Case No: 2004 Folio 272

Neutral Citation Number: [2005] EWHC 9 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 January 2005

Before :

Mr. Nigel Teare QC

- -

Between :

SVENSKA PETROLEUM EXPLORATION AB	**Claimant**
- and -	
GOVERNMENT OF THE REPUBLIC OF LITHUANIA	**Defendants**
AB GEONAFTA	

- -

Michael Bools (instructed by **Norton Rose**) for the Claimant
Timothy Saloman QC (instructed by **Barlow Lyde and Gilbert**) for the First Defendant

Hearing date : 24 November 2004

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Judgment

Mr Nigel Teare QC :

1. The Claimants, Svenska Petroleum Exploration AB, are a Swedish company engaged in the business of exploring for and producing oil and gas. It is the case of the Claimants that they entered into a joint venture agreement with the Government of Lithuania and AB Geonafta, a Lithuanian company, for the purpose of exploiting certain oilfields in Lithuania. The joint venture agreement was governed by the law of Lithuania and contained an arbitration clause. A dispute arose between the parties which was referred to an ICC arbitration in Copenhagen. On 19 July 2000 the Government of Lithuania, the First Defendant, objected to the jurisdiction of the arbitration tribunal on the grounds that it was not a party to the joint venture agreement or to the arbitration agreement within it. The arbitration tribunal considered that jurisdictional objection on 16-17 October 2001 at a hearing at which all parties, including the Government of Lithuania, were represented. On 21 December 2001 the arbitration tribunal issued an interim award in which it held that the Government of Lithuania was a party to the joint venture agreement and was bound by the arbitration agreement. The Government of Lithuania did not challenge the interim award before the Danish Court and in due course, after a 13 day hearing on the merits, a final award was issued dated 30 October 2003 in which the Government of Lithuania and AB Geonafta, the Second Defendants, were ordered to pay the sum of US$12,579,000 plus interest and costs to the Claimants.

2. On 2 April 2004 the Claimants issued an application in this Court seeking permission to enforce the Final Award. On 7 April 2004 Morison J gave that permission. The Defendants were a given a period of time in which to apply to set aside the order. Service was effected on the Second Defendants on 24 May 2004 and, no effective acknowledgment of service having been filed in time, judgment was entered against them on 13 July 2004 pursuant to the order of Moore-Bick J. The Second Defendants applied to set aside that judgment but their application was dismissed by Cooke J. on 24 August 2004.

3. The Government of Lithuania acknowledged service on 31 August 2004 (a different time regime applied to it) and applied for an order that the claim form, the order of Morison J. and the service of proceedings on the Government of Lithuania be set aside on the grounds that, as an independent sovereign state, it was immune from the jurisdiction of this Court.

4. On 29 September 2004 the Claimants issued the application which is now before the Court seeking an order that the Government's application dated 31 August 2004 be struck out, alternatively dismissed on the grounds that the Government has no real prospect of successfully defending the claim brought against it. The case of the Claimants is that the Government was party to an arbitration agreement pursuant to which the arbitration tribunal purported to act and therefore is not entitled to claim State immunity; see section 9 of the State Immunity Act 1978. It is said that the issue as to whether the Government was party to the arbitration agreement has been determined by the arbitration tribunal in its interim award which award has given rise to an issue estoppel on that point. It follows, say the Claimants, that the Government is estopped from denying that it was party to the arbitration agreement and so the

Government's claim to State immunity is bound to fail. Thus the Government's application should be struck out or dismissed now.

Recognition

5. On the hearing of the application Mr. Bools, Counsel for the Claimants, relied upon the provisions of the Arbitration Act 1996, sections 101-103. These provisions concern New York Convention Awards, namely, awards made pursuant to an arbitration agreement in the territory of a state which is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Denmark is a signatory to the New York Convention. It is necessary to set out sections 101-103 in full.

101 Recognition and enforcement of awards

(1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.

