

Neutral Citation Number: 1661

Case No: 2010 FOLIO 1231

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/06/2011

Before :

MR JUSTICE HAMBLEN

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Between :

SOVAREX S.A	**Claimant**
- and -	
ROMERO ALVAREZ S.A	**Defendant**

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- -

David Lewis (instructed by **Gateley LLP solicitors**) for the **Claimant**
David Semark (instructed by **Ashfords LLP**) for the **Defendant**

Hearing dates: 10 June 2011

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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 Justice Hamblen:

A. Introduction

1. This is an application by the Claimant ("Sovarex") for permission to enforce an arbitration award in the same manner as a judgment and to enter judgment in the terms of the Award pursuant to s.66 of the Arbitration Act 1996 ("the Act").

2. The relevant award is FOSFA arbitration award no. 4107 dated 28 January 2010 ("the Award") under which a FOSFA Tribunal ("the Tribunal") awarded Sovarex damages of €1,035,000 against the Respondent ("Alvarez") (plus interest and certain costs).

3. Alvarez's position is that the award is a nullity because no contract was concluded. It also relies on the fact that the Spanish courts were asked to decide on the validity of the alleged contract on 3 October 2008 – months before the commencement by Sovarex of the FOSFA proceedings and contends that they remain seised of this question. It submits that:

(1) The s.66 application should be dismissed because the evidence shows that there is a real ground for doubting the validity of the award. S.66 is a summary procedure. The alternative proposed by Sovarex, a full trial in England with witnesses, is not available to resolve disputed facts in s.66 proceedings.

(2) Alternatively the court should decline jurisdiction or stay proceedings on the basis that (i) any English judgment would be an interference with the jurisdiction of the Spanish courts and/or (ii) that it is obliged to recognise the findings by the Spanish courts on 6 July and 6 October 2009, that the validity of the contract would be determined in Spain, pursuant to Article 33 (1) of the Regulation.

(3) Alternatively, the court should stay these proceedings in the exercise of its inherent discretion, on lis pendens and forum non conveniens grounds.

B. Background

B.1 The Contract

4. Sovarex's claim was brought under a contract which it contends was made on 3 June 2008 ("the Contract"), by which Sovarex agreed to sell to Alvarez 5,000 MT of sunflower seeds CIF Seville for shipment between 15 September and 15 October 2008. The Contract provided for English law and contained an arbitration agreement providing for London FOSFA arbitration and making it a breach of contract to start legal proceedings elsewhere. The Claimant's case was that the Contract was concluded by telephone and email through the intermediary of a broker, Mr Garrido. There is a supporting witness statement of Mr Garrido before the court.

5. Alvarez denies that any contract was concluded. In support of its case it has provided a witness statement from Mr Manuel Romero Alvarez.

6. If a contract was concluded Sovarex submits that it is beyond doubt that it was repudiated by Alvarez when it refused to acknowledge that any contract had been made when the time for performance arose. Sovarex accepted that repudiation on 17 September 2008.

B.2 The arbitration

7. Sovarex initiated arbitration on 16 December 2008, in ignorance of any other proceedings. FOSFA appointed an arbitrator on behalf of Alvarez on 20 February 2009. On 28 January 2010, the Award in Sovarex's favour was issued.

B.3 The Spanish proceedings

8. Alvarez's Spanish action was issued in early October 2008 and formally admitted by the Spanish Court on 1 December 2008, but not served until 20 April 2009.

9. On 22 September 2010, the Spanish Court dismissed Alvarez's action on the basis that Spanish procedural law does not recognise negative declaratory relief asserting the non-existence of a contract. Alvarez is appealing that decision.

10. Alvarez, however, relies upon the facts that, at an earlier stage in the Spanish proceedings, the Spanish Court had on 6 July 2009 dismissed an application made by Sovarex for a stay in favour of the FOSFA arbitration and that it thereafter subsequently re-affirmed its decision on 6 October 2009. Sovarex could appeal those decisions but that depends on the outcome of Alvarez's own appeal.

B.4 The s. 66 application

11. This application was brought on 19 October 2010, initially without notice, after the dismissal of the Spanish proceedings. By order dated 17 December 2010, Teare J ordered service out of the jurisdiction.

C. The Issues

C.1 (1) Whether the s. 66 application should be dismissed because the evidence shows that there is a real ground for doubting the validity of the award.

12. The first issue which arises under this head is whether Alvarez has lost the right to object to the enforcement of the Award under s.66 (3) of the Act by participation in the arbitration.

