



Neutral Citation Number: [2022] EWHC 1168 (Comm)

Case No: CL-2021-000414

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2022

Before :

MR JUSTICE FOXTON

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Between :

NATIONAL INVESTMENT BANK LTD

Claimant

- and -

(1) ELAND INTERNATIONAL (THAILAND) CO LTD

(2) ELAND INTERNATIONAL GHANA LIMITED

Defendants

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Dominic Chambers QC (instructed by **Rosenblatt**) for the **Claimant**
Harish Salve QC (instructed by **Steptoe & Johnson UK LLP**) and **Leigh Mallon**
(of **Steptoe & Johnson UK LLP**) for the **Defendant**

Hearing date: 9 May 2022
Draft judgment to the parties: 11 May 2022

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Approved Judgment

I direct that 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 MR JUSTICE FOXTON

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This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Tuesday 16 May 2022 at 09:00am.

Mr Justice Foxton :

1. This is the Claimant's ("NIB"s) application for relief under s.72(1) of the Arbitration Act 1996 ("the 1996 Act"). Section 72 provides:

"Saving for rights of person who takes no part in proceedings.

(1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question—

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, or

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement,

by proceedings in the court for a declaration or injunction or other appropriate relief."

The factual background

2. In 2001, NIB entered into a Collateral Management Agreement ("the 2001 Agreement") with both the First Defendant ("Eland Thailand") and the Second Defendant ("Eland Ghana") (and collectively "Eland"). In 2004, NIB and Eland entered into a further agreement ("the 2004 Agreement"), clause 6 of which provided:

"All parties agree to resolve any differences in a friendly manner by discussions failing which the matter may be referred to an Arbitrator under the Laws of the United Kingdom in London";

("the Arbitration Agreement"). It was common ground before me that it was arguable that the Arbitration Agreement applied to disputes arising under both the 2001 and 2004 Agreements.

3. On 22 April 2014, Eland Thailand commenced proceedings against NIB in the Accra Court in Ghana, advancing various claims under the 2001 Contract ("the Accra Proceedings"). Thereafter:
- i) On 19 May 2014, NIB served a defence and counterclaim in the Accra Proceedings alleging that the 2001 and 2004 Agreements formed part of a fraudulent scheme put into effect by Eland.
 - ii) On 24 December 2014, NIB served a Third Party Notice on Eland Ghana seeking to make it a party to the counterclaim advanced in the Accra Proceedings.
 - iii) On 3 June 2015, Eland Ghana filed an unconditional Notice of Entry of Appearance in the Accra Proceedings.
 - iv) On 23 October 2015, NIB applied for permission to amend its counterclaim and Third Party claim so as to advance additional claims.

- v) On 11 November 2015, Eland Ghana filed an affidavit in opposition to that application, in terms to which I shall return. The application to amend was refused.
 - vi) On 15 December 2015, Eland Ghana applied to stay the Accra Proceedings in favour of arbitration.
 - vii) On 19 February 2016, Mr Justice Jerome Noble-Nkrumah stayed the Accra Proceedings (“the Arbitration Order”).
4. There was correspondence between the legal representatives of NIB and Eland in January and February 2016 in relation to Eland’s attempt to arbitrate the dispute, and, on 23 May 2016, Eland served a document which purported to be a Notice of Arbitration on NIB (“the NOA”).
 5. On 28 April 2020, NIB served notice of its intention to prosecute the Accra Proceedings. On 13 May 2020, Eland filed an Arbitration Claim form with the Commercial Court asking the court to appoint an arbitrator under s.18 of the 1996 Act. That application and the supporting documents were served on NIB, but NIB did not engage with the application.
 6. On 2 September 2020, Andrew Baker J made an order providing for the appointment of a sole arbitrator in the arbitration purportedly commenced by the NOA.
 7. On 15 January 2021, NIB applied to the Accra Court asking it to exercise its inherent jurisdiction to set aside the Arbitration Order. That order (“the Set Aside Order”) was granted on 22 March 2021.
 8. On 9 July 2021, NIB issued the present application. Eland served their evidence in response on 1 October 2021.

