Neutral Citation Number: [2012] EWHC 3702 (Comm)

Case No: 2012-1047

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2012

Before:

MR JUSTICE ANDREW SMITH

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Between:

ARSANOVIA LIMITED **BURLEY HOLDINGS LIMITED** **UNITECH LIMITED**	**Claimants**
and	
CRUZ CITY 1 MAURITIUS HOLDINGS	**Defendant**

IN THE MATTER OF ARBITRATIONS BETWEEN:

LCIA CASE NO. 111791	
CRUZ CITY 1 MAURITIUS HOLDINGS	**Claimant**
and	
ARSANOVIA LIMITED **BURLEY HOLDINGS LIMITED**	**Respondents**
LCIA CASE NO. 111792	
CRUZ CITY 1 MAURITIUS HOLDINGS	**Claimant**
and	
UNITECH LIMITED **BURLEY HOLDINGS LIMITED**	**Respondents**
LCIA CASE NO. 111809	
ARSANOVIA LIMITED	**Claimant**
and	
CRUZ CITY 1 MAURITIUS HOLDINGS	**Respondent**

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Jonathan Hirst QC and Craig Morrison
(instructed by **Skadden Arps Slate Meagher & Flom LLP**) for the **Claimants**

David Wolfson QC and Nehali Shah
(instructed by **White & Case LLP**) for the **Defendants**

Hearing dates: 21 and 22 November 2012

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Judgment

Mr Justice Andrew Smith:

Introduction

1. On 6 July 2012 three awards were issued by Tribunals appointed by the London Court of International Arbitration comprising the same three members, Mr Salim Moolan, Mr Paul Hannon and Mr J William Rowley:

   i) An award in an arbitration between Cruz City 1 Mauritius Holdings ("Cruz City"), a Mauritian company, as claimants and Arsanovia Limited ("Arsanovia"), a Cypriot company, and Burley Holdings Limited ("Burley"), a Mauritian company, as respondents ("Arbitration 1" and "Award 1").

   ii) An award in an arbitration between Cruz City as claimants and Burley and Unitech Limited, (Unitech"), an Indian company, as respondents ("Arbitration 2" and "Award 2").

   iii) An award in an arbitration between Arsanovia and Burley as claimants and Cruz City as respondents, in which Cruz City made a counterclaim against Arsanovia ("Arbitration 3" and "Award 3").

   On these applications under section 67 of the Arbitration Act, 1996 Arsanovia, Burley and Unitech challenge Awards 1 and 2 on the grounds that the Tribunals did not have substantive jurisdiction. The Tribunals have determined that they had substantive jurisdiction, but their decisions do not bind me in any way and I must consider the matter de novo: Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan, [2010] UKSC 46, paras 26 and 96. The claim form also made applications under section 68 but they were not pursued.

2. Unitech is the parent company of Arsanovia and Burley, and the arbitrations arise out of a joint venture into which they entered with Cruz City for the development of slum areas in Mumbai, India, which involved finding the residents temporary housing, clearing the slums, redeveloping the areas and re-housing the residents. For this purpose, a company called Kerrush Investments Limited ("Kerrush") was formed with Arsanovia and Cruz City as shareholders. Arsanovia, Cruz City and Kerrush entered into a Shareholders' Agreement ("SHA") dated 6 June 2008, and other persons and companies, including Burley, subscribed to parts of the SHA. Unitech, Burley and Cruz City entered into a Keepwell Agreement, also dated 6 June 2008, under which Unitech agreed to put Burley in funds so that it could make payments due under the SHA. The clearance of the slums was delayed, and on 14 July 2010 Arsanovia served a Management Approval Termination Notice and a Buy-Out Notice on Cruz City on the grounds that a "Bankruptcy/Dissolution Event" (as defined in the SHA) had occurred in respect of the "Affiliate which controls Cruz City" (Lehman Brother Holdings Inc, which had filed for Chapter 11 Bankruptcy in the USA). If they were valid, the notices would have given Arsanovia management control over Kerrush and require Cruz City to sell its interest in Kerrush to Arsanovia under a formula in the SHA. On 13 September 2010 Cruz City purported to exercise a put option under the SHA on the basis that requirements for the start of the construction phase of the project had not been met, and required Arsanovia to buy City Cruz's interest in Kerrush. The terms of the put option were much more favourable to Cruz City than the formula governing the Buy-Out Notice. The essential question in the arbitrations was whether Arsanovia's notices were valid because, if they were, Cruz City was never entitled to exercise the put option.

3. This question led to the three arbitrations. In Arbitration 1, Cruz City sought against Arsanovia and Burley damages and specific performance under the SHA. In Arbitration 2 they sought damages against Unitech and Burley under the Keepwell Agreement. In Arbitration 3 Arsanovia sought a declaration that their notices had been validly issued and specific performance of Cruz City's obligations under the SHA or damages for their breach or both, and Cruz City brought a counterclaim seeking relief against Arsanovia and Burley similar to that sought in Arbitration 1. The SHA and the Keepwell Agreement both contained arbitration agreements in materially the same terms. I need set out only that in the SHA, which provided at clause 21.1 in these terms:

> "LCIA Arbitration. Any dispute arising out of or in connection with the provisions of this Agreement, including any question regarding its validity, existence or termination, shall be referred to and finally settled by arbitration under the London Court of International Arbitration Rules ("Rules"), which rules are deemed to be incorporated by reference into this Clause. The number of arbitrators shall be three. The seat or legal place of the arbitration shall be London, England. The language to be used in the arbitral proceedings shall be English. ... Notwithstanding the above, the Parties hereto specifically agree that they will not seek any interim relief in India under the Rules or under the Arbitration and Conciliation Act, 1996 (the "Indian Arbitration Act"), including Section 9 thereof. The provisions of Part 1 of the Indian Arbitration Act are expressly excluded. For the avoidance of doubt, the procedure in this Clause 21 shall be the exclusive procedure for the resolution of all disputes referred to herein."

4. The SHA and the Keepwell Agreement were both governed by Indian law: clause 24 of the SHA provided that:

> "Governing Law. This agreement shall be governed by, and construed in accordance with laws of India, without regard to the conflict of law rules thereof that would require the application of the laws of another jurisdiction."

Clause 18 of the Keepwell Agreement provided that:

> "Governing Law. This Keepwell Agreement shall be governed by, and construed and interpreted in accordance with, the laws of India without regard to conflicts of laws principles thereof. "

5. Although the three arbitrations were separate and were never formally consolidated (hence three separate awards), they were heard together by the same Tribunal. The claimants disputed the jurisdiction of the Tribunals to determine Arbitrations 1 and 2 and the counterclaim in Arbitration 3. In Awards 1 and 2 the Tribunals determined that they had jurisdiction, determined that Arsanovia was not entitled to give the notices and Cruz City had validly exercised the put option, and ordered Burley and

Unitech to pay what was due under the put option. In Award 3, the Tribunal, without making findings on jurisdiction, dismissed the claim and the counterclaim.

6. The grounds on which Mr Jonathan Hirst QC, who represented the claimants, argued that Award 1 is invalid because the Tribunal did not have substantive jurisdiction are these:

i) The law applicable to the arbitration agreement in the SHA is Indian law and therefore Indian law determines whether Burley is a party to it.

ii) Under Indian law, Burley did not agree to be bound by the arbitration agreement in the SHA; and even if the arbitration agreement is governed by English law it did not do so.

iii) Under Indian law, where an arbitration is brought against two respondents only one of whom is party to the arbitration agreement, the arbitration cannot be maintained against either; and so, because the Tribunal did not have jurisdiction over Burley, it did not have jurisdiction to decide the claims against Arsanovia either.