13. S.66 provides:

> **"66.— Enforcement of the award.**
> (1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
> (2) Where leave is so given, judgment may be entered in terms of the award.
> (3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.
> The right to raise such an objection may have been lost (see section 73).
> (4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the Arbitration Act 1950 (enforcement of awards under Geneva Convention) or the provisions of Part III of this Act relating to the recognition and

enforcement of awards under the New York Convention or by an action on the award."

14. S.72 provides:

> **"72.— Saving for rights of person who takes no part in proceedings.**
> (1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question—
> (a) whether there is a valid arbitration agreement,
> (b) whether the tribunal is properly constituted, or
> (c) what matters have been submitted to arbitration in accordance with the arbitration agreement,
> by proceedings in the court for a declaration or injunction or other appropriate relief.
> ...."

15. S.73 provides:

> **"73.— Loss of right to object.**
> (1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—
> (a) that the tribunal lacks substantive jurisdiction,
> (b) that the proceedings have been improperly conducted,
> (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or
> (d) that there has been any other irregularity affecting the tribunal or the proceedings,
> he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.
> (2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling—
> (a) by any available arbitral process of appeal or review, or
> (b) by challenging the award,
> does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling."

16. It was common ground between the parties that the question of whether Alvarez has lost the right to raise its objection to enforcement under s.66(3) depends on whether or not Alvarez took part in the arbitration proceedings. If it did not do so, then its rights under s72 and s66(3) will have been preserved. If it did so, then its right to rely upon s.66(3) will have been lost by reason of s.73(2).

17. It was also common ground that this is an issue which must be determined objectively – see, for example, *Gater Assets Ltd v NAK Naftogaz Ukrainiy* [2007] 2 Lloyd's Rep. 588 at 605, at [79] per Rix LJ.

18. I was referred to a number of authorities in which this issue has been considered. Although each case turns on its own facts they provide some assistance in determining what amounts to taking part in an arbitration.

19. Alvarez relied in particular upon the decisions of Clarke J in *Caparo Group Ltd v. Fagor Arrasate Sociedad* [2000] ADLRJ 254 and of Mann J in *Law Debenture Trust v. Elektrim Finance BV* [2005] 2 Lloyd's Rep. 755.

20. In the *Caparo* case Clarke J held that if a party was invoking the jurisdiction of the tribunal to consider whether it had jurisdiction then that would be taking part in the arbitration. However, merely saying that you are not party to any arbitral agreement and that the arbitration tribunal has no jurisdiction would not be.

21. In the *Law Debenture* case Mann J commented as follows on the Caparo decision [at 23]:

> "It is noteworthy in that case that Clarke J was able to find that protestations as to the absence of jurisdiction, which were presumably intended to persuade, did not amount to participating in the arbitration even where the body had the additional function of deciding whether there was a *prima facie* case on jurisdiction."

22. In relation to the facts of the case before him Mann J said that making the point that you are contesting jurisdiction and saying that the jurisdiction issue should be considered by a court is not taking part in the arbitration. This is to be contrasted with "attempting to argue its case against jurisdiction so that the arbitration can consider it". He considered that the party in that case "was asserting non-jurisdiction, not participating in the exercise of it" (at [28]).

23. The cases therefore draw a distinction between protesting that the arbitration tribunal has no jurisdiction and asserting that the issue should be decided by some other court or tribunal and asking the tribunal to consider the issue of jurisdiction. In the latter case the party is likely to be held to have invoked the jurisdiction of the tribunal.

24. Sovarex sought to rely upon the obiter comment made in *Broda Agro v Alfred C. Toepfer* [2011] 1 Lloyd's Rep. 243 at 250, at [50](Stanley Burnton LJ), where he said:

> "It may be difficult to distinguish between a letter that does no more than inform the arbitral tribunal, as a matter of courtesy, that the respondent does not accept its jurisdiction, and a submission that it has no jurisdiction. This is such a case".

25. I do not regard that comment as being inconsistent with what was said in the *Caparo* and *Law Debenture* cases. A "submission" that the tribunal has no jurisdiction is made when you invite the tribunal to consider that issue and thereby invoke their jurisdiction to decide it.

