Neutral Citation Number: [2018] EWHC 1673 (Comm)

Case No: CL-2017-000432

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2018

Before :

THE HONOURABLE MRS JUSTICE CARR DBE

- -

Between :

DERA COMMERCIAL ESTATE	**Claimant**
- and -	
DERYA INC	**Defendant**

- -
- -

Mr David Semark (instructed by **Mills & Co Solicitors Limited**) for the **Claimant**
Mr Ravi Aswani (instructed by **Hill Dickinson LLP**) for the **Defendant**

Hearing dates: 12th and 13th June 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.

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THE HONOURABLE MRS JUSTICE CARR DBE

Mrs Justice Carr :

Introduction

1. This is a challenge by the Claimant, Dera Commercial Est ("Dera"), to the award of a LMAA Tribunal comprised of Mr David Aikman, Mr Edward Mocatta and Mr James Baker ("the Tribunal") dated 13th June 2017 ("the Award"). By the Award the Tribunal dismissed Dera's counterclaim for damage to and/or loss of cargo ("the cargo claim") pursuant to s. 41(3) of the Arbitration Act 1996 ("s. 41(3)") ("the Act") on the application of the Respondent, Derya Inc ("the Owners").

2. Dera pursues a challenge under s. 68 of the Act ("s. 68") and, with the permission of Leggatt J (as he then was), appeals under s.69 of the Act ("s. 69") on the following grounds:

    a) serious irregularity (s.68): Dera contends that the Tribunal failed to act fairly and impartially in its conduct of the arbitration contrary to s.33 of the Act. Its varied complaints were challenged summarily on paper by the Owners pursuant to CPR 3.3(4) and CPR 23.8(c) in accordance with the procedure provided for in paragraph O8.5 of *The Commercial Court Guide*. Leggatt J dismissed all of the procedural challenges summarily save for the allegation of apparent bias, which he judged to require a hearing for proper resolution;

    b) points of law (s.69):

        i. Whether a claim which is particularised within the six year limitation period applicable to contractual claims pursuant to s. 5 of the Limitation Act 1980 can nevertheless be struck out for "inordinate delay" under s. 41(3) because the parties have contracted for a shorter limitation period (here one year under Article III Rule 6 of the Hague Rules ("Article III Rule 6"));

        ii. Whether, in a contract evidenced by a bill of lading subject to the Hague Rules, a geographic deviation precludes a carrier from relying on the one year time bar created by Article III Rule 6;

        iii. Whether, where the one year time bar created by Article III Rule 6 applies, the period between a) the time that the cause of action arises and b) the expiry of the contractual time limit is to be taken into account when assessing whether the delay is "inordinate" for the purpose of s. 41(3);

        iv. The proper order, burden and/or standard of proof applicable to a tribunal's assessment of whether a delay is "inexcusable" for the purpose of s. 41(3).

3. Thus, Dera's challenges of law on the principles applicable under s. 41(3) go only to the question of inordinate and inexcusable delay. There is no (nor could there be any) challenge to the finding of serious prejudice through delay to the Owners and the consequent likelihood that this gave rise to a substantial risk that it was not possible to have a fair resolution of the issues in the cargo claim. Nevertheless, success for Dera

on the issue of delay would be sufficient for it to succeed in overturning the decision the Tribunal's decision to strike out. The challenge of law on the issue of geographic deviation does not arise directly under s.41(3), but is nevertheless related to the merits of the Owners' application to dismiss the claim for inordinate and inexcusable delay, in the sense that it could affect the relevant limitation period for commencement of the cargo claim.

4. The questions of law are said to be of general public importance. In particular, there is a dearth of post-1996 authority on the operation of s. 41(3). Only two previous decisions in which it has been considered have been identified: *Tag Wealth Management v West* [2008] 2 Lloyds Rep 699 and *Grindrod Shipping Pte Ltd t/a Island View Shipping v Hyundai Merchant Marine Co Ltd* [2018] EWHC 1284 (Comm). In neither of those cases were the issues that arise here under any direct scrutiny. The impact of geographic deviation on limitation and exclusion clauses in the Hague Rules such as Article III rule 6 is also an issue of broad significance.

Background

The voyage

5. By a contract first concluded on 4th February 2011, Dera purchased 18,000mt of Indian maize ("the cargo") from Rika Global Impex Ltd ("Rika"). The purchase price was approximately US$6,000,000. The MV Sur ("the Vessel") was a bulk carrier with a deadweight of 28,000 tons formerly owned by the Owners. On 5th May 2011, Rika chartered the Vessel from the Owners on a voyage charter to carry the cargo from India to Jordan.

6. Five bills of lading were issued in respect of the cargo. Their terms were materially identical. They were all issued in Mumbai on the Congen form and Dera was named as the Notify Party. On their reverse there was a General Paramount Clause incorporating Article III Rule 6 which provides:

> *"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."*

7. There was also a clause incorporating the terms of the charterparty between Rika and the Owners ("the Charterparty"). The Charterparty was on an amended BIMCO form and made provision for disputes to be referred to arbitration in London and for English law to apply.

8. The cargo was loaded onto the Vessel in two batches. On both occasions, rain caused delays and quantities of wet maize were rejected during loading.

9. The first batch (around 8,000mts) was loaded at Diamond Harbour between 24th May and 14th June 2011. Some of the cargo was then discharged from the Vessel and reloaded (for reasons which remain unclear). Two bills of lading were issued in respect of the cargo loaded at Diamond Harbour. The Vessel departed from Diamond Harbour on 16th July 2011 (one month after loading had been completed). The Vessel arrived at Vizag on 18th July 2011 and the remaining 10,000mts of the cargo was loaded between

21st and 27th July 2011. Three Bills of Lading were issued in respect of the cargo loaded at Vizag. The Vessel departed for Aqaba on 28th July 2011 (the day after loading had been completed).

10. The Vessel arrived at Aqaba, Jordan, around two weeks later, on 16th August 2011. On arrival, the Jordanian customs authorities took samples of the cargo from the Vessel's hold. On 8th September 2011, having analysed those samples, the Jordanian customs authorities issued a letter indicating that the cargo would not be permitted to enter Jordan and must be returned to its country of origin. This was on account of "*broken percentage, foreign matters, impurities, damaged kernels…and apparent fungus*".

The Jordanian Proceedings and commencement of the arbitration

11. Four days later, on 12th September 2011, Dera issued proceedings against the Owners in Jordan seeking damages of approximately US$8,000,000 in respect of the damage to the cargo ("the Jordanian Proceedings").

12. On 16th September 2011, the Owners' P & I insurers, the American Club ("the Owners' insurers") (in the exercise of their subrogated rights) appointed Mr Aikman as the Owners' arbitrator "*in connection with all disputes/differences arising under the bills of lading"*.

13. On 4th October 2011, the Owners made an application to the English Court for an anti-suit injunction restraining Dera from taking further steps in the Jordanian Proceedings on the basis that to do so would be in breach of the arbitration provisions in the Charterparty. In the event, the Owners' application for an anti-suit injunction was dealt with by consent.

14. On 7th October 2011, Dera notified the Owners' solicitors that it had appointed Mr Mocatta as arbitrator on its behalf "*in connection with all disputes/differences arising under the bills of lading"*.

15. A consent order in the anti-suit proceedings was sealed on 25th October 2011. It declared that, under the terms of the Charterparty, Dera was obliged to refer the cargo claim to arbitration in London. The Jordanian Proceedings were subsequently struck out.

Re-export of the cargo

16. Meanwhile, the cargo remained on board the Vessel at Aqaba. The Owners' efforts had been focussed on arranging for it to be re-exported so that the Vessel could sail from Aqaba to a port where the cargo could be discharged. The Owners made an urgent application to the Jordanian Court for an order obliging Dera and the Jordanian customs authorities to grant the necessary permissions for it to do so. That application was finally dismissed on 22nd September 2011. On 17th October 2011, the Owners' insurers issued a Letter of Undertaking ("the LOU") to Dera in the following terms:

> *"In consideration of and upon the condition that you release and/or refrain from arresting and/or re-arresting or otherwise detaining [the Vessel] or any other vessel, asset, or other property in the same or associated ownership, management, or*

> *control to secure the above claim, we, the American Steamship Owners Mutual Protection and Indemnity Association, Inc., hereby undertake to pay you within (30) days of our receipt of your written demand, any such sums(s) that may be adjudged to be due to you in respect of [the alleged loss, shortage and/or damage to the Cargo] from the vessel and/or her owners, by a final, unappealable award of a London arbitration Tribunal, or as may be agreed between the parties and the undersigned Association, to be recoverable from the owners of the vessel, in respect of the said claim(s), provided that the total of our liability hereunder shall not exceed the sum of US $9,000,000…including interest and costs."*

17. Dera's efforts had been focussed on reversing the decision of the Jordanian customs authorities so that the cargo could be discharged at Aqaba as originally planned. On 12th October 2011 (five days before the issue of the LOU), Dera thus applied to the Jordanian customs authorities for a reconsideration of this decision. That application was not successful. On 26th October 2011 (nine days after issue of the LOU), Dera made a further application to the Jordanian customs authorities for permission to fumigate the cargo on board the Vessel in the hope of preserving its condition. That application was granted on 2nd November 2011.

18. On 8th November 2011, the Vessel sailed to Turkey with the cargo on board. This was without the consent of Dera or the Jordanian customs authorities.

19. On 16th November 2011, the Vessel arrived in Turkey at the port of Mersin. The cargo remained on board for five months until it was discharged at Mersin between 14th and 21st March 2012. On 25th April 2012, the cargo was sold by pursuant to a judicial sale ordered by the Turkish court. The proceeds of the sale were transferred to the Owners in early 2013, pursuant to two enforcement orders of the Turkish Court.

20. The Owners claimed that the Vessel had incurred demurrage while at Aqaba, during transit to Turkey and during discharge at Mersin. The Owners commenced proceedings in the Turkish courts to recover those sums from Dera ("the Turkish Proceedings"). It was in the context of those proceedings that the enforcement orders against the cargo were made (on 3rd December 2011 and 22nd May 2012 respectively). Service of the enforcement orders on Dera was effected through the Jordanian Ministry of Justice. This took some time and the orders were not formally served until October 2012 (six months after the cargo had been sold). However, both orders made clear (in accordance with Turkish law) that Dera had the right to raise an objection within 7 days of formal service. In the event, Dera did not raise its objections until 16th January 2013 (three months after formal service). Dera's objections were renewed on 21st January 2013. All objections were based on allegations of defective service. All were dismissed on the basis that they had been raised outside the 7-day time limit. The last of those objections was finally dismissed on 15th May 2013.

21. One month later, in June 2013, the Owners sold the Vessel for scrap.

The arbitral proceedings: procedural history

22. It was common ground before the Tribunal that the cargo claim fell within the scope of the appointment of Mr Mocatta on 7th October 2011. Accordingly, the cargo claim was commenced within the one year time limit under Article III Rule 6.

23. No formal procedural steps were taken by either side in the arbitration thereafter until March 2015.

24. On 12th November 2013 the Owners' solicitors wrote to Dera's then solicitors in the following terms:

> *"Your clients presently hold an LOU issued by the American Club in the sum of US$9 million as security for a cargo claim allegedly arising in summer 2011. This claim has never been pursued by your clients. We can only assume that this is because they understand that there are no merits in the claim…. Our clients deny that they had any liability for the cargo damage. Brookes Bell were in attendance at Aqaba and we have their survey report confirming that there were no seaworthy issues with the vessel and, if there was cargo damage, it was not caused by the ship."*

25. On 14th July 2014 the Owners' solicitors again wrote to both Dera's then and intended future solicitors stating, amongst other things:

> *"Other than the appointment of arbitrators, no steps have been taken in relation to the cargo claim. The proceedings are ripe for an application to strike out for want of prosecution."*

26. On 21st July 2014 Dera's (new) solicitors replied in the following terms:

> *"We have spoken to cargo interests and we understand that they wish to transfer the file to us. However, we are waiting for written confirmation, but expect to have this shortly.*
>
> *In the meantime, my understanding is that [Dera] object in the strongest possible terms to any application for strike out. Irrespective of the condition of the cargo, it appears that Owners simply sailed off with the full cargo on board and sold it in a convenient (for them) jurisdiction, and that the proceeds of sale have not been accounted for to [Dera]. Instead, Owners appear to have pocketed the money on the basis of set off against an unascertained claim for demurrage/other expenses in achieving the sale."*

27. On 23rd March 2015 the Owners served particulars of their claim seeking amongst other things a declaration of non-liability for the cargo claim and an order that the LOU be released ("the declaration claim"). That was three and a half years after commencement of their claim on 16th September 2011. Three months later, on 1st June 2015, Dera

served particulars of the cargo claim. That was some three years and eight months after commencement of the cargo claim on 7th October 2011.

28. Reply submissions were served on 26th August 2015 (by the Owners) and on 16th October 2015 (by Dera).

Preliminary issues

29. The Owners, in their LMAA questionnaire dated 26th January 2016, formulated a list of five issues for determination in the declaration claim and the cargo claim. They indicated that two of those issues were suitable for determination as preliminary issues. Dera, in its questionnaire dated 23rd February 2016, identified a list of 16 issues and indicated that none were suitable for determination as preliminary issues.

30. Over the email correspondence that followed, the parties and the Tribunal discussed the nature and scope of the issues in the arbitration. On 15th March 2016, as part of that discussion, the Owners suggested the following formulation of the two preliminary issues identified in its questionnaire:

    a) "Is [Dera's] cargo claim extinguished by virtue of the orders made in proceedings in Turkey as set out in the witness statement of Meryem Deris dated 26 February 2015 served in these proceedings" ("Preliminary Issue A").

    b) "Should [Dera's] cargo claim be struck out for want of prosecution" ("Preliminary Issue B").

31. On 18th March 2016, the Tribunal informed the parties that it would determine (as preliminary issues) Preliminary Issue A and Preliminary Issue B.

32. On 20th March 2016, Dera wrote to the Tribunal and to the Owners objecting to the Tribunal's order:

> *"In the LMAA Questionnaire [the Owner] proposed a preliminary issue on whether [Dera's] cargo claim was time barred. When we explained in our e-mail of 10th March why the claim could not possibly be time barred, the proposal suddenly metamorphosed into a Preliminary Issue on whether [Dera's] cargo claim should be struck out for delay. The tribunal has since allowed that Preliminary Issue in its order below, before we have commented on the matter (albeit we had two and a bit days to do so, before the tribunal made its order)."*

33. In the event, the Tribunal proceeded to determine Preliminary Issue A and Preliminary Issue B as formulated by the Owners in their email dated 15th March 2016.