Mr Hirst submitted that Award 2 is also invalid because the Tribunal did not have substantive jurisdiction on these grounds:

iv) The law governing the arbitration agreement in the Keepwell Agreement is Indian law and therefore Indian law determines its scope.

v) Under Indian law and on the proper construction of the Keepwell Agreement the claims against Unitech and Burley could be brought only after Burley's liability under the SHA had been adjudicated (if not admitted); and they were therefore premature and beyond the Tribunal's jurisdiction.

vi) In any case, under Indian law the question whether Burley was liable under the SHA in the arbitration leading to Award 2 was not within the scope of the arbitration agreement in the Keepwell Agreement, and, since Award 1 was invalid, therefore Burley had not been validly found to be liable under the SHA and so the Tribunal in Arbitration 2 had no jurisdiction to make an award against Burley or Unitech under the Keepwell Agreement.

All these propositions were disputed by Mr David Wolfson QC, who represented Cruz City.

7. The applications made, as I have said, under section 67 of the Arbitration Act, 1996 and challenge Awards 1 and 2 "as to [the Tribunals'] substantive jurisdiction", that is to say (since the term "substantive jurisdiction" has the same meaning in section 67 as in section 30, where it is defined) as to "(a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) whether matters have been submitted to arbitration in accordance with the arbitration agreement".

<u>The law applicable to the arbitration agreement in the SHA</u>

8. Questions about the law applicable to arbitration agreements are not covered by the Rome I Regulation (Regulation (EC) 593/2008 on the law applicable to contractual obligations) because by article 1(2)(e) it does not apply to "arbitration agreements". They are determined by reference to the English common law conflict of law rules, and so the court first decides whether the parties expressly or impliedly chose a law applicable to the arbitration agreement; if they did, the court gives effect to the parties' choice; and if they did not, the court identifies the system of law with which the arbitration agreement has its closest and most real connection. Here it was in dispute whether or not Burley was party to an arbitration agreement with Cruz City, and so the questions are directed to a putative arbitration agreement to which Burley, as well as Cruz City and Arsanovia, was party.

9. The issue concerns the law that governs the scope of the jurisdiction of the Tribunal appointed under the LCIA rules for Arbitration 1 (which might be called the law of the reference): it is the law applicable to the (putative) agreement between the parties to the reference and the members of the Tribunal. This is not as a matter of legal analysis identical to the law applicable to the arbitration agreement whereby the parties agreed (or, for the purposes of determining the applicable law, are taken to have made a putative agreement) to refer a dispute to arbitration (which might be called the law of the arbitration agreement). However, as observed in Joseph, Jurisdiction and Arbitration Agreements and their Enforcement (2nd Ed, 2010), the two laws will be the same in all but an exceptional case, and no difference was suggested here or in any of the authorities to which I was referred. Neither the law of the reference nor the law of the arbitration agreement needs be the same as the law (or any of the laws) applicable to any matrix contract containing the arbitration agreement or to the substantive dispute that is the subject of the reference (sometimes called the lex causae). Equally, they need not be the same as the curial law which governs the conduct of the reference (sometimes called the lex fori or lex arbitri), which is often determined by the choice of the seat of the arbitration and therefore often involves acceptance that that law governs the supervision of the arbitration by the courts. In the case of international arbitrations with a seat in England and Wales the choice of the seat involves acceptance of the mandatory provisions of Part 1 of the Arbitration Act, 1996 (listed in Schedule 1 to the Act) and (as provided in section 4(4)), "It is immaterial whether or not the law applicable to the parties' agreement is the law of England and Wales…", the "parties' agreement" being their arbitration agreement, as Cooke J observed in C v D, [2007] EWHC 1541 (Comm) at para 24.

10. Although, as Lord Mustill pointed out in Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd, [1993] AC 334, 357F, more than one national system of law can bear upon an international arbitration, the parties would not be expected to have chosen pointlessly to resort to numerous different systems to govern their affairs, and so an express choice of a law to govern them in one respect is a strong indication that they might have understood or intended that it should apply to others. The difficulty that arises here and has arisen before is that the parties have chosen as the lex causae the law of one country, but by agreeing to resolve disputes through arbitrations with a seat elsewhere they have clearly indicated the choice of a different lex fori. In these circumstances, which law is (or, notionally, laws are) applicable to the arbitration agreement and determines the jurisdiction of a tribunal appointed under it? More specifically, here the lex causae of the SHA is (by the parties' express choice) the law of India whereas the seat of the arbitration is (by the parties' express choice) London

and so the curial law of the arbitration is English. Which of these two candidates is applicable to the arbitration agreement? Similar issues have recently been considered by the Court of Appeal in C v D, [2007] EWCA Civ 1282 and Sulamérica Cia Nacional de Seguros SA and ors v Enesa Engenharia SA and ors, [2012] EWCA Civ 638, and these two authorities were closely analysed before me.

11. The dispute in C v D concerned the Bermuda form, which provides that "This policy shall be governed by and construed in accordance with" the internal laws of New York (with some exceptions) but also provides for arbitration in London of disputes arising from the policy. The insurers threatened to challenge under US federal arbitration law in a federal court an award secured by the insured in a London arbitration, and the insured obtained an anti-suit injunction from the Commercial Court. The insurers appealed, arguing that the choice of English law as the curial law of the arbitration did not exclude a challenge under the law of New York, which had been expressly chosen to govern the parties' obligations. The insured argued that, because the parties had chosen London as the seat of the arbitration and therefore English law as the curial law, the law of the arbitration was English and an award could be challenged only in the English courts. The only reasoned judgment in the Court of Appeal was that of Longmore LJ. His ratio for upholding the anti-suit injunction was that "by choosing London as the seat of the arbitration, the parties must be taken to have agreed that proceedings on the award should be only those permitted by English law" (para 16), and "the choice of a seat for the arbitration must be a choice of forum for the remedies seeking to attack the award" (para 17). This reasoning did not depend upon which was the curial law of the arbitration and what Longmore LJ said about that was by way of obiter dicta. But, by expressing their agreement with Longmore LJ's judgment, Sir Anthony Clarke MR and Jacob LJ must, I think, be taken to mean that they agree with them.

12. Longmore LJ distinguished the proper law of the underlying insurance contract and the arbitration agreement, observing that the latter was "a separable and separate agreement", and said that the law of the seat of the arbitration "will also be relevant". He then formulated the question for consideration as being this: "if there is no express law of the arbitration agreement", whether the law with which that agreement has its closest and most real connection is that of the seat of the underlying contract or the law of the seat of the arbitration. He considered that "the answer is more likely to be the law of the seat of the arbitration than the law of the underlying contract". He cited the observation of Mustill J in Black Clawson International Ltd v Papierworke Waldhof-Aschaffenburg SA, [1981] 2 Lloyd's Rep 446, 453: "In the great majority of cases, [the lex causae, the law applicable to the arbitration agreement, and the lex fori] will be the same. But this will not always be so. It is by no means uncommon for the proper law of the substantive contract to be different from the lex fori; and it does happen, although much more rarely, that the law governing the arbitration agreement is also different from the lex fori". Longmore LJ understood that Mustill J was saying that the law of the arbitration agreement would only rarely be different from the law of the place (or seat) of the arbitration, and therefore his observation supported the view that the law of the seat of the arbitration had the closest and most real connection with the arbitration agreement.