26. Turning to consider the facts, Sovarex submitted that Alvarez took part in the proceedings relating to jurisdiction by reason of the cumulative effect of the following matters:

> (1)Alvarez's message, on 18 February 2009, to FOSFA setting out reasons as to why FOSFA should refuse to deal with the arbitration commenced by Sovarex. It stated that:
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> > ".....We have received your registered letter date 05.02.09 whereby you advise us that Sovarex has requested FOSFA to appoint an

arbitrator on our behalf on an arbitration proceeding instigated by Sovarex. Please note that in respect to the above, we have never concluded any such a contract as suggested by Sovarex. In fact, proceedings were commenced in Spain last 3rd of October 2008 by Romero Alvarez SA denouncing this serious matter before the Court of Seville (proceedings no 1634/2008, Seville Court no.10). Please find enclosed Court documents admitting our claim and agreeing to summoning same to Sovarex. The Spanish Court in Seville have accepted jurisdiction to deal with our application to declare that no contract was ever agreed with us as suggested in bad faith by Sovarex. Accordingly, there was never a contract with Sovarex and there is a pending litigation case before the Courts of Seville. Therefore, FOSFA must respect the pending litigation case and refuse to deal with Sovarex's groundless application."

(2)Alvarez's further message, on 2 June 2009, following the constitution of the Tribunal, again submitting that there was no arbitration agreement between the parties and also that the proceedings in Spain created a *litis pendente*. It stated that:

"…. As advised earlier on by Messrs. Romero Alvarez SA our clients did not enter into any contract of sale with Sovarex during the year 2008. Accordingly, no arbitration can be claimed by Sovarex before FOSFA. In such respect, Sovarex has a full copy of our writ of action produced before the Spanish Courts and we trust Sovarex has passed a copy to FOSFA. Indeed, Sovarex's lawyers have appeared before the Spanish Court and have pleaded the proceedings to be set aside. The Court has to deal with Sovarex's arguments as to the existence of a contract and hence as to the arbitration. Furthermore, as you know, proceedings were commenced by Romero Alvarez SA in Spain well in advance to the FOSFA arbitration, thus there is a *litis pendente* and we request FOSFA to stop this arbitration until the Spanish Court makes a decision on the merits of our claim."

(3)Alvarez's further message, on 2 July 2009, following the Tribunal's direction that it would deal with jurisdiction and the merits together, containing submissions based on Articles 27 and 28 of the Brussels Regulation and citing the line of case law "consolidated in" *Allianz SpA v West Tankers (The Front Comor)*. It stated that:

"We draw your attention to the fact that in accordance to Arts. 27 and 28 of the 44/2001 Regulation, there is a *lis pendens* since proceedings were initiated first in Spain. Accordingly, we request FOSFA to respect the proceedings that were started in Spain well before the arbitration. If this not the case we will ask the award to be declared null in Spain in breach of 44/2001 and other relevant laws. FOSFA should notice that Sovarex Spanish lawyers have applied for the Spanish proceedings to be stopped and the Court is dealing with such request and will shortly deliver a decision in that respect. You should further consider the line of case law consolidated in the judgment of the Court (Grand Chamber) 10 February 2009 ECJ. In Case C 185/07, on the reference for a preliminary ruling under Articles 68 EC and 234 EC from the House of Lords (United Kingdom), made by the decision of 28 March 2007, received at the Court on 2 April 2007, in the proceedings Allianz SpA, formerly Riunione Adritica di Sicurta SpA,

> General Assicurazioni Generali SpA. Therefore, we cannot accept to draft any submission before FOSFA as that would be a recognition that a contract was ever reached with Sovarex containing arbitration clause, which our clients insist was not the case."

(4) Alvarez's further message, on 23 July 2009, with further submissions about *lis pendens* and *res judicata* based on the Spanish proceedings and on the Regulation. It stated that:

> "Romero Alvarez SA insists that FOSFA should stop the proceedings or the award will be unenforceable for various reasons, inter alia; Romero Alvarez has not appointed arbitrators, nor produce submissions as this matter has been in the hands of the Spanish Courts before the commencement of this arbitration; there is a *lis pendens.* Furthermore, we trust that FOSFA has been informed by Messrs. HBJ Gateley Wareing LLP that Sovarex's application challenging the competence of the Seville Court number 10 in the proceedings number 1634/2008 has been refused by the court in its order of 6 July 2009. The Court Magistrate has ruled that Romero Alvarez's action is to follow before the Spanish Courts and has rejected the argument of Sovarex that a contract had been fixed between Sovarex and Romero Alvarez. For good order sake, we repeat that any award issued under the present circumstances will not be enforceable in Spain. Moreover, FOSFA should consider the judgment of the Court (Grand Chamber) 10 February 2009 ECJ. In Case C 185/07, on the reference for a preliminary ruling under Articles 68 EC and 234 EC from the House of Lords (United Kingdom), made by decision of 28 March 2007, received at the Court on 2 April 2007, in the proceedings Allianz SpA, formerly Riunione Adriatica di Sicurta SpA, Generali Assicurazioni Generali SpA. This judgment makes very clear that 44/2001 applies to Court and arbitrations cases as the present one. Therefore, we reiterate that we cannot accept to draft any submission before FOSFA as that would be a recognition that a contract was ever reached with Sovarex containing an arbitration clause, which our clients insist was not the case."

