989 and 1991. On the timing, it will be enough for the Claimants' to make good any one of these alleged acknowledgements if I am right in my conclusion on the January 1986 part payment. Indeed, even if I am wrong in relation to this part payment, it will suffice for the Claimants' purposes if they make good their case in relation either to the acknowledgment alleged to have been made on 17th February 1988 or to that alleged to have been made on 7th March 1989. Both communications were made within six years of the publication of the award and within six years of the making of the application under the Arbitration Act.

55. On 25th January 1988 NGM wrote to Navlomar referring to their enquiry regarding the manner in which the Claimants had calculated interest accruing on the award and enclosing an up to date calculation of the balance of principal and interest outstanding. That calculation made allowance for the two part payments received to that date and included an item for "costs" incurred in the sum of $195,000. On 17th February 1988 Navlomar replied by telex. After noting the calculation and referring to different rates of interest supplied by their own solicitors and published in the Financial Times, Navlomar said:

> "APART FROM THE MATTER OF RATES THEMSELVES KINDLY TAKE INTO ACCOUNT THAT NO INTEREST AT ALL RUN AS LONG AS NAVROM INSITUTED INJUNCTION".

This last reference was to the injunction obtained against Navrom's vessel the Filaret. The Claimants say that implicit in the limited contention that interest ceased to accrue on the sum awarded while the injunction was in place, is an acknowledgment of the debt constituted by the sum awarded. Such a statement is only meaningful on the basis of an outstanding liability on which interest admittedly accumulates other than for the period when the injunction was current.

56. Similarly, later in the same telex Navlomar deal with the claim for costs in the sum of $195,000. On that issue Navlomar said:

> "IF THESE WERE INCURRED IN RELATION TO THE AWARD ENFORCEMENT IN ROMANIA, IN THE USUAL INTERNATIONALLY RECOGNISED WAY, THESE COSTS WOULD HAVE BEEN RECOVERABLE FROM MEI WE REMIND YOU THAT BOTH ROMANIA AND ENGLAND ARE PARTIES TO THE INTERNATIONAL CONVENTION ON RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS, UNFORTUNATELY THE COSTS IN POINT RESULTED FROM AN UNUSUAL TRYING TO ENFORCE THE AWARD AGAINST ASSETS HAVING ABSOLUTELY NOTHING TO DO WITH YR CHRS MEI, AND CONSEQUENTLY THEY ARE SOLELY AT YR RISK."

The Claimants say that this statement is a clear acknowledgement of the liability constituted by the award. The corollary of the suggestion that costs incurred in relation to the injunction are irrecoverable from the Defendants, is the explicit acceptance that the Defendants would have been liable had the costs been incurred in orthodox enforcement of the award in Romania. This implicitly acknowledges the Defendants' liability for the award.

57. Finally, the same telex concludes with the following words:-

> "HOWEVER PASSED ON MEI YOUR CALCULATION AND WAITING FOR THEIR COMMENTS WE AS BROKERS, ARE STILL HOPEFUL[L] THAT BOTH YOU AND CHRS WOULD FIND A REASONABLE COMMON LANGUAGE TO TALK AND SETTLE THE OUTSTANDING BALANCE BEST REGARDS.
>
> NAVLOMAR

As I stated earlier in this judgment, it is conceded that Navlomar were the authorised agents of the Defendants for the purpose of dealing with the Claimants in relation to the award and its enforcement. Mr. Turner points out, however, that it is necessary to distinguish between statements made by Navlomar in that capacity and expressions of expectation or opinion made on their own behalf as brokers. He argues that the concluding words of this telex fall into the latter category and thus cannot be attributed to their principals for the purpose of the Limitation Act. I would agree that Navlomar's expression of hope that both parties would find a common language for settlement purposes is plainly a statement which, on its terms, distances Navlomar from its principal and is thus made in relation to its principal as distinct from on behalf of the principal. But otherwise the distinction is, I think, too refined to be meaningful in the current context. Navlomar's reference to "THE OUTSTANDING BALANCE" is a straightforward admission of fact made by an agent with authority from the Defendants to deal on their behalf in relation to the award.

58. Apart from the specific point to which I have just referred, the Defendants take two points in relation to this and the other telexes relied upon by the Claimants. First, they say that the statements are insufficiently clear to amount to acknowledgments for the purpose of the Act. Second they point out that, to be effective for the purposes of section 29 of the Act, an acknowledgment must be "in writing and signed by the person making it". These telexes, the Defendants say, are not signed. In relation to the two later telexes relied upon by the Claimants as acknowledgments the Defendants also maintain that they were communications sent during the course of without prejudice negotiations and are, therefore, protected by without prejudice privilege. This particular argument is not, I think, directed to the telex of 17th February 1988, at any rate, I do not see how it could be. The concluding sentence of the telex expresses the hope that commercial negotiations might start, but this was certainly not a telex sent during the course of negotiations.