13. The Sulamérica case was also about insurance. A clause in the policy recorded agreement that "this Policy is governed exclusively by the laws of Brazil". An

arbitration agreement provided that, if the parties did not resolve what was to be paid under the policy through mediation that the parties agreed first to undertake, the dispute would be referred to arbitration and the seat of the arbitration was to be in London. It is, I think, impossible not to detect in the judgment of Moore-Bick LJ in the Sulamérica case that he was uncomfortable with the reasoning of Longmore LJ, particularly because, having decided that there was no express choice of a law to govern the arbitration agreement, Longmore LJ went directly to the question which law had the closest and most real connection with the arbitration agreement, whereas Moore-Bick LJ emphasised (loc cit at para 25) that first the court should consider whether the parties made an implied choice of a law applicable to it and considered that, while the express choice of a law to govern the "Policy" was not an express choice of the law applicable to the arbitration agreement, it was "a strong pointer towards an implied choice of the law of Brazil as the proper law of that agreement" (para 27). However, he recognised that, although there were "powerful factors in favour of an implied choice of Brazilian law as the governing law of the arbitration agreement", two other considerations indicated otherwise; the choice of the seat of arbitrations, coupled with the "inevitable acceptance" of English law to govern the conduct and supervision of arbitrations; and the fact that, according to the insured, under Brazilian law the arbitration agreement was enforceable only with their consent and the perceived improbability that the parties intended it to be governed by a law that made the arbitration agreement so "one-sided". Moore-Bick LJ concluded that these two considerations outweighed the indication in the choice of Brazilian law to govern the policy as to an implicit choice by the parties of the law applicable to the arbitration agreement, notwithstanding a starting assumption that they intended "the same law to govern the whole of the contract". Therefore, since the governing law of the arbitration agreement was not determined by either an express or an implied choice of the parties, Moore-Bick went on to identify which system of law had the closest and most real connection to it, and he decided that it was the law of England.

14. Hallett LJ simply said that she agreed with the judgment of Moore-Bick LJ, whereby, as I take it, meaning that she agreed with both his conclusion and his reasoning.

15. Lord Neuberger MR said that he agreed with Moore-Bick LJ's conclusion and reasoning but added his own observations. He said this (at para 51):

> "Given the desirability of certainty in the field of commercial contracts and the number of authorities on the point, it is, at least at first sight, surprising that it is by no means easy to decide in many such cases whether the proper law of the arbitration agreement is (i) that of the country whose law is to apply to the contract or (ii) that of the country which is specified as the seat of the arbitration. However, once it is accepted that that issue is a matter of contractual interpretation, it may be that it is inevitable that the answer must depend on all the terms of the particular contract, when read in the light of the surrounding circumstances and commercial common sense."

Lord Neuberger recognised that C v D had taken a "rather different approach" from earlier cases, and continued as follows (at paras 56 and 57):

> "Accordingly, (i) there are a number of cases which support the contention that it is rare for the law of the arbitration to be that of the seat of the arbitration rather than that of the chosen contractual law, as the arbitration clause is part of the contract, but (ii) the most recent authority is a decision of this court which contains clear dicta (albeit obiter) to the opposite effect, on the basis that the arbitration clause is severable from the rest of the contract and plainly has a very close connection with the law of the seat of the arbitration.
>
> Faced with this rather unsatisfactory tension between the approach in the earlier cases and the approach in C v D, it seems to me that, at any rate in this court, we could take one of two courses. The first would be to follow the approach in the most recent case, given that it was a decision of this court, namely C v D. The alternative course would be to accept that there are sound reasons to support either conclusion as a matter of principle. Whichever course is adopted, it is necessary to consider whether there is anything in the other provisions of the contract or the surrounding circumstances which assist in resolving the conundrum."

Having rejected the possibility of treating the obiter dicta in C v D as wrong, Lord Neuberger then said that each of the two other possible courses that he had identified led to the conclusion that the arbitration clause was governed by English law, and therefore it was unnecessary to chose between them and he did not do so.

16. Mr Hirst submitted that the judgment of Moore-Bick LJ in the Sulamérica case supports his contention that the law applicable to the arbitration agreement in the SHA is Indian law, the law chosen as the lex causae in the SHA. Mr Wolfson submitted that the same case, and in particular the judgment of Lord Neuberger MR, supports his contention that the applicable law is the same as the curial law, that is to say English law.

17. All the members of the Court of Appeal in the Sulamérica case certainly subscribed to Moore-Bick LJ's reasoning, but Lord Neuberger gave additional reasons of his own about which the other members of the court said nothing. I am not confident that I understand them: his starting point is that the question of which law governs an arbitration agreement is a matter of contractual interpretation, notwithstanding the decision in C v D and conclusion of Moore-Bick LJ depended not upon any express or implied choice of the parties but upon which system of law had the closest and most real connection with the arbitration agreement because the parties had made no choice in their contracts properly interpreted. However, this much seems clear: the court should consider whether the parties have (impliedly, if not expressly) chosen an applicable law before considering which system of law has the closest and most real connection with the arbitration agreement, and of the judgments in these two cases only that of Moore-Bick LJ discusses the proper approach to that anterior question.

18. Mr Hirst argued that the parties to the SHA agreement impliedly chose Indian law as the law applicable to the arbitration agreement because they chose it to govern the

SHA itself. He relied on the judgment of Moore-Bick LJ, and in particular these passages at para 11 and para 26:

> "It has long been recognized that in principle the proper law of an arbitration agreement which itself forms part of a substantive contract may differ from that of the contract as a whole, but it is probably fair to start from the assumption that, in the absence of any indication to the contrary, the parties intended the whole of their relationship to be governed by the same system of law. It is common for parties to make an express choice of law to govern their contract, but unusual for them to make an express choice of the law to govern any arbitration agreement contained within it; and where they have not done so, the natural inference is that they intended the proper law chosen to govern the substantive contract also to govern the agreement to arbitrate.
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> In Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] 1 All ER 664 at 682, [1993] AC 334 at 357-358 Lord Mustill said:
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> "It is by now firmly established that more than one national system of law may bear upon an international arbitration. Thus, there is the proper law which regulates the substantive rights and duties of the parties to the contract from which the dispute has arisen. *Exceptionally, this may differ from the national law governing the interpretation of the agreement to submit the dispute to arbitration.* Less exceptionally it may also differ from the national law which the parties have expressly or by implication selected to govern the relationship between themselves and the arbitrator in the conduct of the arbitration: the "curial law" of the arbitration, as it is often called." (My emphasis.)"

And

> "In the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate. A search for an implied choice of proper law to govern the arbitration agreement is therefore likely (as the dicta in the earlier cases indicate) to lead to the conclusion that the parties intended the arbitration agreement to be governed by the same system of law as the substantive contract, unless there are other factors present which point to a different conclusion. These may include the terms of the arbitration agreement itself or the consequences for its effectiveness of choosing the proper law of the substantive contract: …"

19. Mr Wolfson argued, however, that Moore-Bick LJ recognised that the parties' choice of London as the seat of the arbitration, importing as it did English law as the lex fori and the law governing supervision of arbitration, shows that the parties did not impliedly choose Indian law as the law applicable to the arbitration agreement. He submitted that "the choice of an English seat, absent an effective contracting out of non-mandatory provisions [of the Arbitration Act, 1996] is tantamount to a choice of English law to regulate all aspect of the arbitration". If he intended to submit that the choice of an English seat means that the parties are to be taken to have impliedly chosen English as the law applicable to the arbitration agreement, I cannot agree: in the Sulamérica case Moore-Bick LJ did not hold that the parties had impliedly chosen English law to govern the arbitration agreement, but that the parties had made no choice, whether express or implied. Whatever Lord Neuberger meant by his reference to contractual interpretation, I cannot accept that he disagreed with this part of Moore-Bick LJ's reasoning. However, there is another answer to this part of Mr Wolfson's argument: in the Sulamérica case the Court of Appeal concluded that the parties had not made an implied choice because of the combined impact of the choice of a London seat and the perception that the parties could not have intended the arbitration agreement to operate as it would have done under Brazilian law. Each of these considerations was described as "important", but I do not understand that Moore Bick LJ meant that each by itself would displace the indication of choice implicit in the express choice of a law to govern the "Policy".