27. Sovarex further submitted that Alvarez's participation is reflected by the fact that the Tribunal included a section in its award entitled "Respondents submissions" and made "findings" in respect of such submissions.

28. Alvarez submitted that Dr Arizon's letters did not amount to "taking part" in the FOSFA proceedings. It submitted that these were an objection to the commencement of arbitration proceedings and a preliminary protest regarding the jurisdiction of the Tribunal and cannot be read as a submission by Alvarez to the Tribunal's jurisdiction on kompetenz-kompetenz grounds.

29. In my judgment the correspondence did no more than make it clear that Alvarez was protesting the jurisdiction of the Tribunal and asserting that they should decline to exercise any jurisdiction they might have pending determination of the jurisdiction issue by the Spanish court. It never recognised that the tribunal had jurisdiction, still less did it invite them to consider or determine the issue of jurisdiction. The letters were directed at explaining why Alvarez was not going to participate in the arbitration. They were not inviting any jurisdiction to be exercised. They were asserting that any jurisdiction the Tribunal might have should not be exercised at this stage.

30. Sovarex submitted that inviting the Tribunal to decline jurisdiction was itself an invocation of their jurisdiction. I do not agree. It was not asking them to consider any substantive issue as to that jurisdiction. The position is analogous to that in the *Law Debenture* case in which the tribunal was similarly being urged to allow the jurisdiction issue to be decided by the court. That was regarded as being an assertion of non-jurisdiction rather than a participation in its exercise.

31. For all these reasons, I accordingly reject Sovarex's argument that Alvarez has lost the right to object to the jurisdiction of the arbitration under s. 66(3).

32. It therefore becomes necessary to consider whether Alvarez's objections to the enforcement of the award can be dealt with under the s.66 procedure.

33. It was Alvarez's case that s.66 is a summary procedure that is not available where "there is a real ground for doubting the validity of the award": *Middlemiss v. Hartlepool Corporation* [1973] 1 All ER 172 at p. 175 per Lord Denning MR.

34. It submitted that the evidence before the court clearly establishes a real basis for doubting that any contract was concluded and set out various detailed points in its skeleton argument in support thereof. Alvarez submitted that in these circumstances the present s.66 proceedings should be dismissed and Sovarex left, if so advised, to bring an action on the award. In particular it submitted that:

(1) S.66 of the Act (and its predecessor section 26 of the 1950 Act) provides a summary procedure for the enforcement of arbitration awards.

(2) It is "mere machinery". It does not modify the conditions for enforcement which existed at common law. The right at common law, being an action on the award, is expressly retained under the Act (see section 66(4) of the Act): *The Amazon Reefer* [2010] 1 Lloyd's Rep 222 at [5 – 7] per Thomas LJ.

(3) As a summary procedure, s.66 cannot be used as a route to a full trial.

35. Whilst supporting the arbitral tribunal's conclusion in relation to the making of the contract, Sovarex accepted that Alvarez had sufficiently shown that that is an issue which involves triable issues of fact and that "there is a real ground for doubting the validity of the award". However, it submitted that that is an issue which can and should be dealt with in the context of the present proceedings and that there is no warrant for requiring it effectively to start all over again.

36. It submitted that:

(1) S.66 is the section of the Act that deals with enforcement of arbitration awards generally (see *Gater*, at [44] (Rix LJ). It is intended to reflect Article 35 of the Model Law.

(2) Consistent with its general application, CPR 62 shows that an arbitration claim started under s.66 does not automatically fail simply because the award debtor can show, on paper, that there is a real ground for doubting the validity of the Award.

