Neutral Citation Number: [2018] EWHC 538 (Comm)

IN THE HIGH COURT OF JUSTICE **CL-2017-000557**

BUSINESS AND PROPERTY COURTS

OF ENGLAND AND WALES

COMMERCIAL COURT (QBD)

BETWEEN:

DAEWOO SHIPBUILDING & MARINE ENGINEERING COMPANY LIMITED

Claimant

- and -

(1) SONGA OFFSHORE EQUINOX LIMITED
(2) SONGA OFFSHORE ENDURANCE LIMITED

Defendants

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

Date: 16/03/18

Before:

THE HONOURABLE MR JUSTICE BRYAN

- -

Stuart Catchpole QC and Colin West
(instructed by **Stephenson Harwood LLP**) for the **Claimants**
Simon Rainey QC and Tom Bird
(instructed by **Ince & Co LLP**) for the **Defendants**

Hearing date: 5 March 2018

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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 Bryan

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A. Introduction

1. I have before me two applications:

   (1) The first is an application by the Defendants, Songa Offshore Equinox Limited and Songa Offshore Endurance Limited ("Songa"), to strike out/summarily dismiss the application of the Claimant, Daewoo Shipbuilding & Marine Engineering Company Limited ("DSME"), under section 69 of the Arbitration Act 1996 (the "Act") for permission to appeal against two arbitration awards on preliminary issues of construction (the "Awards") on the ground that the section 69 application was brought outside the 28-day time limit for such applications as set forth in section 70(3) of the Act.

   (2) The second is an application by DSME, under section 80(5) of the Act, to extend time for the making of that section 69 application, if and insofar as an extension is necessary.

B. Factual Background

B.1 The Underlying Dispute

2. The applications arise from two turnkey contracts dated 6 September 2011 for the design, construction and sale of semi-submersible "Cat D" drilling rigs with hull numbers 3031 and 3032 (the "Semi-Rigs") between DSME as Builder and Songa Offshore SE as Buyer (the "Contracts"). The Contracts were subsequently novated to the Defendants (one to each Defendant).

3. The Semi-Rigs were to be built for Songa to enable Songa to perform long-term drilling contracts on the Norwegian continental shelf. The hull design was to be provided by Götaverket Arendal, a Swedish marine engineering and design consultancy, who were to provide the front-end engineering design ("FEED") documentation.

B.2 The Arbitration

4. On 14 July 2014 DSME referred disputes under the Contracts to arbitration under the LMAA Terms. These disputes arose out of time and cost over-runs in the construction of the Semi-Rigs. The highly experienced Tribunal in each arbitration comprised Sir David Steel, John Marrin QC and Stewart Boyd QC.

5. In the arbitration, DSME alleged that the front-end engineering design documentation was defective and that this caused the delays and cost over-runs. DSME argued that, if such an error was notified within a 90-day period, then Songa bore responsibility for any additional costs, expenses or delays resulting from the error.

6. On 11 July 2016 the Tribunal ordered a trial of preliminary issues relating to the proper construction of the Contracts.

i) *"Under [the Contract], did DSME's right under Item 2 in the Yard Clarification List to notify Songa of errors in documents and/or drawings apply to errors in FEED (front-end engineering design) documentation?*

ii) *If so, then in the event that DSME duly notified such an error within the 90-day period, which party bore responsibility for any additional costs, expenses or delays resulting from such errors?"*

7. The trial of the preliminary issues took place at a consolidated hearing in London on 2 and 3 May 2017.

B.3 The Award and the Memoranda of Correction

8. On 18 July 2017 the Tribunal issued the Awards. It found against DSME on both preliminary issues holding that:

i) DSME's right under Item 2 in the Yard Clarification List to notify Songa of errors in documents and/or drawings did not apply to errors in FEED documentation; and

ii) In the event that DSME purported to notify an error in the FEED documentation within the 90-day period, DSME nevertheless bore responsibility for any additional costs, expenses or delays resulting from such error.

9. On 4 August 2017 DSME's solicitors, Stephenson Harwood LLP, applied to the Tribunal under section 57(3)(a) of the Act to correct what they described as four "*clerical errors in the Awards arising from accidental slips*" namely:

> "1. The statement in paragraph 7 that it was Songa which identified the preliminary issue which the Award decides. It was, in fact, DSME which first identified the preliminary issue by way of its application for a trial of preliminary issues dated 31 May 2016;
>
> 2. The statement in paragraph 7 that it was DSME which pleaded a claim for rectification, and then abandoned such claim. DSME did not plead a claim for rectification. It was Songa which, by way of Ince & Co's email to the Tribunal dated 9 December 2016, abandoned its rectification plea advanced at paragraphs 89 to 91 of the Songa Equinox Defence and Counterclaim and at paragraph 11 of the Songa Endurance Defence and Counterclaim;
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> 3. At paragraph 8, DSME is said to have been responsible for formulating the preliminary issues, but then at paragraph 15 the formulation of the first issue is said to have been Songa's. The wording of the preliminary issues adopted by the Tribunal at paragraph 8 of the Awards was first set out at paragraph 19 of DSME's application for a trial of preliminary issues dated 31 May 2016;
>
> 4. At paragraph 22 the key email of 27 May 2011 is dated in 2014."

10. As is evident from the quotation above, these are classic clerical and typographical errors. They are not connected in any way, shape or form with DSME's subsequent appeal. The errors were addressed in two memoranda of correction issued by the

Tribunal on 14 August 2017 (the "Memoranda of Correction"). This was 27 days after the Awards had been issued.

B.4 The application for permission to appeal and subsequent events

11. On 17 August, i.e. some 30 days after the Awards had been issued (and a period of 28 days from the date of the Award had expired on 15 August 2017), there was a telephone conversation between the parties' solicitors. The evidence before me (which has not been challenged by DSME) is that in the course of that conversation, Mr Kim of Stephenson Harwood (DSME's solicitors) informed Mr Ben Moon of Ince & Co LLP (Songa's solicitors) that he *"knew that 15 August 2017 was the deadline"* and that Stephenson Harwood had yet to receive instructions from DSME to appeal the Awards. The evidence before me is that Mr Kim remarked that it *"seemed that DSME had decided not to appeal."*

12. Mr Moon sent an email to Mr Kim (copied to others within Stephenson Harwood) dated 17 August 2017 (11:33) in which he said:

> "The 28 day period for bringing an appeal expired on 15 August. When we spoke this morning you advised that you had not received instructions from DSME to appeal.
>
> Before we incur time and costs engaging with you on the ancillary items, we would be grateful if you would formally confirm that DSME has not appealed, and will not be appealing, the Tribunal's Award."

13. A response from Mr Limbrick of Stephenson Harwood sent later that day recounted that Stephenson Harwood were taking instructions and would revert to Ince & Co. In the event, the response came on 7 September 2017 when Stephenson Harwood enquired whether Ince & Co were authorised to accept service of an arbitration claim form.

14. An arbitration claim form was issued, on behalf of DSME, the next day on 8 September 2017. The form sought permission to appeal under section 69 of the Act on two questions of law arising out of the Awards. The arbitration claim form was then served upon Ince & Co by email on 14 September 2017, with the date of deemed service being the 18 September 2017.

15. There followed correspondence between the solicitors in which Ince & Co took the stance that the appeal application was made out of time (in a letter on 22 September 2017) and invited DSME to withdraw its application. Stephenson Harwood, on behalf of DSME, denied that this was so in a letter of 22 September 2017 and invited Songa not to take the point. Ince & Co reiterated Songa's stance in a letter on 26 September 2017.

16. On 28 September 2017 DSME applied for an extension of time for appealing the Awards and for permission to amend the arbitration Claim Form (in order to comply with CPR r.62.9, which provides that an application for an extension of time must be made in the Claim Form). Leggatt J (as he then was) gave DSME permission to amend the claim form on paper (permission being needed as the Claim Form and Skeleton Argument had already been served on Songa).

17. On 11 October 2017 Songa applied for an order that DSME's section 69 Application be struck out or summarily dismissed on the grounds that it not been brought within

the 28-day time limit and that the interests of justice did not require an extension of time for appealing the Awards.

18. Consequently, the matters that arise for determination are:

(1) Whether DSME's application for permission to appeal the Awards was brought within the 28-day time limit set out in section 70(3) of the Act – this being a question of whether time ran from the date of the Awards or from the Memoranda of Correction; and

(2) If DSME's application for permission to appeal the Awards was not brought in time, whether DSME should be granted a retrospective extension of time for issuing this appeal under section 80(5) of the Act.

19. The first issue involves a dispute between the parties as to the proper construction of section 70 of the Act. The second issue is an exercise of discretion in light of the guidance set out in previous authorities identifying the relevant principles (which were not in issue between the parties).