20. There is another consideration that to my mind is relevant in this case: that the arbitration agreement included a specific agreement not to seek interim relief under the Indian Arbitration and Conciliation Act, 1996 ("IACA"), including section 9 of that Act, and that the provisions of Part 1 of IACA were expressly excluded. As was explained by Mr Pinaki Misra, a Senior Advocate who gave evidence for the claimants, the background to this provision was that in Bhatia International v Bulk Trading SA, (2002) 4 SCC 105, the Supreme Court of India had held that Part I of IACA applied to international arbitrations, although it appeared on its face to apply only to domestic references. (In Bharat Aluminium Co v Kaiser Aluminium Technical Service Inc, a decision of the Supreme Court delivered on 6 September 2012, Bhatia International was overruled with prospective effect, but the SHA was concluded in 2008.) Mr Wolfson submitted that it is inconceivable that the parties intended Indian law to govern the arbitration agreement, given that (i) they contracted for arbitration in London and subject to the English Arbitration Act, 1996 on matters of validity, the conduct of references and challenges to awards, and (ii) they contracted out of the corresponding provisions of the IACA. I disagree: on the contrary, as I see it and as Mr Hirst submitted, where parties have expressly excluded specific statutory provisions of a law, the natural inference is that they understood and intended that otherwise that law would apply. Therefore to my mind the reference to IACA in the arbitration agreement supports the claimants' contention that the parties evinced an intention that the arbitration agreement should be governed by Indian law (except in so far as they agreed otherwise).

21. I agree with Mr Hirst that the parties to the SHA are to be taken to have evinced an intention that the arbitration agreement in it be governed by Indian law for the reasons that Moore-Bick LJ explained. The governing law clause is, at the least, a strong pointer to their intention about the law governing the arbitration agreement and there is no contrary indication other than choice of a London seat for arbitrations. The

wording of the arbitration agreement itself reinforces the conclusion that the parties intended Indian law to govern it.

22. Mr Hirst's submission was that the parties' choice of Indian law was implied: he felt unable in light of authority to contend at first instance that the parties made an express choice, but he reserved that argument should the case go to superior courts. It seems to me that Mr Hirst might have been too diffident: that a case for an express choice might have been available even before me. When the parties expressly chose that "This Agreement" should be governed by and construed in accordance with the laws of India, they might be thought to have meant that Indian law should govern and determine the construction of all the clauses in the agreement which they signed including the arbitration agreement. Express terms do not stipulate only what is absolutely and unambiguously explicit, and it seems to me strongly arguable that that is the ordinary and natural meaning of the parties' express words (notwithstanding relatively recent developments in the English law about the separability of arbitration agreements from the substantive contract in which it was made and assuming that these foreign companies are to be taken to have known about the developments in 2008 when they concluded the SHA). The governing law provisions in the agreements in the two Court of Appeal authorities referred to "the policy" and "this Policy" being governed by the internal laws of New York and Brazilian law respectively, and the word "policy" might naturally be taken to connote to obligations and rights more directly relating to the insurance that the arbitration agreement. Some might consider this a "fussy distinction" of the kind deprecated in Fiona Trust v Privalov, [2007] UKHL 40 para 27, but to my mind it is simply a response to what the parties' language naturally connotes or more precisely what I think that in 2008 it would have connoted to foreign businessmen such as these.

23. However, in view of the argument before me, that is not for me to decide: Mr Hirst's submissions were (i) that the parties to the arbitration agreement impliedly chose that Indian law should govern it, and (if they did not) (ii) the arbitration agreement had its closest and most real connection with Indian law. There is, as observed in Chitty of Contracts (31st Ed, 2012) at para 13-002, a close affinity between the implication of terms and the interpretation of express terms, and I need only say that in my judgment the parties evinced the intention that the arbitration agreement in the SHA be governed by the law of India: it is unimportant whether the choice is characterised as express or implied.

24. Had I had to decide which system of law has the closest and most real connection with the arbitration agreement, I would have concluded that it is English law for the reasons that Longmore LJ concluded that the English law had the closest and most real connection with the arbitration agreement made between C and D and that Moore-Bick LJ similarly decided in the Sulamérica case. But in view of my decision about the parties' choice of an applicable law, that question does not arise.

Did Burley become party to the arbitration agreement in the SHA?

25. The SHA was made between Cruz City, Arsanovia and Kerrush, and it provided that the expression "Parties" referred to them. However, by a director Burley signed a signature page to the SHA in these terms (and other persons and entities signed comparable pages referring to other clauses):

> "The undersigned hereby executes this Agreement to be bound by the direct obligations imposed upon them, under Clauses 3.9, 5.5.4, 5.6.2 and 15.3.4."

The arbitration agreement was not among the clauses identified. The issue between the parties is whether nevertheless Burley and the Parties agreed that Burley should be subject to the arbitration agreement. Cruz City contend that they did and the claimants dispute that. The question turns upon the proper interpretation of the signature page. I have concluded that it is governed by the law of India, but, as I shall explain, I think that it makes no difference whether it is governed by English or Indian law.

26. The clauses which were expressly mentioned on Burley's signature page concerned:

i) Construction delay: the SHA provided that Cruz City might require Burley (as well as Arsanovia) to buy shares under the put option in the event that the Conditions for Start of Construction of the project were not met on time (clause 3.9);

ii) Indemnities and liabilities: the SHA provided that Burley (as well as Arsanovia) should indemnify, defend and hold harmless Cruz City and others from and against losses arising from specified events (clause 5.4.4);

iii) Representations, warranties and covenants: Burley (as well as Arsanovia) undertook to make payments and contributions under the SHA from contributions or revenues from sources outside India and not from funds received from India (clause 5.6.2); and

iv) Indemnity for breach of warranties and covenants: Burley (as well as Arsanovia) agreed to pay their liabilities to Cruz City within specified time limits (clause 15.3.4).

27. Mr Hirst submitted that the wording signed on their behalf state Burley's agreement to be bound by certain specified clauses of the SHA and the clear implication is that it is not bound by others. I accept that submission: it seems to me that that is the natural meaning of the signature page and that the conclusion is supported by three other considerations:

i) In all four clauses identified on the signature page the SHA specifically referred to Burley and stated its obligation in the clause itself. In contrast the Arbitration Agreement did not refer to Burley.

ii) On the contrary the Arbitration Agreement referred to "the Parties" agreeing not to seek interim relief. Had it been intended that Burley was bound by the arbitration agreement, Burley as well as the parties would have been said to agree to this. (Of course, if Burley were party to the arbitration agreement, there might well be scope for the wording to be manipulated to deal with this, but my point is about what the wording of the clause indicates as to the parties' intention.)

iii) The signature page referred to Burley being "bound" by obligations imposed on it. It was not suggested, and I cannot conceive, that the Parties and

> Burley intended to make a one-sided arbitration agreement: that the Parties should have a right to bring a reference against Burley, but Burley has no right to bring arbitration proceedings. If Burley were party to the arbitration agreement, they would have had that right and the Parties (or at least Cruz City) would have undertaken corresponding obligations to Burley, but on its face the signature page does not reflect an agreement of this kind.

28. Mr Hirst had a further argument: Cruz City did not contend that Burley entered into the arbitration agreement because it was introduced by incorporation from another document, but Mr Hirst suggested that the position here is somewhat analogous. The English courts generally adopt a cautious approach to holding a party bound by arbitration agreements incorporated into their contract. Thus in Aughton Ltd v M F Kent Services Ltd, (1991) 57 BLR 1 Sir John Megaw said (at p.32):

> "This status of "self-contained contract" exists irrespective of the type of substantive contract to which it is collateral. In *Bremer Vulkan* it was a shipbuilding contract. It appears to me that this consideration (which I believe has not infrequently been over-looked) is another important reason why arbitration clauses are to be treated as being in a category of their own, as was the arbitration clause in the charterparty, which the House of Lords declined to permit to be incorporated into the bill of lading contract in *Thomas v Portsea*. If this self-contained contract is to be incorporated, it must be expressly referred to in the document which is relied on as the incorporating writing. It is not incorporated by a mere reference to the terms and conditions of the contract to which the arbitration clause constitutes a collateral contract. "

Russell on Arbitration (23rd Ed, 2007) observes:

> "… judicial thinking seems to have favoured the approach of Sir John Megaw in *Aughton*, namely that general words of incorporation are not sufficient. Rather, particular reference to the arbitration clause needs to be made to comply with s.6 of the Arbitration Act 1996, unless special circumstances exist."