(3) On the contrary, CPR 62.18 contemplates two different paths for an application under s.66; namely:

(i) Either an enforcement order may be made without notice pursuant to CPR 62.18(1);

(ii) Alternatively, the court will specify that the arbitration claim form must be served under CPR 62.18(2) and the enforcement proceedings then continue. This contemplates the enforcement proceedings being assimilated to any CPR claim in circumstances where the court has felt unable to act summarily (see *Gater* at [74-75] (Rix LJ), see also *Colliers International* [2008] 2 Lloyd's Rep. 368 at [24] (Beatson J)).

(4) By reason of the order of Teare J, this case has taken the second path. The court should now make directions to dispose finally of these enforcement proceedings. The procedure should henceforth be the equivalent of a jurisdictional rehearing under s.67 of the Act.

37.The general procedure which has been adopted by the courts in respect of the enforcement of awards under the Arbitration Acts is conveniently summarised by Thomas LJ in *The Amazon Reefer* [2010] 1 Lloyd's Rep 222 at [7]:

"The procedure for enforcement by action is little used in practice. For many years it has been the practice of parties who seek to use the enforcement mechanism of the court in England and Wales to use the procedure under section 26 of the 1950 Act and section 66 of the 1996 Act to enforce an award. The procedure is straightforward. The parties make an application to the court on an *ex parte* (or without notice) basis and any challenge to the enforcement is heard by the judge. The procedure under sections 26 and 66 had its origins in earlier legislation and was a summary form of proceeding intended to dispense with the full formalities of the action to enforce an award. The summary procedure was originally intended only to be invoked in reasonably clear cases – see *Boks & Co v Peters, Rushton & Co Ltd* [1919] KB 491 at page 497 where Scrutton LJ made clear it was only to be invoked in "reasonably clear cases". However, procedures were developed so that the court could decide summarily questions of law which did not involve issues of fact. By the 1980s courts were prepared to deal with all applications under the summary procedure provided objections could be disposed of without a trial: see, for example, *Middlemiss and Gould v Hartley Corporation* [1972] 1 WLR 1643 and *Hall & Wodehouse Ltd v Panorama Hotel Properties Ltd* [1974] 2 Lloyd's Rep 413. The summary procedure both under section 26 and the 1950 Act and section 66 of the 1996 Act is so convenient that it is by far the most common way of enforcing an award."

38. Historically the enforcement mechanism provided under the Arbitration Acts was therefore treated as involving a summary procedure. However, in recognition of the greater convenience of that procedure over an action on the award the nature of the issues which could be dealt with thereby grew. As Thomas LJ stated, by the 1980s the courts were prepared to deal with all applications under the procedure provided objections could be disposed of without a trial. The question raised by the present proceedings is whether this means or requires that disputed issues of fact can never be dealt with under s.66.

39. As Alvarez pointed out, in *The Amazon Reefer* Thomas LJ assimilated the procedure under s.26 with that under s.66 and I was referred to other cases and textbooks in which this has been done. However, none of those cases or citations addresses the issue of whether the court has power to deal with disputed issues of fact under s.66.

40. The starting point is s.66 itself. As Sovarex submitted, there is a difference between s.66 and s.26 due to the inclusion in s.66 of s.66(3), which has no equivalent in the earlier legislation.

41. The proviso in s.66(3) applies where the person resisting enforcement "shows" that the tribunal lacked substantive jurisdiction. That indicates proof of that fact rather than merely showing that it involves a triable issue. It also indicates that that is a matter which can be determined within the context of the s.66 procedure.

42. By contrast in an action on an award it is incumbent on the claimant to "plead and prove both the arbitration agreement and the award", and to "establish that the dispute was within the terms of the submission, and that the arbitrator was duly appointed" – see *Mustill and Boyd on Commercial Arbitration* (2nd edition) at p418, 419. If the party who has obtained an award cannot rely on s.66 and is compelled to start an action on the award the burden of proof will accordingly be the reverse of that contemplated under s.66(3) and he will therefore lose that benefit, a benefit which the Act confers on him.

43. Further, placing the burden of proof on the party resisting enforcement is consistent with the approach to recognition and enforcement set out in the New York Convention, s. 103 of the Act and the Model Law (upon which s.66 was based, as stated in the DAC report). Under all of these it is incumbent on the party resisting recognition or enforcement of the award to prove the grounds relied upon. In effect the party who has obtained an award has the benefit of a presumption of validity and it is for the party resisting recognition or enforcement to prove otherwise. S.66 would appear to be intended to confer a similar benefit, but one which would be lost if an action on the award is the only means by which disputed issues of validity can be resolved.