The Award

34. The Award was published on 13th June 2017 following a three day hearing in March 2017. It is a full and clearly structured decision. A notable feature is the fact that two out of the four areas of current complaint arise out of issues that were raised very late in the day by Dera: the issue of geographical deviation was never pleaded but only raised in argument at the hearing. Whilst the Tribunal chose to address the issue

substantively, the Owners' procedural objection remains outstanding. Debate over the burden and standard of proof only arose in the course of closing submissions. None of this made the task of the Tribunal any easier. The experience highlights the avoidable complications that can arise if issues are not properly and timeously identified by the parties.

Preliminary Issue A

35. In relation to Preliminary Issue A, the Tribunal found that the cargo claim was not extinguished by the orders made in the Turkish Proceedings.

36. At paragraph 109 of the Award, the Tribunal summarised the issues as follows: "… *it seems to us that the overriding issues which emerge from the contentions of the parties were whether there had been a submission by [Dera] to the jurisdiction of the Turkish Courts and, if so, whether there had been an effective determination of the Cargo Claim. The [Owners] also raised arguments regarding estoppel and waiver/renunciation of the arbitration clauses …*".

37. The Tribunal found in favour of Dera on all issues:

    a) At paragraph 110, the Tribunal concluded that the steps taken by Dera in the Turkish Proceedings did not amount to a submission to the jurisdiction of the Turkish Court;

    b) Later in paragraph 110, the Tribunal concluded that there was no consideration on the merits, and therefore no "effective determination", of the cargo claim by the Turkish Court;

    c) At paragraph 111, the Tribunal concluded that no issue or cause of action estoppel arose because the cargo claim, as particularised in the arbitration, had not been considered by the Turkish Court;

    d) At paragraph 112, the Tribunal disposed of the waiver issue on the basis that there was no evidence of an unequivocal representation by Dera or detrimental reliance by the Owners.

Preliminary Issue B

38. In relation to Preliminary Issue B, the Tribunal found that there been inordinate and inexcusable delay on the part of Dera, and that such delay had caused serious prejudice to the Owners and created a substantial risk that it was not possible to have a fair resolution of the cargo claim. Accordingly, the Tribunal struck out the cargo claim under s. 41(3).

39. The Tribunal dealt, at the outset, with what it described as "*an important point of disagreement which came to a head towards the end of the parties' closing submissions regarding the standard of proof which we should apply in reaching our decision*".

40. The Tribunal noted (at paragraph 117 of the Award) that the standard of proof to be applied on an application under s. 41(3) is the balance of probabilities. This was in response to the submission (from counsel for Dera) that "*Dera would only have to satisfy a prima facie burden of proof in relation to the issue of whether it has a credible*

excuse for failing to progress its claim any earlier than it did". The counter-submission (for the Owners) was that "*the prima facie type of standard is applied by tribunals and courts when dealing with an interim matter….The [Owners'] application is for a final decision as to whether the claim should be dismissed pursuant to s41 of the Arbitration Act….there is nothing in the authorities to support the proposition that a respondent to an application of this type only has to prove an excuse prima facie.*" The Tribunal accepted that counter-submission and concluded that "[*s]ince the award of the Tribunal will be a Final Award*" the standard of proof is the balance of probabilities.

41. At paragraph 118, the Tribunal went on to consider the burden of proof and acknowledged that "*the burden of proof is generally on the party seeking dismissal and that where a delay is found to be inordinate, the evidential burden then shifts to the party resisting dismissal to "make out a credible excuse"…*".

42. The Tribunal made further observations in relation to the burden and standard of proof later in the Award. At paragraph 131, the Tribunal referred to the burden of proof having "shifted" from the Owners (in relation to the question of whether the delay was inordinate) to Dera "*to prove that it was not inexcusable*". At paragraph 156, having reviewed the submissions of the parties and the evidence, the Tribunal considered whether it had been "*persuaded on the balance of probabilities that [Dera] has a credible excuse for its delay in pursing the Cargo Claim or that the [Owners] bore responsibility for that delay*". At paragraph 157, the Tribunal referred to the burden of proof having "shifted" from Dera (in relation to the question of whether the delay was inexcusable) to the Owners (in relation to the issue of whether the delay has caused, or is likely to cause, serious prejudice to the Owners).

Inordinate

43. At paragraph 128, the Tribunal concluded that the applicable limitation period for the cargo claim should be "*the yardstick of inordinate delay*". It relied on Merkin & Flannery, *The Arbitration Act* (5th ed.) (2014) ("*Merkin & Flannery")* (at p.161) citing the decision of Aikens J (as he then was) in *TAG Wealth Management v West* [2008] 2 Lloyd's Rep 699 (at p. 26) and the decision of Rix J (as he then was) in *The Finnrose* [1994] 1 Lloyd's Rep 559 (at p. 564).

44. At paragraph 129, the Tribunal concluded that (pursuant to Article III Rule 6) the applicable limitation period was one year. This was on the basis that, on a proper construction of Article III Rule 6, the one-year limitation period was intended to apply even in cases pleaded in tort or where there has been a serious breach of contract such as a geographic deviation. The Tribunal based its finding in relation to geographic deviation on the decision in *The Kapitan Petko Voivoda* [2003] 2 Lloyd's Rep 1 at [16] to [17] in which it was held that the words "*in any event*" suggest that the limitation provision applies even in cases where the breach is of the obligation to stow cargo below deck. *The Kapitan Petko Voivoda* concerned the limitation under Article IV Rule 5 of the Hague Rules. The Tribunal relied on the commentary in *Carver on Bills of Lading* (3rd ed.) (2012) (and now in its 4th ed. (2017) and materially the same) ("*Carver"*) at [9-181] in which it was said "*the reasoning [in The Kapitan Petko Voivoda] is clearly intended to apply to the time bar also."*

45. At the start of paragraph 130, the Tribunal found that it was entitled to take into account the entire period (since accrual of the cargo claim) when considering whether the delay

was inordinate. The Tribunal found that there was no basis for excluding the period after commencement of the cargo claim but before the limitation period had expired, relying on *Rath v Lawrence & Partners* [1991] 1 WLR 399 at [411C] and the commentary in Ambrose & Maxwell, *London Maritime Arbitration* (3rd ed.) (2009) (now in its 4th ed. (2017) and materially the same) (*"Ambrose & Maxwell")* (at pp. 212-213).

46. The Tribunal noted Dera's obvious ability to particularise the cargo claim as early as 12th September 2011 (because it did precisely that in the context of the Jordanian Proceedings). On that basis, the Tribunal counted the entire period from that date until the date on which the cargo claim was particularised in the arbitration (i.e. 1st June 2015). That was three years and nine months. The Tribunal accepted that it should use its knowledge and experience to assess whether, in all the circumstances, the delay was inordinate. On the facts of the case, when comparing a period of three years and nine months with the one year limitation period applicable under the Hague Rules, it found the delay by Dera in prosecution of the cargo claim to be inordinate. The Tribunal also confirmed that, even if it had accepted the submission of counsel for Dera that time should not start to run until the date on which Dera contended that the cargo should have been delivered (i.e. November 2011), its decision would have been the same.

Inexcusable

47. The principal excuse for the delay proffered by Dera was Dera's impecuniosity. After the departure of the Vessel on 8th November 2011, the Jordanian authorities began investigating the circumstances surrounding that departure. As part of that investigation Dera was referred to the Jordanian State Anti-Corruption Authority. Ultimately, in 2013, Dera and its directors were charged with smuggling. Meanwhile, the Jordanian authorities refused to issue Dera with permits to import further cargo. By 2012, a number of banks had withdrawn Dera's banking facilities. Dera blamed the Owners, and their decision to depart on 8th November 2011, for these events. Dera maintained that, as a result of these events, Dera simply could not afford to progress the cargo claim. Dera submitted that the Owners were not permitted to rely on delays for which they were responsible (even if only in part).

48. Having considered all the evidence, including the oral evidence of Mr Mazin Bulbul of Dera, the Tribunal rejected Dera's evidence that its impecuniosity was caused by the actions of the Owners. The Tribunal found that Dera's financial problems pre-dated the departure of the Vessel from Aqaba and were caused by Dera's default in respect of its payment obligations under various loan agreements. Mr Bulbul had said that Dera was able to take steps to progress the claim in June 2015 because Dera had "*won a couple of cases and we are executing these cases in Jordan and outside Jordan*". The Tribunal found that this evidence was not supported by the documentary record and rejected it as a matter of fact. It went on to say:

> *"We can therefore only conclude that the service of [Dera's] Defence and Counterclaim on 1st June 2015 had been prompted as alleged by the [Owners], by the service of [the Owners'] Claim Submissions on 23rd March 2015."*

Prejudice/risk to fair resolution

49. Having concluded that the delay was inordinate and inexcusable, the Tribunal went on to consider whether it had caused, or was likely to cause, serious prejudice to the Owners or gave rise, or was likely to give rise, to a substantial risk that it would not be possible to have a fair resolution of the issues. The Tribunal concluded, at paragraphs 163 and 164, that there was prejudice caused by the delay and that it would threaten the fair resolution of the issues. This was on account of the unavailability of key evidence on the condition of the cargo at the time of loading and the events at Aqaba following the decision of the Jordanian authorities on 8th September 2011.

Costs

50. The Tribunal's award on costs is set out at paragraph 173:

> *"Given that, the outcome of the application before us is that the Cargo Claim which has been brought by [Dera] as a counterclaim in these proceedings has been struck out and has accordingly been extinguished, the [Owners] ha[ve] been successful and we see no reason to depart from the general principle that costs follow the event. We therefore award the [Owners] [their] costs in this reference and those costs shall be in the currency that they were billed rather that the United Sates dollars as sought by the [Owners]."*

Ss. 68 and 69

51. The court has no general supervisory jurisdiction over arbitral proceedings. Its powers of intervention are strictly circumscribed. Ss. 68 and 69 are the relevant sections for present purposes. S. 68 provides materially:

> *"(1) A party to arbitral proceedings may…apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).*
>
> *(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant-*
>
> *a) failure by the tribunal to comply with section 33 (general duty of tribunal)…"*

52. S. 33 of the Act provides materially:

> *"General duty of the tribunal*
>
> *1) The tribunal shall:*

> *a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent…*

53. The threshold for intervention by this court under s. 68 is a high one: see the judgments of Popplewell J in *Terna Bahrain Holding Co YJJ v Bin Kamel Al Shamzi* [2013] 1 Lloyds Rep 86 (at [85]) and *Reliance Industries Ltd and another v The Union of India* [2018] EWHC 822 (Comm) at [12] to [15]). As Popplewell J there stated, the threshold is deliberately high because a major purpose of the Act was to reduce drastically the extent of intervention by the courts in the arbitral process. He went on as follows:

> *"A balance has to be drawn between the need for finality of the award and the need to protect parties against the unfair conduct of the arbitration. In striking this balance, only an extreme case will justify the Court's intervention. Relief under s. 68 will only be appropriate where the tribunal has gone so wrong in its conduct of the arbitration, and where its conduct is so far removed from what could reasonably be expected from the arbitral process, that justice calls out for it to be corrected."*

54. The test is not what would have happened had the matter been litigated; the focus of the enquiry under s. 68 is due process and not the correctness of the Tribunal's decision (see paragraph 280 of the Departmental Advisory Committee report on the Arbitration Bill and *Secretary of State for the Home Department v Raytheon* [2014] EWCH 4375 (TCC) at [33]). S. 68 is thus designed as a long-stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice demands a remedy.

55. S. 69 provides materially as follows:

> *"Unless otherwise agreed by the parties, a party to arbitral proceedings may…appeal to the court on a question of law arising out of an award made in the proceedings."*

56. The law is to be applied by reference to the facts as found by the Tribunal.

57. Given the nature of the criticisms levelled at the Award, it is important to bear in mind the court's general approach to appeals on points of law under s. 69. The courts strive to uphold arbitration awards. When reviewing the reasons of an arbitral tribunal, the court should read the award "*as a whole in a fair and reasonable way…..[and] should not engage in minute textual analysis"* (see *Kershaw Mechanical Services Ltd v Kendrick Construction*" [2006] EWHC 727 (TCC) at [57]). The courts do not approach awards "*with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration"* (see *Zermalt Holdings SA v Nulife Upholstery Repairs Ltd* [1985] 2 EGLR 14). Not only will the court not be astute to look for defects, but in cases of uncertainty it will so far as possible construe the award in such a way as to make it valid rather than invalid (see *MRI Trading AG v Erdenet Mining Corp LLC* [2012] EWHC 1988 (Comm) at [15] and [16] (upheld on appeal at [2013] EWCA Civ 156)).

58. Finally, the relief element in both ss. 68 and 69 is discretionary, as indicated by the permissive nature of the use of the word "*may*" in s. 68(3) and s. 69(7) (see *Integral Petroleum SA v Melars Group Ltd* [2016] EWCA Civ 108 at [26] and [27]). The court is not required to make any order at all even if the application is well-founded, although cases of no relief being granted following a well-founded application are rare.

The challenge on points of law : s. 41(3)

59. The points of law in issue all arise out of or are relevant to the Owners' application under s. 41(3). S. 41(3) provides that, unless otherwise agreed:

> *"(3) If the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay-*
>
> *(a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in the claim, or*
>
> *(b) has caused, or is likely to cause, serious prejudice to the respondent,*
>
> *the tribunal may make an award dismissing the claim."*

60. S. 82 of the Act provides that "claimant", unless the context otherwise requires, includes a counter-claimant, and related expressions shall be construed accordingly".

61. The predecessor to s. 41(3) was s. 13A of the Arbitration Act 1950 (inserted by s. 102 of the Courts and Legal Services Act 1990, which came into force on 1st January 1992), giving to arbitrators a power to dismiss for inordinate and inexcusable delay causing prejudice similar to that exercised by the courts. This followed a "*clamour*" in the markets and the courts that the law be changed so that stale arbitration claims could be dismissed in much the same way as stale claims in the courts (see the comments of Sir Thomas Bingham MR in *L'Office Chérifien des Phosphates Unitramp SA v Yamashita-Shinnihon Steamship Co Ltd ("The Boucraa")* [1994] 1 AC 486). The powerlessness of arbitrators in this regard had come to be seen as a "*significant blemish*" on the English arbitration regime, and the amendment was intended to remove it.

62. As the authors of *Merkin & Flannery* point out (at p. 161), there is no small irony in the fact that, shortly after the Act came into force, the old court power (under RSC Order 25 in particular) to strike out for want of prosecution was removed and replaced with a much more general (but arguably more limited) power under CPR 3.4.

Point of law 1 : whether a claim which is particularised within the six year limitation period applicable to contractual claims pursuant to s. 5 of the Limitation Act 1980 can nevertheless be struck out for "inordinate delay" under s. 41(3) because the parties have contracted for a shorter limitation period (here one year under Article III Rule 6)

63. In my judgment it is clear on authority and principle that a claim which is particularised within the six year period applicable to contractual claims pursuant to the Limitation Act 1980 can nevertheless be struck out for inordinate delay under s. 41(3) because the

parties have contracted for a shorter period. The answer is straightforward. The statutory limitation period is irrelevant in circumstances where, as here, the parties have contracted for something different.