I agree that this lends some further support for Mr Hirst's submission that the wording of the signature page is not sufficient to make Burley subject to the arbitration agreement in the SHA.

29. Mr Wolfson pointed out that, as Mr Hirst accepted, Burley's obligations under the SHA were affected by the governing law clause, which, like the arbitration agreement, is not referred to in the signature page, and he submitted that the same "must follow for the arbitration clause". He also submitted that any contrary interpretation would lead to uncommercial results.

30. This reasoning reflects Award 1, in which the Tribunal said this:

> "The arbitration clause, and the choice-of-law clauses in (Clause 24), are not primary obligations of the same nature as

> an obligation to pay. Rather they are accessory obligations which define the conditions in which these primary obligations can be exercised. It is inconceivable, in the Tribunal's view, that the parties – having taken the care of including compatible and detailed arbitration clauses in both the SHA and the Keepwell Agreement – intended that Cruz City would be free to sue Burley before some (undefined) state court, applying a law other than that expressly chosen in their agreements (Indian law). It is clear, and the Tribunal hereby holds, that the parties intended that the arbitration agreement in the SHA (and, so far as relevant, the choice of law clause) would apply to Burley with respect to disputes arising out of or in connection with the limited substantive obligations which it expressly assumed under the SHA, so that both Cruz City and Burley would be bound to arbitrate – and not to litigate – any claim relating to those substantive rights."

(I cite their reasoning not because the award is binding upon me in any way but simply because it is useful to see how the Tribunal dealt with the question that I am re-examining de novo: see the Dallah Real Estate case at para 160.)

31. I am not persuaded by these considerations: the parties' agreement to the governing law is not analogous to an arbitration agreement. The choice of governing law bears directly upon the meaning and effect of the obligations to which Burley agreed to bind itself: it is more closely akin to provisions about contractual interpretation or agreed definitions than an arbitration agreement or jurisdiction clause, which are separate agreements about how obligations can be enforced.

32. Mr Wolfson's argument about uncommercial results was in that, if Burley is not party to the arbitration agreement, Cruz City would not be able to proceed against Arsanovia and Burley in the same forum, and the parties cannot, it is said, have intended a regime whereby they might have to sue Arsanovia and Burley on the same (joint and several) obligations in different fora. This would be the more surprising given that (as was not disputed) both were special purpose vehicles incorporated in different jurisdictions. Mr Hirst accepted that it might have been sensible for the parties to have entered into tidier arrangements for dispute resolution than they did, but submitted that that is not a justification for manufacturing a bargain that the parties did not make.

33. Mr Wolfson's complaint about uncommercial results is really that the regime for resolving disputes for which the claimants contend would be inconvenient from their point of view. There is nothing uncommercial about the regime whereby Arsanovia or Burley could proceed against Cruz City. Nevertheless, I acknowledge that there would be some force in Mr Wolfson's point about disputes if it were shown that, on the claimants' interpretation of the contract, Cruz City would have to use different fora to sue both Arsanovia and Burley, (with the associated litigation costs and the risk of inconsistent decisions), but this was not established by evidence. For example, Mr Wolfson asserted that if Cruz City brought proceedings against Burley in Mauritius (where both are incorporated) they could not join Arsanovia in the proceedings, but there was no evidence about whether Mauritian law would prevent

this. It was for Cruz City to prove the factual basis for this argument and they have not done so. But in any event, if Cruz City have made an agreement that has this consequence, that is still the bargain that they made.

34. I have thus far considered the question whether Burley is party to the arbitration agreement on the basis of English law, and I conclude that on this basis it would not be. However, if I am right that the arbitration agreement is governed by Indian law, it determines whether Burley is party to it, and I must therefore examine the evidence of Indian law: the claimants relied upon evidence of Mr Misra, and Cruz City relied upon evidence of Mr Arvind Datar, who is also an Indian Senior Advocate. Both were well qualified to give evidence of Indian law, and they gave clear and careful witness statements to which I pay tribute. They identify two separate questions, which Mr Datar expressed as follows: "Is there an agreement in *writing* for the purposes of S.7 of IACA? If so, what is the scope of the agreement, and can Burley be said to be a party to the same (in the sense of being bound by the same)? The first is a matter of *form*, the second is a matter of *interpretation.*".

35. The difference between the parties turns on the second: the SHA agreement, including the arbitration agreement, was wholly in writing, and if Burley assented to it, it was in writing. The question therefore is one of contractual interpretation, and the only admissible evidence of the Indian law experts about it is as to any relevant rules of Indian law about contractual construction: Dicey, Morris & Collins, The Conflict of Laws (15th, 2012) para 9-019. Mr Datar explained that Indian law would approach the question on the basis that a contract providing for arbitration is a commercial document and to be interpreted as such; that the Indian courts would take into account the improbability that "the commercial intention of the parties was that Burley could be sued before an undefined court applying its own choice of law rules" (echoing Award 1), or that the intention was that Burley would be bound by the express choice of law in the SHA but not the arbitration agreement; and the impact of the wording of the arbitration clause. But Mr Wolfson did not submit that here or in any other respect the rules or principles of contractual interpretation of Indian law are different from those of English law. I agree with him. Mr Hirst submitted only that Indian law requires that a party's agreement to arbitration must be strictly or specifically shown, and he frankly recognised that the highest that he could put his case is that Indian law takes a "marginally tougher" view than English law as to when a party has evinced his agreement to arbitrate. I do not consider that established on the evidence: English law requires that an intention to enter into an arbitration clause must be clearly shown and is not readily inferred, and I have seen nothing in the evidence that shows any different rule of construction under Indian law. Indeed, Mr Hirst accepted that something of a softening of approach of the Indian courts, at least in relation to international arbitrations, may be detected in the Severn Trent Water case, to which I refer below.

36. I therefore uphold the challenge to Award 1 as against Burley because (in the words of section 30 of the Arbitration Act, 1996) there is not a valid arbitration agreement between Cruz City and Burley.

Did the Tribunal have jurisdiction to make Award I against Arsanovia?

37. The claimants contend that, if Burley was not party to the arbitration agreement in the SHA, the Tribunal did not have jurisdiction as a matter of Indian law to hear the claims against Arsanovia either. This argument is based upon Mr Misra's evidence that under Indian law a dispute cannot be adjudicated in arbitration if the entire subject matter of the suit is not covered by the arbitration agreement between the parties or if the dispute concerns a person or persons who are not party to the arbitration agreement. According to Mr Misra, this principle is demonstrated by the decision of the Supreme Court of India in Sukanya Holdings (P) Ltd v Jayesh Pandya and anor, (2003) 5 SCC 531, a case that was itself concerned with the dissolution of a partnership and a petition by one of the partners that the court should refer the parties to arbitration under section 8 of the IACA, which provides that "A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies [in time], refer the parties to arbitration". The petition was opposed inter alia on the grounds that relief was claimed not only against parties to the arbitration agreement but other partners who were not. The High Court refused the petition and the Supreme Court upheld the decision. The Supreme Court said:

> "The next question which requires consideration is even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, if follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed."

Such "bifurcation" would also cause delay and the risk of conflicting decisions.