The adjournment application

9. On 22 March 2022, Eland’s solicitors, KaurMaxwell LLP, came off the record. On 6 May 2022, the Friday before the hearing, Steptoe & Johnson UK LLP came on the record for Eland and applied to adjourn the hearing. However, on 8 May 2020, Eland’s advocates, Mr Salve QC and Mr Mallon, served a detailed skeleton argument addressing the issues which arose.
10. In the course of my pre-reading of the case, I had formed the view that the issues which arose were relatively straightforward, largely turned on the analysis of undisputed facts, and could readily be argued by Eland’s counsel team (particularly in circumstances in which Mr Salve QC had been involved in the matter when KaurMaxwell LLP were on the record). That impression was amply borne out by the hearing, in which I received comprehensive arguments. In addition, I was concerned at the delay which would follow from a late adjournment of the hearing, particularly when the reasons why there had been a change in legal representation and why this had interrupted preparations for the hearing had not been satisfactorily explained.
11. In these circumstances, and with the agreement of the parties, I decided that argument would proceed, but that it would be open to the court to revisit the issue of adjournment

to the extent that the course of argument revealed any areas where Eland's legal team were genuinely in difficulty. In the event, it was possible to complete the argument without any such issue emerging. I therefore refused the adjournment application as I indicated at the end of the hearing.

The s.18 argument

12. At the hearing, Mr Salve QC took a preliminary argument that the s.18 order made by Mr Justice Andrew Baker precluded NIB from relying on s.72. Section 18 provides as follows:

“18.—Failure of appointment procedure.

- (1) The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal. There is no failure if an appointment is duly made under section 17 (power in case of default to appoint sole arbitrator), unless that appointment is set aside.
 - (2) If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.
 - (3) Those powers are—
 - (a) to give directions as to the making of any necessary appointments;
 - (b) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;
 - (c) to revoke any appointments already made;
 - (d) to make any necessary appointments itself.
 - (4) An appointment made by the court under this section has effect as if made with the agreement of the parties.”
13. It is now clear that for the court to exercise its s.18 powers, it is not necessary for it to reach a final decision on whether or not there is an arbitration agreement between the parties, or whether the dispute which the applicant seeks to refer to arbitration falls within the scope of that arbitration agreement. It is sufficient that the s.18 applicant can show a good arguable case to that effect: *London Steam-ship Owners' Mutual Insurance Association Limited v The Kingdom of Spain* [2021] EWCA Civ 1589, [58] approving *Noble Denton Middle East v Noble Denton International Ltd* [2010] EWHC 2574 (Comm). It follows that it is possible for the pre-conditions to a s.18 appointment to be satisfied, and yet for there to be no valid arbitration or no agreement to submit the relevant matters to arbitration for the purposes of s.72(1)(a) and (c).
14. Mr Salve QC argued that ss.18 and 72 operated together as follows:
- i) An appointment by the court under s.18, by virtue of s.18(4), had the same effect as if the non-participating arbitrating party had made the appointment itself.