C. The Time Limit under section 70 of the Arbitration Act 1996

C.1 The relevant provisions of the Act

20. The time limit applicable to section 69 appeals (and indeed to in relation to applications pursuant to section 67 and section 68 of the Act) is set out in section 70. So far as is relevant to this application, section 70 provides as follows:

> "**70 Challenge or appeal: supplementary provisions.**
>
> (1) The following provisions apply to an application or appeal under section 67, 68 or 69.
>
> (2) An application or appeal may not be brought if the applicant or appellant has not first exhausted—
>
> (a) any available arbitral process of appeal or review, and
>
> (b) any available recourse under section 57 (correction of award or additional award).
>
> (3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process."

21. Section 54 of the Act provides:

> "**54 Date of award.**
>
> (1) Unless otherwise agreed by the parties, the tribunal may decide what is to be taken to be the date on which the award was made.
>
> (2) In the absence of any such decision, the date of the award shall be taken to be the date on which it is signed by the arbitrator or, where more than one arbitrator signs the award, by the last of them."

22. Section 57 of the Act provides:

> "**57 Correction of award or additional award.**
>
> (1) The parties are free to agree on the powers of the tribunal to correct an award or make an additional award.
>
> (2) If or to the extent there is no such agreement, the following provisions apply.
>
> (3) The tribunal may on its own initiative or on the application of a party—
>
> > (a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or
> >
> > (b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.
>
> These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal.
>
> (4) Any application for the exercise of those powers must be made within 28 days of the date of the award or such longer period as the parties may agree.
>
> (5) Any correction of an award shall be made within 28 days of the date the application was received by the tribunal or, where the correction is made by the tribunal on its own initiative, within 28 days of the date of the award or, in either case, such longer period as the parties may agree.
>
> (6) Any additional award shall be made within 56 days of the date of the original award or such longer period as the parties may agree.
>
> (7) Any correction of an award shall form part of the award.

23. Section 1 set out the principles underlying the Act:

> "1 **General principles**
>
> The provisions of this Part are founded on the following principles, and shall be construed accordingly—
>
> > (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
> >
> > (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
> >
> > (c) in matters governed by this Part the court should not intervene except as provided by this Part."

24. The question in this case, in circumstances where there have been corrections to the Awards, is from what time does the 28-day time limit run? There would appear to be three potential answers to this question:

i) First, it might be the case that <u>any</u> correction effectively resets the time limit for bringing an application or appeal, even if the corrections were wholly

irrelevant to that subsequent application or appeal. This is the position adopted by DSME. That position could be arrived at if it was concluded that an application for a correction pursuant to section 57 of the Act was an arbitral process of appeal or review for the purposes of section 70(3), or alternatively if the date of the award for the purposes of section 70(3) where corrections are sought is when those corrections are published (or when the decision rejecting the proposed corrections is published as the case may be).

ii) Second, it might be the case that no application under section 57 is ever of any relevance to the time-limit set out in section 70(3) - the time limit is always 28 days from the original award.

iii) Third, the position might depend on the nature of the correction, such that the time limit was 28 days from the date of the original award unless there was a correction to the award of a particular type, for example if the correction was in some way material to the decision to appeal. This is the position adopted by Songa.

C.2 Prior Authorities

25. This is not the first case in which the relationship between section 57 and section 70(3) has come before the Courts. On the contrary, there is a considerable body of case law in which the issue has either been touched upon, or considered, culminating in the decision of Teare J in *K v S* [2015] EWHC 1945 (Comm) as subsequently followed by HHJ Waksman QC, sitting as a High Court judge, in *Essar Oilfields Services Ltd v Norscot Management Pvt Ltd* [2016] EWHC 2361 (Comm), [2017] Bus. L.R. 227 at [91]-[93].

26. Indeed, in the light of the decision in *K v S* and DSME's skeleton argument, it was suggested by Mr Simon Rainey QC, on behalf of Songa, that I should not trouble myself with a review of all of the authorities preceding *K v S*, but should simply follow it applying the principle in *Colchester Estates (Cardiff) v Carlton Industries Plc* [1986] Ch 80 at [85], Teare J having comprehensively reviewed the preceding authorities including that of *Surefire Systems Limited v Guardian ECL Limited* [2005] EWHC 1860 (TCC) where a different conclusion was reached (albeit without the reasons for that conclusion being expressed and seemingly without the benefit of reference being made to prior authorities) by Jackson J, unless I was convinced that the decision of Teare J was wrong in not following *Surefire*. However, I have heard full argument on the authorities and the issue of construction that arises, and in such circumstances I have chosen to determine the issue myself (before considering any application of the *Colchester Estates* principle).

27. The first case I have been referred to in relation to section 70(3) is a decision of HHJ Humphrey Lloyd QC in *Gbangbola v Smith & Sheriff* [1998] 3 All ER 730. *Gbangbola* is not a decision on section 70(3) but rather concerned section 70(2) of the Act. Following a preliminary award addressing whether construction work had been complete at the relevant date, the arbitrator made a final award. Both parties were successful on some issues. The final award included a costs order providing that Gbangbola was to pay Smith & Sheriff's costs. One of the reasons given by the arbitrator for this costs order cast doubt upon the preliminary award. Gbangbola applied to the court challenging the award and the costs order pursuant to section 68 but had not made any application to the arbitrator to clarify certain ambiguities within the award (these not having a bearing on the main challenge to the costs order). Smith & Sheriff contended that the whole of Gbangbola's section 68 challenge was barred

by section 70(2) of the Act as Gbangbola had failed to apply to the arbitrator for the removal of ambiguities within the award.

28. HHJ Humphrey Lloyd QC held that the section 68 challenge was not barred in its entirety. The award was to be severed. The resolution of the ambiguities within the award did not affect the main ground of challenge concerning the costs award with the consequence that application had been properly made. In reaching this conclusion, HHJ Humphrey Lloyd QC rejected the submission made by counsel for Smith & Sheriff that the court should have the totality of the arbitrator's views as clarified and with ambiguities removed in all respects. The learned judge expressed himself as follows (at pages 736 to 737):

> "These all refer to matters which should have been taken up with the arbitrator before an appeal should be launched. However, I do not agree with Mr Coster's submission that this has the effect of barring the whole of the appeal. I see no reason why an award should not be severed and those parts of the award which are unaffected by decisions on ambiguities or uncertainties should not have effect or be treated as unaffected without any requirement under s 70(2) first to have recourse to s 57 before launching an appeal or application. Mr Coster says that the purpose of the Act is to ensure both that the arbitrator and the courts are not troubled by repeated applications, but also that the court should have the totality of the arbitrator's views as clarified and with ambiguities removed in all respects before considering any appeal or process. He relies upon the words of sub-ss 2 and 3 in referring to any available process of appeal and any process of appeal or review.
>
> I see the force of that argument. It certainly must apply where the uncertainty or ambiguity has affected or may affect that part of the result which is in question (and also perhaps in some cases the reasoning leading to that result). However, one must carefully consider what would be the point of delaying an appeal on a matter which as here would be completely unaffected by any possible outcome of going back to the arbitrator to clarify an ambiguity or uncertainty. The purpose of arbitration proceedings is, amongst other things, to have an expeditious and economical resolution of a dispute: see s 1 of the Act which provides:
>
> > "1.The provisions of this Part are founded on the following principles, and shall be construed accordingly-(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; (c) in matters governed by this Part the court should not intervene except as provided by this Part…"
>
> The time limits set out in the Act seem to me to point quite clearly to the court being seized of any appeal within a specific time limit. Recourse to s 57 necessarily postpones those time limits (see s 57(4)-(6)) and leaves any otherwise victorious party in uncertainty as to whether or not there would be a challenge to a part of the award which was otherwise entirely clear and certain as to its effect. Mr Coster's argument would therefore enable a recalcitrant party to apply to the arbitrator for the correction of any supposed error (of any of the kinds described in s 57(3)(a)) in order to give it more time to lodge any appeal or to make an application in respect of a part which could not possibly be connected to the supposed error. In addition the request for correction might demonstrate that there was no error so that the award would be altered. If there were an error and if the arbitrator's response to the application did resolve the question of law or ground of challenge an appeal or application would then be made within the statutory period. If either the applicant or the respondent to an appeal or application in

> respect of the unaffected part considered that its outcome might be influenced by the arbitrator's response then, and in the relatively unlikely event, that such an appeal or an application might be heard or decided before the response was known, an application should be made to the court for a postponement.
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> In my judgment therefore Mr Coster's suggested interpretation is not consistent with the principles of the Act as set out in s 1, one of which is that there should be a fair resolution of disputes. A party should know whether it has got an award which will be enforceable or not and, if there is to be a challenge or appeal which is unrelated to the outcome of the correction of a supposed ambiguity or uncertainty, it is to know within a short time whether there is to be a challenge and why there is to be a challenge. Accordingly, giving the Act the teleological interpretation required by s 1, I do not consider that Mr Coster's argument is correct for this reason and those set out above. It is clear that resolution of the points upon which it is said there is ambiguity or uncertainty would not affect the main grounds of challenge."