38. Mr Misra recognised that section 8 of the IACA is directly concerned with domestic arbitrations, but he considered that it applies equally to foreign arbitrations, citing in support of this the decision of the Bombay High Court in Severn Trent Water Purification, Inc v Chloro Controls India Pvt Ltd and ors, (2010) (2) Bom CR 712, a case concerning an international arbitration. In that case, a notice of motion had been brought under section 8 of IACA (in part I of the Act, which applies where the place of the arbitration is in India), but it was conceded that it should have been brought under section 45 (in Part II, which concerns "foreign awards"). Under section 45 "a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement [in writing for arbitration to which the New York Convention (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards) applies] shall, at the request of one of the parties or any persons claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative, or incapable of being performed". It was said by the Supreme Court (at para 16) that, "… both sections are, in the most part,

para materia [sic], as to the circumstances in which a reference can be made of disputes to arbitration". The application for a reference succeeded on the basis that (at para 20), "… the law laid down by the Apex court [sc., as I understand the terminology, the Supreme Court] in the case of Sukanya Holdings … is not applicable to the facts of the case in hand. The concept of separation of parties, separation of reliefs or separation of cause in the suit on making a reference to arbitration would not arise in the instant case."

39. Mr Datar did not consider that the decision in the Sukanya case supports the principle that Mr Misra extracted from it. He said that it is directed to the powers of the court under section 8 of the IACA to refer matters to arbitration where this would lead to the "bifurcation" of a cause of action, and not with whether a tribunal is competent to adjudicate under an arbitration agreement; and further the underlying rationale is to avoid delay in resolving disputes and the risk of irreconcilable judgments, reasons that Mr Datar considered weigh in favour of both Burley and Arsanovia being bound by the arbitration agreement and Award 1, not against either of them being so bound.

40. Both these points are true as far as they go: however, although the decision in the Sukanya case was made in the context of an application under section 8 of the IACA, this does not engage with Mr Misra's point that it reflects what, he says, is an underlying principle of Indian law that arbitration clauses are construed strictly and are effective only to make arbitrable matters in dispute that are wholly covered by it. Mr Misra cited three other cases that he said explain or apply this principle:

i) The decision of the High Court of Madras in Kensoft Infotech Limited v Sundaram BNP Paribas Home Finance Ltd and anor, MIPR 2010 (1) 301, in which the claimants brought proceedings against two defendants, with the first of whom they had entered into an arbitration agreement. The allegation was that the defendants had colluded to infringe the claimant's copyright. An application to refer the claimants and first defendants to arbitration was refused (at para 17):

> "This Court has to necessarily indicate that there is no provision in the Act which enables the Court to refer a matter to arbitration, if the subject matter of the suit includes the subject matter of arbitration agreement as well as other disputes also. Equally, there is no provision for splitting up the cause of action or the parties and referring the matter to arbitration. Apart from that, Section 8 does not envisage or answer a situation when some of the parties to the suit were not parties to the arbitration agreement. Under Section 8 the Court is required to refer the parties to arbitration only in a matter which is the subject matter of an arbitration agreement. Under the circumstances, merely because of the reason that the second defendant has filed a memo as referred to above, that he would be ready to submit to arbitration, the Court cannot exercise its power under Section 8 referring the matter to arbitration where all the parties can have the decision. The contention put forth by the learned Senior Counsel for the respondents that there is no prohibition to follow such a course cannot be countenanced.

> Merely because there is no prohibition in the Act to follow such a course of action, the parties cannot be referred to arbitration so long as some of the parties were not parties to the agreement containing the arbitration clause. If such a course to be allowed [sic], that would be against the intent of the legislature as envisaged under Section 8. Under the circumstances, this Court is of the considered opinion that it is not a fit case where the parties could be referred to arbitration invoking Section 8 of the Arbitration and Conciliation Act, and hence, the order of the learned Single Judge has got to be set aside.".

ii) A decision of the Kolkata High Court in Emirates Grains Products Co LLC v LMJ International Ltd, dated 23 July 2009, (MANU/WB/1220/2009), in which there was an arbitration agreement in a contract between the claimant and the first defendant, but the court considered that the plaint was not confined to one between those parties but involved the third defendant. It was held that in these circumstances the arbitration agreement was not operable, and the proceedings against the first defendant should not be stayed.

iii) The judgment of the Supreme Court in Booz Allen and Hamilton Inc v SBI Home Finance Ltd and ors, (2011) 5 SCC 532, another case concerning section 8 of the IACA. Consideration was given (at para 20) to "whether the subject-matter of the suit is "arbitrable", that is, capable of being adjudicated by a private forum (Arbitral Tribunal); and whether the High court ought to have referred the parties to arbitration under Section 8 of the Act?" The court said (at para 34) that the concept of arbitrability "relat[es] to the jurisdiction of the Arbitral Tribunal" and has three facets: whether the disputes are capable of adjudication and settlement by arbitration or whether their nature is such as to be capable of resolution only in the public forum of the courts; whether the disputes are covered by the arbitration agreement; and whether the parties have referred the disputes to arbitration, that is to say whether they fall within the scope of any reference that has been make.

41. Mr Misra said that these facets of the "arbitrability" are applicable principles whatever the context of the question whether a matter is arbitrable, whether the court is asked to refer parties to arbitration or a jurisdictional objection is raised before the tribunal; and so the judgment in the Sukanya case informs what is arbitrable whatever the context or forum in which it falls to be considered whether a matter is covered by an arbitration agreement. As I read the authorities which Mr Misra identified, three (related) strands of thought have led the courts to refuse to stay court proceedings:

i) The first concerns the scope of the court's powers to refer to arbitration: this seems to be in the forefront of the judgment in the Sukanya case itself, where the court was concerned about not having power to require the "bifurcation" of a "matter" which includes a claim against a person who is not a party to the arbitration agreement. As it might be put, only part of the "matter" is the subject of the arbitration agreement and a section 8 reference requires that the whole matter is so covered.

ii) The second, found in the Emirates Grains Products case, concerns whether an arbitration agreement is operable where one of the parties to the dispute is not party to the arbitration agreement.

iii) Thirdly, there is the apparently broader notion of "arbitrability" articulated in the Booz Allen case.

42. It would not follow from all these lines of reasoning that a tribunal has no jurisdiction to decide a dispute between persons who have agreed to arbitrate a claim simply because it is also brought against another person who has not. The first strand is only about the court's powers, and I can leave aside an analysis of the second. However, the judgment in the Booz Allen case distinctly puts the principle on a broader basis, and I accept Mr Misra's evidence that the three "facets" of arbitrability apply, and in particular the second facet applies, whatever the context in which the question whether a matter is arbitrable arises, whether through an application to the court to refer the parties to arbitration or through a challenge before a tribunal or the court to the tribunal's jurisdiction. The question is always whether the matter is covered by the arbitration agreement.

43. Mr Misra recognised in his first witness statement of 3 August 2012 that section 8 of the IACA is directly concerned with domestic arbitrations, but he considered that it applied equally to foreign arbitrations, citing in support of this the decision of the Bombay High Court in Severn Trent Water Purification, Inc v Chloro Controls India Pvt Ltd and ors, (2010) (2) Bom CR 712. He referred to other cases in which the principle of Sukanya was treated as applicable to a case concerning an international rather than a domestic arbitration. One was the Emirates Grains Products case, to which I have referred. Another was the decision of the Bombay High Court in Global Market Direct Ltd v GTL, 2004 (3) Arb LR 56, in which, after reference to Sukanya, it was said that "the Civil Court in spite of an arbitration agreement continues to have jurisdiction and that jurisdiction can only be ousted in a manner provided under Section 8 in the case of a domestic arbitration and in the matter provided in Section 45 or Section 54 in the case of an international commercial arbitration, depending on whether it is bound by the New York Convention or Geneva Convention".

