Neutral Citation Number: [2006] EWCA Civ 1529

Case No: B6/2005/2737

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (COMMERCIAL COURT)
(Mrs Justice Gloster DBE)
2004 Folio 272

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 November 2006

Before :

SIR ANTHONY CLARKE MR
LORD JUSTICE SCOTT BAKER
and
LORD JUSTICE MOORE-BICK

- -

Between :

SVENSKA PETROLEUM EXPLORATION AB	**Claimant/ Respondent**
- and -	
(1) GOVERNMENT of the REPUBLIC of LITHUANIA **(2) AB GEONAFTA**	**Respondents/ Appellants**

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- -

Mr. Stewart Shackleton (Solicitor Advocate) and Mr. David Holloway (instructed by **Eversheds LLP**) for the **appellant**, the **Government of the Republic of Lithuania**
Mr. Michael Bools (instructed by **Norton Rose**) for the **respondent**

Hearing dates: 24th, 25th & 27th July 2006

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Judgment

Lord Justice Moore-Bick:

1. This is the judgment of the court.

1. Introduction

2. This appeal arises out of an attempt by the respondent, Svenska Petroleum Exploration AB ("Svenska"), to enforce as a judgment in this country an arbitration award made in Denmark by a panel of arbitrators acting under the rules of the International Chamber of Commerce ("the ICC"). The award was made in favour of Svenska against the appellant, the Government of the Republic of Lithuania ("the Government"), and AB Geonafta, which, until it was privatised on 16th June 2000, was an organisation owned and controlled by the state of Lithuania but which enjoyed separate legal personality.

(a) The dispute

3. The dispute between the parties arose out of a Joint Venture Agreement ("the Agreement") signed at a ceremony in Vilnius on 28th April 1993 under which Svenska and Geonafta, then known as Gargzdai State Oil Geology Enterprise or "EPG", agreed to establish a joint stock company to exploit the oil reserves within the area of Lithuania identified in the annex to the Agreement which was known to contain the Genciai oilfield.

4. The Government itself was not expressed to be a party to the Agreement, but several of its articles contained not only terms dealing with the rights and obligations of Svenska and EPG but also terms dealing expressly with the rights and obligations of the Government. It was signed on behalf of EPG by one of its directors, Mr. Ricardas Vaitiekunas, and on behalf of the Government by the Minister of Energy, Mr. Algimantas Stasiukynas, and Dr. Gediminas Motuza, the Director of the Geological Service at the Ministry of Construction and Urban Development. Over the signatures of Mr. Stasiukynas and Dr. Motuza there appeared a rubric in the following terms:

> "The Government of the Republic of Lithuania hereby approves the above agreement and acknowledges itself to be legally and contractually bound as if the Government were a signatory to the Agreement."

The meaning and effect of this rubric, and thus the significance of the Government's signature of the Agreement, later came to play an important part in the dispute with Svenska.

5. The Agreement provided that Svenska would carry out a feasibility study as soon as practicable in relation to two other oilfields lying within the area covered by it, the Kretinga and Nausodis fields, and contemplated that, if it were economically feasible to do so, Svenska and EPG would also develop those fields under a separate agreement. The Agreement also provided that Svenska should have a preferred position in relation to the exploration and development of a second area of the country identified in another annex. In the event, however, Svenska complained that it was not allowed to take part in the development of either the Kretinga or Nausodis oilfields and was not given the preferred status to which it was entitled in relation to the

exploration and development of the additional area. Thus a dispute arose, principally between Svenska and the Government, but also between Svenska and Geonafta, which led to Svenska's pursuing a claim against both of them for relief of various kinds.