29. The first case to which I have been referred that actually touches upon section 70(3), is the unreported decision of HHJ Thornton QC in *R.C. Pillar & Sons v Edwards* 2001 WL 676628. The principal award in that case was published on 17 April 2000. An application for corrections was made, the corrections being published on the 27 June 2000. The section 68 application was made on 17 July 2000. One issue before the Technology and Construction Court was whether the application was made out of time. This would be the case if time ran from the date of the original award but not if time ran from the publication of the corrections.

30. At paragraph 42, HHJ Thornton QC remarked:

> "42. There is, potentially, a short answer to the Edwards' submission that Pillar's application was made out of time, namely that the application was made within time since, by virtue of section 70 (3) of the Act, the requisite 28 day period within which a court challenge must be made runs from the date of the award unless "there has been any arbitral process of appeal or review". In such a case, the period within the application must be made runs from the date when the applicant was notified of the result of that post-award process. It would seem arguable that the process of correcting each award that was undertaken by the arbitrator was a "process of review", in which case the relevant starting date for the 28 day period for the principal award was 17 June 2000. On this view, Pillar's section 68 application in connection with that award was made in time. However, it is also arguable that the process of correction is something different from a process of appeal or review, particularly since section 70 appears to distinguish a process of correcting the award from other processes of review. Section 70(2)(a) refers to a "process of appeal or review" and section 70(2)(b) refers to "any available recourse under section 57". I will, therefore, consider and determine Pillar's application for an extension of time since an extension of time would appear to be required as a prerequisite for my determining that application."

31. HHJ Thornton QC therefore considered it arguable that time commenced upon the publication of the corrections but did not dispose of the application on that basis. Instead, HHJ Thornton QC addressed whether an extension of time was to be granted (concluding that it would be appropriate to do so in the circumstances).

32. Section 70(3) was subsequently addressed in *McLean v Blackdale Limited* [2001] WL 1560746, another decision of HHJ Humphrey Lloyd QC. This case featured heavily in the parties' oral submissions. In *McLean*, an award was issued on 22 September 2000.

A request for clarification was made thereafter. On 20 October, the arbitrator decided not to issue a clarification but instead to treat the request for clarification as a request for a further award. This further award was issued on 15 November 2000. Blackdale then issued an arbitration claim form on 11 December 2000, alleging a serious irregularity under section 68 of the Act. The question before the Court was whether this arbitration claim was issued out of time.

33. HHJ Humphrey Lloyd QC recorded in his judgment that there had been "*an extensive argument about the interpretation of sections 57 and 70 of the Arbitration Act 1996, and their application to the facts*". After setting out section 57, the learned judge observed:

> "8. Section 57(7) says in terms that the correction of the award shall form part of the award, and s.54 says that the date of the award, unless the tribunal has decided otherwise or it is otherwise agreed by the parties, shall be taken to be the date on which it is signed by the arbitrator. The ordinary construction of the Act, reading s.54(2) with s.70(3), is that, for the purposes of the latter, the date of the award is the date when the award is signed by the arbitrator.
>
> 9. So, on the face of it, if someone asked for a correction within the 28-day period provided by sub-section (4), then that process so initiated might well not be exhausted until after the 28-day period required by s.70(3) had expired. So how does one reconcile the apparent conflict between sub-s.(2)(b) and sub-s.(3) and s.70 with the process in s.57?"

34. HHJ Humphrey Lloyd QC then made reference to section 1 of the Act, and the principles governing the application and interpretation of, *inter alia*, sections 57 and 70 before considering the potential practical problem arising from the interaction of section 57 and section 70(2) and (3):

> "11. In considering what Parliament presumably intended by s.57 and s.70, then of these principles one needs to bear in mind the first, namely, that one of the objectives of arbitration is to obtain the resolution of disputes without unnecessary delay or expense; and the third, namely, that the court is not to intervene except as provided by that Part of the Act. It must also be inferred from the second principle that parties should not be required or obliged to go to the court unless it is absolutely essential, since the role of the court is a reserve power and to be minimised so that the parties may be free to resolve their disputes consensually. Thus the arbitration process should be worked through to finality before there is recourse to the court (see also section 70(3).
>
> 12. Because of the distinction made in sub-section (2) of section 70 between (a) the process of appeal or review and (b) recourse under section 57, the latter clearly cannot be a process of review. But for that distinction it would otherwise be so treated since the power to correct or to make an additional award would plainly be part of the "available arbitral process" as defined by section 82 of the Act as it would a process of review by a person vested by the parties with powers in relation to that matter (who may be the arbitrator). Quite clearly the distinction is drawn between those two methods of recourse. Thus the objection taken by the respondent throws up something in the nature of a Catch 22: If you cannot make an application or bring an appeal by virtue of s.70(2) until you have exhausted the process of review under s.57, how then can you ever comply with s.70(3)?"

35. Having set out the submissions made by counsel, the lack of authority bearing on this matter and having considered the potential significance of his earlier decision in *Gbangbola*, HHJ Humphrey Lloyd QC resolved the issue in the following terms:

> "19. In my view, a balance has to be struck between the tension created between the application of the principles that there should be a fair resolution of a dispute and that the parties should not be involved in unnecessary delay and expense. Unnecessary expense is to be avoided, namely pre-emptive applications, and if the role of the court is to be kept to the minimum, and if parties are to know where they stand before they decide whether or not to make an application or to resist an application under s.68 or s.69, they must first know precisely what is the arbitrator's decision, where his award has been questioned under s.57. In my judgment, reading the provisions of the Act together, and applying section 1 in the purposive manner that is required, the reason why there is no reference in sub-s.(3) to sub-s.(2)(b), namely any available recourse under s.57, is because, for all practical purposes, the date of the award cannot be the date upon which it is signed by the arbitrator but the date upon which the correction is or, by decision of the arbitrator, [is] not made, following an application under s.57, because that is the date when any uncertainties that there may have been about the award will be resolved. Accordingly there will then a resolution of the all the disputes with which the arbitral tribunal has power to decide stemming from the original reference and extended by the provisions of section 57 (as the parties did not agree on the powers of the tribunal to correct an award or to make an additional award). Section 57 is dealing not merely with slips and other such mistakes but with substantive clarifications and the removal of ambiguities, both of which are likely to be of potential importance if required. Section 57(7) provides any correction of the award shall form part of the award but does not deal with the date of the corrected award. I cannot accept that the correction is to be back dated: the change might affect the substance. The date of an award, if corrected, must be the date of the corrected award.
>
> 20. The other part of section 57 is of comparable, if not greater, importance as it may lead to an additional award to deal with an issue that has been overlooked. In my view it would be most unsatisfactory if a party that is left in doubt about the meaning or effect of an award because it was not clear whether or not a particular claim or issue had been dealt with and that had therefore to invoke both parts of section 57, would, before receiving the tribunal's decision, have to decide whether or not to make an application or any appeal on a speculative basis and on the footing that there would be no additional award. If an additional award were needed and made then there can be no doubt that, for the purposes of section 70(3), its date would be the effective date. Yet if the arbitrator decided, perhaps wrongly, no additional award were needed the applicant would have to appeal or challenge the original award. That is not desirable nor is consistent with the simplicity that should be achieved in arbitration. When the dispositive parts of the award are separated so that the award can properly be severed and the applicant does not need to know more from the arbitrator to mount an appeal or challenge then, notwithstanding recourse to section 57, the date in relation to the part unaffected must be that provided by section 54(2) applied literally. If they cannot be severed then given that, where there was a process of appeal or review, Parliament intended that the time for making an application should only begin once the result was known to the applicant, I cannot believe that it was intended that an applicant who had sought correction or clarification should nevertheless have to make an application or appeal without knowing or being certain of the grounds upon an appeal or challenge could properly be made. The rules governing such applications call for the grounds to be set out comprehensively and with clarity and precision. Arbitration applications are not to be made on a speculative basis nor are they to be equated with the issue of simple claim form to stop time

running. I therefore accept Miss Jackson's submissions. These conclusions are necessarily pragmatic but such an approach is in my judgment is required by the Arbitration Act 1996 .

21. Accordingly, for the purposes of s.70(3) the correct date will be the date upon which Mr. Higgins decided that the award should stand as it did, and that it did not require to be clarified, that is to say 20 October 2000."