64. It would nevertheless be wrong to elevate the relevant limitation period to the status of being "the" yardstick. Rather it is "a" yardstick, albeit an important one. The length of the relevant limitation period sets the context in which the nature of the period or periods of delay will be assessed, specifically whether the delay overall is inordinate or not. Whether or not delay is inordinate will always be a fact-sensitive exercise in each case.

65. This is consistent with the decision of Rix J (as he then was) in *The Finnrose* [1994] 1 Lloyd's Rep 559 where he stated (at p. 564):

> *"…where parties agree or are otherwise subject to a limitation period such as one year, so much shorter than the period of six years which would otherwise apply, it is clearly contemplated that the parties will or ought to proceed with litigation with that dispatch and promptitude inherent in the relevant time scale."*

66. It is also consistent with the decision in *Tag Wealth Management v West* (supra) where Aikens J (as he then was) (at [27]) accepted the arbitrator's approach that it would be wrong to dismiss a claim for want of prosecution where the limitation period had not expired. It is borne out by various commentaries in the textbooks. Thus, in *Merkin & Flannery* (at page 161) the authors state:

> *"It is usually inappropriate for an award dismissing the claim to be made within the applicable limitation period, because the delay is usually not regarded as 'inordinate' until the limitation period has expired, and the claimant would be free in any event to start another arbitration: see TAG Wealth Management v West, which stands as the only reported authority on section 41(3), and where Aikens J (as he then was) appears to have assumed as correct that it would be wrong for a tribunal to dismiss a claim for want of prosecution where the limitation period had not expired….In our view, the corollary of the principle accepted in TAG Wealth Management is that, once the limitation period has expired, the delay is much more easily classifiable as inordinate; the question becomes whether it is inexcusable, which is for the tribunal to determine on the facts, if an application is made to dismiss the claim."*

67. In *Ambrose & Maxwell* the authors state (at p. 236):

> *"Inordinate means "excessive". It is not a term which can be precisely defined: "what is or is not inordinate delay must depend upon the facts of each particular case". It will normally be measured against what is regarded as acceptable according to the standards of those normally involved in that type of arbitration… The time limits or timetables applicable under arbitration rules may provide helpful guidelines; however,*

> *regard must always be had to the circumstances of the particular case. In a weighty dispute, for example, more time will usually be permitted for the gathering of evidence than in a simple documents-only arbitration. In the Finnrose Rix J suggested that the question of whether delay should be regarded as inordinate and inexcusable depended upon the intention of the parties as to the speed with which the proceedings should be conducted. Where, as is common in maritime disputes, the parties have agreed to a one-year time limit such as the Hague Rules' one-year time-bar then they ought to proceed with the despatch inherent in that timescale."*

68. Dera sought to argue that Rix J's statement in *The Finnrose* (that the parties necessarily contemplate proceeding with litigation with despatch where the applicable timebar is one year) is not consistent with the real-world experience of those dealing with cargo claims and that the Tribunal was wrong to focus on the one-year limitation period as the yardstick for assessing whether a delay in particularising a cargo claim is inordinate. Multiple extensions of the one-year timebar are a commonplace of cargo claim handling. The reported judgments of this court are replete with example of cargo claims which have taken some years to progress without defendants seeking to dismiss the claim – see for example *The Superior Pescadores* [2016] 1 Lloyds Rep 561 (at [4] to [6]).

69. In my judgment there is no basis for undermining the principle that where, without more, the parties sign up to the one-year limitation period in Article III Rule 6, Rix J's statement (cited without reservation in *Ambrose & Maxwell*) remains accurate. If the parties choose subsequently to extend time for commencement of proceedings or consent to a prolonged timetable for particularisation, that is a matter for them. Such a course would doubtless be taken into account in assessing whether any delay could be said to be inordinate. But absent any such extensions or consent to delay, there is no reason why the one-year rule is not objectively relevant for the purpose of assessing delay. It sets the tone and context for that exercise.

70. Dera also argued that adoption of the one-year rule as the principal yardstick for assessing delay creates an unfair imbalance between claims asserted against shipowners on the one hand and claims brought by shipowners against other parties to the contract of carriage on the other hand. It referred to the commentary in *Carver* (at [9-179]) where the imbalance is recognised. The authors state that the reason normally given for the short period is that carriers cannot be expected to keep records for long periods and must know rapidly, while the events are still reasonably fresh in the memory and on the record, to what claims they may be subjected: the carrier must be able to clear his books. Reference was also made to the commentary in Aikens, *Bills of Lading* (2nd ed) (at [10.184]) on the rationale for a carrier's special advantage:

> *"…it is not clear why the carrier is especially deserving in this respect, and the reality is that the rule was part of the package to induce owners to accept the basic irreducible Article III rules 1 and 2 obligations".*

71. This submission cannot avail Dera. Article III Rule 6 represents the product of the commercial compromise between stakeholders in the maritime industry at the time that

the Hague Rules were agreed. Any imbalance is one inherent in the Hague Rules to which the parties in this case agreed to submit. The commentary in *Carver* emphasises the risk of prejudice through delay. The commentary in *Aikens* underlines the potential importance to owners of a short limitation period as an inducement. Moreover, in so far as it is helpful to look at questions of rationale at all (which I doubt), the position is not as clear cut as Dera suggests. As was pointed out by David Foxton QC (sitting as a Deputy High Court Judge) in *Deep Sea Maritime Ltd v Monjasa A/S* [2018] EWHC 1495 (Comm) at [49], while the Article III Rule 6 time bar has come to be seen as a provision benefiting the shipowner, this was not the position when the Hague Rules were agreed:

> *"…As Professor Michael Sturley noted (in "The History of COGSA and the Hague Rules") (1991) 1 JMLC 1 at 23-24) the time of suit provisions were "the cargo interests' other big victory" at the Hague Conference, their effect being seen as "guaranteeing a cargo claimant a full year in which to bring suit"."*

72. Finally, to the extent that Dera contended that the Tribunal applied the one year limitation period mechanistically or as the only yardstick, a fair reading of the Award does not bear that out. The Tribunal recognised that it should use its knowledge and experience in reaching its decision (at paragraph 130 of the Award). Nothing from that knowledge and experience led it to conclude that that Dera's delay was not inordinate on all the facts of this case. The parties had agreed to a one-year time limit for the commencement of proceedings. There were no agreed extensions, nor is there any suggestion of consent on the part of the Owners to delay in the particularisation of the cargo claim. On the contrary, the Owners highlighted the delay in express terms to Dera in November 2013 and July 2014, as set out above, on the latter occasion even stating in terms that the cargo claim was ripe for an application to dismiss for want of prosecution. There were no negotiations between the parties on the cargo claim. At no stage were the Owners recognising, let alone accepting, delay in prosecution of the cargo claim in the arbitration as a matter of market practice or otherwise.

73. Dera pointed (in reply) to the fact that Dera took some active measures involving the Owners during the period of 3 years and 9 months under scrutiny, namely its continuing attempts in 2011 to achieve discharge of the cargo in Jordan and then in the proceedings in Turkey, and that damages on the cargo claim crystallised once the cargo was sold and the proceeds not paid out. As to the Turkish Proceedings, it is to be noted that Dera took no step until January 2013 and in any event the proceedings were concluded by May 2013 at the latest. The sale of cargo took place in April 2012. Fundamentally, however, none of these matters can be said to affect the question of delay in the arbitral proceedings, which is no doubt why they were not relied upon in this context before the Tribunal by Dera. What they demonstrate is that there was no impediment to Dera pursuing the cargo claim in the arbitration at any stage from the outset, as the Tribunal found.

Point of law 2: whether, in a contract evidenced by a bill of lading subject to the Hague Rules, a geographic deviation precludes a carrier from relying on the one year time bar created by Article III Rule 6

74. As with several other issues, there is a procedural wrinkle on this second point of law. At no stage in the arbitration had Dera pleaded any geographic (or other) deviation. The issue was raised for the first time in Dera's written opening submissions provided shortly before the preliminary issues hearing. The Owners (unsurprisingly) raised a procedural objection to the point being raised in those circumstances. They went on to submit that in any event there was a legal answer, in that the one-year limitation period applied in any event. The Tribunal accepted that submission. It did so without addressing the two logically anterior issues, namely the Owners' procedural objection and whether there had been a geographic deviation at all on the facts (as disputed by the Owners, particularly in circumstances where the contracted voyage had been completed). The Owners have expressly reserved their position on both points.

75. Against that background, I address the question of law raised. Although the parties did not descend into any historical detail, it is convenient to start with an overview of the early cases on geographical deviation.

Early cases on geographical deviation

76. The early cases on geographical deviation are rooted in marine insurance. The Marine Insurance Act 1906 codified the law on marine insurance as it stood at the end of the nineteenth century. S. 46 provided:

> *"(1) Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of the deviation, and it is immaterial that the ship may have regained her route before any loss occurs."*
>
> *(2) There is a deviation from the voyage contemplated by the policy—*
>
> > *(a) Where the course of the voyage is specifically designated by the policy, and that course is departed from; or*
> >
> > *(b) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from.*
>
> *(3) The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract."*

77. S. 46 (and the common law rules that came before it e.g. *Green v Young* (1702) 2 Salk 444) corresponded with the obligations of a shipowner under the contract of carriage. In circumstances where the contract of carriage specified the route to be followed from the load port to the discharge port, the shipowner was under an obligation to follow that

route. In circumstances where the contact of carriage did not specify the route, the shipowner was under an implied obligation to follow the usual and customary course (see *Davis v Garrett* (1830) 6 Bing 716; *Scaramanga v Stamp* (1880) 5 CPD 295 CA).

78. The effect of s. 46 is that, in the event of the shipowner's breach of its obligation not to deviate (whether stemming from the terms of the contract or from the common law), the owner of any cargo on board the ship would lose its insurance cover in respect of loss or damage to that cargo. It was of course open to the cargo owner to sue the shipowner for breach of contract in respect of the deviation. However, if the shipowner then sought to rely on limitations or exemptions in the contract of carriage the cargo owner might be unable, through no fault of its own, to recover from the shipowner or from its insurer.

79. In order to mitigate the perceived unfairness to cargo owners, the common law developed in such a way that the effect of a deviation was to deprive the shipowner of the benefit of any limitation or exemption in the contract of carriage (see *Davis v Garrett* (1830) 6 Bing 716; *Balian and Sons v Joly Victoria and Co Ltd* (1890) 6 TLR 345; and *Joseph Thorley Ltd v Orchis SS Co Ltd* [1907] 1 KB 660). The shipowner would only have the benefit of any limitations or exemptions afforded to the common carrier. The result was that the shipowner would become the *de facto* insurer of the cargo if, as a result of the shipowner's unjustified deviation, the cargo owner lost its cover. In *Stag Line v Foscolo Mango* [1932] AC 328 ("*Stag Line"*) it was argued that this common law rule was not applicable in circumstances where the contractual limitation or exemption stemmed from the Hague Rules. Lord Russell rejected this contention (at p. 347):

> *"In my opinion the argument is unsound. It was well settled before the Act that an unjustifiable deviation deprived a ship of the protection of exceptions. They only applied to the contract voyage. If it had been the intention of the legislature to make so drastic a change in the law relating to contracts of carriage of goods by sea, the change should and would have been enacted in clear terms."*

80. The early deviation cases bear some of the hallmarks of the now discredited doctrine of fundamental breach under which a rule of law was said to exist to the effect that, regardless of its wording, a party to a contract is prevented from relying on an exemption clause in circumstances where there had been a "*fundamental breach*" or breach of a "*fundamental term*" (see *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461 (at [465]); *Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936 (at [940] and [943]); *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1956] AC 576 (at [587] to [589]); *Yeoman Credit Ltd v Apps* [1962] 2 QB 508 (at [520]); *Charterhouse Credit Co Ltd v Tolly* [1963] 2 QB 683 (at [710]); and A*stley Industrial Trust v Grimley* [1963] 1 WLR 1468 (at [1470])).

Hain Steamship

81. *Hain Steamship Company Ltd v Tate & Lyle Ltd* [1936] 41 Com Cas, 350 ("*Hain Steamship"*) was the first case in which the House of Lords considered the geographical deviation cases in some detail. Neither the House of Lords nor the Supreme Court has re-visited them since then.

82. Lord Atkin, confining himself to contracts of carriage by sea, confirmed (at p. 354) that the effect of a geographic deviation was that the other party to the contract is entitled, upon discovering the deviation, to retrospectively declare itself as "*no longer bound by any of the contract terms*". If it did so, it was not bound by "*the promise to pay the agreed freight any more than by his other promises*". However, the innocent party could also elect to treat the contract as subsisting and, if it did so with knowledge of its rights, it would be bound by all of its terms. Lord Atkin made clear that there was no automatic displacement of the contract - if that were so, the wrongdoer could by its own wrong get rid of the contract. Lord Atkin also made clear that deviation did not just serve to expunge the limitations and exemptions in the contract. That would be inconsistent with previous cases in which a deviation had been held to have the effect of expunging demurrage provisions. It affected all provisions.

83. Lord Atkin, Lord Wright MR and Lord Maugham, with whom Lord Thankeron and Lord Macmillan agreed, each expressly agreed on the issue of the effect of the deviation. All spoke in terms of deviation being a fundamental breach of the contract of carriage embodied in the bill of lading, the effect of which was to displace the entire contract (with emphases added):

a) Per Lord Atkin:

i. "*I venture to think that the true view is that the departure from the voyage contracted to be made is a breach by the shipowner of his contract, but a breach of such a serious character that however slight the deviation the other party to the contract is entitled to treat it as going to the root of the contract, and to declare himself as <u>no longer bound by any of the contract terms</u>*" (p. 354);

ii. "*One of the terms [of a bill of lading] is the performance of an agreed voyage, a deviation from which is a <u>fundamental breach</u>*" (p.357);

b) Per Lord Wright MR:

i. "*An unjustified deviation is a <u>fundamental breach</u> of a contract of affreightment.*" (p. 362);

ii. "*I have discussed the effect of a deviation in so far as it deprives the shipowner of a right to rely on the contractual exceptions, but a deviation carries wider consequences. I think it is right to say that it <u>abrogates the special contract entirely</u>*." (p. 367);

c) Per Lord Maugham:

i. "*My Lords, the breach of a condition contained in a contract of carriage by sea, even <u>so fundamental a condition</u> as that the ship in the absence of express provision shall proceed by the ordinary and customary route does not of itself, that is, without an acceptance of the repudiation by the charterer or other party concerned, <u>abrogate the contract</u>*." (at p. 371).

(In that passage, Lord Maugham emphasised that the contract was not automatically displaced. However, the obligation not to deviate was a

fundamental term such that, if the innocent party elected to terminate, the effect of deviation was to displace the entire contract.)