44. The procedure in relation to Arbitration Act claims is also different under the Act to that which prevailed under the 1950 Act. The relevant procedure is set out in CPR Part 62 and Practice Direction 62. Under that procedure where, as in this case, the s.66 application has been served then pursuant to CPR 62.18(3) the enforcement proceedings continue as if they were an arbitration claim under Part I. This means that it is subject to the court's case management powers under CPR Part 62.7 to give such directions as may be appropriate. It is clear, and was not disputed, that they may include directions appropriate for the determination of issues of fact, as often, for example, happens where there is a s.67 challenge to jurisdiction. There is no procedural reason why similar directions should not be given where the same issue arises in respect of a claim form issued under s.66.

45. As Sovarex submitted, the procedure whereby the court may specify that the arbitration claim form must be served under CPR 62.18(2) and the enforcement proceedings then continue as if they were an arbitration claim contemplates the enforcement proceedings being assimilated to any other arbitration claim, such as a s.67 claim. As it further submitted, it would be anomalous if an award debtor was in a more advantageous position under s.66(3) than it would have been if it had taken part in the arbitration (see *Gater* at [93] (Moses LJ)).

46. Given that the court has the power under CPR Part 62 to give appropriate directions to enable issues of fact to be determined, there is no obvious reason why the enforcing party should be compelled to start proceedings all over again by commencing an action on the award, thereby potentially wasting both time and costs. S.66 is meant to deal with enforcement generally and there is nothing in s.66 itself or in the CPR which requires an alternative mode of procedure to be adopted in the event of the application being challenged on the facts. Consistent with the Overriding Objective the priority must be to progress matters sensibly and cost effectively rather than to waste time and costs for formalistic reasons.

47. Aside from the fact that it has been the approach adopted historically in respect of s.26 applications, the only reason suggested by Alvarez for why a party should be compelled to start an action on the award was that it is right in principle that where there is a real ground for disputing the validity of the award the burden of proof should be on the claimant. However, as noted above, that is contrary to both the terms of s.66 (3) and the approach taken under the New York Convention, the Act and the Model law. The party who has an award is entitled to start from the position of validity. That is a reason for recognising a procedure for trying issues under s.66 rather than excluding that procedure.

48. For all these reasons I consider that the court does have the power to direct that there be a determination of disputed issues of fact under s.66 and that there is no necessity for this to be done by way of action on the award. No doubt there will be cases where it will still be appropriate for the proceedings to continue as if it was an action, particularly where the dispute is one of some complexity. However, in a case such as the present which involves relatively straightforward issues of fact such as are commonly determined on a s.67 application, I consider it is appropriate for the issues to be dealt with under s.66 and for appropriate directions to be given under CPR Part 62.7.

49. Alternatively, if that be wrong, I would have ordered that the proceedings should continue as if they had been begun by a claim form in an action on the award and would have given the same directions as I am going to give in respect of the determination of the s.66 application so that the end procedural result would be the same.

50. As stated in *Mustill and Boyd on Commercial Arbitration* (2nd edition) at p419 in relation to applications under s.26:

"If the application under section 26 is refused, the plaintiff is left to enforce the award, if he can, by action. In such a case the Court has power, in order to save the time and expense of commencing fresh proceedings, to order that the proceedings should continue as if begun by writ and to give directions for the further conduct of the action."

51. I am satisfied that the court has the same power under CPR and/or its inherent jurisdiction and indeed this was not disputed.

C.2 (2) Whether the court should decline jurisdiction or stay proceedings on the basis that (i) any English judgment would be an interference with the jurisdiction of the Spanish courts and/or (ii) that it is obliged to recognise the findings by the Spanish courts on 6 July and 8 October 2009, that the validity of the contract would be determined in Spain, pursuant to Article 33 (1) of the Regulation.

52. As to point (i), Alvarez submitted that the validity of the alleged contract has been an issue with which the Spanish courts have been seised since October 2008 and that it would be undesirable to have an identical procedure, with identical witnesses before different courts in the EU.

53. It further submitted that any judgment enforcing the award would be an interference with the jurisdiction of the Spanish court. It pointed out that there are no assets or security in England which would respond to any judgment issued here and so it follows that Sovarex's intention must be to enforce the judgment in Spain in an effort to gain a jurisdictional advantage in the proceedings currently underway in that country.