36. In *McLean*, HHJ Humphrey Lloyd QC commented on *Gbangbola* and expressed the view that his statement in that case (as quoted above) to the effect that the making of a section 57 application necessarily postpones the date of the award, was somewhat dogmatic, stating that, *"I did not have on that occasion the same careful and detailed arguments which have been so ably presented to me today, especially about the effect of the opening words of section 70(3), and the meaning of section 54(2) when the award is corrected."*

37. *McLean* was followed by Judge Havelock-Allan QC in the case of *AHT v Tradigrain* [2002] 2 Lloyd's Rep 512. The submission that an application under section 57 did not stop the 28-day period set out in section 70(3) was rejected. The learned judge expressed the view that:

> "63. The obvious way to achieve this effect is to construe "the award" in s. 70(3) as meaning "the award as corrected" in any case where an application has been made to the tribunal under s. 57(3)(a). Section 57(7) provides that "Any correction of an award shall form part of the award", but does not say that it should share the date of the original award in its uncorrected form. The common sense view is to treat the corrected award as bearing the date of the correction, so that the 28 days run from the date on which the correction was published. This was the approach of Judge Humphrey Lloyd, Q.C. in *Blackdale Ltd. v. McLean Homes South East Ltd.* (TCC Nov. 2, 2001, unreported at pars. 8-14 and 19) and I respectfully agree with it. Judge Humphrey Lloyd further held that where two complaints are made about separate parts of an award only one of which is made the subject of a reference to the tribunal under s. 57(3)(a), time will run from the date of the original award in respect of the other part complained of, if that part is properly severable. In some cases this will prevent a party raising a number of complaints about an award from gaining a generous extension of time for challenging it because a small part has been referred back to the arbitrators under s. 57(3)(a). However, even where severance is not possible, the time gained by referring back one part of the award under s. 57(3)(a) is not very great. By s. 57(5) any correction of an award must be made within 28 days of the application being received by the tribunal and the application itself must be made within 28 days of publication of the original award, unless agreed between the parties.
>
> 64. The correction award was published on Nov. 22, 2001. The application under s. 68 was issued on Dec. 20, 2001. If all that matters is the date of the correction award, the application was in time."

38. The next authority to which I have been referred is the decision of Jackson J (as he was then) in *Surefire Systems Limited v Guardian ECL Limited* [2005] EWHC 1860 (TCC). DSME placed considerable weight upon this decision. In *Surefire*, an award was made and subsequently clarified. One of the parties sought leave to appeal. The application for leave was brought within 28 days of the clarification, but not within 28 days of the original Award. The question arose whether it was in time. As the

applications gave rise to issues of principle, the matter was listed for an oral hearing. Following that hearing, Jackson J held that the application for leave to appeal had been made in time, stating at paragraph 27:

> "In my view, the arbitrator's clarification issued on 2nd May 2005 constitutes "an arbitral process of … review" for the purposes of section 70(3) of the Act. Accordingly, no extension of time is necessary."

39. Although the question that is before this court was in issue in *Surefire*, no authority was cited in support of this proposition by Jackson J, indeed there is no direct indication that relevant authorities on this point were drawn to the attention of the court. Nor did the judge explain his reasons for reaching this conclusion.

40. In *Price v Carter* [2010] EWHC 1451 (TCC), an award was published with an application for a correction being made. An arbitration claim form was later issued – being within 28 days of the response to the correction application but more than 28 days after the date of the award. Although Edwards-Stuart J considered this aspect of the case to be academic (having ruled that the proposed grounds of appeal were hopeless) some consideration was given to section 70(3):

> 67 The first difficulty with these provisions is whether the extended running of time for appeal mentioned in subsection (3) applies only to any process invoked under subsection (2)(a) or applies to an application under section 57 as well. Taking the provisions as they stand, the fact that subsection (3) uses the words "any arbitral process of appeal or review" which are found only in subsection (2)(a) suggests that an application under section 57 does not have the effect of extending the 28 day time limit, although the way in which the provisions are drafted – with section 70(3) appearing to qualify the whole of section 70(2) – might suggest otherwise. In *Surefire Systems Ltd v Guardian ECL Ltd* [2005] EWHC 1860, Jackson J briefly considered this point. He said, at paragraph 27, that in his view clarification of an award given by an arbitrator following correspondence from the parties constituted "an arbitral process of … review " for the purposes of section 70(3) of the Act.
>
> 68 The expression "available arbitral process" is defined in section 82(1) as including any process of appeal to or review by an arbitral or other institution or person vested by the parties with powers in relation to that matter. It is plainly a different process to that of correction of an award by the arbitrator himself.
>
> 69 It is perhaps relevant also that section 57(6) provides that any additional award is to be made within 56 days of the date of the original award (or such longer period as the parties may agree), so that it constitutes a further award in its own right, whereas section 57(7) provides that any correction of an award shall form part of the award. Thus the making of a correction does not alter the date on which the award is treated as having been made. This might suggest that the 28 day time limit runs from the date when the award is made, irrespective of any application for correction under section 57.
>
> 70 I have to say that, whilst the conclusion of Jackson J makes very good sense from a practical point of view, I have reservations as to whether it is correct. It is not clear from the report of the decision in that case whether or not the question was the subject of any detailed argument. It seems to me that the very precisely drafted wording in section 70(3) means that only an arbitral process of appeal or review (if there is one) has the effect of extending the

time with which to appeal, so that even where there is an application for correction of an award under section 57 any application or appeal must be brought within 28 days of the award."

C.3 The decision in *K v S*

41. The most detailed analysis of section 70 of the Act, is to be found in the decision of Teare J in *K v S,* supra. In that case, an Award was made against two Russian parties referred to as K and Y. Y appealed within 28 days. K did not. Instead it made an application to the Tribunal for correction of the award pursuant to article 27 of the LCIA Rules. In particular, it applied for the Award to be corrected insofar as the Award stated that K had accepted the jurisdiction of the Tribunal. These references were at odds with other parts of the Award, in which the Tribunal determined a challenge to jurisdiction by K, and from which it was apparent that K had in fact challenged the Tribunal's jurisdiction. The Tribunal duly made those corrections. K then instituted an arbitration claim 28 days after the corrections were issued.

42. The defendant to the arbitration claim (referred to as S) applied to strike out K's claim on the ground that it was out of time. K applied for an extension of time. Teare J held that the application was out of time and refused an extension. In doing so, Teare J held that the application for clarifications was not an arbitral process of appeal or review within section 70(3) so time did not run from the date on which K had been informed of the result of its application for a correction. Counsel for K had submitted that an application for a clarification was a process of appeal or review, relying on the decision of Jackson J in *Surefire Systems*. Teare J rejected that submission in the following terms (at paragraph [18]):

> "I accept that in one sense a correction of an award involves a review of the award because it is only by reviewing it that the tribunal can decide whether there is a mistake, error or ambiguity which needs to be corrected. However, in my judgment it is clear from section 70(2) of the Arbitration Act 1996 that an "arbitral process of appeal or review" is a different process from "any available recourse under section 57". I consider that the former process is one by which an award is subject to an appeal or review by another arbitral tribunal (as in GAFTA arbitrations or in arbitrations pursuant to Lloyd's Standard Form of Salvage Agreement) whilst the latter recourse for correction is to the same arbitral tribunal which issued the award. This distinction is consistent with the definition of available arbitral process in section 82 of the Act and was also drawn by Edwards-Stuart J in *Price v Carter* [2010] EWHC 1451 (TCC) at para 68. I respectfully disagree with the observation of Jackson J in *Surefire Systems Ltd v Guardian ECL Ltd* if he was referring to a correction issued pursuant to section 57 of the Act."

43. It was common ground in *K v S* that where there is a *material* application for a correction pursuant to section 57, the 28-day period runs, on the true construction of section 70(3), from the date of the award as corrected. Teare J stated at [24]:

> "Challenges to arbitration awards are strictly limited by the Arbitration Act. Where they are permitted they must be promptly made. In this way the Act promotes the finality of arbitration awards. In that context I consider that an application for correction of an award is material and will properly serve to postpone the running of the 28-day period until the date of the corrected award where the correction is necessary to enable the party to know whether he has

grounds to challenge the award. In such a case there is obvious good sense in construing the 28-day period as running from the date of the award as corrected for the reasons stated in *McLean Homes v Blackdale Ltd* and *Al Hadha Trading Co v Tradigrain SA*. But if the grounds for challenge are known and are not dependent upon the outcome of the application for clarification then there is no good reason to postpone the running of the 28-day period until the date of the corrected award. To do so would unnecessarily delay the making of a challenge to an award. That would be contrary to the aim and object of the Act which is to promote the finality of arbitration awards. This was the approach of HHJ Humphrey Lloyd QC in *McLean Homes v Blackdale Ltd* at paras 19 to 24 with which I respectfully agree."