84. At first glance, in referring to the need for election by the innocent party, the decision in *Hain Steamship* could be said to have refined the law on geographical deviation so as to align it with the now well-established doctrine of repudiatory breach. However, the decision in *Hain Steamship* is inconsistent with the modern doctrine of repudiatory breach in two important respects.

85. First, the decision in *Hain Steamship* suggests that even a trivial deviation which does not cause any loss of or damage to the cargo will be sufficient to give the cargo owner the right to treat the contract of carriage as at an end (per Lord Atkin (at p. 354). The right arose "*however slight the deviation"*.

86. By contrast, under the doctrine of repudiatory breach, the breach must be one which deprives the innocent party of the entire benefit of the contract (see *Hong Kong Fir Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at p. 66).

87. Secondly, as set out above, the decision in *Hain Steamship* suggests that the effect of termination is that the entire contract is displaced. Thus, the House of Lords referred to (and did not disapprove) the decision of the Court of Appeal in *Joseph Thorley Ltd v Orchis SS Co Ltd* [1907] 1 KB 660, adopting the reasoning in *Balian and Sons v Joly Victoria and Co Ltd* [1890] 6 TLR 345, in which it was held in clear terms that the effect of a deviation was to displace the contract entirely. In *Balian and Sons v July Victoria and Co Ltd* Lord Esher MR said (at p. 667) that the undertaking not to deviate was a "*condition precedent to the right of the shipowner to put the contract in suit"*.

88. By contrast, under the doctrine of repudiatory breach, following acceptance, the contract remains in play even though the innocent party, or in some cases both parties, is or are excused from further performance (see *Heyman v Darwins Ltd* [1942] AC 356 at p. 373; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at p. 844).

<u>*Suisse Atlantique* and *Photo Production*</u>

89. Some 30 years after the decision in *Hain Steamship*, the doctrine of fundamental breach was considered by the House of Lords in *Suisse Atlantique Societe d'Armement Maritime SA v Rotterdamsche Kolen Centrale* [1967] 1 AC 361 ("*Suisse Atlantique"*) and again, 13 years later, in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 ("*Photo Production"*).

90. In *Suisse Atlantique* Viscount Dilhorne, approving the comments of Pearson LJ in *UGS Finance Ltd v National Mortgage Bank of Greece and another* [1964] 1 Lloyds Rep 446 at p. 453, said (at pp. 392 and 393):

> *"In my view, it is not right to say that the law prohibits and nullifies a clause exempting or limiting liability for a fundamental breach or breach of a fundamental term. Such a rule of law would involve a restriction on freedom of contract and in the older cases I can find no trace of it.*

> *In each case not only have the terms and scope of the exempting clause to be considered but also the contract as a whole. In the cases I have cited above, I think that, on construction of the contract as a whole, it is apparent that the exempting clauses were not intended to give exemption from the consequences of the fundamental breach."*

91. The majority agreed. Lord Reid made clear that the rejection of the suggested rule of law would give rise to the need for legislation to address the potential unfairness that may result from the application of contractual limitations and exemptions (at p. 406C to 406F). Lord Wilberforce went on to explain that the fundamental breach doctrine was rooted in a consideration of the parties' contractual intention. He set out why, with reference to sale of goods, hire purchase and deviation cases, the "*conception…of "fundamental breach" as one which, through ascertainment of the parties' contractual intention, falls outside an exceptions clause is well-recognised and comprehensible*" and concluding that there was no "*need, or authority, in relation to exceptions clauses, for extension of it beyond this*…" (at p. 432B to p. 435A). Lord Wilberforce identified no difference in principle between the deviation cases and the other cases.

92. In *Photo Production*, the House of Lords considered the doctrine of fundamental breach for the second time. In the meantime, the Unfair Contract Terms Act 1977 ("the 1977 Act") had been introduced. Limitation and exemption clauses were subject to the requirement of reasonableness set out in the 1977 Act. It is important in this context to note that contracts for the carriage of goods are controlled only to a limited extent by the 1977 Act (see *Chitty on Contracts* 32nd Ed. [15-032]).

93. Having referred to *Suisse Atlantique*, Lord Wilberforce made clear that there was no generally applicable rule of law by which limitations or exemptions in a contract may not be applied to a fundamental breach or breach of a fundamental term and that the question was one of construction (at pp. 842 to 843):

> *"…I am convinced that, with the possible exception of Lord Upjohn whose critical passage, when read in full, is somewhat ambiguous, their Lordships [in Suisse Atlantique], fairly read, can only be taken to have rejected those suggestions for a rule of law which had appeared in the Court of Appeal and to have firmly stated that the question is one of construction, not merely of course of the exclusion clause alone, but of the whole contract… I do not think that I should be conducing to the clarity of the law by adding to what was already too ample a discussion a further analysis which in turn would have to be interpreted. I have no second thoughts as to the main proposition that the question whether, and to what extent, an exclusion clause is to be applied to a fundamental breach, or a breach of a fundamental term, or indeed to any breach of contract, is a matter of construction of the contract. Many difficult questions arise and will continue to arise in the infinitely varied situations in which contracts come to be breached - by repudiatory breaches, accepted or not, by anticipatory breaches, by breaches of conditions or of various terms and whether by negligent, or deliberate action or otherwise. But there are ample resources in*

> *the normal rules of contract law for dealing with these without the superimposition of a judicially invented rule of law. I am content to leave the matter there with some supplementary observations."*

94. Lord Wilberforce made clear that the rationale for the abolition of the doctrine of fundamental breach was in part based on the introduction of the 1977 Act and also the uncertainty to which the doctrine gave rise (at p. 843):

> *"The doctrine of "fundamental breach" in spite of its imperfections and doubtful parentage has served a useful purpose. There was a large number of problems, productive of injustice, in which it was worse than unsatisfactory to leave exception clauses to operate. Lord Reid referred to these in the Suisse Atlantique case [1967] 1 A.C. 361, 406, pointing out at the same time that the doctrine of fundamental breach was a dubious specific. But since then Parliament has taken a hand: it has passed the Unfair Contract Terms Act 1977. This Act applies to consumer contracts and those based on standard terms and enables exception clauses to be applied with regard to what is just and reasonable. It is significant that Parliament refrained from legislating over the whole field of contract. After this Act, in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions.*
>
> *At the stage of negotiation as to the consequences of a breach, there is everything to be said for allowing the parties to estimate their respective claims according to the contractual provisions they have themselves made, rather than for facing them with a legal complex so uncertain as the doctrine of fundamental breach must be. What, for example, would have been the position of the respondents' factory if instead of being destroyed it had been damaged, slightly or moderately or severely? At what point does the doctrine (with what logical justification I have not understood) decide, ex post facto, that the breach was (factually) fundamental before going on to ask whether legally it is to be regarded as fundamental? How is the date of "termination " to be fixed? Is it the date of the incident causing the damage, or the date of the innocent party's election, or some other date? All these difficulties arise from the doctrine and are left unsolved by it."*

95. Lord Wilberforce then went on explicitly to address the doctrine of fundamental breach as it relates to deviation cases (at p. 845):

> *"I must add to this, by way of exception to the decision not to "gloss" the Suisse Atlantique [1967] 1 A.C. 361 a brief observation on the deviation cases, since some reliance has been placed upon them, particularly upon the decision of this House in Hain Steamship Co. Ltd. v. Tate and Lyle Ltd. (1936) 155 L.T. 177 (so earlier than the Suisse Atlantique) in the support of the Harbutt doctrine. I suggested in the Suisse Atlantique that these cases can be regarded as proceeding upon normal principles applicable to the law of contract generally viz., that it is a matter of the parties' intentions whether and to what extent clauses in shipping contracts can be applied after a deviation, i.e., a departure from the contractually agreed voyage or adventure. It may be preferable that they should be considered as a body of authority sui generis with special rules derived from historical and commercial reasons. What on either view they cannot do is to lay down different rules as to contracts generally from those later stated by this House in Heyman v. Darwins Ltd. [1942] A.C. 356."* (emphasis added)

96. Thus, Lord Wilberforce expressly identified the reasoning in *Hain Steamship* and the early deviation cases referred to above, indicating that they perhaps fell to be considered as a separate body of authority. It is not clear to precisely what he was referring when he spoke of "*special rules derived from historical and commercial reasons*". It was suggested to me (for Dera) this may have been at least in part a reference to deviation cases having their roots in marine insurance, as already mentioned. In this regard it is to be noted that the authors of *Carver* contend that the modern position may have moved on (see [9-037]):

> *"The doctrine is said to be based on the fact that goods insured for a voyage were uninsured when the ship was off the voyage route; this might also in former times have been true of the ship, which might be insured together with its cargo. Nowadays it seems that by virtue of "held covered" clauses and other provisions this would no longer be so, and it seems that ships are more likely to be insured on a time basis. In any case, this explanation would explain the displacement of the excepted perils, but not that of other clauses."*

The position post *Photo Production*

97. The status of deviation cases in the light of this significant development in the law has been considered, albeit indirectly, by the Court of Appeal in two cases: "*The Antares"* [1987] 1 Lloyds Rep 424 ("*The Antares"*) and "*The Kapitan Petko Voivoda"* [2003] 2 Lloyds Rep 1 ("*The Kapitan Petko Voivoda")*. Both cases concerned non-geographical deviation, or what has been described as "*quasi-deviation*", namely the unauthorised stowage of cargo on deck.

98. *The Antares* concerned Article III Rule 6 of the Hague-Visby Rules ("Article III Rule 6 HV") which provides materially as follows:

> *"…the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen."*

99. It therefore differs from Article III Rule 6 by the addition of the word "*whatsoever*".

100. In *The Antares* it was held that Article III Rule 6 HV made no distinction between fundamental and non-fundamental breaches of contract, nor did it make any distinction between breaches which did and breaches which did not amount to deviation. The broad purpose underlying Article III Rule 6 HV was that the time limit was of general applicability which would promote certainty and predictability. The owners' breach did not preclude them from relying on the one-year time bar. Specifically, Lloyd LJ said this (at pp. 429 to 430):

> *"Mr Nicholls relies on a passage in the current edition of Scrutton at page 167: "The effect of deck stowage not so authorised will be to set aside the exceptions of the charter or bill of lading, and to render the shipowner liable under his contract of carriage for damage happening to such goods."*
>
> *That passage has appeared in identical terms in successive editions of Scrutton, going back, we are told, to the last edition for which Lord Justice Scrutton was himself responsible. But with great respect to the editors of the current edition it no longer represents the law. The doctrine of fundamental breach on which Mr Nicholls relies, that is to say the doctrine that a breach of contract may be so fundamental as to displace the exceptions clauses altogether, no longer exists. The death knell sounded in Suisse Atlantique Societe d'Armement Maritime S.A. v Rottedamsche Kolen Centrale (1967) 1 A.C. 371. The corpse was buried in Photo Production Limited v Securicor Transport Limited (1980) A.C. 827. It is sufficient to quote a single sentence from Lord Wilberforce's speech in the latter case at page 842 where, after referring to Suisse Atlantique, he said:*
>
> > *"I have no second thoughts as to the main proposition that the question whether, and to what extent, an exclusion clause is to be applied to a fundamental breach, or a breach of a fundamental term, or indeed to any breach of contract, is a matter of construction of the contract."*
>
> *It is sometimes said that the so-called "deviation cases" may have survived the abolition of the doctrine of fundamental breach. Mr Nicholls argues that, by analogy with the deviation cases, the rule relating to deck cargo as set out in Scrutton has also survived.*

> *In Suisse Atlantique Lord Wilberforce suggested that the deviation cases should be regarded as proceeding on ordinary principles applicable to contract generally. In Photo Production v Securicor he said that it might be preferable to regard them as a body of authority sui generis with special rules derived from historical and commercial reasons. Whatever may be the position with regard to deviation cases strictly so called, (I would myself favour the view that they should now be assimilated into the ordinary law of contract), I can see no reason for regarding the unauthorised loading of deck cargo as a special case." (emphases added)*

101. Lloyd LJ then addressed the question of construction (at p. 430), concluding that Article III Rule 6 HV "*clearly*" applied:

> *"…It provides that the carrier shall in any event be discharged from all liability whatsoever unless suit is brought within one year. This is even wider language than the old Article III rule 6, which omitted the word "whatsoever". In the current edition of Scrutton it is said, at page 440, that the addition of the word "whatsoever" makes it clear that the time limit applies even where the carrier has committed a deviation. Whether that be true of a deviation strictly so called, it is certainly true of the unauthorised carriage of goods on deck."*

102. *The Kapitan Petko Voivoda* was a case in which the Hague Rules, and therefore Article III rule 6, applied. In that case, Longmore LJ accepted the cargo owners' description of a breach involving unauthorised deck stowage as "*very serious*". He went on to say (at p. 10):

> *"…However, the seriousness of the breach is no longer a self-sufficient yardstick for determining whether exception or limitation clauses apply to particular breach. The doctrine of fundamental breach or breach of a fundamental term was discredited in Suisse Atlantique…and given its formal burial in Photo Production…which decided that the question whether particular clauses applied to excuse or limit liability was solely a matter of construction of the contract. But the doctrine of fundamental breach never sprang fully fledged from the heads of Judges in the middle years of the last century; it had a respectable commercial origin in the 19th century cases relating to "serious" breaches of contract such as deviation from the contractual voyage and storing goods in a warehouse other than that originally agreed. It has not yet been conclusively decided whether what I may call the deviation cases and the warehouse cases must be regarded as dead and buried along with the doctrine of fundamental breach…." (emphasis added)*

103. Later (at [13] to [15]) Longmore LJ said:

> *"….the Hague Rules are an international Convention…to be construed on broad principles of general acceptation….*
>
> *It may be difficult to know in any given case what "broad principles of general acceptation" are to prevail over domestic principles but the approach must be very relevant where it is sought to rely on the peculiarly common law principle derived from the deviation cases. This is not an appropriate case to decide whether what Lord Wilberforce called "a body of authority sui generis with special rules" … is consistent with the law as expounded in the Photo Production case. It is, however, on any view a peculiar creature of the common law. Although it appears to have been received into the United States and, indeed, to have been extended to apply to cases of carriage on deck in breach of contract, it cannot be described as a "broad principle of general acceptation" …. It is a question of some controversy whether they now exemplify even a principle of English law."*

104. Longmore LJ went on to agree with the statement by Lloyd LJ in *The Antares* (at p. 430) in which, having recorded that he favoured the view that deviation cases should now be incorporated into the ordinary law of contract, Lloyd LJ held that there was no reason for regarding the unauthorised stowage of cargo on deck as a special case. Longmore LJ concluded therefore that "[*t*]*he duty of the Court is merely to construe the contract which the parties have made"* (at [15]).