(b) The arbitration proceedings

6. Apart from the rubric attached to the Government's signature to which we have already referred, the Agreement contained two articles which were of primary significance in relation to Svenska's pursuit of its claim. The first is Article 9 which provides as follows:

> "SETTLEMENT OF DISPUTES
>
> 9.1 Disputes between the Founders concerning the performance or interpretation of this Agreement are settled through negotiations between the Founders.
>
> 9.2 In the event that disputes cannot be settled through negotiations within 90 days of the receipt of the written notice by either Founder about the existence of such disagreement the disputable matter shall be submitted upon agreement of the Founders for consideration to:
>
> a) the Court of the Republic of Lithuania or
>
> b) independent arbitration in Denmark, Copenhagen to be conducted in accordance with International Chamber of Commerce Rules of Arbitration in the English language.
>
> In case the Founders do not reach an agreement on the institution where the dispute is to be settled, the disputable matter shall be submitted for consideration to an independent arbitration provided in subparagraph b) of this paragraph."

7. The second is Article 35 which provides as follows:

> "GOVERNING LAW AND SOVEREIGN IMMUNITY
>
> 35.1 GOVERNMENT and EPG hereby irrevocably waives [sic] all rights to sovereign immunity.
>
> 35.2 This Agreement shall be governed by the laws of Lithuania supplemented, where required, by rules of international business activities generally accepted in the petroleum industry if they do not contradict the laws of the Republic of Lithuania."

8. Svenska sought to pursue its claim against the Government by arbitration under the terms of Article 9. It maintained that the Government had agreed to be bound as if it

were a party to the Agreement, that Article 9 contained the only provision for resolving any disputes that might arise under the Agreement and that it was obviously intended that any disputes that might arise between itself and the Government, as well as between itself and EPG, should be resolved in that way. On 12th June 2000 Svenska filed a request for arbitration with the secretariat of the ICC and on 21st July the Government filed its answer protesting the jurisdiction of the ICC and of any tribunal appointed by it. That led to a hearing before a panel of arbitrators in October 2001 for the sole purpose of determining the issue of jurisdiction and on 21st December the panel published an interim award in which it held that the Government had agreed to refer disputes to arbitration and that the tribunal therefore had jurisdiction to hear and determine Svenska's claim. We shall refer to this as "the first award".

9. Svenska then proceeded with the substance of its claim. Following a hearing in Copenhagen in June 2002 the tribunal eventually published its final award on 30th October 2003 holding the Government and Geonafta liable to Svenska in damages in the sum of US$12,579,000. We shall refer to this as "the second award". Although the Government took part in the proceedings which led to that award, it did so under protest, reserving its position as to the tribunal's jurisdiction.

(c) The enforcement proceedings

10. Following the publication of the second award Svenska began proceedings in this country seeking permission to enforce the award as a judgment of the court under section 101 of the Arbitration Act 1996. The application was made without notice in accordance with the provisions of CPR Part 62. On 7th April 2004 Morison J. made an order giving Svenska permission to enforce the award, but stayed its effect for a period of 2 months and 21 days from the date of service on the Government to enable it, if it thought fit, to file an acknowledgment of service and to apply to set aside the order. On 31st August 2004 the Government filed an acknowledgment of service and applied under CPR Part 11 to have the order giving permission to enforce the award set aside on the grounds that it was entitled to immunity from process of any kind.

11. Svenska took the view that the first award provided a short answer to the Government's claim to state immunity. It therefore issued an application under CPR Part 24 seeking to have the Government's application struck out and judgment entered in terms of the second award. In our view that was an inappropriate course to take and one which has since given rise to some difficulty and confusion, as we shall explain later. Nonetheless, that was the course it took and it was that limited application which on 24th November 2004 came on for hearing before Mr. Nigel Teare Q.C. sitting as a Deputy Judge of the High Court. On 11th January 2005 Mr. Teare delivered a judgment dismissing Svenska's application on the grounds that although the first award should be recognised, it did not inevitably, as Svenska had contended, finally determine the question whether the Government had agreed to submit disputes under the Agreement to arbitration.

12. The Deputy Judge's decision paved the way for the hearing of the Government's application to set aside the order of Morison J. Immediately following the delivery of the judgment the parties agreed certain directions for the hearing of that application, including directions for the service of evidence of fact and expert evidence of Lithuanian law, but they were later superseded by further directions given by Cresswell J. on 13th April 2005. In due course the application came before Gloster J.

for hearing on 4th July 2005, the Government being represented by Mr. Shackleton and Mr. Holloway and Svenska by Mr. Bools, as they were before us.