59. As to the first point, namely, that the statements are insufficiently clear to amount to acknowledgments of the claim for the purpose of section 29 of the Act, in my judgment the statements which I have quoted from the telex of 17th February 1988 are clear acknowledgments of the claim for payment of the award. They clearly evince recognition of an outstanding liability. The authorities in this area reveal a distinction between statements which recognise a claim but dispute liability for it and statements which recognise the liability itself. These statements fall into the latter category. It is, moreover, clear that where a liability is acknowledged, it becomes legitimate to refer to other documents or other extrinsic evidence in order to identify the liability in question; see *Dungate v Dungate* [1965] 1 WLR 1477. Cross reference to other documents is permissible for this purpose. In my judgment the premise on which the telex of 17th February 1988 proceeds is the existence of an outstanding liability for the award.

60. The Defendants' case on signatures is that, for the purposes of section 29 of the Limitation Act 1980, an acknowledgment is not signed unless the maker of the document inscribes his name or characteristic mark on it by his own hand. The Defendants say that this is the ordinary meaning of the word "signed" and there is no reason to depart from it when construing section 30 of the Act. There is, apparently, no reported authority on this question in the context of acknowledgments and limitation, although there is plenty of authority on the meaning of signature in other contexts, including in particular in connection with section 4 of the Statute of Frauds. If the Defendants' argument is correct, no telex communication can ever constitute an acknowledgment for limitation purposes because it can never be signed by the sender.

61. As a matter of general principle, in my view a document is signed by the maker of it when his name or mark is attached to it in a manner which indicates, objectively, his approval of its contents. How this is done will depend upon the nature and format of the document. Thus in the case of a formal contract which prints the names of the parties and leaves a space under each name for the parties to write their names, the document will not have been signed by a party until he writes in his name in the space provided. Conversely, with a telex, where there is no such facility, the typed name of the sender at the end of the telex not only identifies the maker but leads to the inference that he has approved its contents: the typed name, therefore, constitutes his signature. Thus in my judgment each of the telexes relied on by the Claimant was signed by the sender typing in its name, or his name, at the foot of the document.

62. The cases decided under the Statute of Frauds provide support by analogy for this conclusion. I accept Mr. Matthews's submission that, given the purposes and policies underlying statutes of fraud and limitation respectively, there is no reason to stipulate for stricter formal requirements for a document by which the maker acknowledges his own liability for the purpose of discontinuing a period of limitation, than for a document by which the maker assumes liability as surety for another. If anything, the reverse is true.

63. For present purposes it will suffice to mention three cases decided under the Statute of Frauds. In *Decouvreur v Jordan & Another* The Times – 25th May 1987 (CA), Lord Justice Nourse said this at page 8, paragraph 20 of the transcript:

> *"…Any writing by the party to be charged by which he identifies himself or by which he can be identified by others and which shows, objectively, an intention to adopt the note or memorandum will suffice."*

In *Schneider And Another v Norris* (1814) 2 M&S 286, a case of sale of goods, the name of the party to be charged had been printed in the contract but that party had added in manuscript the name of the seller. After rejecting the proposition that in no case could a printing constitute a signature Lord Ellenborough C.J. said:

> *"He has by his handwriting in effect said, I acknowledge what I have written to be for the purpose of exhibiting my recognition of the within contract."*

Bearing in mind that this was said of the defendant's signing of the plaintiff's name, the statement seems to me to identify the essential attributes of a signature, namely, recognition and approval of the contents of the document. Finally, in *The Anemone* [1987] 1 Lloyd's Rep. 546, another guarantee case, Mr. Justice Staughton did not find it necessary to decide whether the sender's answerback on a telex sufficed as his signature because the material telex had the sender's name printed on it and was, therefore, signed by the sender.

64. It follows that in my judgment the effect of the telex of 17th February 1988 was that the limitation period for an action to enforce the award is to be treated as having accrued on that date. Even if I am wrong in relation to the effect of the part payment of January 1986, the primary limitation period for enforcement of the award had not expired by the date of this telex. Furthermore, because 17th February 1988 was less than six years prior to the date of the Claimants' application to enforce the award under the Arbitration Act, it is unnecessary for me to lengthen an already long judgment by deciding whether the other alleged acknowledgments and part payment were effective for the purposes of section 29 (5) of the Limitation Act. In the result, therefore, the Claimants' action to enforce the award, which was instituted in the form of an application under section 26 of the Arbitration Act 1950, was not time barred when it was commenced.