44. As to what constitutes a material application for a correction, at [25], Teare J considered that the application in that case was not material as the outcome of the application was not necessary in order for K to know whether it had grounds to challenge the award.

45. As I have already noted, *K v S* was followed by HHJ Waksman QC, sitting as a High Court judge, in *Essar Oilfields Services Ltd v Norscott Rig Management PVT Ltd*, supra. There Essar applied for clarification of the award, with such clarification being made in an addendum to the award. Essar issued an arbitration claim form within 28 days of that addendum being issued, but not within 28 days of the original award.

46. Judge Waksman QC noted at [90] that "*The legal position regarding corrected awards in this context emerged clearly from the observations of Teare J in K v S [2015] 2 Lloyd's Rep 363, which I gratefully adopt"*, continuing:

> "90…
>
> First, the reference to arbitral review in section 73 which could be the starting point for the 28-day period, if there was such a review, does not apply to corrected awards, which are not the same thing. The fact that the arbitrator has power to correct an award under section 57 is not to the point: see paras 17–19.
>
> 91 As to corrected awards, the position on time was as follows. Merely because the relevant party had sought a corrected award pursuant to section 57(3) , that does not without more extend time, so that the 28 days now runs from the date of the corrected award. In that regard, I respectfully prefer the view of Teare J to the very brief observations of Jackson J in *Surefire Systems Ltd v Guardian ECL Ltd [2005] BLR 534* . However, if the application to correct was material to the issue now being raised under section 68(2), then the 28 days would indeed run only from the date of the corrected Award: see paras 18–20.
>
> 92 As to what is material, I again respectfully adopt the formulation of Teare J in para 24, which is that the correction is material if it is "necessary to enable the party to know whether he has grounds to challenge the award or not". As Teare J went onto say, if the grounds of challenge were known and were not dependent on the outcome of the correction application, time indeed should run from the date of the original award."

C.4 The parties' respective cases

47. It is against this backdrop that Songa's application to strike out/obtain summary judgment by reason of the section 69 application being made out of time falls to be considered. For Songa, Mr Simon Rainey QC submits that the law is as set out in *K v S* by Teare J, as followed by HHJ Waksman QC in *Essar Oilfields*. Reliance is placed upon the distinction between "*any available arbitral process of appeal or review*" (section 70(2)(a)) and "*any available recourse under section 57*" (section 70(2)(b)). No mention of the latter is made in section 70(3). Mr Rainey QC has also made submissions to the effect that the common ground before Teare J in *K v S* in relation to material corrections follow from a proper construction of section 70 in conjunction with section 57 of the Act. Mr Rainey QC drew a distinction between those cases where an application under section 57 (or the regime agreed by the parties) is made in order to fulfil section 70(2) and so to bring an application or appeal before the Court, and those instances where it merely fulfils a facultative role in correcting minor typographical errors and the like. It is only in the former category of cases that the date of the award is of significance.

48. As already foreshadowed, Mr Rainey QC has also prayed in aid the principle articulated in *Colchester Estates (Cardiff) v Carlton Industries Plc*, supra in relation to this court following the decision of Teare J in *K v S*.

49. Mr Stuart Catchpole QC, on behalf of DSME, submits (at paragraph 55 of DSME's Skeleton Argument) that the construction adopted in *McLean*, as followed in the subsequent authorities including *K v S*, constitutes an unwarranted gloss upon the wording of the Act. Those cases require reading section 70(3) as if additional words were provided by Parliament, it being emphasised that there is no reference in section 70(3) to any concept of "materiality" or to the possibility that a single award could have the effect of giving rise to several different 28-day time periods, if the award gives rise to different potential grounds of appeal, some of which are potentially susceptible to recourse under section 57 and others of which are not.

50. What Mr Catchpole QC urges upon me is that the better interpretation is to treat the words "*any arbitral process of appeal or review*" as extending to an application for corrections under section 57(3), as did Jackson J in the *Surefire* case (albeit, it would seem, without full argument, and without setting out his reasons for such an approach). In this respect, Mr Catchpole QC submits that Teare J in *K v S* was wrong to hold that such a process of appeal or review had to be to someone other than the arbitrator. He submits that there is nothing in those words which implies such a limitation, and he refers to the definition in section 82(1) of the Act whereby an "*available arbitral process*" "*includes any process of appeal to or review by an arbitral or other institution or person vested by the parties with powers in relation to that matter*" as being an expansive and not a limiting definition.

51. Mr Catchpole QC also made submissions as to what the date of the award, as defined in section 54 of the Act, is in circumstances where an application is made to the tribunal for correction. Mr Catchpole QC submits that in such circumstances the date of the award is the date of the corrected award, even in circumstances where the correction was wholly immaterial to the challenge to the original award. In his words, even spurious applications stop time from running from the date of the original award. It is said that, subject to severance of dispositive parts of an award, it is conceptually impossible for an award to have multiple dates and to hold that an award can have different dates for different applications would engender confusion and future disputes. Mr Catchpole QC further submits that what was common ground before Teare J in *K v S* is wrong and is not supported by the authorities to which Teare J refers. Mr Catchpole QC also submits that any delay associated with his interpretation

of the Act cannot be considered unnecessary or illegitimate in circumstances where it is, on his case, mandated by the terms of the Act.

C.5 Discussion

52. In my view, there is a clear, and indisputable, distinction drawn between *"any available arbitral process of appeal or review"* (section 70(2)(a)) and *"any available recourse under section 57"* (section 70(2)(b)) as was rightly recognised by Edwards-Stuart J in *Price v Carter* and by Teare J in *K v S*. Section 70(3) expressly refers to *"any arbitral process of appeal or review"* but not to recourse under section 57. I do not consider that the absence of the word "*available*" in section 70(3) is of assistance to DSME.

53. As to the meaning of "*any [available] arbitral process of appeal or review*" in section 70(2)(a) and section 70(3), I share the view of Teare J in *K v S* that this is a reference to a process by which an award is subject to an appeal or review by another arbitral tribunal. An application to the same tribunal for a correction of the award does not fall within the ordinary and natural meaning of such language. On the contrary I consider the ordinary and natural meaning of such language, in the context of a statutory provision that draws a delineation between an appeal or review and a correction, is that it is a reference to a process by which an award is subject to an appeal or review by another arbitral body. This is supported by the fact that, under section 57, and absent any contractual provision permitting it to do so, a tribunal cannot reconsider whether it reached the correct decision, or indeed change its decision, given that it has already delivered its award (rather any recourse is by an appeal or review by another arbitral body or, absent that, under section 69 of the Act if the requirements for permission to appeal are met). I also agree with Teare J that this is consistent with the definition of "*available arbitral process*" found in section 82 (albeit that the definition is not exhaustive), and I too respectfully disagree with the view expressed by Jackson J in *Surefire*.

54. The same approach to section 57 and section 70 of the Act is reflected in Professor Merkin's commentary at paragraph 18.121 of *Arbitration Law* (Service Issue 77 – November 2017):-

> "It is apparent from the structure of the legislation that any arbitral process of appeal or review is quite distinct from available recourse under s 57, so that there are two distinct triggers for the running of time: 28 days from the date of the award; and 28 days from the notification to the applicant of the outcome of any arbitral process of appeal or review. There is no indication as to how the time limits are to be applicable where an application has been made under the slip rule, although it would seem to be apparent that s 70(2)(a) has no relevance because an application under s 57 is not any arbitral process of appeal or review even though the statutory definition is not exhaustive."

See also in this regard *Russell on Arbitration* (24th Ed. 2015) at paragraphs 8-119 to 9-122.

55. The conclusion reached in *K v S*, and in the present case, is in line with the approach under English law to arbitration. As is recognised in section 1(a) of the Act "*the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense*". The principles of speed and finality of arbitration are of great importance. These would be undermined if the effect of making <u>any</u> application for a correction is that time for appealing runs from the date the appellant is notified of the outcome of that request. This is not simply a "concern"

(nor is it one that has been over-stated as alleged by DSME) rather it is contrary to the whole ethos of the Act. It would be open to parties who have freely agreed to arbitrate their disputes to frustrate and delay that agreed mechanism of dispute resolution by relying upon completely irrelevant minor clerical errors. This cannot have been the intention of Parliament, which imposed a short time limit of 28 days in order to serve the principles of speed and finality.