13. The hearing before Gloster J. occupied six days. There were three main issues: whether the Government had submitted to the jurisdiction of the English courts within the meaning of section 2 of the State Immunity Act 1978; whether the application to enforce the second award involved proceedings relating to a commercial transaction entered into by the Government within the meaning of section 3 of that Act; and whether the application to enforce the second award involved proceedings relating to an arbitration to which the Government had agreed to submit within the meaning of section 9. Each of these questions turns in whole or in part on the meaning and effect of the Agreement, but Svenska argued that the first award (which has never been challenged in Denmark) had finally determined in its favour that the Government had agreed to refer the dispute to arbitration and the Government argued that the Deputy Judge's judgment had finally determined in its favour that the first award had not done so. Each side was therefore arguing that a previous decision had given rise to an issue estoppel in its favour in relation to that central question.

14. On 4th November 2005 Gloster J. delivered judgment. She began by considering the issues surrounding section 2 of the State Immunity Act and rejected Svenska's submission that the waiver of sovereign immunity contained in Article 35 of the Agreement amounted to a submission to the jurisdiction of the English courts. Next the judge considered the argument relating to section 3. She held that the Agreement was a commercial transaction within the meaning of that section and one to which the Government was a party, but she rejected the submission that the application involved proceedings relating to that transaction. That left only the argument based on section 9. The judge held that the Deputy Judge's judgment did not give rise to an issue estoppel (that is, it did not bind her to hold that the first award did not finally determine the question of the tribunal's jurisdiction). She therefore went on to consider that question for herself and held (contrary to the decision of the Deputy Judge) that the first award did finally determine that question in favour of Svenska. She therefore held the Government had agreed to submit the dispute with Svenska to ICC arbitration in Denmark and she also held that the application to enforce the second award involved proceedings relating to the arbitration within the meaning of section 9 of the Act. That was sufficient for her to dismiss the Government's application. Nonetheless, the judge went on to consider whether, on the true construction of the Agreement, the Government had agreed to refer disputes arising under it to arbitration. Having heard expert evidence of Lithuanian law and evidence from those who had been concerned in the negotiations, she held that it had done so.

(d) The appeal

15. Before us the parties have made broadly the same submissions as they made before the judge. As we have already said, each side sought to rely on the principles of issue estoppel: Svenska (relying on the first award) to prevent the Government from contending that it had not agreed to submit disputes under the Agreement to arbitration; the Government (relying on the judgment of the Deputy Judge) to prevent Svenska from contending that the first award finally determined that very question. Moreover, since the Government maintains that it was not a party to an arbitration agreement of any kind, these questions are inextricably linked to that of the recognition by the courts of this country of the first award. The issues have been very

fully argued, both orally and in writing, and we think it appropriate, if only in recognition of the industry of the parties and the importance of the issues to them, to deal with the majority of their submissions, even though in some cases it may be unnecessary to do so.

16. At the root of the dispute lies the question whether the Government in fact agreed to submit disputes with Svenska to ICC arbitration and it is not surprising, therefore, that a large part of the parties' submissions were in one way or another directed to it. It is an issue that cannot be ignored, whatever the outcome of the appeal, and because of its importance is in our view best considered at the outset. In these circumstances we think it is helpful to consider the relationship between Svenska and the Government as it developed over the course of time, even if that involves dealing with some issues which ultimately have little or no significant bearing on the outcome of the appeal. We propose, therefore, to begin with the issues surrounding the Agreement itself.

2. The Agreement

17. The Agreement was executed in both the Lithuanian and English language, but it expressly provides that the two forms of the text are of equal validity and no significant discrepancies were drawn to our attention. It was common ground before us that the correct approach for the court to take when ascertaining the meaning of a contract governed by foreign law is to construe the contract itself applying the appropriate principles of construction which it has found by reference to such expert evidence of the relevant foreign law as may have been placed before it.

(a) Questions concerning the governing law

18. We have already referred to Article 35 which provides that the Agreement is to be governed by the laws of Lithuania

> "supplemented, where required, by rules of international business activities generally accepted in the petroleum industry if they do not contradict the laws of the Republic of Lithuania."