44. However, after Mr Misra's first statement had been served the Supreme Court of India considered and dismissed an appeal against the decision in the Severn Trent Water case. The Supreme Court heard submissions that (at para 50(v)) "the judgment in the case of Sukanya does not enunciate the correct law. Severability of cause of action and parties is permissible in law, particularly, when the legislative intent is that arbitration has to receive primacy over the other remedies. Sukanya being a judgment relatable to Part I (Section 8) of [IACA], would not be applicable to the facts of the present case which is exclusively covered by Part II of [IACA]". The Court undertook a detailed examination of the proper interpretation and application of section 45, but with regard to this submission said this (at paras 133, 134):

> "The ambit and scope of Section 45 of the 1996 Act, we shall be discussing shortly but at this stage itself, we would make it clear that it is not necessary for us to examine the correctness or otherwise of the judgment in the case of *Sukanya* (supra). This we say for varied reasons. Firstly, Sukanya was a judgment of

> this Court in a case arising under Section 8 Part I of the 1996 Act while the present case relates to Section 45 Part II of the Act. As such that case may have no application to the present case. Secondly, in that case the Court was concerned with the disputes of a partnership concern. A suit had been filed for dissolution of partnership firm and accounts also challenging the conveyance deed executed by the partnership firm in favour of one of the parties to the suit. The Court noticing the facts of the case emphasized that where the subject matter of the suit includes subject matter for arbitration agreement as well as other disputes, the Court did not refer the matter to arbitration in terms of Section 8 of the Act. In the case in hand, there is a mother agreement and there are other ancillary agreements to the mother agreement. It is a case of composite transaction between the same parties or the parties claiming through or under them falling under Section 45 of the Act. Thus, the dictum stated in paragraph 13 of the judgment of *Sukanya* would not apply to the present case. Thirdly, on facts, the judgment in *Sukanya's* case, has no application to the case in hand.
>
> Thus, we decline to examine the merit or otherwise of this contention."

45. As I understand the judgment of the Supreme Court, it did not overrule the Sukanya decision. The Court simply said that it "*may* have no application", by which I understand they meant that it might or might not apply to an international arbitration agreement: they simply did not decide the point. Therefore, in my judgment, the claimants are entitled to invoke earlier authorities that apply the principle in the Sukanya case to international arbitration agreements: they have not been overruled.

46. I therefore accept Mr Misra's evidence that the Sukanya principle (i) is based on a concept of arbitrability and is not confined to applications for the court to refer the parties to arbitration, and (ii) applies to international as well as domestic arbitrations. Because the Tribunal in Arbitration 1 did not have jurisdiction over Burley, the whole matter before them, viz the claims against Arsanovia and Burley, was not arbitrable. It follows, to my mind, that they therefore did not have substantive jurisdiction over the claim against Arsanovia within the meaning of section 67: it was not a matter "submitted to arbitration in accordance with the arbitration agreement". Indeed, Mr Wolfson did not dispute that, if the claim against Arsanovia was not arbitrable in the sense that I have described, Award 1 is susceptible to challenge under section 67.

What law is applicable to the arbitration agreement in the Keepwell Agreement?

47. The claimants contend that the arbitration agreement in the Keepwell Agreement, like that in the SHA, is governed by Indian law. However, Mr Wolfson submitted that they are not entitled to do so because they did not raise this "objection" before the tribunal and they are now precluded from doing so by section 73 of the Arbitration Act, 1996. I reject this argument: the claimants did argue before the Tribunal that it had no jurisdiction and did so on the basis that, in light of the Indian decision in

Union of India v Raman Iron Foundry, AIR 1974 SC 1265 (to which I refer below), money was not due from Burley and so the reference was premature. I accept Mr Hirst's submission that the implication of this was that the claimants were submitting that the arbitration agreement in the Keepwell Agreement was governed by Indian law. In any case, I do not consider that the contention that Indian law is applicable to the Keepwell Agreement is an "objection" within the meaning of section 73. I entirely concur with the view of Colman J in JSC Zestafoni v Ronly Holdings Ltd, [2004] 2 Lloyd's LR 335, 345, that section 73 would not be satisfied simply because there had been a challenge to the Tribunal's jurisdiction and that the claimant must have raised each of the grounds of challenge that he asserts under section 67, but the section requires that the applicant must have raised each grounds of challenge that he advances before the court. But that does not mean that a party must have advanced (still less that he must expressly have advanced) each stage in the argument in support of each ground of objection. This conclusion is supported by St John Sutton, Gill & Russell (23rd Ed, 2007) para 8-061.

48. The claimants are entitled to argue that the arbitration agreement in the Keepwell Agreement is governed by Indian law, Cruz City contends that it is governed by English law, the parties' arguments are effectively the same as those about the SHA arbitration agreement, and I conclude that it is governed by Indian law.

Was the claim of Cruz City upheld in Award 2 beyond the scope of the Tribunal's jurisdiction because it was premature?

49. The next issue is whether the claim of Cruz City that was upheld in Award 2 was beyond the scope of the Tribunal's jurisdiction because it was premature. This involves two questions: was the claim premature? and if so does it mean that the Tribunal did not have substantive jurisdiction? Mr Hirst contended that the first is governed by Indian law, and the answer to the second follows from Indian law, under which the claim, being premature, was not arbitrable.

50. There is no dispute that the first question is governed by the proper meaning of the Keepwell Agreement, and so is a question of construction governed by Indian law. The nature of the Keepwell Agreement is explained in clause 15.3.3 of the SHA:

> "The obligation of Unitech and [Burley] to make payments to [Cruz City] in respect of the amounts set forth in Clause 15.3.4 (collectively, the "Obligations") shall be secured by Unitech Limited pursuant to [the "Keepwell Agreement"], which shall be executed and delivered to [Cruz City] by Unitech Limited and [Burley] on or prior to the Effective Date. [Cruz City] shall have the right to recoup under the Keep Well Agreement any and all Losses arising out of or resulting from such failure of Unitech or [Burley] to satisfy the payment obligations set forth in the first sentence of this Clause 15.3.3."

51. By clause 2(b) of the Keepwell Agreement, Unitech undertook to "(i) cause Burley to timely make the payments specified in Clause 15.3.3 of the [SHA] (such amounts collectively, the "Obligations"), and (ii) to make sufficient funds available to [Burley], no later than five (5) Business Days after receipt of notice from [Cruz City]

requiring payment of any Obligations to enable [Burley] to timely satisfy the Obligations".

52. By clause 10, it was provided that the occurrence of certain matters should constitute an "Event of Default" including this: "[Burley] shall fail to pay or perform in full, when due, any of the Obligations or Unitech Ltd shall fail to perform in full, when due, its obligation to make funds available to [Burley] and cause [Burley] to pay all outstanding Obligations"; and "then, and in any such event, so long as the same may be continuing, [Cruz City] may by notice in writing to Unitech Ltd or [Burley], as applicable, exercise any or all rights available in law or in equity".

53. The claimants do not dispute that under English law the Tribunal's unchallenged findings would mean that Unitech's liability to Cruz City under the Keepwell Agreement had accrued due and there would be no basis for challenging Award 2 on the basis that the claim was premature. They contend, however, that under Indian law clauses 2(b) and 10(a)(i), properly construed, prevent a claim from being brought against Unitech or Burley under the Keepwell Agreement unless Burley's liability under the SHA has already been determined by a court or proper arbitral tribunal (if not agreed). Until then no liability of Burley accrued "due" under clause 10 and similarly, as I understand it, that Unitech had no "Obligation" under clause 2. It is Mr Misra's evidence that, "The obligations under the Keepwell Agreement cannot be said to be *due* until adjudication of disputes under the SHA, which is the subject matter of the First Arbitration. If the liability of Burley has not been adjudicated by the Tribunal in the Arbitration under the SHA (as indeed it could not be since Burley is not a party to the Arbitration Agreement), then the Second Arbitration is clearly premature as there has not been any adjudication on Burley's liability to pay. Accordingly, there cannot be any adjudication of Unitech's liability under the Keepwell Agreement until *after* Burley has been found liable under the SHA".