56. Mr Catchpole also submitted that the date of the "*award*", in circumstances where any application for a correction is made, is the date of that correction, relying upon sections 54 and 57(7) of the Arbitration Act and what was said in *McLean*. I reject that submission. It is contrary to the whole ethos of the Act, and would frustrate the object and purpose of the short time limit in section 70(3). On their proper interpretation, sections 54 and 57 do not justify the conclusion that where there has been *any* correction the date of the correction is to be treated as the date of the award. Given the importance of speed and finality in the context of arbitration, it would have been most surprising if the statutory intention, embodied in those sections, was that any correction – no matter how trivial or irrelevant – had the effect of postponing the strict time limit set out in section 70(3).

57. As to *McLean*, it would not appear that the striking proposition that *any* application for a correction, however trivial and inconsequential, has the effect of postponing the date of the award to when the correction is made or the decision not to issue a correction is made, was put, in terms, before the court in *McLean*. I do not consider that what HHJ Humphrey Lloyd QC said was directed to such a scenario, or that he would have said what he said, or acceded to such a submission, in that scenario. Indeed, HHJ Humphrey Lloyd QC's judgment would appear to contemplate circumstances where a change may affect the substance, where there is uncertainty as to what the arbitrator decided and where the applicant needs to know more from the arbitrator to mount an appeal or challenge. For this reason, the statement that the date of the award is the date of correction (or non-correction) "*because that is the date when any uncertainties that there may have been about the award will be resolved*" cannot sensibly be read as supporting the view that an application (for example) to correct mere typographical error in counsel's name, or the omission of post-nominal initials Q.C., postpones the running of the 28-day period. That is not a change which might affect the substance. However if HHJ Humphrey Lloyd QC were to have been of the view that immaterial corrections impacted on the award, then I would disagree for the reasons that I have given.

58. Nor do I consider that it is conceptually impossible for an award to be treated as having more than one date for the purposes of section 70. In *McLean*, HHJ Humphrey Lloyd QC envisaged that the dispositive parts of an award could be severed. It seems to me that the same approach can be applied in relation to the various potential challenges which could be made to an award. This conclusion also serves the principles of speed and finality.

59. The vice of DSME's construction is no less by virtue of the suggestion that it would only result in a "short" delay in circumstances where an application for correction is to be dealt with under section 57(5) within 28 days of receipt under the Act (or potentially longer under particular arbitral rules). This could be an almost doubling of the time period, it would be contrary to the ethos of the Act, and it would be open to the abuse that I have identified. Nor do I accept that such delay is built into the processes set out in section 57 and section 70, and so is legitimate (per the submission of Mr Catchpole QC referring to paragraph 15 of the judgment in *McLean*). On the true interpretation of the Act, and for the reasons I have given, the delay is not built into the processes set out in section 57 and 70 of the Act. The Act, as properly

interpreted, provides that the date of the award is the date of the original award and not the date of the corrected award (save in cases where the corrections are material to the challenge in question, as addressed below). Accordingly the 28 day period runs from the date of the original award and not any correction to the award and I so find. That is consistent both with the express language of section 70 of the Act, and the ethos of the Act.

60. In common with Teare J, and other judges before him, I recognise that there may be cases where a correction is necessary to enable a party to know whether he has grounds to challenge such an award. That is not this case. In the present case any application for a correction is irrelevant, and cannot change the date for the calculation of the 28-day period from the date of the Award on the proper construction of section 70, for the reasons that I have already given, and this issue therefore does not arise.

61. However the point has again been fully argued before me, and so I will express my views upon it. I am in no doubt whatsoever that the position is based on a test of materiality, as identified by Teare J in *K v S*, and followed by HHJ Waksman in *Essar Oilfields*. I consider that it was (rightly) common ground in *K v S* that where there was a *material* application for a correction pursuant to section 57, the 28-day period ran, on the true construction of section 70(3), from the date of the award as corrected.

62. Challenges to arbitration awards are strictly limited by the Arbitration Act. Where they are permitted they must be promptly made, which furthers the finality of arbitration awards. In that context I (like Teare J and HHJ Waksman QC before me) consider that an application for correction of an award is material and will properly serve to postpone the running of the 28-day period until the date of the corrected award where the correction is necessary to enable the party to know whether he has grounds to challenge the award. In such a case it makes good sense. However, where the grounds for challenge are known and are not dependent upon the outcome of the application for clarification then there is no good reason to postpone the running of the 28-day period until the date of the corrected award for the reasons that I have already given. To do so would unnecessarily delay the making of a challenge to an award. That would be contrary to the aim and object of the Act to promote the finality of arbitration awards, as I have already identified.

63. A test of materiality is supported by the language of section 70 in the context of its statutory object and purpose. Section 70(2) requires prospective applicants to the court to first exhaust available avenues within the arbitral process (those avenues being any available arbitral process of appeal or review and any available recourse under section 57 (correction of award or additional award)). This, therefore, is a requirement that is a distinct requirement that must first be fulfilled. The purpose is to ensure that before there is any challenge, any arbitral procedure that is relevant to that challenge has first been exhausted. Thus if there is a material ambiguity that is relevant to the application or appeal you have first to go back to the arbitrators. However if what you are doing is seeking correction to typos then that is not a bar to you pursuing your application. Materiality is inherent within section 70(2). It is only where a matter is material that you first have to exhaust the available remedies specified in section 70(2), so that it is only in those circumstances that it is necessary for time only to run after those available remedies have been exhausted. There is no reason or necessity for time not to run, or be extended, in the context of immaterial corrections – these are not matters that have to be corrected before an appeal can be brought. This illustrates that the test of materiality is inherent in the structure of section 70(2) and 70(3). Additionally, if there was not an inherent requirement of

materiality this would undermine the entire ethos of the Act of speedy finality and also serve no useful purpose.

64. That test of materiality is well-known and well-established in the Commercial Court, the London Circuit Commercial Court and no doubt the Business and Property Courts generally, following the decision of Teare J, as subsequently followed by HHJ Waksman QC. It reflects the ethos of the Act, and it is not apt to refer to it as a "gloss", still less an unwarranted one.

65. The test of materiality also has the merit of being clear, and easy to apply, and it can leave no party uncertain as to the time by which it has to issue an arbitration claim form to seek permission to appeal. I would only add that if any prospective applicant were ever to be in any doubt, and it could not agree matters with the other party (in terms of the timing of an appeal) it could always issue an application for an extension of time before the 28 day time period expired, and indeed seek permission to appeal to the extent that it was able to do so at that time. No doubt in many cases (based on the content of the application for a correction showing materiality) such an application for an extension of time would not even be opposed, or if opposed, would be resolved in the applicant's favour should any point be taken.

C.6 Colchester Estates

66. As has already been foreshadowed, some reliance has also been placed by Mr Rainey QC upon the principle that to ensure certainty in the law, where there are two conflicting decisions of the High Court, the latter decision is to be preferred, provided it was reached after full consideration of the earlier decision, unless the third judge is convinced that the second was wrong in not following the first. As expressed by Nourse J in *Colchester Estates (Cardiff) v Carlton Industries Plc* [1986] Ch. 80 at 85:

> "It is [...] desirable that the law, at whatever level it is declared, should generally be certain. If a decision of this court, reached after full consideration of an earlier one which went the other way, is normally to be open to review on a third occasion when the same point arises for decision at the same level, there will be no end of it. Why not in a fourth, fifth or sixth case as well? Mr. Barnes had to face that prospect with equanimity or, perhaps to be fairer to him, with resignation. I decline to join him, especially in times when the cost of litigation and the pressure of work on the courts are so great. There must come a time when a point is normally to be treated as having been settled at first instance. I think that that should be when the earlier decision has been fully considered, but not followed, in a later one. Consistently with the modern approach of the judges of this court to an earlier decision of one of their number (see, e.g., *Police Authority for Huddersfield v. Watson* [1947] K.B. 842, 848, *per* Lord Goddard C.J.), I would make an exception only in the case, which must be rare, where the third judge is convinced that the second was wrong in not following the first. An obvious example is where some binding or persuasive authority has not been cited in either of the first two cases."

67. Mr Catchpole QC referred to *In re Taylor (A Bankrupt)* [2007] Ch. 150. In that case, Judge Kershaw QC considered the various cases on the subject of judges of co-ordinate jurisdiction following each other and expressed his conclusion in the following terms:

> "46 In the event I do not agree that a judge at first instance must treat a point as "settled" at first instance by the most recent decision of a court of co-ordinate jurisdiction unless (which will be rare) there is some reason why he is satisfied that it is wrong. In my judgment the duty of a judge under the law and according to his oath is to follow the law as declared by superior courts, in the present instance the House of Lords and the Court of Appeal, but otherwise to make his decision on the merits of the submissions put before him, giving appropriate weight but no more to authorities which may be persuasive but which, by law, are not binding. The point is of particular importance where the issue of law is one of jurisdiction. In my judgment it is both unseemly and wrong in law for a court to decide upon the extent of and the limits to jurisdiction given by Parliament on the basis of what amounts to a rebuttable presumption that the decision of another court of co-ordinate jurisdiction was correct. It is in the exercise of discretion, not rulings on "black-letter law" that consistency at first instance has a particular inherent value. Furthermore, bankruptcy is ex hypothesi a situation in which means are likely to be limited or non-existent, and if the approach to precedent suggested in *Colchester Estates (Cardiff) v Carlton Industries plc* [1986] Ch 80 is correct then neither a bankrupt who is sued without leave by a creditor who has a debt provable in bankruptcy nor the Official Receiver or trustee in bankruptcy would be able to take the jurisdiction point without the expense of the skilful argument necessary for an attempt to convince the High Court that the point should not he regarded as settled by *In re Saunders (A Bankrupt)* [1997] Ch 60 ."