(2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

102 Evidence to be produced by party seeking recognition or enforcement

(1) A party seeking the recognition or enforcement of a New York Convention award must produce—

(a) the duly authenticated original award or a duly certified copy of it, and

(b) the original arbitration agreement or a duly certified copy of it.

(2) If the award or agreement is in a foreign language, the party must also produce a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

103 Refusal of recognition or enforcement

(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.

(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves—

(a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;

(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;

(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));

(e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;

(f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.

(4) An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.

It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security.

6. Counsel for the Claimants said that before the Claimants could advance their case on issue estoppel the Interim Award had first to be recognised by this Court. Section 101(1) provides that a New York Convention award "shall be recognised as binding on the persons as between whom it was made and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales". Section 102 sets out the evidence which must be produced by a party seeking recognition, namely, the award and the arbitration agreement. Although a certified copy of the interim award was said not to be before the Court it was in Court. Mr. Saloman QC, Counsel for the Government, made clear that he was not taking a procedural point in that regard. Thus there was no dispute that both of the required documents were before the Court.

7. Section 103(1) provides that recognition shall not be refused except where the person against whom recognition is invoked proves any one of the matters listed in section 103(2). It has been held that proof that the person against whom recognition is invoked was not party to the arbitration agreement falls within section 103(2)(b); see *Dardana Limited v Yukos Oil Company* [2002] 1 AER (Comm) 819 at para.8.

8. Where one of the matters listed in section 103(2) is proved "recognition … may be refused". Counsel for the Claimants therefore submitted that the Court had a discretion whether or not to recognise the award in such a case; it was not bound to refuse recognition. It was said that, assuming that the Government were able (absent the suggested estoppel) at the hearing of its application to adduce evidence which proved that the Government was not party to the arbitration agreement, the Court would nevertheless, on the facts of this case, exercise its discretion to recognise the interim award.

9. In considering this submission it is necessary to have regard to the guidance of the Court of Appeal in *Dardana Limited v Yukos Oil Company* at paras.8 and 18 as to the nature of the discretion conferred by section 103(2). Mance LJ said that

> "Section 103(2) cannot introduce an open discretion. The use of the word "may" must have been intended to cater for the possibility that, despite the original existence of one or more of the listed circumstances, the right to rely upon them had been lost, by for example, another agreement or estoppel. ……..The word "may" at the start of s.103(2) does not have the permissive, purely discretionary, or I would say arbitrary, force that the submission suggested. Section 103(2) is designed, as I have said in [8] above, to enable the court to consider other circumstances, which might on some recognisable legal principle affect the prima facie right to have an award set aside arising in the cases listed in s.103(2)."

10. If the Court recognised the interim award it was accepted by counsel for the Claimants that it then had to be shown that the requirements for an issue estoppel were satisfied, in particular, that the interim award finally and conclusively determined that the Government was party to the arbitration agreement. It was not submitted that once this Court recognised the interim award pursuant to sections 101-103 of the Arbitration Act 1996 the Government's claim that it was not party to the arbitration agreement and so was entitled to state immunity must fail. Recognition was relied upon as a gateway to an issue estoppel, not as a reason why, independently of any issue estoppel based on the common law, the Government's claim that it was not party to the arbitration agreement was bound to fail.

11. The issues raised by the Claimants' application appear to be, in some respects, novel. No case was cited where the discretion to recognise a Convention award conferred on the Court by section 103(2) had been exercised in the context of a jurisdictional dispute and no case was cited where an issue estoppel was held to have arisen from an arbitration award on a jurisdictional issue.

Objections to recognition as a matter of procedure and principle

12. Counsel for the Government submitted that it was not open to the Claimants to seek recognition of the interim award on this application. It was said that the application does not seek recognition of the interim award, that issues of enforcement and recognition go hand in hand, and that the issues of discretion raised by the Claimants ought to be raised only after the Court has determined the Government's application to set aside the proceedings on the grounds of state immunity.