- ii) The effect of doing so was that the non-participating party became a party to the arbitral proceedings, although that left open the question of whether the arbitral tribunal had jurisdiction. This is because it is perfectly possible to participate in the appointment process without accepting the tribunal's jurisdiction, leaving it to the tribunal to determine its jurisdiction under s.30 with a right of challenge under s.67: see s.31(1) ("a party is not precluded from raising [an objection that the arbitral tribunal lacks substantive jurisdiction] by the fact that he has appointed or participated in the appointment of an arbitrator").
 - iii) However, someone who participated (or is to be treated as having participated) in the appointment process cannot bring themselves within s.72. Such a person is clearly a party to arbitral proceedings (whereas s.72 only applies to "a person *alleged* to be a party to arbitral proceedings") and/or by virtue of being deemed to have participated in the appointment process, they do not meet the s.72(1) requirement of being a person "who takes no part in the proceedings".
15. Ingenious as this argument was, and attractively as it was presented, I am unable to accept it. Section 72 provides an important protection to those who do not accept the jurisdiction of the arbitral tribunal and take no part in the arbitral process. The Department Advisory Committee on Arbitration Law ("DAC") Report on the Arbitration Bill (February 1996) observed of what was then clause 72:
- "To our mind this is a vital provision. A person who disputes that an arbitral tribunal has jurisdiction cannot be required to take part in the arbitration proceedings or to take positive steps to defend his position, for any such requirement would beg the question whether or not his objection has any substance and thus be likely to lead to gross injustice. Such a person must be entitled, if he wishes, simply to ignore the arbitral process ... Those who do decide to take part in the arbitral proceedings in order to challenge the jurisdiction are, of course, in a different category, for then, having made that choice, such people can fairly and properly be required to abide by the time limits etc that we have proposed".
16. On Mr Salve QC's construction, that "vital" protection would be lost in any case in which the participating party applied to the court under s.18, in default of the co-operation of the non-participating party, even though the non-participating party took no part in the s.18 application. Moreover, this erosion of the s.72 protection would operate in a haphazard way:
- i) It would not operate where the participating party could approach a contractually designated appointing body, rather than the court, to complete the appointment process without the co-operation of the non-participating party, or where s.17 of the 1996 Act allows the arbitrator appointed by the participating party to be appointed as sole arbitrator.
 - ii) On its face, the terms of s.18(4) on which the argument relies apply only to "an appointment made by the court under this section". However, s.18 permits other orders by the court including giving "directions as to the making of any necessary appointments". While s.18(4) can no doubt be read as extending to any appointment effected by reason of the s.18 application, the imprecision in the language used in s.18(4) does not suggest that it is intended to have the important effect for which Mr Salve QC contends.

- iii) Section 17(2), addressing a very similar issue, uses different language (“whose award shall be binding on both parties as if he had been so appointed by agreement”) which is not susceptible to the same argument. Mr Salve QC’s submission, therefore, would involve a stark and unexplained distinction between these two provisions intended to address the same issue of non-participation in the appointment process.
 - iv) There is nothing in the DAC Reports of February 1996 or January 1997 which suggests that s.18 was intended to operate in this way.
17. Further, the statutory language relied upon is clearly aimed at different issues:
- i) Section 18(4) seeks to make it clear that the powers of the arbitrator and effect of an award do not differ if the arbitrator in question, or a member of the arbitral tribunal, is a court-appointed rather than party-appointed arbitrator (as s.10(1) of the Arbitration Act 1950 had done, albeit in different language). In short, the statute deems the *outcome* (or effect) of the appointment, but it does not deem the *participation* of the non-participating party in the appointment process for any other purpose.
 - ii) Section 72(1) necessarily refers to a person “*alleged*” to be a party to arbitral proceedings” because it operates in circumstances in which this is the issue in dispute which s.72 is intended to resolve. Section 31(2) uses the word “*alleged*” for the same reason.

The waiver argument

18. That brings me to the first of Mr Chambers QC’s three arguments. I have set out the terms of the Arbitration Agreement above. It was common ground that this is a permissive arbitration agreement. The Privy Council considered the effect of language of this kind in *Hermes One Ltd v Everbread Holdings Ltd* [2016] 1 WLR 4098. The Board considered three possible analyses: that the clause imposed an obligation to arbitrate (“analysis I”); that the language allowed each party to commence litigation but gave the other party the right to commence an arbitration (“analysis II”); or that the language allowed each party to commence litigation, but the other party could refer the dispute to arbitration by making an unequivocal request to that effect (“analysis III”). The Board rejected analysis I:

“[12] Arbitration clauses commonly provide that unresolved disputes “should” or “shall” be submitted to arbitration. The silent concomitant of such clauses is that neither party will seek any relief in respect of such disputes in any other forum.