68. Nevertheless, the principle expressed in *Colchester Estates* has been approved by the Court of Appeal. In *In re Lune Metal Products Ltd (In Administration)* [2006] EWCA Civ 1720; [2007] Bus. L.R., Neuberger LJ held, at paragraphs 9 and 10:

> "9 Whether or not the decision is ultimately upheld in this court, I consider that Judge Hodge QC was entirely right to follow the decision of Rimer J. Where a first instance judge is faced with a point on which there are two previous inconsistent decisions from judges of co-ordinate jurisdiction, then the second of those decisions should be followed in the absence of cogent reasons to the contrary: *see Colchester Estates (Cardiff) v Carlton Industries plc* [1986] Ch 80, 84 e –85 h, per Nourse J. The present case appears to me to be *a fortiori*. There were a number of inconsistent first instance decisions on the point, which Rimer J considered, and came to a clear conclusion as to which line of authority he agreed with. In those circumstances, very convincing reasons indeed would have had to have been put before Judge Hodge QC before he could sensibly have departed from the reasoning and conclusions of Rimer J.
>
> 10 It is obviously desirable that the law on any topic is as clear as reasonably possible, and that is as true in insolvency as any other field. Those administering and advising on insolvencies, and those with interests in insolvencies, need to know where they stand as certainly, cheaply and promptly as possible. Albeit that any well advised person will always be aware that a decision at first instance can be overruled by this court, that cannot possibly justify judges effectively ignoring decisions of their colleagues, even though they are not, of course, bound by them."

69. I am of the view that the law is as expressed by Nourse J in *Colchester Estates*. However, in the present case, and in circumstances where I heard full argument, and have formed my own views which accord with those of Teare J, there is no need for me to reach my decision on the basis of the *Colchester Estates* principle, and I have simply added my own reasons for reaching the conclusions I have. Nevertheless, and for the avoidance of doubt, *K v S* post-dates *Surefire*, Teare J gave full consideration to *Surefire*, and I most certainly was not convinced that Teare J was wrong (very much the reverse). The same outcome would therefore be achieved by an application of the *Colchester Estates* principle. However, I considered that certainty would best be furthered by adding my own confirmation and reasoning to that of previous judges of this Court, so as to reflect the consistent, and continuing, practice of this Court which has particular expertise in the construction of the Act, and its application.

D. DSME's Application for an Extension of Time

D.1 The Law

70. Turning then to DSME's application for an extension of time pursuant to section 80(5) of the Act. This provides:

> "Where any provision of this Part requires an application or appeal to be made to the court within a specified time, the rules of court relating to the reckoning of periods, the extending or abridging of periods, and the consequences of not taking a step within the period prescribed by the rules, apply in relation to that requirement."

71. The factors to be considered by this Court in exercising its discretion to grant an extension of time are well established. The principles were summarised by Popplewell J in *Terna Bahrain Holding Company WLL v Bin Kamil Al Shamsi* [2012] EWHC 3283 (Comm); [2013] 1 All E.R. (Comm) 580 at paras 27 – 31:

> "27 The principles regarding extensions of time to challenge an arbitration award have been addressed in a number of recent authorities, most notably in *Kalmneft JSC v Glencore International AG* [2001] CLC 1805, *Nagusina Naviera v Allied Maritime Inc* [2003] 2 CLC 1, *L Brown & Sons Ltd v Crosby Homes (North West) Limited* [2008] BLR 366, *Broda Agro Trade (Cyprus) Ltd v Alfred C Toepfer International GmbH* [2010] 2 CLC 621, and *Nestor Maritime SA v Sea Anchor Shipping Co Ltd* [2012] EWHC 996 (Comm); [2012] 2 Ll Rep 144 , from which I derive the following principles:
>
> > (1) Section 70(3) of the Act requires challenges to an award under s. 67 and s. 68 to be brought within 28 days. This relatively short period of time reflects the principle of speedy finality which underpins the Act, and which is enshrined in s. 1(a) . The party seeking an extension must therefore show that the interests of justice require an exceptional departure from the timetable laid down by the Act. Any significant delay beyond 28 days is to be regarded as inimical to the policy of the Act.
> >
> > (2) The relevant factors are:
> >
> > > (i) the length of the delay;

(ii) whether the party who permitted the time limit to expire and subsequently delayed was acting reasonably in the circumstances in doing so;

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

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

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

(vi) the strength of the application;

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

(3) Factors (i), (ii), and (iii) are the primary factors.

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

29 Secondly, factor (ii) involves an investigation into the reasons for the delay. In seeking relief from the court, it is normally incumbent upon the applicant to adduce evidence which explains his conduct, unless circumstances make it impossible. In the absence of such explanation, the court will give little weight to counsel's arguments that the evidence discloses potential reasons for delay and that the applicant ‘would have assumed’ this or ‘would have thought’ that. It will not normally be legitimate, for example, for counsel to argue that an applicant was unaware of the time limit if he has not said so, expressly or by necessary implication, in his evidence. Moreover where the evidence is consistent with laxity, incompetence or honest mistake on the one hand, and a deliberate informed choice on the other, an applicant's failure to adduce evidence that the true explanation is the former can legitimately give rise to the inference that it is the latter.

30 Thirdly, factor (ii) is couched in terms of whether the party who has allowed the time to expire has acted reasonably. This encompasses the question whether the party has acted intentionally in making an informed choice to delay making the application. In Rule 3.9(1) of the Civil Procedure Rules, which sets out factors generally applicable to extensions of time resulting in a sanction, the question whether the failure to comply is intentional is identified as a separate factor from the question of whether there is a good explanation for the failure. This is because in cases of intentional non-compliance with time limits, a public interest is engaged which is distinct from the private rights of the parties. There is a public interest in litigants before the English court treating the court's

procedures as rules to be complied with, rather than deliberately ignored for perceived personal advantage.

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

72. The factors identified by Popplewell J in *Terna* were derived from the judgment of Colman J in *Kalmneft JSC v Glencore International AG* [2001] CLC 1805. In *Kalmneft* Colman J identified the following factors at paragraph [59] of his judgment:

> "Accordingly, although each case terms on its own facts, the following considerations are, in my judgment, likely to be material:
>
> (i) the length of the delay;
> (ii) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances;
> (iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;
> (iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;
> (v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred in respect of the determination of the application by the court might now have.
> (vi) the strength of the application;
> (vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined."

73. The judgment of Colman J in *Kalmneft* was approved by the Court of Appeal in *Nagusina Naviera v Allied Maritime Inc* [2002] EWCA Civ 1147; [2003] 2 CLC 1 in which Mance LJ (Latham and Simon Brown LJJ agreeing) endorsed the judgment of Andrew Smith J at first instance (*Nagusina Naviera v Allied Maritime Inc* [2002] CLC 385).

74. In the course of that judgment, Andrew Smith J noted that it was not necessary for the respondents there to establish that they had been prejudiced by the delay in serving the claim form, on the authority of *Secretary of State for the Environment v Euston Centre Investments* [1994] 3 WLR 1091 and *Huyton SA v Jakil SpA* [1998] CLC 937. In the latter case, at page 940, Brooke LJ stated:

> "In the *Euston Centre* case this court affirmed, with a slight change of language, the developing practice of Commercial Court judges to strike out court challenges if they are not being pursued with appropriate despatch. Steyn LJ made it clear that the court's inherent power to strike out appeals to the High Court from awards of arbitrators was not limited to cases where the delay occasioned by one party was such as to cause serious prejudice to the other: it was exercisable wherever there had been a failure to conduct and prosecute an appeal with all deliberate speed."

75. The Court of Appeal in *Nagusina* also emphasised that the policy of the Arbitration Act 1979 and of the courts in relation to applications for permission to appeal is that such should be pursued with appropriate speed. As Mance LJ remarked at 14:

> "We are told that the present arbitration has not proceeded much further, but it seems to me that that is, on any view, a relatively minor factor. A party cannot, by a later application for permission to appeal which happens to have stopped the process of an arbitration (if indeed that is what has happened) significantly improve his position."