13. I do not accept this submission. Section 101(2) of the Arbitration Act 1996 provides that awards may be enforced by leave of the Court. Thus an application is necessary for the purposes of enforcement. Questions of recognition and enforcement may often go hand in hand (and in this case the Claimants' claim form dated 2 April 2004 seeks both recognition and enforcement of the final award) but questions of recognition may arise independently of enforcement. Thus Section 101(1) of the Act provides that an award may be relied on by way of defence in any legal proceedings. In the present case the Government has applied for an order that the Claim Form, the order of Morison J. and the service of the Claim Form be set aside on the grounds that the Government is immune from the jurisdiction of this Court. The Claimants consider that the Government has no real prospect of establishing that it is immune from the jurisdiction of this Court and seek to make that contention good by reliance upon the interim award which determined that the Government was a party to the arbitration agreement. They have therefore issued the application which is now before the Court and seek an order pursuant to CPR Part 24. It seems to me that the Claimants are entitled to persuade the Court to recognise the interim award on this application. Had this application not been made the Claimants would have been entitled to persuade the Court to recognise the interim award on the hearing of the Government's application to set aside the proceedings. Moreover, it is appropriate in terms of case management, to consider the question of recognition now. If the Claimants are right in saying that the interim award ought to be recognised and that such recognition will give rise to the suggested issue estoppel the determination of such points now, effectively as a preliminary issue, will avoid the need for the Court to determine afresh whether, under Lithuanian law, the Government is party to the joint venture agreement and to the arbitration agreement within it.

14. Counsel for the Government relied upon the correspondence between the parties leading up to the hearing of this application from 16 September 2004 until 11 October 2004. That made clear that the present application was concerned with the question of issue estoppel and that if the Claimant succeeded there would remain an opportunity for the Government to put forward reasons why the final award should not be enforced. Since the issue estoppel question derives from the interim award it seems to me that there is nothing in the correspondence which can or should prevent the Claimant from seeking to rely upon that award by way of defence to the Government's claim to state immunity.

15. Counsel for the Government also raised what was said to be a fundamental objection to the Court recognising the interim award by permitting the Claimants to rely upon it by way of defence to the Government's claim to state immunity. That objection was

said to be that in English law an arbitration award on a jurisdictional issue cannot be recognised (or enforced) unless and until the Court reviewing the award has determined that the arbitrators did indeed have jurisdiction. This submission was based upon several well known authorities and extracts from well known textbooks on *res judicata* and the law of arbitration.

16. I was referred in particular to *The Duke of Buccleuch v The Metropolitan Board of Works* (1870) LR 5 Ex.221 (per Lord Blackburn) and to *Christopher Brown v Genossenschaft Oesterreichischer Waldbesitzer Holzwirt-Schaftsbetriebe Registrierte Genossenschaft Mit Beschrankter Haftung* [1954] 1 QB 8 (per Devlin J.) as authorities for the proposition that where an arbitration tribunal determines that it has jurisdiction its decision will not be binding upon the parties. I was also referred to passages in *Spencer Bower on Res Judicata* 3rd.edition at paras.115-118 and in *The Law and Practice of Commercial Arbitration by Mustill and Boyd* 2nd.edition pp.554-578. However, whilst these authorities and textbooks undoubtedly correctly stated the law as it was prior to the Arbitration Act 1996, it is now necessary to refer, when questions regarding jurisdiction are raised, not to the common law, but to those sections of the Act dealing with questions of arbitral jurisdiction, in particular section 73. This is indeed stated in the *2001 Companion Volume to the 2nd.edition of The Law and Practice of Commercial Arbitration by Mustill and Boyd* at p.232. Under the Arbitration Act 1996 a person who takes no part in arbitral proceedings may contend, when it is sought to enforce an arbitration award against him, that the tribunal had no jurisdiction over him; see section 72. However, pursuant to section 73(2), "a party to arbitral proceedings", who could have questioned a ruling by the arbitral tribunal that it has jurisdiction by any arbitral process of appeal or review or by challenging the award but does not do so, "may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling". If, as appears to me and as suggested by the *2001 Companion Volume to the 2nd.edition of The Law and Practice of Commercial Arbitration by Mustill and Boyd* at p.363, the expression "a party to arbitral proceedings" includes a person who takes part in arbitral proceedings for the purpose of contesting the substantive jurisdiction of the tribunal then it is clear that the common law position set out in the authorities and textbooks to which I was referred no longer represents the English law of arbitration. That is because the decision of the tribunal on a jurisdictional issue will, in effect, be binding upon the a person who is within section 73(2) of the Arbitration Act 1996.