105. On that issue of construction, Longmore LJ found (at [16]) that the most natural meaning of the words "*in any event"* in Article III Rule 6 is "*in every case"*. Referring to the wider wording in Article III Rule 6 HV considered by Lloyd LJ in *The Antares*, Longmore LJ stated (at [17]) that:

> *"…in the light of his rejection of the "deviation" argument, I doubt if the conclusion would have been different, if the question had arisen under the old form of the rule…"*

106. He referred to *The Happy Ranger* [2002] 2 Lloyds Rep 357 where it was held that breach of the overriding seaworthiness obligation did not mean that the exemptions in Article IV Rule 5 of the Hague-Visby Rules could not be relied upon by the owners. The words "*in any event"* were unlimited in scope.

Discussion

107. I align myself with the view of Lloyd LJ in *The Antares* (at p. 430), with which Longmore LJ did not dissent in *The Kapitan Petko Voivoda,* to the effect that geographical deviation cases should now be assimilated into the ordinary law of contract. I can see no sound basis for treating such cases differently from cases involving the unauthorised stowage of cargo on deck. Both are examples of very serious breach. That geographical deviation can be said to be a more serious breach, is a question of degree not principle. As Longmore LJ said in *The Kapitan Petko Voivoda* (at [10]), the seriousness of the breach is no longer a self-sufficient yardstick for determining whether limitations or exemptions apply to particular breaches.

108. The early geographical deviation cases bear the hallmarks of the doctrine of fundamental breach which, as Lloyd LJ stated in the clearest of terms in *The Antares*, no longer exists. The reasons for discrediting the doctrine are relevant to geographical deviation cases just like any other. Uncertainty is as undesirable in a contract of carriage as it is in any other type of contract. Although the provisions of the Unfair Contract Terms Act 1977 are largely inapplicable in cases involving contracts of carriage by sea, as Lord Wilberforce said in *Photo Productions* (at p. 843): "*in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance… there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions"*. Again, these points apply with equal force to a contract of carriage by sea as they would to any other type of commercial contract.

109. This conclusion is at least consistent with, and in certain instances supported by, the specialist maritime commentaries:

a) Carver (at [9-181]): *"It was held in The Kapitan Petko Voivoda that these words [i.e. the words "in any event"] indicate that as a matter of interpretation the package or unit limitation applies even where the goods are wrongfully stowed on deck, which can be regarded as a form of deviation, and the reasoning is clearly intended to apply to the time bar also. Whether it also applies to traditional geographical deviation by the vessel was not decided. <u>But the emphasis on the significance of the words "in any event" in both provisions suggests that it does</u>. The reasoning is stronger under the Hague-Visby Rules, because they have the "force of law". For the Hague Rules the reasoning is somewhat less convincing: if the contract is displaced, the whole limitation, with all its wording, is arguably displaced also."* (emphasis added);

b) Cooke et al, Voyage Charters (4th ed.) (2014) (at [85.175]) in relation to the reasoning in *The Antares* and the *The Kapitan* Petko Voivoda: *"It remains to be seen whether it would apply in the case of a true geographical deviation… which as a matter of law gives the right to the bill of lading holder to treat the contract of carriage as repudiated and deprives the carrier of the benefit of the contract exceptions, unless the deviation is waived. Since the doctrine of deviation is understood to displace the contract of which Article III rule 6 forms a part, it may be thought that the breadth of formulation of the rule should not be material. <u>However, the tenor of modern judicial and academic opinion seems to favour retaining the Hague Rules protection even in the case of such deviation. The precise analytical basis is not clear; it may be that terms relating to claims procedures are not abrogated in the same way as exceptions clauses or other clauses germane to the loading, carriage and delivery of the goods. There may in any event be a significant difference in this respect between the application of the Hague Rules and the Hague-Visby Rules.</u>"* (emphasis added);

c) Scrutton on Charterparties and Bills of Lading (23rd ed.) (2017) ("*Scrutton")* (at [12-014]): *"In the past the significance of classifying the breach as fundamental was that, if the innocent party chose to terminate the contract, he was able to avoid any clauses excluding or limiting liability. The controversial question is whether that fundamental breach doctrine still applies to deviation cases even though its use as a rule of law has otherwise been abolished by the House of*

> *Lords in the Suisse Atlantique case and Photo Production Ltd v Securicor Ltd. Any breach, however serious, can now generally be excluded by an appropriately worded exclusion clause: whether it does so or not is a question of construction. On one view, the fundamental breach doctrine lives on in respect of deviation. This derives some support from dicta of Lord Wilberforce in the Photo Production case: ''It may be preferable that [the deviation cases] should be considered as a body of authority sui generis with special rules derived from historical and commercial reasons''. If this view prevails then where the charterer or goods-owner elects to terminate the contract for deviation, he can claim the delivery of his goods, and since the exceptions contained in the contract are inapplicable, the shipowner will be liable for any loss or damage which the goods may have sustained, unless he can show (1) that the loss or damage was occasioned either by the act of God, or by the King's enemies, or by inherent vice of the goods, and (2) that the said loss or damage must equally have occurred even if there had been no deviation. And it is probably immaterial whether the loss or damage arises before, or during, the deviation, or after it has ceased. The alternative view is that the fundamental breach doctrine has been abolished even for deviation so that, where the charterer or goods-owner elects to terminate, the applicability of contractual exceptions clauses is a matter of construction. This view has been favoured by Lloyd and Longmore LJJ ''the deviation cases should now be assimilated to the ordinary law of contract''. It is likely to prevail."* (emphasis added)

110. I also agree with the authors of *Carver* (at [9-053] and [9-057 to 9-059]) that the reasoning in *Joseph Thorley* should be treated as having been superseded by the decision in *Hain Steamship* and that the latter should be considered in the light of the more recent authorities dealing with the doctrine of repudiatory breach:

> *"It is submitted that the right course for the courts is to reject the English line of special authority even for geographical deviation; to regard the reasoning in Joseph Thorley Ltd v Orchis SS Co Ltd as superseded by that of the House of Lords in Hain SS Co Ltd v Tate & Lyle Ltd; and to redevelop the reasoning in the latter case (where the preoccupation at the time was with the significance of waiver) in accordance with the doctrine of discharge of contract by breach subsequently laid down by the House in Heyman v Darwins Ltd and Photo Production Ltd v Securicor Transport Ltd. This would emasculate the ancient doctrine, and any modern extensions it might be argued to have, but it is submitted that it is appropriate to do so. It would, as already stated, leave untouched established case law regarding the burden of proof in bailment and the interpretation of contract clauses; though where the Hague or Hague-Visby Rules apply, the wording of the time bar and package or unit limitations is already strong enough to resist the latter technique in this context."*

111. In these circumstances, I would then approach the matter as one of construction (following the line of reasoning in *Suisse Atlantique, Photo Productions, The Antares* and *The Kapitan Petko Voivoda*). As a matter of construction, Article III Rule 6 is in

my judgment sufficiently broad to apply to circumstances of a geographic deviation. This is clear from the use of the words "[*i*]n *any event*" at the start of the clause. In a case such as this, where the Hague Rules apply, comparison with the wording in the Hague-Visby Rules is neither necessary nor instructive. First, as Flaux LJ stated in *The Aqasia* [2018] 1 Lloyds LR 530 (at [59]), the terms of the Hague-Visby Rules "*cannot conceivably affect the construction of the Hague Rules adopted 45 years earlier."* Secondly, whilst it has been said that the word *"whatsoever"* in the parallel clause in the Hague-Visby Rules broadens its scope, as a matter of grammar and on a natural reading, the position of the word "*whatsoever"* means that it is the nature of the "*liability"* that is broadened, not the triggering words "[*i*]*n any event"*.

The doctrine of precedent

112. Having reached this conclusion on the current law, I have nevertheless had to consider whether or not it is one open to me in the light of the House of Lords decision in *Hain Steamship.* Dera did not positively contend as part of its case that I was bound by that decision on this second point of law. However, I invited written submissions on the point from the parties after the conclusion of the hearing. In answer to that invitation, Dera submitted that I was so bound. The *ratio decidendi* of *Hain Steamship,* either unanimously or by a majority, is that where a carrier by sea deviates impermissibly from the contract route, the cargo owner can treat itself as not bound by any of the contract terms. The Owners' riposte is that in 2018 I am not bound to follow *Stag Line* and *Hain Steamship* (adopting the approach identified in the comments of Lord Goff in *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 at pp. 378-379). *Stag Line* and *Hain Steamship* were decisions based on the doctrine of fundamental breach which is no longer part of English law. They can be treated as having been impliedly overruled by the House of Lords' decisions in *Suisse Atlantique* and *Photo Production* and/or because they are irreconcilable with those decisions. The Owners also suggest that none of the commentators suggest that short of consideration by the Supreme Court the position in law has to be treated as authoritatively decided by *Stag Line* and *Hain Steamship.*

113. I am unable to accept the Owners' submissions. I do not consider that *Hain Steamship* has been impliedly overruled by the House of Lords' decisions in *Suisse Atlantique* and *Photo Production.* It is clear from the speech of Lord Wilberforce in *Photo Productions* (at p. 845D-H) that the geographical deviation cases were not swept up under the auspices of the general law of contract. It might be preferable to consider them as a separate body of authority with "*special rules derived from historical and commercial reasons"*. (Even if Lord Wilberforce's real concern was to dismiss the relevance of these cases to the issues before him, he cannot be said to have impliedly overruled them or reached a decision fatal without more to their reasoning.) The leading case to date on that body of authority is *Hain Steamship.* This is reflected in the two subsequent decisions of the Court of Appeal, namely *The Antares* and *The Kapitan Petko Voivoda,* where the Court of Appeal has expressly proceeded on the basis that the position with geographical deviation cases remains open. This also meets the suggestion that the decision in *Hain Steamship* is irreconcilable with the decisions in *Suisse Atlantique* and *Photo Production.* That can hardly be the case when the reasoning in *Hain Steamship* is expressly identified and deliberately left untouched in *Photo Production*. Whilst Lord Wilberforce commented (at p. 845H) that he could not address the numerous cases in which the doctrine of fundamental breach had been applied or discussed, he

nevertheless thought it appropriate to single geographical deviation cases out for special comment. And when he did so, he identified that they might require special treatment.

114. In these circumstances, *Hain Steamship* has not been impliedly overruled by nor is it irreconcilable with subsequent House of Lords' decisions in the shape of *Suisse Atlantique* and *Photo Production*. As the commentators make clear, there has not been a further consideration by the House of Lords or Supreme Court of geographical deviation cases since *Photo Production.*

115. Nor is it right to say that no commentator has commented that Supreme Court intervention is unnecessary. In *Lewison on the Interpretation of Contracts* (6th ed.) (2017) (at [12-18]) the author states:

> *"…unless the Supreme Court were to overrule at least one previous decision of the House of Lords […For example, Hain Steamship Co Ltd v Tate and Lyle Ltd [1936] 2 All E.R. 597…] it is difficult to see how the deviation cases may be treated except as a body of substantive law with rules of its own."*

116. For these reasons, I consider that I am bound to follow the House of Lords decision in *Hain Steamship.* If this is a cautious approach, it is justified by the fact that the issue is one that merits a full and comprehensive survey of a type that was not carried out before me over a two day hearing where there were, as is apparent from the balance of this judgment, numerous other issues to address.

117. On the basis that I am bound to follow the *ratio decidendi* of *Hain Steamship,* a geographic deviation does preclude a carrier from relying on the one-year time bar created by Article III Rule 6 if the other party to the contract of carriage elects to terminate. (I note that there has been no finding on the question of election in this case, any more than on the factual question of whether there was a deviation at all.) Accordingly, the Tribunal erred in law in concluding that, in a contract evidenced by a bill of lading subject to the Hague Rules, a geographic deviation does not preclude a carrier from relying on the one year time bar created by Article III Rule 6.

118. Were I not so bound, for the reasons set out above, I would hold that a geographic deviation does not preclude a carrier from relying on the one-year time bar created by Article III Rule 6. The weight of modern authority supports that conclusion.

Dera's alternative submission

119. Finally, for the sake of completeness, I am not attracted to Dera's fall-back position to the effect that the Tribunal should have approached the strike-out application "*on the basis that if it found at the eventual hearing on the merits that there had been a geographic deviation, there was a strong prospect of the applicable limitation period being six years"*. It is difficult to see how the Tribunal could have proceeded on that basis for the purpose of determining the dismissal application, given the importance of the limitation period to the merits of the application. Once Dera had raised the issue of geographic deviation, assuming that the Tribunal was not prepared to accept the Owners' outright procedural objection to the matter being introduced at all, the question of the applicable limitation period had to be determined substantively. The intermediate approach mooted would have left the Tribunal in "no-man's land" - with, for example,

no proper view on the merits of the strike-out application or on whether or not there had been a geographic deviation in the first place.

Point of law 3: whether, where the one year time bar created by Article III Rule 6 applies, the period between a) the time that the cause of action arises and b) the expiry of the contractual time limit is to be taken into account when assessing whether the delay is "inordinate" for the purpose of s. 41(3)

120. By the conclusion of the hearing before me, it was common ground that, where the one year time bar created by Article III Rule 6 applies, the period between the time that the cause of action arises and the expiry of the contractual time limit is to be taken into account when assessing whether the delay is inordinate for the purpose of s. 41(3).

121. So much is clear from the relevant authorities: see for example *Trill v Sacher* [1993] 1 WLR 1379 (at 1389B) following *Rath and another v CS Lawrence & Partners* [1991] 1 WLR 399 where Slade LJ stated (at p. 411):

> *"… I can find no support for the proposition that the time elapsed after the issue of a writ but before the expiration of the limitation period cannot constitute inordinate delay for the relevant purpose. The late issue of a writ is one thing; by itself it cannot be regarded as culpable. The causal and dilatory conduct of proceedings in breach of the rules, after a writ has been issued, is another thing…".*

122. Thus, although time elapsed before the issue of a writ within the limitation period could not of itself constitute inordinate delay such as to justify dismissal of the action, once a writ had been issued the plaintiff was bound to observe the rules of court and proceed with reasonable diligence. Accordingly, the inordinate and inexcusable delay by the plaintiffs within the limitation period could be relied upon to support the defendants' applications to strike out after the expiry of the limitation period.

123. The authors in *Ambrose & Maxwell* also confirm, citing *Rath v CS Lawrence & Partners,* (at p. 238):

> *"14.25 Once the limitation period has expired the tribunal is entitled to take account of all the earlier periods of inexcusable delay since the commencement of the arbitration. These periods can include period of delay occurring before the expiry of the limitation period which, at an earlier stage, could not be treated as inordinate…".*

124. That is sufficient to dispose of the question posed in the third question of law.

125. However, Dera's true complaint is in the event not reflected in the question posed at point 3 (or in the argument before Leggatt J for the purpose of seeking permission). Rather, Dera submits that the Tribunal should have carried out the sort of exercise displayed in the award under review in *Grindrod Shipping v Hyundai* (supra) where the tribunal identified three specific periods of separate delay. The Tribunal made no breakdown or assessment of specified periods of time and just compared three years and nine months with a limitation period of one year.