54. In these circumstances it submitted that the court should stay these proceedings, and order that any further proceedings in England be stayed until such time as a final unappealable judgment is issued in Spain on the question of whether a valid contract was concluded between the parties.

55. The current position in the Spanish proceedings, however, is that no determination of the validity of the contract is going to be made. On that basis there is not going to be a duplication of proceedings. That the Spanish court decision is being appealed does not alter that present fact. As Sovarex's Spanish lawyer, Mr Casas says, "pending the appeal decision, the Spanish High Court's decision is presumed to be valid" and accordingly the question of the existence or non-existence of the contract is not "as the matter currently stands, a live issue before the Spanish Court".

56. It is in any event difficult to see why the English court, being the court of the seat of the arbitration, should stay enforcement proceedings properly before it on the basis of the possibility of proceedings being brought elsewhere should the Spanish High Court decision be successfully appealed.

57. Further, as Sovarex submitted:

> (1)A claimant is entitled to try and enforce the award where it sees fit and it is generally incumbent on the respondent to resist enforcement "then and there" (see *Dallah Real Estate v Ministry of Religious Affairs* [2010] 2 Lloyd's Rep. 691 at [23] and [29] (Lord Mance).
>
> (2)S.66 is intended to reflect Article 35 of the Model Law (see the DAC Report on the Arbitration Bill at para. 273, cf. paras. 371-376 and the DAC Supplementary Report at para. 32). Accordingly, while s.66 does contain a discretion, the Model Law upon which it is based only contemplates, by Article 36(2), a discretion to refuse enforcement in deference to competing proceedings in the seat of the arbitration, mirroring Article VI and V(1)(e) of the New York Convention (and, therefore, s. 103(5) and 103(2)(f) of the Act). It would be surprising if the English courts had a significantly different, wider discretion in relation to an award where England was the seat than the discretion they have in relation to an award from a foreign seat.
>
> (3) The English court has recently taken the view that enforcement proceedings under s.66 should not be derailed by reason of competing Regulation proceedings in another Member State, in circumstances where the award creditor has a real prospect of establishing the primacy of the award, through its conversion into an English judgment, over any inconsistent foreign judgment (see *West Tankers Inc v Allianz SpA* [2011] EWHC 829 (Comm.), 6 April 2011, at [30] (Field J)).
>
> (4) An English judgment would be enforceable and have primacy in England. Whilst Sovarex accepts that a decision of the English court that there was a valid arbitration agreement would not be entitled to automatic recognition in Spain under Article 33 of the Regulation, that does not necessarily mean it is incapable of preclusive effect, in Spain or elsewhere. Its effect will depend upon whether the Spanish (or other) courts recognise any principle similar to issue estoppel (see *Dallah*, ibid, at [29] (Lord Mance)).

58. As to the alleged interference, it is not an interference with the Spanish proceedings for the English court, as the court of the seat, to determine the validity of the arbitration agreement. As Waller LJ said in *The Wadi Sudr*, ibid, at 201, [38(i)], explaining the

Opinion of the Advocate General in *Allianz SpA v West Tankers Inc (The Front Comor)* Case C-185-07 [2009] 1 AC 1138):

> "... I would suggest that, at least by implication if not expressly, one can say that it was the Advocate General's opinion: (i) that it was not an interference with the jurisdiction of a member state for one court at the seat of the arbitration to grant a declaration as had occurred in that case..."

59. This is not a case where some injunction is being sought but simply a determination of the parties' rights. Further, any "interference" is no more than arises from the fact that Sovarex has an award in its favour. Armed with such an award it can seek to enforce in Spain and it is difficult to see how a judgment in the terms of the award increases the alleged resulting "interference".

60. As to point (ii), Alvarez submitted that:

(1) The two Spanish decisions were Regulation judgments and as such they give rise to an issue estoppel on the question of which court should determine the validity of the contract.

(2) This applies to English arbitration proceedings excluded from the Regulation, just as it would in Regulation proceedings before an English court: *The Wadi Sudr* [2010] 1 Lloyd's Rep. 193 (CA) at [56] per Waller LJ and [119] per Moore-Bick LJ.