54. Mr Misra's view is based upon four Indian cases: Union of India v Raman Iron Foundry, [1974] AIR SC 1265; Custodian General of Evacuee Property, New Delhi v Harnam Singh, AIR 1957 P&H 58 (para 6); Marwar Tent Factory v Union of India, AIR 1975 Del 27 (at paras 15.16); and Bharat Sanchar Nigam Ltd and anor v Motorola India Pvt Ltd, (2009) 2 SCC 337.

55. The Raman Iron Foundry case concerned a provision in clause 18 of the General Conditions of Contract used in the standard form in which contracts were made by the Central Purchase Organization of the Government of India ("CPO") for the purchase of stores from third parties. It gave the CPO wide powers to realise security, to appropriate other sums due or to become due and to require payment on demand "Whenever any claim for the payment of a sum of money arises out of or under the contract …". This was interpreted by the Supreme Court as applying only when a claim had been adjudicated (if not admitted) and an amount had been held to be due, and not to refer to other cases where a claim for damage had been made. The Marwar Tent Factory case was a similar decision on the same General Conditions of Contract. The Custodian General case was before the Punjab High Court and concerned section 48 of the Administration of Evacuee Property Act, 1950, which provided that "Any sum due to the State Government or to the custodian under the provisions of this Act may be recovered as it were an arrear of land revenue". It was said that this "summary remedy … for the recovery of sums due to the State

Government or to the Custodian must … be restricted to sums legally recoverable, i.e. sums which are admitted or proved to be due and cannot be extended to sums alleged or claimed to be due".

56. Mr Datar's opinion is that the authority of the Raman Foundry case is questionable in view of the decision of the Supreme Court in HM Kamaluddin Ansari & Co v Union of India, (1983) 4 SCC 417. His view is that the Raman Foundry case has been overruled not only (as Mr Misra recognised) with regard to the test for when an injunction would be granted but also as to the interpretation of the clause in question. I do not need to express any view about that because, even assuming that the Raman Foundry case is still good law, as I read the authorities upon which Mr Misra relies, they deal only with the proper interpretation of the particular contractual provisions with which they are concerned or, in the Custodian General case, the applicable statutory provision. In the Raman Foundry case itself, for example, the court was concerned to define the limits of a contractual right for the CPO to appropriate other sums, and adopted (understandably, if I may respectfully say so) a contractual interpretation that prevented unrestrained exercise of such a right. Similarly in the Bharat Sanchar case the Supreme Court interpreted a contractual provision that the "Quantum of liquidated damages assessed and levied by the purchaser shall be final and not challengeable by the supplier" as arising only after the supplier's liability for delay in the performance of delivery obligations had been established: otherwise the right conferred on the contractor was open to abuse. The cases simply exemplify that, in Indian and in English law, the court will give contractual provisions of this kind a commercial and businesslike interpretation. I do not consider that they establish a general proposition that, unless a liability is admitted, a judicial or arbitral determination is required before proceedings can be brought to enforce an obligation such as that undertaken by Unitech (or, as the Tribunal put it in Award 2, that a tribunal "may not find a debt is due under another contract until such time as a Court or tribunal with jurisdiction over that contract makes a binding adjudication to that effect"). Certainly (and this is more important, see para 35 above), I am not persuaded by Mr Misra that Indian law has any relevant rule or principle of construction in accordance with which I should interpret the Keepwell Agreement.

57. However, even if I were persuaded that the Tribunal should have concluded that no liability of Unitech had accrued because there had been no valid finding that anything was due from Burley under the SHA, I do not accept that this goes to the Tribunal's substantive jurisdiction. The claimants maintain that the Tribunal made a "premature" award against Unitech. But it did not assume to itself a jurisdiction to make an award against Unitech for a liability that had not accrued. The Tribunal's error, if such it was, was to conclude that Unitech's liability had accrued when, as the claimants contend, it had not. But that very matter had been referred to the Tribunal and it had jurisdiction to rule on it. Thus, the claimants' complaint does not go to a question about "what matters have been submitted to arbitration in accordance with the arbitration agreement" within the meaning of section 30(1)(c) of the Arbitration Act, 1996 or otherwise go to the Tribunal's substantive jurisdiction. Nor, if it matters, can I accept that as a matter of Indian law it would go to the Tribunal's jurisdiction.

Was the question whether monies was due under the SHA within the scope of the arbitration agreement in the Keepwell Agreement?

58. The claimants submit that the Tribunal for Arbitration 2 did not have jurisdiction to determine what Burley's liability under the SHA was, and that in Award 2 the Tribunal exceeded its jurisdiction in that it purported to do so. The arbitration agreement in the Keepwell Agreement is in wide terms and was for the referral of disputes "arising out of or in connection with [the] Keepwell Agreement", but the claimants say that those words are not sufficiently wide to cover the determination of Burley's liability under the SHA. If Burley is not party to the arbitration agreement in the SHA, it is said, Cruz City cannot circumvent that by referring disputes under the SHA to arbitration under the arbitration agreement in the Keepwell Agreement.

59. Cruz City rely in response to this argument upon the decision of the Supreme Court in Olympus Superstructures Pvt Ltd v Meena Vijay Khetan and ors, (1999) 5 SCC 651. But Mr Hirst submitted that that decision concerned the meaning of an arbitration clause in different terms and with very wide wording indeed:

> "All disputes or differences whatsoever which shall at any time hereafter (whether during the continuance and in force of this agreement or upon or after it discharges or determination) arise between the parties hereto or their respective successors-in-title and assigns touching or concerning this agreement or its interpretation or effect or as to the rights, duties and liabilities of the parties hereto or either of them under or by virtue of this agreement or otherwise as to any other matter in any way connected with, arising out of or in relation to the subject-matter of this agreement shall … be referred …"

60. Mr Hirst for his part relied on the decision of the High Court of Bombay in Indian Organic Chemicals Ltd v Chemtex Fibres Inc, AIR (1978) Bain 106, the facts of which, he said, are more closely analogous to those here. There were three associated agreements with different arbitrations with different fora, and the court refused to accept that disputes under all were covered by the words of the widest arbitration agreement in one of them, and held that there had to be separate arbitrations under the different agreements. He cited this passage from para 47 of the judgment:

> "… It is sufficient for the purposes of the present controversies to observe that the arbitration agreements postulate applicability of different systems of law as the proper law governing the arbitration between the parties. The arbitration clause contained in the four party agreement specifically commended by Shri M.H Shah for the defendants does not help matters. It does not further resolution of the problem. It provides for the arbitration in England and the applicability of the rules of the International Chamber of Commerce. It however, cannot govern disputes arising under other two agreements. These multifarious factors governing the adjudication of disputes and differences which constitute an indivisible matrix for determination, in my opinion, take the case outside the pale of Section 3 of the 1961 Act."

61. These authorities are, in my respectful judgment, of limited value to what I have to decide. The question for me is one of construction of the arbitration agreement in the Keepwell Agreement. That question is, as I have concluded, one of Indian law, but I can deal with it as if I were construing an English law contract because no relevant Indian law principle of construction has been established.

62. I am unable to accept the claimants' argument. As the Tribunal observed, "there is nothing conceptually difficult about a court or tribunal making a determination that a debt is due under another contract in order to determine whether relief should be granted under the contract before it – this is frequently the case, for instance, under contracts of guarantee". The Tribunal needed to determine whether Burley was liable under the SHA in order to determine whether Unitech was liable under the Keepwell Agreement, and so they had both the jurisdiction and the duty to do so. It was a question that needed to be determined in order to resolve a "dispute arising out of or in connection with the provisions of [the] Keepwell Agreement", that dispute was referred to it and the question was within the Tribunal's substantive jurisdiction.

Conclusion

63. I grant the application in relation to Award 1, and declare that the Tribunal in Arbitration 1 did not have substantive jurisdiction and that the Award was of no effect on the merits. I refuse it in relation to Award 2 and conclude that the Tribunal in Arbitration 2 had substantive jurisdiction.