126. The Owners submit that, permission having been granted for the third point of law in the terms that it was phrased and not otherwise, this court should not entertain this rather different complaint, particularly where Dera's revised approach sails very close to a challenge to a finding of fact, namely that there was inordinate delay of three years and nine months. There is some force in this submission. But the parties having fully addressed me on the issue and in case it provides useful guidance I propose nevertheless to address it.

127. In cases where there are periods of procedural activity and non-activity, it will normally be appropriate to assess individual periods of delay separately and distinctly, arriving at a cumulative picture of overall delay. However, where there are no individual periods of delay to demarcate as such, as here, that may not be necessary. On the facts of this case there simply was no substantive procedural activity in the arbitral proceedings such as to require the sort of analysis suggested by Dera or of the type that was appropriate in *Grindrod Shipping v Hyundai* (supra). In those circumstances, it is understandable that the Tribunal proceeded on the basis of a single block period of what it found to be inordinate delay. Whilst inordinate delay was always for the Owners to prove, it is to be noted that Dera at no stage advanced a positive case before the Tribunal by reference to individual periods of time.

128. This does not mean that the exercise was a purely mechanical one, as already discussed above under point 1. The Tribunal stated in terms (in paragraph 130 where the finding of inordinate delay was made):

> *"…The facts of this case indicate that [Dera] was aware of its Cargo Claim from an early stage and this is supported by the fact that it filed an action against [the Owners] at the Aqaba Court of First Instance on 12th September 2011 for the full value of the Cargo following the decision of the Jordanian Ministry of Agriculture to reject it…"*

129. The Tribunal took the clear view that Dera could have (commenced and) particularised the cargo claim in the arbitral proceedings as early as September 2011. The Tribunal was standing back on the facts of this case, considering the one year limitation period, and concluding that the delay in particularisation (whether from September or November 2011) in all the circumstances was inordinate.

Point of law 4: the proper order, burden and/or standard of proof applicable to a tribunal's assessment of whether a delay is "inexcusable" for the purpose of s. 41(3)

Preliminary objection by the Owners: ss. 57 and 70 of the Act and rule 25 a)ii) of the LMAA Terms

130. The right of appeal under s. 69 is subject to s. 70(2) and (3) of the Act (see s. 69(2)). S. 70(2) provides that an application or appeal may not be brought if the applicant or appellant has not first exhausted any available recourse under s. 57. S. 57 provides materially:

> *"Correction of award or additional award*
>
> …

> *(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,…."*

131. The Owners submit that, in relation to the fourth point of law, Dera has not exhausted the recourse available under s. 57 and also rule 25 a)ii) of the LMAA Terms (2012) which provides:

> *"In addition to the powers set out in section 57 of the Act, the tribunal shall have the following powers to correct an award or to make an additional award:*
>
> *ii) The tribunal may on the application of a party give an explanation of a specific point or part of the award."*

132. Thus, it is contended that Dera cannot pursue this ground.

133. The short answer to this is that Leggatt J has granted permission for the point to be pursued. He did not rule expressly on the objection in doing so, but it is implicit. The right to appeal is subject to s. 70(2)). Leggatt J would not have granted permission to appeal if he had thought that the right did not exist because of a failure to exhaust an available recourse under s. 57. Properly read, his reference to possible remission to the Tribunal on question 4 was not, as suggested by the Owners, a reference to this procedural objection remaining live. Rather it was a reference to possible remission to the Tribunal in the event that the Tribunal had erred in its application of the burden and standard of proof.

Burden and standard of proof

134. At the very end of the hearing before the Tribunal, during the course of closing submissions, issues were raised for the first time as to the correct approach to questions of burden and standard of proof. It appears that for the Owners it was submitted that the legal (or persuasive) burden of proof shifted outright onto Dera on the question of inexcusable delay. Reliance was placed on the comments of Neill LJ in *Trill v Sacher* (supra) at 1398B:

> "…
>
> *(4) Delay which is inordinate is prima facie excusable…It is for the plaintiff to make out a credible excuse…."*

135. For Dera it was submitted that a finding of inordinate delay placed an evidential burden on it to establish a *prima facie* case that there was a credible excuse for the delay. (This submission gave rise to a related debate as to the applicable standard of proof.) Once that was established, submitted Dera, the evidential burden shifted back to the Owners to rebut it.

136. In my judgment, the effect of these submissions was unnecessarily to complicate what should be and is a simple position. It is perhaps not surprising that as a result there is a degree of confusion in some of the Tribunal's comments in the Award on the issue.

137. The legal (or persuasive) burden of proof lay at all times on the Owners to establish (on a balance of probabilities) not only that there was inordinate but also inexcusable delay. That was the Owners' affirmative case for them to prove at all times on the evidence.

138. In the passage relied on from *Trill v Sacher* set out above, Neill LJ was not addressing any formal shift of legal burden of proof. Rather he was reflecting the fact that inordinate delay demands an explanation. The practicalities on the ground mean that the delaying party is likely to be the one holding the cards, armed with the relevant information to explain the delay in question. The position was put beyond doubt by Neill LJ himself in *Shtun v Zalejska* [1996] 1 WLR 1270 (at 1289E), where he stated in terms that the burden of satisfying the precondition that the plaintiff had been guilty of inordinate and inexcusable delay rests on the person seeking the order. In the light of this authority, the Owners (rightly) abandoned any submission to the effect that Dera carried the legal burden of proof on the question of whether or not the delay was inexcusable.

139. Beyond the question of legal burden, as presaged in *Trill v Sacher*, it could be said that there is a shift of evidential burden on to the responding party once inordinate delay is established by the applying party (see the discussion in *Phipson on Evidence* (19th ed.) (2017) at [6-02]).

140. Nevertheless, I do not consider it necessary or helpful in this context to talk of a shift of evidential burden (or of swings in the evidential burden of the type referred to *The George S* [1989] 1 Lloyds Rep 369 at 370). Nor is it necessary or helpful to lay down any hard and fast rule as to what evidential standard of proof the responding party has to meet.

141. All that is happening on a s. 41(3) application is that a tribunal is being asked to consider whether or not the applying party has proved that the (inordinate) delay was (probably) inexcusable in circumstances where the responding party is the party from which the evidence relevant to that issue is likely to emanate. If the responding party has good reason for the delay it will no doubt come forward with that evidence, for the applying party then to address as it can. The applying party can do so in a number of ways, by leading its own evidence and/or by eliciting evidence in cross-examination of the responding party's witnesses, as in fact happened here, or by mere submission. Thus, although each case will be fact specific, as a matter of practice it will be the responding party that identifies what it contends to be a credible excuse for the delay. Otherwise, a tribunal will normally be driven to the conclusion that there is (probably) no such excuse.

142. Against that background I consider the Tribunal's approach in the Award. Dera submits that the Tribunal effectively reversed the legal burden of proof. That is not borne out by paragraph 118 of the Award where the Tribunal correctly recorded that the burden of proof was generally on the party seeking dismissal. It went on to state that where a delay is found to be inordinate, the evidential burden then shifts to the party resisting dismissal to make out a credible excuse. The reference (in paragraph 131) to shift of burden upon the finding of inordinate delay must be read in that context. The Tribunal

also correctly stated that at the last stage, the party seeking dismissal had to establish a clear causal link between the culpable delay of the other party and likely prejudice.

143. Having set out the parties' respective contentions, the Tribunal set out examination of the evidence in detail by reference to those contentions at paragraphs 145 to 155 of the Award. Paragraph 156 represents the highpoint of Dera's attack:

> *"In conclusion, from the foregoing review of the evidence before the evidence before us, we have not been persuaded on a balance of probabilities that the Respondent has a credible excuse for its delay in pursuing its Cargo Claim or that the Claimant bore responsibility for such delay."*

144. The Tribunal did not address the question of legal burden of proof in terms in that paragraph. It could be said inferentially from the language used that the legal burden of proof was being placed (incorrectly) on Dera. However, as set out above, the court should be astute not to be over-legalistic. The Tribunal clearly understood the limited nature of the shift of burden in paragraph 118 of the Award. The Tribunal could just have well have stated the positive, rather than the negative, i.e.: "*We were persuaded on a balance of probabilities that the Respondent does not have a credible excuse for its delay in pursuing its Cargo Claim or that the Claimant bore responsibility for such delay."*

145. Dera points to the opening sentence of paragraph 157 under the heading "*Prejudice and the risk of not having a fair resolution of the claim"*:

> *"Following our decision that the Respondent did not have a credible excuse for not prosecuting the Cargo claim any earlier than it did, the burden of proof then shifted to the Claimant to show that the delay "has caused, or is likely to cause, serious prejudice to the Claimant" and/or "gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim."*

146. Again this could be said to indicate that the Tribunal did think at least at some stage that the legal burden of proof had previously been on Dera (on the question of inexcusable delay). As stated, this would be inconsistent with its approach in paragraph 118 of the Award.

147. Reading the Award as a whole, it is therefore not possible to be clear as to precisely how the Tribunal was proceeding at certain stages in the Award in terms of a) legal and b) evidential burdens.

148. However, what matters ultimately is whether or not any confusion or error as to questions of burden of proof was material. The courts are naturally reluctant to determine issues by reference to the burden of proof. It is generally not helpful and the courts avoid it where possible (see for example the comments of Lord Brandon in *The Popi M* [1985] 2 Lloyds LR 1 at p. 6). The burden of proof itself has no "*weight"* (see *Pope v General Dental Council* [2015] EWHC 278 (Admin) at [25]).

149. It is clear from the Tribunal's analysis at paragraphs 145 to 155 that it was asking itself the right question, namely whether or not the delay was (probably) inexcusable. On a fair reading of the Award, the Tribunal did not determine the issue of "*inexcusable"* delay on the basis of who carried the legal burden of proof, nor did it need to. This was, on the Tribunal's findings, far from a borderline case where that issue might be dispositive. As it was put for the Owners, the "killer finding" was that contained in paragraph 154 of the Award:

> *"….We can therefore only conclude that the service of its Defence and Counterclaim on 1st June 2015 had been prompted as alleged by the Claimant, by the service of its Claim Submissions on 23rd March 2015."*

150. The Tribunal looked at all of the evidence in the round and made a clear determination on the right question according to the correct standard of proof. Putting it another way, it cannot be said that any confusion as to the where the legal (or evidential) burden of proof lay made any difference to the outcome of the Tribunal's conclusion on the question of whether or not the inordinate delay was "*inexcusable*".

Challenge under s. 68 : serious procedural irregularity: apparent bias

151. As set out above, s. 68(2) defines "*serious irregularity"* as a failure to comply with s. 33 of the Act that the court considers has caused or will cause substantial injustice to the applicant. Where a tribunal is shown to be biased, substantial injustice will be assumed (see *ASM Shipping Ltd of India v TTMI* [2006] 1 Lloyds Rep 375 at p. 387).

152. There are four areas of complaint:

a) the Tribunal's one-sided approach to interlocutory orders and directions;

b) the Tribunal's failure to award Dera the costs of successfully defending the Owners' argument that their claim was res judicata by reason of orders made by the Turkish courts;

c) the Tribunal's refusal to strike out the Owners' claims for demurrage and detention despite striking out Dera's counterclaim for damage to and conversion of the cargo;

d) hostile remarks made by the Tribunal during the hearing in March 2017 regarding Dera's claim.

153. In his oral submissions, Mr Semark for Dera made his primary case by reference to the Tribunal's remarks during closing submissions alone. These were, he contended, sufficient to show apparent bias without more. If he is wrong about that, he relies on the other matters as well on the basis that cumulatively they establish the bias contended for.

Overarching objection by the Owners: s. 73

154. The Owners object at the outset to this ground of challenge on the basis that Dera has lost its right to object under s. 73 of the Act ("s. 73") which provides materially:

> *"Loss of right to object*
>
> *1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection-*
>
> *…*
>
> *b) that the proceedings have been improperly conducted, …*
>
> *d) that there has been any other irregularity affecting the tribunal or the proceedings,*
>
> *he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection…"*

155. The intention behind s. 73 is to ensure that parties do not hold objections in reserve for a later challenge, reflecting a principle of openness and fair dealing between the parties. The words "*any objection*" means any ground of objection and "*that objection*" means that ground of objection (see for example *Primetrade AG v Ythan Ltd* [2005] EWHC 2399 (Comm) at [59]).

156. In deciding that the challenge for procedural irregularity required a full hearing, it can be assumed that Leggatt J did not consider that Dera's right to appeal under s. 68 had been lost. The ground of objection here is apparent bias as revealed in the Tribunal's remarks during the course of closing submissions. The earlier matters (and subsequent costs order) are relied on as supporting evidence. Dera's case is based on the cumulative effect of events, including the Tribunal's final costs order, but with particular focus on the Tribunal's remarks in the course of closing submissions. In those circumstances, Dera cannot fairly be said to have taken part or continued to take part in the proceedings after the matters to which it objects took place. On its case, it did not realise (nor could it with reasonable diligence have discovered) the issue of apparent bias until the conclusion of the proceedings. Dera also points to the fact that it did from time to time complain (for example, on 20th March, 28th August 2016 and 5th January 2017), albeit not as to apparent bias, rather as to the unfairness of various orders or steps taken by the Tribunal.

Apparent bias

157. The relevant law is non-contentious. The test for determining whether there is apparent bias is "*whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased*" (see *Porter v Magill* [2002] 2 AC 357 at [103]). The "*fair-minded and informed observer*" is "*the sort of person who always reserves judgment on every point until [he/she] has seen and fully understood both sides of the argument*" and who is not "*unduly sensitive*

or suspicious". He/she knows that "*judges must be seen to be unbiased and will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done may make it difficult for them to judge the case objectively*" (see *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416 at [1] to [3]). The fair-minded observer ought to conclude that partiality is established if such an observer "*would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and submissions of counsel*" (see *Locobail (UK) Ltd v Bayfield Properties Ltd and another* [2000] QB 451 at [21]). The legal standard of impartiality is the same for arbitrators as it is for judges (see *Locobail (UK) Ltd v Bayfield Properties Ltd* at [3]).

158. A failure to act impartially may be established if the fair-minded observer concludes that the arbitrators had, by their conduct of and during proceedings, apparently already closed their minds. Equally where the tribunal's words or conduct result in a perception of unfairness or that the tribunal regards a party with contempt which may be carried into an award (see *El Faragy v El Faragy* [2007] EWCA Civ 1149 at [31]. Extremely hostile remarks or pronounced views in favour of or adverse to a category of persons to which one of the parties belongs may be sufficient to establish apparent bias (see *Amec Capital Projects Ltd v Whitefriars City Estates Ltd* [2005] 1 All ER 723 at [21]).