[13] As with any issue of construction, the language and context of the particular agreement must ultimately be decisive. But clauses depriving a party of the right to litigate should be expected to be clearly worded—even though the commercial community’s evident preference for arbitration in many spheres makes any such presumption a less persuasive factor nowadays than it was once. The consequence of the defendants’ case would, at least in theory, be that the claimant’s commencement of litigation was a breach of contract, for which the defendants proving loss could without more claim damages—

though the prevalence of clauses providing that arbitration “shall” take place and the infrequency of claims for their breach may again reduce the weight of this factor. The fact remains that there is an obvious linguistic difference between a promise that disputes shall be submitted to arbitration and a provision, agreed by both parties, that “any party may submit the dispute to binding arbitration”. This clear contrast and the evident risk that the word “may” may be understood by parties to mean that litigation is open, unless and until arbitration is elected, are, in the Board's view, important pointers away from analysis I”.

The Board concluded that analysis III was the correct interpretation.

19. In this case, NIB argues that Eland waived its right to arbitrate the disputes raised in the Accra Proceedings. It contends that resolving the claims which were the subject of the Accra Proceedings in court or doing so in arbitration are inconsistent courses of conduct, as to which Eland had a right of election. NIB contends that Eland will be held to have waived the right to elect to have those disputes resolved in arbitration if they have acted “in such a way as to lead [NIB] to believe [they have] completed [their] election” (referring to *The Mihaios Xilas* [1979] 1 WLR 1018, 1034-35). It is trite law that a party will be held to have made an election if they act “in a manner consistent only with his having chosen one of the two alternative and inconsistent courses then open to him” (*The Kanchenjunga* [1990] 1 Lloyd’s Rep 391, 398). Those principles were not in dispute.
20. Before turning to the election case on the facts, it is necessary to address two preliminary arguments Mr Salve QC advanced.
21. First, he alleged that the Arbitration Order gave rise to an issue estoppel that the right to arbitrate the claims in the Accra Proceedings had not been waived. It is clear that NIB did raise a waiver argument in its submissions in opposition to Eland Ghana’s stay application. However, the argument is not addressed in the judgment granting the stay. I accept that the ruling of a court may be capable of giving rise to an issue estoppel on a matter which is not expressly addressed by the judgment in question (*Spencer Bower and Handley, Res Judicata* (5th) [8.08]-[8.10]). However, the inferred determination must be reasonably clear. In addition, where the issue estoppel is said to arise from a foreign judgment, it has been noted that caution is necessary ([8.28]).
22. I remain unclear as to the significance of Judge Noble-Nkrumah’s omission to consider the waiver issue when issuing the Arbitration Order. However, I do not need to resolve this question, because the Arbitration Order has been set aside, and there has been no appeal against the Set Aside Order. The expert evidence before me confirms Judge Noble-Nkrumah’s jurisdiction to set the Arbitration Order aside, and (as I have said) there has been no challenge to his jurisdiction to do so either in Ghana or in the evidence filed for this hearing. In circumstances in which the Arbitration Order has been set aside by the judge who made it, I am not persuaded that any “inferred” determination arising from the Arbitration Order when made is capable of founding an issue estoppel (particularly given the caution required in this context).
23. Second, he argues that it is an abuse of the process of the English court for NIB to raise the issue of waiver in its s.72 application in circumstances in which NIB failed for a prolonged period to challenge the Arbitration Order and Judge Noble-Nkrumah’s

failure to deal with the waiver argument when making that order. However, in circumstances in which the Set Aside application in the Accra Proceedings was not held to have been brought too late, and has been granted, it would be a quite exceptional step to conclude that delay in taking steps in the Accra Proceedings made it abusive to rely on a waiver argument here. It should be noted that for a significant part of the period since the Arbitration Order, Eland have taken no steps to pursue any arbitration. Against the background of that inactivity, the suggestion that NIB's delay makes its s.72 application abusive is even more challenging.