76. Mance LJ also addressed the relevance of general considerations of fairness stating, at 14:

> "Finally, as to factor (vii), general considerations of fairness, the judge must have had well in mind considerations of overall justice and fairness. They must, however, always be viewed in the particular context that Parliament and the courts have repeatedly emphasised the importance of finality and time limits for any court intervention in the arbitration process."

77. Mr Rainey QC has also rightly observed in his skeleton argument that the practice of this Court is to require "*cogent reasons for extending time*": see para. O9.2 of *The Commercial Court Guide* (10th Ed. 2017).

D.2 Application of the applicable principles to the facts

D.2.1 The Primary Factors (i)-(iii)

(i) The length of the delay

78. Mr Catchpole QC submitted that a delay of 24 days was not significant. I disagree. As Popplewell J rightly noted at paragraph 28 of his judgment in *Terna*, a delay measured even in days is significant, whilst a delay measured in many weeks or in months is substantial. It is important to bear in mind the relevant statutory yardstick which reflects the intention of Parliament, namely the short period of 28 days from the award so as to ensure finality in relation to arbitration matters. Therefore, as was also recognised by Popplewell J in *Terna,* the length of delay must be judged against the "*yardstick of the 28 days provided for in the Act.*" The delay in the present case, of 24 days, is over three weeks, and is approaching the entirety of the period specified by Parliament. That is a substantial delay – by the time DMSE made their belated application for permission to appeal under section 69 almost twice the length of time prescribed by statute had passed.

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

79. Not only was the delay substantial but no satisfactory explanation has been given as to why the delay arose. DSME suggested in its evidence that it was "*acting reasonably and in line with prevailing authority.*" As to the latter point, DSME was not acting in line with prevailing authorities. I have already addressed the relevant authorities. The decision of Teare J in *K v S* is clear and is directly in point and it was followed in *Essar Oilfields*. In any event DSME does not suggest, and cannot suggest that, it was unaware that the deadline was 15 August 2017 or that it acted on the basis that there was some other deadline as a result of the request for correction – Mr Kim acknowledged the deadline of 15 August 2017 in his conversation with Mr Moon on 17 August 2017.

80. Even when DSME was informed that it was out of time by Songa on 20 September 2017, it did not issue its section 69 application promptly, with the application only being made over a week later on 28 September 2017.

81. DSME was not acting reasonably in all the circumstances in failing to issue the application by the deadline or until it did, and the various explanations it has offered to explain the reasons for the delay do not justify its inaction. In this regard it is said:-

i) First, that Korean corporations have "*very hierarchical management structures*" and that "*decision-making will often take a considerable period of time in relation to important issues*".

ii) Secondly, Mr Young Soon Lee (who has been described as the decision maker), was travelling outside Korea from 17 – 23 July 2017 to attend a meeting in Europe.

iii) Thirdly, the shipyard was closed from 28 July to 14 August 2017 for a summer vacation.

iv) Fourthly, even though the shipyard was closed until 14 August, "*Songa argue that the deadline for any appeal under s.69 of the Act expired the following day on Tuesday 15 August*".

v) Fifthly, it is asserted that until the Memoranda of Correction were published by the Tribunal on 14 August 2017, it was "*difficult to DSME to make a decision in relation to the next issue as to whether an application for leave to appeal should be made under s.69 of the Act*".

82. I do not consider that any of these matters, individually, or collectively, provide a justification for the delay or lead to the conclusion that DSME was acting reasonably in all the circumstances.

83. The fact that Korean corporations have very hierarchical management structures and take a considerable period of time in relation to important issues does not begin to justify delay. Indeed if there is such a structure that is all the more reason to put steps in train in good time before the deadline. That there is a short time limit is a well-known fact and is an important feature of arbitration under the Act. Many parties appearing in this Court in arbitration matters no doubt have hierarchical management structures and take time to make decisions. This is not a convincing reason to extend time generally, nor in the circumstances of this case, not least because it would substantially undermine the fundamental principle of speedy finality.

84. Turning to the second point, Mr Lee was only outside of Korea for five days. He was working in Europe. His role was likened by Mr Catchpole QC to a filter, with Mr Lee being the person who elevates matters to be decided by those further up in DSME. No explanation has been offered as to why he was unable to take steps to elevate the decision whether or not to appeal remotely in Europe or during the remainder of the time period when he was in Korea.

85. Taking the third and fourth points together, the fact that the shipyard was closed from 28 July to 14 August 2017 for a summer vacation does not begin to justify, either on its own or cumulatively with any other factor, the delay. DSME knew of its own work practices, and of its planned closures. It was for DSME to take account of such matters and work around them. There was nothing to prevent decisions being taken remotely (if not already taken) during the closure period. The underlying substantive drafting (which could be considered and approved remotely) would have been done by the lawyers.

86. Finally, the assertion that, prior to the publication of the Memoranda of Correction, it was difficult to DSME to make a decision whether or not to appeal lacks reality. The corrections in question were minor clerical errors – essentially typographical errors – wholly unrelated to DSME's (belated) challenge. Put simply, DSME could not have had any doubt as to the meaning or effect of the Awards, or to the Tribunal's reasoning. In such circumstances, they had no reasonable bearing upon DSME's decision making.

87. In all the circumstances DSME was not acting reasonably in failing to issue the application by the deadline or until it did, and the various explanations it has offered to explain the reasons for the delay do not justify its inaction.

(iii) Whether the Respondent to the application or the arbitrator caused or contributed to the delay.

88. It is not suggested, and cannot be suggested, that Songa, or the Tribunal caused or contributed to the delay. Far from causing or contributing to the delay, I have already noted that Songa's solicitors promptly drew to the attention of DSME's lawyers that time had expired but even then no immediate application was made, and further time passed before an application for an extension was made.

89. Thus, there was a substantial delay in circumstances where DSME was not acting reasonably in failing to issue the application by the deadline or when it did and neither Songa nor the Tribunal caused or contributed to such delay. These primary factors speak with one voice that this is not an appropriate application for an extension. I turn to the remaining factors.

D2.2 The remaining factors (iv)-(vii)

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

90. There is no evidence of any prejudice to Songa beyond the fact that, if permission is granted, it will need to respond to the section 69 application. It is clear on the authorities, in particular *Euston Centre Investments* and *Huyton SA v Jakil SpA* that

prejudice is not a necessary requirement for a refusal of an application to extend time. Indeed, there is a public interest in finality in arbitrations, quite separate from any particular prejudice to an individual party in a given case. The lack of prejudice does not, in of itself, or in combination with any other factor, justify an extension in the present case.

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

91. The Awards disposed of DSME's claims, and so this is not a case where any extension would impact upon the progress of the application. By the same token, however, given that this, the principle of finality is engaged (as already addressed).

(vi) The strength of the application

92. As to the merits of the case, I do not consider this to be a case where the prospects of DSME succeeding are such that it could materially impact upon my view as to whether the discretion ought to be exercised. This is not a case in which DSME's claim can be said to be so strong it would be an obvious hardship for them not to be able to pursue it. If, anything, on a preliminary examination of the papers, the Tribunal would not appear to be obviously wrong. In particular, in this regard, DSME's case (including its Skeleton Argument on the application for permission to appeal) does not grapple with the fact that during the clarification process DSME had been asked and answered Question 10 in the following terms: *"Confirm acceptance of the full responsibility for design documents/Input to GVA design (ITT 3.11 – FEED documentation and Appendix F Part 1…"* to which the reply from DSME was, *"Builder confirms"* a matter relied upon by the Tribunal in support of their construction on the first question (Award paragraph 22). However I do not consider DSME's claim to be so weak as to be a factor to be taken against them.

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

93. Finally, in relation to the general consideration of fairness to the applicant applied in the context of the regime enacted by Parliament with its emphasis upon speedy finality, I do not consider that, in the broadest sense, it would be unfair to DSME to be denied the opportunity of having its application determined. The time limit imposed by Parliament is intentionally short. The delay here was both significant and substantial. DSME has failed to demonstrate that in permitting the time limit to expire, and in relation to the subsequent delay that occurred it was acting reasonably in the circumstances. These are strong primary factors telling against the granting of an extension. Having regard to all the factors, as addressed above, and taken as a whole, I do not consider that this is an appropriate case for an extension, and accordingly I refuse the extension of time sought.

E. Conclusion

94. The statutory time period of 28 days having expired and no extension having been granted, DSME's section 69 application stands no real prospect of success and accordingly I dismiss that application.

95. I trust the parties will be able to agree an Order consequential upon my judgment including as to costs which, *prima* facie, should follow the event.