(3) The finding in these judgments that the Spanish court had jurisdiction to determine the validity of the alleged contract, was not affected by the subsequent judgment of the Spanish court that declaratory relief in the form requested by Alvarez was not available

61. As Sovarex pointed out, Alvarez's argument begs the question of whether any estoppel has been created by those judgments on an issue that arises for decision in these proceedings. I agree with Sovarex that no relevant issue has been decided. In particular:

(1) The Spanish judgments have not decided the key issue of whether or not an arbitration agreement has been concluded (cf. *Through Transport Mutual v New India Assurance Co. Ltd* [2005] 1 Lloyd's Rep. 67 at [13-14] [50] (Clarke LJ) as qualified in *The Wadi Sudr* [2010] 1 Lloyd's Rep. 193 at [51] (Waller LJ) and at [121] (Moore-Bick LJ)).

(2) The judgments of the Spanish court should be taken as a whole and the overall outcome is that the Spanish court has declined jurisdiction because of its ruling on 22 September 2010 that Spanish law does not recognise the possibility of negative declaratory relief in relation to the existence of a contract.

(3) Even taking the judgments of 6 July and 8 October 2009 in isolation, they are not a preclusive ruling that only the Spanish Court has jurisdiction so that the English court does not have jurisdiction in relation to enforcement proceedings seeking an English judgment on an Award given in an arbitration with the seat in England.

C.3 (3) Whether the court should stay these proceedings in the exercise of its inherent discretion, on lis pendens and forum non conveniens grounds.

62.Alvarez submitted that the court should do so for the following reasons:

(1) The submissions made regarding (i) interference, and (ii) recognition.

These have been addressed above. Neither provides good grounds for a stay.

(2) The undesirability of parallel proceedings, involving the same witnesses, being conducted before the courts of two EU Member States simultaneously.

As matters stand, however, there will not be parallel proceedings.

(3) The fact that the two principal witnesses, Mr Garrido and Mr Romero are (i) domiciled in Spain, and (ii) native Spanish speakers. A Spanish court is therefore inherently better placed than an English court to assess their credibility. (Mr Romero is also 78 years old.).

Again, this assumes that the Spanish court decision will be reversed and that there will be Spanish proceedings on the issue. In any event the English court is well able to conduct such a trial and most of the relevant documents are in English.

(4) The fact that but for Article 1 (2) (d) there would be no question that this court would be compelled to decline jurisdiction in favour of Spain, in circumstances where the Spanish courts have accepted jurisdiction.

This is irrelevant given the existence and application of Article 1(2)(d).

(5) The weakness of the evidence in support of Sovarex's claim that a valid contract was concluded.

Whilst I accept that Sovarex has an arguable case on the evidence on the material before the court it is not possible or appropriate to form any view as to the relative strength and weaknesses of the parties' respective cases.

(6) The fact that the Spanish court, being first seised in Regulation proceedings, is highly unlikely to recognise any judgment given by the English court which is inconsistent with its ability to determine the validity or otherwise of the contract.

This again assumes that there is a successful appeal since there is currently no inconsistency. In any event there is no evidence as to this and, if this be correct, it is a further reason why there can be no "interference". Further, it is up to Sovarex where it wishes to seek enforcement and there is no necessary reason for assuming that it can only be in Spain.

(8) The possibility that the English court may have to recognise the final judgment of the Spanish courts pursuant to Article 33 (1) of the Regulation. Field J's decision in West Tankers v. Allianz is under appeal.

This assumes two successful appeals. The court cannot proceed on such a hypothetical basis.

63. In any event, the real question is not where a trial on the merits should be heard, but rather where it is appropriate to decide whether an award from an arbitration with its seat in London should be converted into an English judgment. Even accepting that this involves considering whether a FOSFA tribunal had jurisdiction under an English law agreement with London as the seat of arbitration, the natural forum for such a dispute is England.

64. Further, I accept the further reasons given by Sovarex as to why the existence of the Spanish proceedings does not justify staying the English proceedings. In particular:

(1)The arbitration in England was started at about the same time as the Spanish proceedings.

(2)The English proceedings are significantly advanced: there is already a detailed arbitration award in existence, which the English courts can examine (see *Dallah* at [31] (Lord Mance)), and both sides have adduced considerable witness and documentary evidence.

(3)The Spanish courts have, as things stand, dismissed Alvarez's action in Spain.

(4) Any further hearing in England could take place later this year, whereas (even if the Alvarez's appeal against its dismissal was successful) a first instance hearing in Spain would not be likely until June 2012.

65. For all these reasons I accordingly reject Alvarez's application for a discretionary stay.

D. Conclusion

66. For the reasons set out above I reject Alvarez's case that the s.66 application should be dismissed or stayed. However, I accept that Alvarez has not lost the right to challenge jurisdiction and that directions for determination of its challenge therefore need to be given.