24. That brings me to the merits of the waiver argument. The position of Eland Thailand is, in my view, straightforward. It *commenced* the Accra Proceedings. That was the clearest possible waiver of any right on Eland Thailand's part to have the disputes raised by Eland Thailand in the Accra Proceedings arbitrated. Mr Salve QC argued that when Eland Ghana was joined to the proceedings and sought a stay, that somehow revived Eland Thailand's right to refer the dispute to arbitration. However, an election is generally final in its effect, and I am unable to see how a party who has commenced proceedings and proceeded to serve their reply and defence to the defendant's counterclaim is entitled to revisit those choices simply because a different party takes a different position.
25. Eland Thailand relied in this connection on the decision in *Delta Reclamation Ltd v Premier Waste Management Ltd* [2008] EWHC 2579 (QB). In that case, the claimant had sought urgent court relief, on the basis that it was content for the case to proceed in court or arbitration as the defendant wished. Argument at the injunction hearing had proceeded on the basis that the injunction had been sought under s.44 of the 1996 Act, albeit the application failed for lack of arguability without reference to the particular requirements of s.44. After the hearing, the defendant decided that it wished to have the dispute determined in court, and it then argued that, by commencing proceedings, the claimant had waived its right to arbitrate. That contention failed. The argument appears to have proceeded on the basis that the issue for determination was whether the arbitration agreement had been terminated for repudiatory breach (rather than whether the right to refer a particular dispute to arbitration under a valid arbitration agreement had been waived). In any event, the case appears to have been one in which it was ambiguous as to whether the court proceedings were seeking to involve the merits jurisdiction of the court, or its supervisory jurisdiction under s.44 (the claimant being content with either option depending on the defendant's response). For these reasons, I do not think the case assists Eland Thailand here.
26. The position of Eland Ghana is more difficult, raising the unattractive prospect of claims by companies in the same corporate group raising the same claims relating to the same contracts in court and arbitration. However, on the particular facts of this case, I have been persuaded that Eland Ghana too had waived the right to refer the disputes in the Accra Proceedings to arbitration. My reasons for reaching this conclusion are as follows:
 - i) A key feature of this case is that it was Eland Thailand who first invoked the jurisdiction of the Accra Court by commencing the Accra Proceedings. While Eland Ghana was not a party to the proceedings, it featured prominently in Eland Thailand's statement of claim, which brought claims under the 2001 Agreement to which Eland Ghana (described as Eland Thailand's "sister company") was also a party.

- ii) The Defendant's Defence and Counterclaim brought identical claims against Eland Thailand and Eland Ghana.
 - iii) The Defendant's Third Party Notice made it clear that it was seeking to pass on Eland Thailand's claims to Eland Ghana, and joining Eland Ghana to its counterclaim.
 - iv) In response, Eland Ghana entered an unconditional appearance on 3 June 2015. Expert evidence before the Court, in the form of an opinion from Justice Stephen Alan Brobbey, makes it clear that there are two forms of appearance under Ghana law: a conditional appearance, which bears the words "CONDITIONAL APPEARANCE" and takes the form of an appearance under protest, and an unconditional appearance.
 - v) As I have stated, NIB applied to amend the terms of its claims against both Eland entities in the Accra Proceedings on 23 October 2015. The affidavit of Janet Adjei on behalf of Eland Ghana resisting that application referred to promissory notes in favour of Eland Thailand of which Eland Thailand and Eland Ghana still had custody and which would be submitted to the court at the appropriate moment; that Eland Ghana would defend the Third Party Notice by showing that it was NIB who was in breach of the 2001 Agreement; that Eland Ghana was not liable to NIB under the 2001 Agreement; and that the application should be dismissed because it would "delay the speedy trial of the suit". The clear impression given in the affidavit was that it was the Accra Court which would determine the dispute.
 - vi) Up until early December 2015, six months after the unconditional Notice of Appearance had been entered, there had been no suggestion by Eland Ghana that the claim should be arbitrated.
27. Looking at the position at that point, I am satisfied that the conduct of Eland Ghana, cumulatively and against the background of the proceedings commenced by Eland Thailand, involved acting "in such a way as to lead [NIB] to believe [it] has completed [its] election", and was not reserving the right to take what would, from the perspective of rational businesspeople, have been the wholly uncommercial course of seeking to have claims involving Eland Thailand litigated in Ghana while identical claims involving Eland Ghana were arbitrated. I should make it clear that it is only the cumulative effect of all of these matters, in the specific circumstances of this case, which have led to this conclusion.
28. For these reasons, I am satisfied that NIB has made good its case under s.72((1) of the Arbitration Act 1996 so far as the issues raised in the Accra Proceedings are concerned and that it is entitled to a declaration and consequential relief to that effect. Eland have since confirmed that the only claims they are seeking to arbitrate are those concerning the issues raised in the Accra Proceedings, and that they do not resist s.72 relief so far as other claims are concerned.