Remarks during closing submissions

159. Against that background, I turn to Dera's primary case based on certain remarks made by the Tribunal during closing submissions.

160. Dera relies on the following comments in particular:

a) from Mr Aikman, as tending to show that he predetermined the cargo claim as opportunistic and unmeritorious:

i) "*MR AIKMAN: As a matter of interest, it is not uncommon for the price of this sort of cargo to rise during the summer, to reach peak in the autumn. This is what's behind many of [**these games**] for some years.*"

ii) during a discussion as to whether Dera had made a claim under its cargo insurance policy:

> "*MR AIKMAN: You are telling us that two and a half years beyond the expiry of the 12 months is not inordinate. We have to wonder why the claim wasn't made to the insurance company. Unless of course, [**there wasn't a claim under the insurance policy**].*"

iii) "*MR AIKMAN: [What claim are they defending?]*

MR SEMARK: That brings me on to my next point.

> *MR AIKMAN: [Is that none, there isn't a claim they are defending?]"*

b) from Mr Mocatta and Mr Baker, in relation to the expert report produced on behalf of the Owner when the Vessel was at Aqaba, as tending to show that they had predetermined the cargo claim as unmeritorious:

> i) "*MR MOCATTA: **[They don't seem to show any signs of saltwater damage, those reports]**. I don't know whether you would have expected them to. Moisture more or less within the 14 per cent acceptable limit."*
>
> *"THE CHAIRMAN: Sorry, can I just pose one question in relation to the summary of Salamon & Seaber at page 116. **[When looking at the averages for holds 1 and 2, I think they were within the Jordanian specification. So it raises a question about why Dera didn't seek to discharge at least the sound – well, sound within the Jordanian specification cargo.]**"*
>
> ii) *"MR MOCATTA: I'm sure [**we all thought**] that by doing preliminary points [**we might be able to short-circuit and avoid a full cargo claim hearing**], but judging by the amount of documentation produced, it is the same sort of size."*

c) From Mr Aikman, following submissions from Mr Semark as to the approach to be adopted on the question of inexcusable delay, as showing a closed mind:

> *"MR AIKMAN: Your view is noted."*

161. I am not persuaded that these remarks, either individually or cumulatively, come close to establishing apparent bias by reference to the relevant test.

162. First, the remarks cannot be taken in isolation. The individual members of the Tribunal showed clear signs of having an open mind in relation to the s. 41(3) application which was what was before them. Thus, by way of example,:

a) Mr Mocatta explored at length the meaning of the term "inordinate":

> *"MR MOCATTA: What does "inordinate" mean? It is not a word I normally use in normal conversation.*
>
> *MR ASWANI: Well, I say that "inordinate" has to, in this context, be judged by reference to the applicable limitation period.…Now, I don't suggest that the moment limitation expires it's necessarily an inordinate delay. That would be putting it too highly. But it is a yardstick or a benchmark which any tribunal should have in mind as to whether the delay is inordinate, it has to be judged by reference to the applicable limitation period.*

MR MOCATTA: So if you have got the one-year time limit and nothing happens, you can't say that's inordinate. Do you then say, oh, well, let's add another one year on top of that, so if nothing happens say within two years you can say that is inordinate? "in" implies a negative and "ordinate", a coordinate, ordinate? It means extraordinary?…"

b) Mr Mocatta and Mr Aikman explored at length the parties' respective positions in relation to the delay:

"MR MOCATTA: You're saying two and a half years elapsed between November 2012, which is when the one-year time limit would have expired, and June 2015 when they finally served their counterclaim?

MR SEMARK: Correct. But within that two and a half year period, there must be a further period where the delay cannot be inordinate, because the guillotine does not drop automatically on the expiry of the one-year period. It is not for me to tell you what that is. Nowhere in the case that has been presented to you, either in Mr Moore's evidence or my learned friend's submissions, has he tried to do that….

MR AIKMAN: Isn't he trying to persuade us that two and a half years is inordinate?

MR SEMARK: If he does try to persuade you on that –

MR AIKMAN: Hasn't he done that? Isn't that the point?

MR SEMARK: If that is his case, which don't understand it to be – perhaps it is a point he would like to revisit in reply – it can't be right because, as I said, a delay doesn't suddenly become inordinate once the one-year Hague Rules time bar is up, because if that is right, then every single cargo claim which is particularised after expiry of a one-year period would be –

MR AIKMAN: We have got past the one year, haven't we? We have another two and half years.

MR SEMARK: Yes, at some point in that two and a half years what my learned friend has to do is convince you that a period started which was inordinate.

MR AIKMAN: isn't it sufficient to say two and a half years is inordinate?

…

MR MOCATTA: Doesn't it depend to a certain extent on the timing of the initiation of all this? In many of these cargo claims, the cargo is discharged. I don't know, there are some surveys.

The claim isn't raised against the P&I Club or the owner until some time has elapsed after the discharge, despite that clause in the Hague Rules which says that have to give notice within seven days of something being wrong. So about a year later, this thing sort of may arise and sometimes, very often, the first you hear about it is a P&I Club man says, "They want an extension of time because the year is running out".

…

"MR MOCATTA: Then you have another year. But in this case the cargo interests knew immediately what the problem was: the cargo disappeared. They went to court in Aqaba. They got anti-suit injunction. Then they knew what was going on in Turkey but they didn't [do] anything about presenting their cargo claim apart from getting hold of a letter of indemnity from the American Club which didn't actually result in the ship being able to sail. Then they did nothing. Then two and a half years later, in 2015 they put in their claim. So surely you could take part of that year – you say you exclude the year altogether, but surely if they know about it and they haven't actually started anything you should be able to take that into consideration. I'm not saying that on day 366 you would say it was inordinate delay. But if it was 18 months, and nothing happened, and they knew about it from the beginning, that would seem to me to be excessive, where you haven't even really raised your claim.

MR SEMARK: Well, it depends. The yardstick against which it falls to be measured – how are other claims like this dealt with in the industry? Because inordinate must mean something inordinate in comparison to something else.

MR MOCATTA: In my experience, if the cargo owner is saying, hey, the shipowner has sailed off with my cargo, it should start very quickly. They are not going to hang around. You are going to presumably try to follow the ship and try to arrest it at the next port it goes to.

MR SEMARK: That's to obtain security, yes, quite, which we did.

MR MOCATTA: They got security and the ship still sailed. What I mean is, if they were really concerned that the owner had converted the cargo or taken it off without permission, wouldn't they have tried to arrest the ship? You could follow ship movements relatively easily, go to a Turkish Court and say "This guy has walked off with my cargo, I beg you to intercede on my behalf", but they didn't do anything like that."

…

> *"You're saying what would we as claims handlers in P&I Clubs expect to happen in something. In a normal cargo claim it turns up on month 11, you give an extension, you try to find out as much as you can about it. Yes, you probably wouldn't be able to argue about delay until at least another year had gone by but in this particular instance it is something immediate. They must know – they knew their cargo had disappeared."*

163. Secondly, it is important to put the remarks in context, including the fact that the Tribunal in considering both delay and prejudice were fully entitled to explore the substantive merits and background of the cargo claim. There were some 12 lever arch files of documents before the Tribunal and the parties had adduced what material they wished for the purpose of disposal of the issues. Thus:

a) Mr Aikman's reference to *"**[these games]**"* was made during the course of submissions from Mr Aswani for Dera on the value of the cargo when it was at Aqaba in the autumn of 2011. Mr Aswani had submitted that the value of the cargo might have been zero at that stage. Mr Aikman then suggested that the price of maize tended to rise towards the summer:

> *"MR ASWANI: …There are some serious issues in relation to what exactly the value of this cargo was, if indeed beyond zero, at Aqaba. The reasons I say there is a credible case it was zero is, if it is sitting there, no reasonable prospect of anything happening, in order to realise even $1 of value it has to go somewhere else if nothing can be done in Jordan. You have my submissions on that.*
>
> *MR AIKMAN: As a matter of interest, it is not uncommon for the price of this sort of cargo to rise during the summer, to reach peak in the autumn. This is what's behind many of **[these games]** for some years."*

b) Mr Aikman's comment that "***[there wasn't a claim under the insurance policy]***" was made during the course of submissions from Mr Semark for Dera on the question of why the cargo claim was not particularised earlier than it was. Mr Semark was seeking to rebut the suggestion (made by the Owners) that Dera was acting purely reactively in response to the Owners' particularisation of its declaration claim in 2015. Mr Aswani sought to do so by pointing to Dera's attempts, two years earlier (in 2013), to instruct a law firm to take forward the cargo claim on its behalf. Mr Aikman was seeking to find out whether Dera had also made a claim under its cargo insurance policy:

> *"MR AIKMAN: One of the things the cargo interests were not doing, presumably they believed they had a claim against the owner under contract of carriage.*
>
> *MR SEMARK: That is my understanding.*
>
> *MR AIKMAN: For which they took out an insurance policy.*

MR SEMARK: Correct.

MR AIKMAN: They did not issue an insurance claim and they did not allow the insurance company to take recovery action against the owners.

MR SEMARK: That is an issue which has arisen during the course of the evidence given by Mr Bulbul. So it is not something on which we have had an opportunity to –

MR AIKMAN: You know with such claims that's the normal procedure.

MR SEMARK: It is the normal procedure. But, as you also know, Mr Aikman, if an insurance company sees a way not to pay out on a claim, it will not do so.

MR AIKMAN: One of the reasons it sees not to pay out on a claim is because it doesn't fall under the policy.

MR SEMARK: It doesn't fall under the policy. One of the exclusions we were looking at yesterday is an exclusion for rejection of cover for where the loss or damage occurs by rejection by the Jordanian authority. I will show you what the evidence is later on. The evidence is that what Mr Bulbul senior was trying to do prior to the vessel leaving was to get the Jordanian authorities to reverse its decision. Now, I don't know at this stage, because I haven't seen the exchanges between the insurers and the owners, why it is precisely that a claim wasn't made, but I don't think it is safe to assume –

MR AIKMAN: Do you see the difficulty for the tribunal?

MR SEMARK: Well, you will have to explain that difficulty, sir.

MR AIKMAN: You are telling us that two and a half years beyond the expiry of the 12 months is not inordinate. We have to wonder why the claim wasn't made to the insurance company. Unless, of course, ***[there wasn't a claim under the insurance policy]****."*

c) Mr Aikman's questions ("***[What claim are they defending?]***" and "***[Is that none, there isn't a claim they are defending?]***") were posed following a suggestion that the Owners ought to have called Mr Bulut (an employee of the Owners) to give evidence on the extent to which the Owners' ability to defend the claim had been prejudiced:

"So what you have to decide is, is that allegation which is contained in an unsigned witness statement of a witness who is not before you, and who obviously hasn't been presented – this

is another illogicality in my learned friend's case, because of course I have produced a witness. You have had the opportunity to see my client give his evidence. The owners are on that side of the table. They haven't produced any witness. Normally when an owner says "my ability to defend that claim has been prejudiced" you expect somebody from the owners to come and tell us.

MR AIKMAN: ***[What claim are they defending?]***

MR SEMARK: That brings me on to my next point.

MR AIKMAN: ***[Is that none, there isn't a claim they are defending?]***

MR SEMARK: No, certainly not, sir. That brings me on to my next point."

(In this context Mr Semark also complained that the Tribunal had seen fit to rely on what was only an unsigned witness statement from Mr Bulut who had not come to give evidence. However, Mr Bulut's absence (through ill health) and poor recollection substantiated the very prejudice of which Owners were complaining.);

d) Mr Mocatta and Mr Baker's questions about the contents of the expert reports were asked during the course of submissions from Mr Semark in relation to those reports. Mr Semark was seeking to rebut the suggestion (made by the Owners) that the Owners had suffered prejudice through the lack of available evidence. Dera sought to do that by pointing out that these reports existed. Mr Mocatta and Mr Baker were simply making observations about what those reports said:

"MR SEMARK: As far as Aqaba is concerned, well, of course we do have Captain Daniels' own contemporaneous report. He was there. He will presumably be tendered as witness of fact at any hearing in which the company [sic] of the cargo in in issue. In obvious preparation for the defence of the claim, Captain Daniells sent all the samples he had taken to Salamon & Seaber for analysis in London. You see a synopsis of the analyses carried out by Salamon & Seaber on page 116 and the actual analysis reports are located in a cluster of documents that run from 117 all the way through to 140. Then at 141 we have photographs. They start with photographs of events at the loadport, again, obviously collected by Mr Daniells from presumably the vessel's crew or somebody who took them during the course of loading operations.

THE CHAIRMAN: Sorry, can I just pose one question in relation to the summary of Salamon & Seaber at page 116. When looking at the averages for holds 1 and 2, I think they were within the Jordanian specification. So it raises a question about why Dera

didn't seek to discharge at least the sound – well, sound within the Jordanian specification cargo.

MR SEMARK: I am not sure and I don't have instructions on this but I consider it to be unlikely that these were ever sent to us at the time. I can take instructions on that if you wish me to, but this is evidence which the owners – these certificates are address to Brookes Bell. So it is evidence that the owners collected.

THE CHAIRMAN: I don't know if they were shared with –

MR SEMARK: I can take instructions. The answer is no, we didn't see them at the time, according to Mr Bulbul. I agree, it might well have been useful if we had, but we didn't.

THE CHAIRMAN: I would have thought that the analysis of the government would have reflected a similar sort of range of values.

MR SEMARK: Yes, one would have hoped so. But I think the reason we often send samples to Salamon & Seaber is the governments overseas are not always –

MR MOCATTA: They don't seem to show any signs of saltwater damage, those reports. I don't know whether you would have expected them to. Moisture more or less within the 14 per cent acceptable limit."

e) Mr Mocatta's comments that "***[we all thought]…[we might be able to short-circuit and avoid a full cargo claim hearing]***" were referable to the volume of documentary evidence adduced by the parties for a preliminary issues hearing that was meant to be confined to issues of law. This was in response to a suggestion, by Mr Semark, that part of the reason for the delay in the arbitration was the length of time it had taken to fix the preliminary issues hearing:

"MR SEMARK: I would ask you to bear this in mind: why has this reference not progressed since my clients sent their reply submission? It has not progressed for two reasons. First, the claimants alleged that my client's time [sic] was barred by the orders made by the Turkish court. That was a transparently weak allegation which should never have been made. They alleged in their defence submissions. That was then followed almost a year later by an application for dismissal, and it has taken all that time since then to bring – before we have had a chance to resolve this matter. So when we are talking about delay in this reference, there has indeed been an extensive delay in this reference but it has not been one caused by my client's actions, let alone culpable actions.

MR MOCATTA: I'm sure ***[we all thought]*** *that by doing preliminary points* ***[we might be able to short-circuit and avoid***

> ***a full cargo claim hearing]****, but judging by the amount of documentation produced, it is the same sort of size."*
>
> It was a perfectly legitimate comment.