19. Clauses of this kind are often found in agreements between state bodies and foreign contractors. They are usually included at the insistence of the contractor with a view to ensuring that the contract is not governed solely by the state's own domestic law, which it fears the state may later alter in ways that serve its own interests. In the present case the history of the negotiations shows, as one would expect, that the "internationalising" element in Article 35.2 was included at the request of Svenska and it is ironic, therefore, that in the present case Svenska should be contending that the principles applicable to the construction of the Agreement were to be derived from Lithuanian law alone and that the Government should be contending that some regard should also be paid to principles of construction derived from international sources.

20. On this issue the judge preferred Svenska's argument. In paragraph 79 of her judgment she said:

> "Nor does Article 35.2 justify any invocation of principles of "international law" as Mr. Shackleton suggested. The clause gives primacy to Lithuanian law and only permits other laws to

> be referred to where they are "required" to supplement Lithuanian law, which they are not in the present case. Moreover, even if it were necessary to so, recourse may only be to the "rules of international business activities generally accepted in the petroleum industry". There is no basis for simply asserting that these rules are the same as the rules of international arbitration. Furthermore, recourse is to be had to such rules only insofar as they do not contradict the laws of Lithuania. Lithuanian law provides rules for determining whether the arbitration clause is a valid agreement to arbitrate. Insofar as the rules of international arbitration are the same as Lithuanian law they add nothing; insofar as they differ, they are inapplicable because they contradict Lithuanian law. They can, therefore, be disregarded in any event. The State did not, in any event, adduce any evidence of what were the "rules of international business activities generally accepted in the petroleum industry". "

21. We agree with the judge that Article 35.2 gives primacy to the law of Lithuania and that it is to the law of Lithuania that one must turn first in order to find the principles of construction that must be applied in ascertaining the meaning and effect of the Agreement. However, we find it more difficult to accept the suggestion that the rules of international business activities generally accepted in the petroleum industry (whatever they may be) can be entirely ignored since they are either the same as the law of Lithuania or contradict it and must therefore be disregarded in either event. It was common ground before us that under the law of Lithuania the fundamental principle of construction applicable to an agreement of this kind is to ascertain the parties' true intentions. What that means and how it is to be achieved are matters to which we shall turn in a moment, but it is difficult to reconcile with that principle a complete rejection of what, at least on the face of it, appears to have been regarded by both parties as a significant element of their agreement on the governing law.

22. As the judge pointed out, the Government did not seek to adduce evidence of any particular rules of international business activities generally accepted in the petroleum industry, but Mr. Shackleton submitted that this expression should be understood as shorthand for general principles of law recognised by tribunals dealing with international commercial agreements and that those principles could be collected from published decisions of courts and arbitration tribunals dealing with disputes of that kind. He therefore drew our attention to a number of such decisions in support of his submission that on the true construction of the Agreement the Government had not undertaken any obligations to Svenska, and in particular that it had not undertaken any obligation to refer disputes to arbitration. It is convenient to deal with those submissions and the decisions which are said to support them at a later stage, but we mention them at this point because it is necessary to bear in mind two things: first, that the particular terms in which a state has appended its signature to the document in any given case are likely to be highly significant; and second, that in the present case it is necessary to ascertain what the parties really intended the Government's signature to represent.

(b) The principles of Lithuanian law

23. In paragraph 82 of her judgment the judge summarised the main principles of Lithuanian law applicable to the interpretation of contracts in the following way:

> " (i) The overriding principle is that a contract should be interpreted in good faith.
>
> (ii) Thereafter, the Court's search is for "the real intentions of the parties without being limited by the literal meaning of the words". In other words, unlike under English law, the primary objective is to ascertain what the parties subjectively actually intended, regardless of the words they used. In the present case, therefore, the enquiry becomes one into whether Lithuania and Svenska intended that disputes between them would be resolved by arbitration, regardless of the literal meaning of the words they used.
>
> (iii) In seeking to ascertain the parties' actual intention, regard must be had to "the preliminary negotiations between the parties, practices which the parties have established between themselves, the conduct of the parties subsequent to the conclusion of the contract, and the existing usages". Consequently, and again contrary to the position in English law, the court must look at the negotiations which led to the conclusion of the contract, take into account earlier drafts of the contract and consider each party's subjective intention.
>
> (iv) If, despite these sources, what the parties really intended cannot be ascertained *then* the court will apply an objective interpretation and give the contract "the meaning that could be attributed in the same circumstances by reasonable persons in the corresponding position as the parties."