The argument that the NOA does not extend to the claims brought in the Accra Proceedings or is too uncertain

29. I can deal with this issue briefly. The principles determining what is necessary effectively to refer a particular dispute to arbitration for the purposes of s.14 of the 1996 Act were not in dispute between the parties. In summary:
- i) It was agreed that the court should interpret the notice in question “broadly and flexibly” avoiding a strict or technical approach.
 - ii) The requirements of s.14 will generally be satisfied if the notice sufficiently identifies the dispute and makes clear that the person giving notice is intending to refer the dispute to arbitration.
 - iii) The court should concentrate on the substance rather than the form of the communication and consider how a reasonable person in the position of the recipient would have understood the notice in the context in which it was written.
- (Sir William Blair in *LLC Agronefteprodukt v Amepora AG* [2021] EWHC 3474 (Comm), [17]).
30. Mr Chambers QC took two, related, points in relation to the NOA. First, that it refers only to the 2004 Agreement and makes no reference to the 2001 Agreement. Second, the NOA makes no reference to any particular kind of dispute, referring simply to the fact that “disputes and differences have arisen ... in respect of the manner in which [NIB] performed or purported to perform its part of the bargain expressed or implied in the Contract”.
31. In dealing with these points, it is necessary to have regard to the context in which the NOA was served:
- i) As I have mentioned, on 15 December 2015 Eland sought to stay the Accra Proceedings, which application was granted by the Arbitration Order on 19 February 2016.
 - ii) In January and February 2016, NIB and Eland’s lawyers exchanged correspondence about Eland’s application to stay the claims in the Accra Proceedings in favour of arbitration, and about the process for arbitrating such claims.
 - iii) The covering letter to the NOA expressly refers to that correspondence. Mr Chambers QC accepted that if this reference was properly to be read as a reference for the purposes of defining the dispute to be arbitrated, then there could be no objection to the NOA. However, he suggested that the reference to the correspondence was only made to address the issue of how the NOA could be served.
 - iv) The covering letter also expressly referred to the Arbitration Order. Mr Chambers QC argued that this was not done to link the NOA with the disputes which were subject to that order, but as a means of resisting any argument as to the validity of the Arbitration Agreement in the context of some other potential arbitration.

32. I am satisfied that these arguments are wholly unrealistic. The NOA of May 2016 was the culmination of Eland Ghana's December 2015 application to stay the Accra Proceedings, the correspondence between the parties in January and February 2016 in relation to Eland's attempt to arbitrate the issues in the Accra Proceedings, and the reference in the covering letter to the correspondence of January and February 2016 and the Arbitration Order were included expressly to link the NOA to those prior communications and events.
33. The NOA and the covering letter referred to the 2004 Contract because that is where the Arbitration Agreement was to be found. That did not detract from the overall effect of the NOA, read in context, as I have set out.