17. For these reasons I do not agree that there is in English law a fundamental objection to the Court recognising the interim award by permitting the Claimants to rely upon it by way of defence to the Government's claim to state immunity.

18. In any event, the interim award was not an English arbitration award but a Danish arbitration of which recognition was sought pursuant to section 101-103 of the Arbitration Act 1996. It has been held in *Dardana Limited v Yukos Oil Company* [2002] 1 AER (Comm) 819 at para.10 that the only burden on the person seeking recognition of the award is to produce the documents required by section 102. He does not have to show at that stage that the award was binding upon the person against whom recognition is sought. Such questions are for that person to raise at the second stage under section 103.

The Court's discretion to refuse recognition pursuant to section 103(2) of the Arbitration Act 1996

19. The judgment of Mance LJ in *Dardana v Yukos Oil Company* gives some guidance as to how the discretion to refuse recognition of an award pursuant to section 103(2) of the Arbitration Act is to be exercised when a person can prove that he is not a party to the arbitration agreement. The discretion is not an "open" discretion but is only to be exercised where "despite the original existence of one or more of the listed circumstances, the right to rely on them had been lost, by for example, another agreement or estoppel" or where there are circumstances "which might on some recognisable legal principle affect the prima facie right to have an award set aside arising in the cases listed in section 103(2)."

20. Counsel for the Claimants submitted that the circumstances of the present case are capable of falling within the circumstances identified by Mance LJ and that the discretion to recognise an award should be exercised notwithstanding that it is accepted, for the purposes of this application, that the Government can, by reference to factual and expert evidence, prove that it was not party to the arbitration agreement contained in the joint venture agreement. He said that this was so because:

> (i) the Government asked the arbitration tribunal to determine the question whether it was party to the arbitration agreement and participated in a 2 day hearing on the merits of that question;
>
> (ii) that question was determined against the Government in a 69 page interim award dated 21 December 2001;
>
> (ii) the Government has not challenged that decision;
>
> (iv) the Government participated in 13 day hearing on the substantive merits of the dispute which resulted in a final award dated 20 October 2003;
>
> (v) the Government has not challenged that final award; indeed, on 11 February it resolved that "it is not expedient to apply to a court for annulment of the award" dated 20 October 2003;
>
> (vi) the Government is now seeking to relitigate before the English Court the question whether it was a party to the arbitration agreement;
>
> (vii) given that the Government could have challenged the interim and final awards before the Danish courts but has chosen not to do so it would be wrong, as a matter of discretion, for the English Court now to refuse to recognise the interim award; the course followed by the Government is calculated to result in inconsistent judgments in different jurisdictions.

21. Counsel for the Government submitted:

> (i) that an issue estoppel created by the interim award of which recognition is sought could not be the sort of matter contemplated by Mance LJ as justifying recognition notwithstanding proof of one of the matters listed in section 103(2) of the Arbitration Act 1996;
>
> (ii) that recognition of the interim award in such circumstances would be contrary to the scheme of the New York Convention;
>
> (iii) that the Convention does not make it a condition of a refusal to recognise an award that the person against whom recognition has been sought has applied to the local courts for a review of the decision of the arbitral tribunal;
>
> (iv) that it is well established that a party may wait until enforcement of an award is sought before challenging the decision of the arbitral tribunal that it has jurisdiction.