Abuse of Process – Leave to Execute

65. Section 26 (1) of the Arbitration Act 1950 provides that:

> *"An award on an arbitration agreement may, by leave of the High Court or judge thereof, be enforced in the same manner as a judgment or order to the same effect and, and where leave is so given, judgment may be entered in terms of the award."*

The notes to the 1950 Arbitration Act in the old Rules of the Supreme Court state that, where leave is given to enforce in the same manner as a judgment, judgment may be

entered in terms of the award without further order. An application to enforce an award as a judgment under section 26 of the Act was governed at the time by R.S.C. Order 73 rule 10. That rule provided for the application to be made *ex parte* in the first instance but allowed the court to direct the issue of an originating summons. Service of the order out of the jurisdiction was permissible without leave – RSC O73 r 10 (5). By sub-rule 6 the debtor was given such period after service on him as was specified in the order to apply to set it aside and until that period expired or, if the debtor applied to set aside the order within that period, until that application had been finally disposed of, there was to be no enforcement of the award.

66. As I stated earlier, the order of Saville J. of 25th January 1993 allowed the Defendants 22 days after service to apply to set aside and directed that there be no enforcement until that period had expired. In the event, as I stated earlier, the order was not served on the Defendants in Romania until August 2001. In accordance with the standard practice at the time the order was made without an oral hearing on the basis of an affidavit sworn by the Claimants' solicitors, Hughes Hooker. That affidavit set out the principal and interest accrued to date and gave credit for the two 1986 part payments. It did not refer to the ongoing enforcement proceedings in Romania.

67. The Defendants' essential argument is that it is an abuse of process now to attempt to enforce an *ex parte* order that was left unserved for about eight years. They point out that, had the Defendants proceeded by originating summons, the summons, unless served, would have expired within four months of its issue in accordance with the rules in force at the time. Once the limitation period for an action to enforce the award had expired, the Defendants would have been unable either to renew their summons or to issue a fresh one. All these limitation problems, they say, have been avoided by the simple expedient of obtaining an *ex parte* order and sitting on it.

68. These are formidable arguments. Had the evidence suggested that the Defendants had had no intention of serving the order when they obtained it but had nevertheless omitted to disclose either the existence of the Romanian proceedings or their intention not to disclose the order while those proceedings were pending, I might have taken a different view of the matter. However, that was not, I think, the case. Having been advised by their Romanian lawyer that to serve the order might prejudice their position in the Romanian proceedings, they held back from serving it. It was not until 12th May 1993 that the Municipal Court of Bucharest gave judgment in the Claimants' favour allowing both recognition and enforcement of the award; but that judgment proved to be merely the first of six rounds in a process which lasted far longer than could reasonably have been expected at the time and which ended in the Claimants failing on the enforcement issue. In the light of those developments, which must have indicated that the order would not be served within the near future, the correct procedure, I think, would have been for the Claimants to return to court with an explanatory affidavit. The court might then have accepted the delay in service or it might have directed service of the order or the issue of an originating summons. I also accept that the ordinary assumption on which an *ex parte* order is made is that it will be brought to the respondent's attention and served as soon as reasonably practicable.

69. Against this, the terms of the order ensured that there could be no enforcement while the order was not served on the Defendants and the procedure which the Claimants had

adopted was the one prescribed by the rules. In the event the Defendants do not in my judgment make out a case of abuse of process. Accordingly I decline to set aside the order made by Mr. Justice Saville on 25th January 1993.

70. By their own application of 7th December 2001 the Claimants seek permission to enforce the award as a judgment in accordance with the terms of the order of Saville J. or to enter judgment in the terms of the award. The application explains that this permission is sought because of the order of Mr. Justice Moore-Bick of 25th January 2001 who, in lifting the automatic stay, directed that no steps be taken to enforce the award without leave of the court and/or because more than six years had passed since the *ex parte* order had been made.

71. The relevance of this reference to the passing of six years since the date of the order is explained by R.S.C. Order 46 rule 2 (1), which states that a writ of execution to enforce a judgment or order may not issue without the leave of the court where six or more years have elapsed since the date of the judgment or order. This rule is relevant because, by the order of 25th January 1993, the Claimants became able to enforce the award as though it were a judgment including the entering of judgment in terms of the award. There is no application before me to issue a writ of execution to enforce a judgment in terms of the award, but I have heard full argument in relation to RSC Order 46 rule 2 (1) and that argument has been treated as having a bearing on the Claimants' application to enter judgment. Certainly, having been in a position equivalent to that of a judgment creditor since January 1993, there is no reason to my mind why the Claimants should avoid either the time constraints on execution imposed by Order 46 r. 2 (1) or, indeed, the law on limitation regarding interest on judgment debts.