The argument that the Set Aside Order gives rise to an issue estoppel that the claims in the Accra Proceedings are not arbitrable

34. Mr Chambers QC also argued that the effect of the Set Aside Order, holding that fraud claims were not arbitrable as a matter of the law of Ghana, gave rise to an issue estoppel.
35. Once again I intend to deal with this issue shortly.
36. First, I am satisfied that the Arbitration Agreement was governed by English law, by reason of the provision that the disputes "may be referred to an Arbitrator under the Laws of the United Kingdom in London". The words "under the Laws of the United Kingdom" do more than simply specify the seat of the arbitration (which was achieved by the words "in London").
37. Second, on that basis I am satisfied that a decision of the Accra Court that fraud claims cannot be arbitrated as a matter of Ghana public policy raises a different issue to whether such claims are arbitrable as a matter of English public policy, with the result that no issue estoppel arises. Public policy issues of this type in international arbitration are matters for each country to decide for itself: *Stati v Kazakhstan (No 2)* [2019] 1 WLR 897, [38] and *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2014] QB 458.

Conclusion

38. For these reasons, NIB's application for a declaration under s.72(1) of the 1996 Act to the effect that the arbitrator appointed by the order of 2 September 2020 does not have jurisdiction over the claims asserted in the Accra Proceedings succeeds, both as regards Eland Thailand and Eland Ghana.
39. In those circumstances, NIB has raised an issue as to the status of the costs order made in Eland's favour by Mr Justice Andrew Baker on the s.18 application. It argues that the costs order falls away because "the court did not have jurisdiction to exercise its powers under s.18(3)". That argument was premised on NIB's contention that the NOA was ineffective, which I have rejected.
40. In any event, I do not accept that the court's s.18 jurisdiction is so dependent. Mr Chambers QC relied in this regard on the decision in *The Lapad*. In that case, Moore-Bick J at [12] said that the court's jurisdiction under s.18 depended on the failure of the contractual appointment procedure, and the absence of agreement as to what steps should be taken in those circumstances. It was argued in that case that there had been

no failure of the appointment procedure because there had been no effective s.14 notice. That argument was rejected on the facts, but Moore-Bick J observed at [20] that “if I am wrong about that, it must follow that the court had no jurisdiction to appoint an arbitrator” when the arbitration claim form was issued, but that on any view an effective s.14 notice had been served before the appointment was made, which was sufficient.

41. The decision in *The Lapad* was reached before the decisions at [13] had established that it was sufficient for a s.18 applicant to demonstrate a good arguable case. I can see no reason why the effectiveness of the purported s.14 notice should stand in a different position to the issues of whether there is an arbitration agreement or the dispute falls within its scope. The issue of whether a purported s.14 notice is effective will often be an important issue in an arbitration in which a limitation defence arises, and consistent with the policy reflected in the decisions at [13], the court will try and avoid trespassing on issues which are susceptible to determination by the arbitral tribunal when granting s.18 relief. For those reasons, I am satisfied that the exercise of the s.18 power is not dependent on a final determination as to the efficacy of the document relied upon as the s.14 notice. I would note that if the contrary were the case, then NIB would have faced an issue estoppel defence from Eland when seeking to raise this issue before me.
42. In the alternative, Mr Chambers QC seeks an order under CPR 3.1(7) and/or the inherent jurisdiction, setting the costs order aside under the principles in *Tibbles v SIG plc* [2012] 1 WLR 2591. I would note that the court also has power under CPR 23.11(2) to re-list the application (*Yeganeh v Reese* [2015] EWHC 2032 (Ch)). Both of these jurisdictions are to be exercised sparingly.
43. In circumstances in which NIB’s non-participation in the s.18 application reflected their right, which I have upheld, not to participate in the arbitral process, I am satisfied that NIB should not have to meet the costs of the s.18 application. I have concluded that the most appropriate means of giving effect to that principled position is by giving relief under s.72(1), in the form of an order that relieves NIB of liability for the costs of the s.18 application.
44. I will hear the parties on the terms of the order and any outstanding consequential matters.