22. In my judgment the Claimants, when seeking to persuade the Court pursuant to section 103(2) of the Arbitration Act 1996 to recognise the interim award, can rely upon a "recognisable legal principle" which affects the Government's prima facie right to a refusal of recognition of the interim award. Since the introduction of the Arbitration Act 1996 it has been recognised that a person who has taken part in arbitration proceedings for the purpose of contesting the jurisdiction of the arbitral tribunal, and who loses that argument and then fails to avail himself of a right to challenge the award may not object later to the tribunal's jurisdiction on any ground that was the subject of that ruling. This principle is recognised in section 73(2) of the Arbitration Act 1996, having been recommended by the Departmental Advisory Committee on Arbitration Law at paras.295-298. It is a beneficial principle because where a person has taken the opportunity to arbitrate a question relating to the jurisdiction of the arbitral tribunal, has lost on that issue, and, although he has had an opportunity to challenge that decision in court, has failed to take it, that person will be prevented from re-litigating the very same issue at a later date, thereby saving the expense of arguing the matter a second time.

23. Counsel for the Government objected that to give effect to any such principle would enable arbitrators who lack jurisdiction "to pull themselves up by their own bootstraps" (cf *Jet Holdings Inc. v Patel* [1990] QB 335 per Staughton LJ). I accept that this was not permissible in the context of an arbitration governed by English law prior to the Arbitration Act 1996 but section 73(2) of that Act changed the law in that respect.

24. It seems to me that since the principle to which I have referred is recognised in respect of arbitrations governed by English law it is legitimate to have regard to that principle when the Court is deciding how to exercise the discretion conferred on the Court by section 103(2) of the Arbitration Act 1996.

25. Moreover, the discussion in *2001 Companion Volume to the 2nd.edition of The Law and Practice of Commercial Arbitration by Mustill and Boyd* at pp.82-96, especially p.89, and the approach of Colman J. in *Minmetals Germany GmbH v Ferco Steel Ltd.* [1999] 1 AER (Comm) 315 at p.331, to both of which I referred when preparing this judgment, are consistent with and support this approach.

26. In response to each of the Government's objections referred to above:

(i) Whilst Mance LJ did not mention the specific question of an unchallenged interim award giving rise to an issue estoppel he mentioned "estoppel" and issue estoppel is a well-known form of estoppel. The principle recognised by section 73(2) of the Arbitration Act is analogous to such an estoppel.

(ii) I do not consider that this approach is contrary to the scheme of the New York Convention. Section 103(2) is based upon Article V of the Convention. The Convention, like the Act, does not provide that recognition shall be refused when one of the stated matters is proved. The Court is given a discretion to refuse recognition where the person against whom recognition is sought is not a party to the arbitration agreement. I consider that where a person has participated in an arbitral hearing to determine whether he is party to the arbitration agreement, has lost on that issue and has not sought to challenge the arbitral ruling when he had the opportunity to do so such circumstances are or may be appropriate for the discretion conferred by Article V of the Convention and section 103(2) of the Act to be exercised in favour of recognition.

(iii) I agree that the New York Convention does not make it a condition of refusal to recognise an award that the person against whom recognition is sought has applied to the local courts for a review of the decision of the arbitral tribunal. However, it seems to me legitimate to take into account when exercising the discretion conferred by section 103(2) that the person against whom recognition has been sought has taken the point on jurisdiction before the arbitral hearing, participated in a hearing on that issue, has lost and has then failed to challenge the decision before the local courts when he had the opportunity to do so.