72. The basis of the discretion to allow execution of a judgment after the passage of six years from the date of judgment was considered recently by Mr. Justice Evans-Lombe in *Duer v Frazer* [2001] 1 AER 249. It is clear that the passage of six years itself leads to the loss of the right to execute and calls for an explanation for the delay from the judgment creditor before permission to execute can be given. In paragraph 25 of his judgment Evans-Lombe J. said that:

> *"... the court would not, in general, extend time beyond the six years save where it is demonstrably just to do so. The burden of demonstrating this should, in my judgment, rest on the judgment creditor. Each case must turn on its own facts but, in the absence of very special circumstances such as were present in the* National Westminster Bank *case, the court will have regard to such matters as the explanation given by the judgment creditor for not issuing execution during the initial six-year period, or for any delay thereafter in applying to extend that period, and any prejudice which the judgment debtor may have been subject to as a result of such delay including, in particular, any change of position by him as a result which has occurred. The longer the period that has been allowed to lapse since the judgment the more likely it is that the court will find prejudice to the judgment debtor."*

73. Since the conclusion of the argument in this case the Court of Appeal has also considered the principles for exercise of this discretion in *Patel v Singh* Court of Appeal (Civil Division) 13.12.2002 – Peter Gibson L.J., Sir Anthony Evans. The Court of Appeal in that case cited *Duer v Frazer* and confirmed that the loss of the right to execute after six years called for an explanation for the delay from the judgment creditor before permission to execute could be given. This requirement contrasted with the absence of any requirement on the debtor to show prejudice resulting from the delay. Given that the general rule is that execution will not be allowed after six years, the creditor is required to show circumstances which take the case out of the ordinary. Unfortunately a copy of the full transcript of the judgment in *Patel v Singh* is not yet available.

74. In *Patel v Singh* the judgment creditor had taken no steps to enforce the debt and had failed to instruct lawyers to enforce the debt in Germany to where the debtor had moved shortly after the judgment. In *Duer v Frazer*, although the creditor had from time to time commissioned enquiries, there had also been no attempt at enforcement proceedings and there was positive evidence that the debtor had suffered prejudice as a result of the delay in that his financial circumstances had changed.

75. In contrast, in the present case the judgment creditor has given an explanation of the delay which takes the case out of the ordinary. From January 1993, when the Claimants acquired the status of judgment creditors, until about May or June 1998 when, as I understand it, the Claimants were notified of the decision against them by the Supreme Court of Romania, the Claimants were continuously involved in enforcement proceedings in the country in which the Defendants principally carry on business. This is not, therefore, a case where the creditor has sat back or where the debtor could have been led to believe that the debt would not be enforced. Admittedly, there was considerable delay after the conclusion of the Romanian proceedings. This period of delay exceeded that which was reasonable for recuperation and reconsideration after the long and no doubt costly failure in those proceedings. But I do not believe that that, in itself, should lead to the Claimants being refused permission to enforce. In my judgment the interests of justice point to permission being given to enforce in this unusual case.

76. The Claimants' application to enter judgment raises a question of the amount for which judgment should be entered. I have heard no argument on this, but one matter of principle would appear to arise. In *Lowsley v Forbes* [1999] A.C. 329 the House of Lords ruled that proceedings to execute a judgment were not "an action upon … any judgment" for the purpose of section 24 (1) of the Limitation Act 1980. But they also held that section 24 (2) which provides that:

> *"No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due."*

applies to interest accruing on any judgments and not just in an action to enforce the judgment. Thus only interest accruing in the last six years is recoverable when a judgment is executed. My first impression is that, as a matter of principle, there is no reason why section 24 (2) should not apply to interest accruing on the Claimants' award

given that, for enforcement purposes, the award has had the status of a judgment since January 1993. It seems to me that the Claimants should be in no better position regarding recovery of interest than they would have been in had they actually entered judgment in terms of the award under the January 1993 order. However, as I have heard no argument on the issue of interest I express no final view.

77. The result, therefore, is that I allow the Claimants' application to enforce the award in the same manner as a judgment in accordance with the order of 25th January 1993 and I reject the Defendants' application to set that order aside. Permission to enter judgment will have to await the outcome of any argument as to the amount of interest recoverable.