164. Thirdly, the meaning of some of the remarks is not sufficiently clear for a fair-minded and informed observer to draw any firm conclusions of animus against Dera or the cargo claim, or as to a closed mind on the part of the Tribunal. Dera's interpretation of the remarks is not the only plausible (or even the most obvious) explanation:

a) It does not follow from Mr Aikman's reference to "***[these games]***" that Mr Aikman had necessarily formed the view that Dera was playing such "games";

b) The statement that "***[there wasn't a claim under the insurance policy]***" could be interpreted as a straightforward question or statement of fact;

c) It is not at all clear what Mr Aikman was driving at with his questions ("***[What claim are they defending?]***" and "***[Is that none, there isn't a claim they are defending?]***"). These comments may have been a response to Dera's suggestion that the Owners were obliged to call evidence to defend a very stale claim. It seems implausible that Mr Aikman could have meant his comments literally. There can be no doubt that, at that stage, he knew that Dera had a made claim for damage to/conversion of its cargo and that that was the claim that the Owners were defending;

d) The questions asked by Mr Mocatta and Mr Baker could readily be construed as a straightforward attempt by the Tribunal to explore the background facts: "***[They don't seem to show any signs of saltwater damage, those reports]***" and "***[When looking at the averages for holds 1 and 2, I think they were within the Jordanian specification. So it raises a question about why Dera didn't seek to discharge at least the sound – well, sound within the Jordanian specification cargo.]***";

e) It is does not follow from Mr Mocatta's comments ("***[we all thought]*** …***[we might be able to short-circuit and avoid a full cargo claim hearing]***") that he had decided that a full cargo claim hearing *would* be avoided. The comments simply reveal Mr Mocatta's belief that this was a possibility - which it was;

f) It is difficult to see why Mr Aikman's comment that Mr Semark's submissions were "***[noted]***" can be said to be controversial. It is the sort of comment made by arbitrators and judges up and down the country every day.

165. Fourthly, it is important to be realistic, taking into account the cut and thrust of the arbitral process. It would be wrong to (and the fair-minded and informed observer would not) jump to serious conclusions of bias because of a passing comment or interjection where the use of language may not be as considered or careful as would ideally be the case, or because the Tribunal referred to experiences or thoughts that may not have been directly on point.

166. Fifthly, Dera suggests that the remarks demonstrate that the Tribunal had closed its mind on the question of the substantive merits of the cargo claim. The Tribunal was not

being asked to rule on those merits. Even if it had closed its mind in the manner suggested, it does not follow that the Tribunal had a closed mind on the question of the merits of striking-out the cargo claim under s. 41(3). The Award demonstrates that the Tribunal considered those merits very carefully.

167. Sixthly, the transcript makes it clear that Mr Semark (and on one occasion, Mr Aswani,) played a firm role in steering the Tribunal to focus on the issues when necessary and that the Tribunal was open to and understood their submissions. By way of example,:

a) Mr Aikman's reference to *"**[these games]**"* was followed by:

> *"MR ASWANI: Yes. I fully accept there may be seasonal variations in price. Neither party has raised any suggestion that that's an issue in this case.*
>
> *MR AIKMAN: Correct."*

b) Mr Aikman's comment that "[***there wasn't a claim under the insurance policy****]*" was followed by:

> *"MR SEMARK: Well, it is Mr Bulbul's evidence, as I understand it, that he has not to this date made a claim under the insurance policy. But you would have to ask yourself why that point would be relevant to your analysis of whether there has been an inordinate delay by my client in bringing his claim against the shipowners. Now, there may be any number of reasons why a claim hasn't been made. One obvious reason why a claim may not have been made is because the policy wording that we looked at specifically excludes loss caused by rejection by the authorities, and we know that at the time the vessel had left Aqaba Mr Bulbul senior was attempting to persuade the authorities to reconvene a third inspection committee and reverse its previous decision to disallow the cargo in, but the vessel left before that step could be taken. So that may well explain why it is that a claim was not in fact made on the policy. But you can't assume, from the fact that a claim wasn't made under policy, that that necessarily meant that my client somehow thought he didn't have a claim against the owners.*
>
> *MR AIKMAN: Except the fact that the cargo was disallowed the day after the vessel arrived.*
>
> *MR SEMARK: Well, there were two rejections of the cargo by the Jordanian authorities, and my client was in the process of trying to reverse that, as we will see. But my submission to you is that that is not a relevant consideration for you here.*
>
> *MR AIKMAN: Okay."*

c) Mr Aikman's questions ("[*What claim are they defending?*]" and "[*Is that none, there isn't a claim they are defending?*]") were followed by:

"MR SEMARK: No, certainly not, sir."

d) Mr Mocatta and Mr Baker's comments ("[***They don't seem to show any signs of saltwater damage, those reports***]" and ("[***When looking at the averages for holds 1 and 2, I think they were within the Jordanian specification. So it raises a question about why Dera didn't seek to discharge at least the sound – well, sound within the Jordanian specification cargo.****]*") were followed by:

> *"MR SEMARK: That will no doubt be the argument advanced against me at the hearing on the merits. The question for us today is –*
>
> *MR MOCATTA: At which you will no doubt challenge Mr Daniel's recollection of events on the basis of the lapse of time.*
>
> *MR SEMARK: This is essentially my point. The point for you today is not – emphatically clearly not – has my client proved its cargo claim. The application before you is to dismiss my client's claim on the basis that it is no longer possible for the owners to get a fair resolution of it because their ability to defend the claim has been seriously prejudiced. When assessing the strength of that averment, it's obviously a point for you, gentlemen, but you may carry out a preliminary assessment of what this evidence which the owners have collected shows and decide whether or not it is the sort of evidence which you might expect an owner to submit in defence of such a claim. If you are satisfied that the evidence does or will assist in the claim, then that is obviously a factor that you have to take into account in assessing whether or not to dismiss my client's claim under section 41(3) because that is the only application for you today."*

e) Mr Moccatta's comments that "**[*we all thought*]** …**[*we might be able to short-circuit and avoid a full cargo claim hearing*]**" were followed by:

> *"MR SEMARK: Yes, that is water under the bridge. But the only question for you now, sir – this is the point. There are two issues before you. One, is my client's claim time barred by the order of the Turkish courts? I will take you very briefly if we have time to why the answer is no. But it should be very obvious to you from what Mr Guzel said yesterday. And, secondly, can the owners show that their ability to defend the claim has been seriously prejudiced by a culpable delay by my clients which is inexcusable?"*

168. Standing back, a fair-minded and informed observer, having considered the facts, would not conclude from the Tribunal's remarks during the course of closing submissions that there was a real possibility that the Tribunal was biased.

Other matters : orders and decisions

169. Dera sought to rely on other matters that it submitted, when taken together with the remarks made during closing submissions, demonstrate the existence of apparent bias.

One-sided approach to interlocutory Orders

170. Dera's case is that the Tribunal made a series of interlocutory orders and directions that, when taken together with the remarks made during closing submissions, demonstrate apparent bias. It is important to note that it is no part of Dera's case that these interlocutory orders and directions, on their own, amount to serious irregularities such as to justify an allegation of apparent bias. It is the cumulative effect of these decisions, when considered in the light of the remarks made during closing submissions, that is said to amount to an irregularity.

171. Given the gravity of the allegations levelled at the Tribunal in this regard, it is necessary to consider the evidence of Mr Boaden, Dera's solicitor, and Mr Moore, the Owners' solicitor, in a little detail.

172. Mr Boaden gave evidence of the following interlocutory orders and directions that, when taken cumulatively, he submitted demonstrate apparent bias:

a) Preliminary issues: Dera made clear its position was that none of the issues in the arbitration were suitable for determination as preliminary issues. Nevertheless, the Tribunal adopted the preliminary issues procedure and proceeded with the Owners' formulation of the two preliminary issues (set out in the Owners' email of 15th March 2016) without giving Dera the opportunity to comment;

b) Disclosure: Dera's request for disclosure of all relevant documents relating to the Turkish Proceedings was refused on the basis of an assertion by the Owners that no such documents existed. That assertion was exposed as incorrect when the Owners subsequently served further evidence of that nature. Dera's request for disclosure of an email from the Owner's insurers to the Owners around the time of the departure of the Vessel from Aqaba was also refused. However, when the Owners sought specific disclosure of a wide range of documents from Dera, the Tribunal made an order in precisely those terms;

c) Expert evidence: the Owners were allowed to submit expert evidence without permission or directions from the Tribunal. In contrast, 30 of the 36 paragraphs of expert evidence adduced by Dera were struck out by the Tribunal;

d) Accusations by Mr Mocatta: in an email dated 14th October 2016, Mr Mocatta wrongly accused Dera of having changed its position in relation to the question of whether the preliminary issues could be determined on the papers alone.

173. In response, Mr Moore (to whose evidence Dera did not respond with any further evidence) said the following:

a) Preliminary issues: the Owners' position on preliminary issues was first raised in their LMAA questionnaire on 26th January 2016. The Owners' email of 15th

March 2016 modified the wording of those issues but did not raise them for the first time. Therefore, it is not correct to say that Dera was not given an opportunity to comment. Dera had an opportunity to, and did, comment during the course of the correspondence (between the parties and the Tribunal) on the nature and scope of the issues in the arbitration;

b) Disclosure: Dera's request for disclosure was a very broad and general request for all documents relevant to the Turkish Proceedings. Dera did not identify any specific documents or classes of documents of which it sought disclosure. The Owners asserted that it had disclosed all documents relevant to the Turkish Proceedings. This assertion was correct at the time that it was made i.e. before Dera had adduced any evidence of Turkish law. Once Dera had adduced its evidence of Turkish law, the Owners reconsidered the case they had to meet and disclosed further documents which had only then become relevant. The Owners' application for specific disclosure was made on the basis of 16 deficiencies in Dera's disclosure to date. It was a targeted request and it was of a completely different nature to Dera's vague request for all documents relevant to the Turkish Proceedings;

c) Expert evidence: Dera's expert evidence of Turkish law was served purportedly in reply to the Owners' expert evidence of Turkish law. However, it contained new matters and was not confined to matters of reply. It was struck out for that reason;

d) Accusations by Mr Mocatta: in his email dated 14th October 2016, Mr Mocatta gave an accurate description of recent events.

174. Mr Moore denied that the Tribunal never acceded to Dera's requests for interlocutory orders. Thus:

a) On 25th April 2016, the Tribunal ordered the Owners to serve evidence of prejudice. This was done at the request of Dera;

b) On 4th July 2016, the Tribunal allowed Dera's request for further time to serve witness evidence.

175. Mr Moore also denied that the Tribunal always acceded to the Owners' requests. On 21st March 2017 (i.e. the second day of the hearing), the Tribunal refused the Owners' request to cross examine Dera's witness in relation to privileged material which had been disclosed inadvertently.

176. Finally, Mr Moore pointed out that Preliminary Issue A was decided entirely in Dera's favour.

177. It is clear from a review of the full circumstances surrounding the Tribunal's interlocutory orders and directions, and of the conduct of the arbitration as a whole, that none of the matters relied on by Dera demonstrate the existence of apparent bias on a cumulative basis as asserted. Mr Boaden's witness statement overstates the position. So for example, it is not right to say that Dera had no opportunity to influence the question of whether or not, and if so what, preliminary issues should be heard. The steps taken

by the Tribunal, for example in relation to disclosure and expert evidence, were readily understandable.

Refusal to strike out the demurrage claim

178. As for the refusal to strike out the demurrage claim, it cannot be said that this demonstrates the existence of bias. There are at least two obvious reasons why the Tribunal declined to strike out the demurrage claim. First, such a decision would have been outwith the Tribunal's jurisdiction at the hearing on the preliminary issues; secondly, the limitation period for that claim had not yet expired.

Award on costs associated with Preliminary Issue A

179. Dera suggests that the costs order in the Award demonstrates apparent bias. The Owners raise a specific s. 57 challenge on the basis that Dera could and should have sought clarification of the Tribunal's reasoning in this regard. This is an unattractive submission which in any event falls foul of the permission granted by Leggatt J.

180. I was told that Dera positively invited the Tribunal to deal with costs immediately in the Award rather than to reserve them for further argument once the Tribunal's decisions and reasons were known. At first blush, it might seem odd that the costs order did not reflect Dera's success on Preliminary Issue A. However, on closer analysis, it can be seen why the Tribunal could properly have exercised its discretion in the way that it did. Both preliminary issues went to the question of whether or not the cargo claim could survive. The Owners were the overall winners on that issue. A fair-minded and informed observer would not conclude from the outcome on costs that there was a real possibility of bias on the part of the Tribunal.

181. Thus these additional matters, combined with the Tribunal's remarks during the course of closing submissions, do not tip the balance in Dera's favour so as to establish apparent bias.

182. For all these reasons, Dera has failed to overcome the "*uphill struggle*" that Leggatt J identified on this ground and the challenge under s. 68 based on apparent bias fails.

Conclusion

183. For the reasons set out at paragraphs 151 to 182 above, I dismiss Dera's challenge under s. 68. On the points of law raised under s. 69 for which permission to appeal was granted and for the reasons set out above, I answer as follows:

a) Whether a claim which is particularised within the six year limitation period applicable to contractual claims pursuant to s. 5 of the Limitation Act 1980 can nevertheless be struck out for "inordinate delay" under s. 41(3) because the parties have contracted for a shorter limitation period (here one year under Article III Rule 6 of the Hague Rules ("Article III Rule 6"): yes, it can be (see paragraphs 63 to 73 above);

b) Whether, in a contract evidenced by a bill of lading subject to the Hague Rules, a geographic deviation precludes a carrier from relying on the one year time bar created by Article III Rule 6: on the basis that I am bound by *Hain Steamship,*

yes, it does (assuming also election by the innocent party to treat the contract as at an end). Were I not so bound, I would answer no, it does not (see paragraphs 74 to 119 above);

c) Whether, where the one year time bar created by Article III Rule 6 applies, the period between a) the time that the cause of action arises and b) the expiry of the contractual time limit is to be taken into account when assessing whether the delay is "inordinate" for the purpose of s. 41(3): yes, it can be (see paragraphs 120 to 129 above);

d) The proper order, burden and/or standard of proof applicable to a tribunal's assessment of whether a delay is "inexcusable" for the purpose of s. 41(3): the legal (or persuasive) burden lies on the applying party to prove on a balance of probabilities that the inordinate delay in question is inexcusable. Although each case is fact-specific, and whilst it is not generally helpful to speak in terms of a shift of evidential burden in this context, it will normally be the responding party that identifies a credible excuse for the delay (see paragraphs 130 to 150 above).

184. This has been a valuable exercise in providing an opportunity for the court to address central issues arising under s. 41(3) and the question of geographical deviation in the context of the discrediting of the doctrine of fundamental breach.

185. I invite the parties to draw up an order reflecting my findings and conclusions above and to agree all consequential matters, including costs, so far as possible.