(iv) Whilst it was well established prior to the Arbitration Act 1996 that a person may wait until enforcement of an award is sought before challenging the decision of the arbitral tribunal that it has jurisdiction, that is no longer the case so far as the English law of arbitration is concerned. Although section 73(2) only applies to arbitrations in England it is appropriate, in my judgment, to exercise the Court's discretion pursuant to section 103(2) by having regard to the beneficial principle recognised by section 73(2) of the Act, notwithstanding that in Denmark (see para. 36 below) it would have been possible to obtain a declaration that the Government was not party to the arbitration agreement had an attempt been made to enforce the final award there.

27. In my judgment the present case is an appropriate case in which to exercise the discretion conferred upon the Court by section 103(2) of the Act to recognise an arbitration award by permitting the Claimants to rely upon it in defence of the Government's claim to set aside the proceedings notwithstanding that, leaving aside the effect of that award, the Government could, it is assumed, prove that it was not a party to the arbitration agreement. Firstly, having objected to the tribunal's jurisdiction on the grounds that it was not party to the arbitration agreement the Government participated in a two day hearing on that very issue in Denmark in October 2001 when both factual and expert evidence on the law of Lithuania was adduced. Secondly, the tribunal decided that issue against the Government in an interim award published in December 2001 of some 69 pages which set out extensively the facts and evidence relied upon, the expert evidence of Lithuanian law, the arguments of the parties and the reasoning and conclusions of the tribunal. Thirdly, having lost on that issue, the Government did not take the opportunity to seek a review of the interim award in the Danish Courts. No reason was suggested as to why this step could not have been taken. Fourthly, the Government participated in a 13 day hearing on the merits which resulted in a final award against the Government published in October 2003. Fifthly, having decided not to challenge the final award in the Danish Court in February 2004 and to notify the Claimants of the Government's position, the Government then, after the Claimants took steps to enforce the final award in April 2004, claimed immunity from the jurisdiction of this Court, a contention which could only made good if the Government was not party to the arbitration agreement, contrary to the decision of the arbitral tribunal in its interim award which the Government had not challenged.

Issue Estoppel

28. Counsel for the Claimants submitted that if the Court recognised the interim award by permitting the Claimants to rely upon it by way of defence to the Government's claim of state immunity it was then necessary to consider whether the interim award gave rise to an issue estoppel on the question whether the Government was party to the arbitration agreement.

29. The arbitral tribunal decided that the Government was party to the arbitration agreement in the joint venture agreement. This issue also has to be determined between the same parties in the context of the Government's claim to state immunity because, pursuant to section 9 of the State Immunity Act 1978, there is no immunity where the Government has agreed in writing to submit a dispute to arbitration.

30. The issue as to whether the Government was party to the arbitration agreement contained in the joint venture agreement was determined after a hearing on the merits. But there remains the question whether the decision of the arbitral tribunal was "final and conclusive".

31. The submission on behalf of the Claimants is that a decision is, as a matter of English law, final and conclusive if the issue is incapable of being re-opened before the same court or tribunal who decided the matter. Whether this is so is a matter for the procedural law of the tribunal, which in this case is Danish law. Under Danish law the

interim award is incapable of being reopened before the arbitral tribunal and so it is "final and conclusive". In the argument of Counsel no distinction was drawn between awards on the question of jurisdiction and awards on the substance of the dispute.

32. On behalf of the Government it was accepted that the Claimants' submission was correct in the context of the judgments of foreign courts. However, in the context of arbitration awards it was said that they were not final and conclusive unless and until the reviewing Court in the forum where recognition and enforcement is sought has reviewed the award and upheld it, having dismissed any jurisdictional challenges. The status of the award in the country where the award was made was said to be of doubtful relevance but if it was relevant the evidence of Danish law demonstrated that an arbitral decision in Denmark on a question of jurisdiction was reviewable by the Danish Courts and so such a decision was not final and conclusive.

33. Neither party was able to refer to an authority which directly supported its argument. *Fidelitas Shipping v V/O Exportchleb* [1966] 1 QB 630 is authority for the proposition that an arbitration award can give rise to an issue estoppel but it did not involve any question of an award on jurisdiction. *Nouvion v Freeman* (1889) 15 App.Cas. is authority for the proposition that where a decision of a foreign court can be contested in that foreign court it cannot give rise to an issue estoppel. It was further said, *obiter*, that the existence of a right of appeal to a higher court does not prevent a decision of a foreign court from being "final and conclusive." However, that case did not concern the decision of an arbitral tribunal on a question of jurisdiction.

34. Counsel for the Claimants submitted that, consistently with *Nouvion v Freeman*, the circumstance that the decision of an arbitral award on jurisdiction could not be re-opened before the arbitral tribunal in Denmark led to the conclusion that that it was "final and conclusive", notwithstanding that it could be challenged in the Danish Court.

35. In my judgment the question whether an award is final and conclusive must depend upon its status in the country where the award was made, just as the question whether a foreign judgment is final and conclusive depends upon its status in the country where the judgment was pronounced.

36. There was expert evidence to the effect that under Danish law the interim award was subject to challenge or appeal before the Danish Court pursuant to section 7 of the Danish Arbitration Act on very limited grounds. Thus, the Claimants' expert explained that whilst the Government could mount a challenge "based on a repetition" of its argument that it was not party to the arbitration agreement the Government could not ask a court to "review the merits" of an arbitration award. Having considered the evidence on Danish law it seems to me that it cannot be said that the decision of the arbitral tribunal in Denmark finally and conclusively determined that the Government was a party to the arbitration agreement.

i) The right in Denmark to bring an action for a declaration that the Government was not a party to the interim award under section 7 of the Danish Arbitration

Act clearly indicates that in a very real sense the decision of the arbitrators on that question was neither final nor conclusive.

ii) Although the right to obtain such a declaration has been called "an appeal" in the evidence of Danish law, that right does not appear to me to be analogous to the right of an appeal from one court to a higher court such as was mentioned in *Nouvion v Freeman* and which did not prevent the decision of the lower court from being final and conclusive. In such a case the decision of the lower court determines the issue between the parties finally and conclusively in the event that the right of appeal is not exercised. The losing party cannot avoid the consequences of losing by seeking a declaration, when an attempt at enforcement is made, that the decision is not binding upon him. Whereas, in the case of an arbitration award on jurisdiction, the losing party can, when an attempt is made to enforce the award, seek a declaration that he was not party to the arbitration agreement.

iii) I accept that the decision of the arbitral tribunal could not be re-opened before the arbitral tribunal but I do not accept that it follows that the decision of the arbitral tribunal was final and conclusive in Denmark. On the contrary it was not, because the Government could have re-argued the question before the Danish Court and would not have been bound by the decision of the arbitral tribunal in the interim award in the same way that it would have been bound by the decision of the arbitral tribunal in the final award on the substance of the dispute.

37. There was discussion in the evidence of Danish law as to the circumstances in which, by reason of delay or waiver, the right to review the interim award might be lost but this did not feature in the Claimants' argument. It was not said, for example, that although the interim award did not, as at the date of the award, finally and conclusively determine the question whether the Government was party to the arbitration agreement, yet it now did because of delay in exercising, or waiver, of the right of review.

38. For these reasons I have reached the conclusion that the Claimants cannot establish the required issue estoppel. I have reached that conclusion reluctantly because the Government raised the question whether it was a party to the arbitration agreement before the arbitral tribunal, requested that that question be determined by the arbitral tribunal, participated in a two day hearing on that very issue and when it lost failed to avail itself of the remedy available in Denmark for challenging that decision of the arbitral tribunal. However, it cannot be shown that the arbitral award finally and conclusively determined that issue in Denmark and so, it seems to me, the Claimants cannot establish the required estoppel on the issue whether it was party to the arbitration agreement.

39. For this reason I must dismiss the Claimants' application.