24. Before us both parties accepted that this was a fair summary of the relevant principles subject to one minor qualification. As they accepted, the use of the expression "subjective intention" is apt to mislead. Unless the parties share a common intention which they have communicated to each other or some common intention which can be attributed to them (for example, an intention derived from words to which they have both assented) there can be no meeting of minds and no recognisable agreement between them. The expression "subjective intention" is often used to mean the private intention of one party, which may or may not be the same as that of the other and may or may not have been communicated to him. To search for the subjective intentions of the parties in that sense is therefore a pointless exercise, but neither party suggested that that is what Lithuanian law requires. On the contrary, both Mr. Shackleton and Mr. Bools submitted that the proper approach under Lithuanian law is to ascertain the parties' real intentions, that is, their actual common intentions, by reference not only to the language of the document in which their agreement is expressed but also by reference to such other evidence as may be of assistance. That may take the form of pre-contractual negotiations and post-contractual conduct as well as the surrounding

circumstances, existing usages and any communications between them. As Mr. Shackleton observed in the course of argument, the exercise is essentially objective in nature; it does not involve disregarding the language of the document but construing it in a way which most fully and accurately gives effect to the parties' real agreement.

(c) Did the Government agree to refer disputes to ICC arbitration?

25. A number of separate issues arise under this head. It is convenient to refer at this stage to the Government's submission that it incurred no obligations of any kind to Svenska under the Agreement. Mr. Shackleton submitted that, although the Government signed the Agreement, it did so only in an administrative capacity and in order to signify its approval of the obligations being undertaken by EPG. It is common, he submitted, when a state enterprise enters into a commercial agreement with a foreign party, for the state to add its own signature to the agreement in order to provide an assurance to the other contracting party that in purporting to undertake the obligations set out in the document the state enterprise is not exceeding its powers. However, by so doing the state itself incurs no liability under the contract, nor does it stand as a guarantor for the performance by the state enterprise of its obligations.

(*i) Did the Government undertake any obligations to Svenska?*

26. Mr. Shackleton's submission rested on two main pillars: the fact that the document does not describe the Government as a "party" to the Agreement and a presumption, which he submitted was to be derived from the authorities, that the state does not by its signature of the document intend to undertake any obligation to the contracting parties. We have no doubt that in a case such as the present the state can, and often will, append its signature to the document in an administrative capacity merely to indicate its approval of its terms and without itself undertaking obligations of any kind to the contracting parties. However, we are equally confident that, if it chooses to do so, the state may become a full party to an agreement of a commercial nature made between a private party and one of its own state organisations or may incur obligations of a more limited kind to either or both of the parties, if it chooses to do so. In each case the question is whether it has undertaken any obligations, and if so, of what kind and to whom. For these reasons it is immaterial in our view to debate whether the Government "signed" the Agreement or "became a party" to it and what the distinction might be. These are simply forms of words. What matters is whether by putting its signature to the document with the attached explanation of its purpose in so doing the Government incurred legally binding obligations towards Svenska.

27. In the present case the Government's intention in signing the Agreement appears to be clearly stated in the rubric to which we referred earlier. It was both to "approve" the Agreement *and* to acknowledge itself to be "legally and contractually bound as if it were a signatory to the Agreement". It is quite true, as Mr. Shackleton pointed out many times, that the Government is not named or described as a "Party" to the Agreement and that the term "Party" is used to denote EPG and Svenska in contradistinction to the Government (see, for example, Articles 18E.1, 20.2 and 40.1, although the usage is not entirely consistent as can be seen from Article 26.5), but in our view that does not take the argument very far. What matters for this purpose is whether the Government intended to undertake legally binding obligations towards EPG and Svenska and that is essentially a question of construction.

28. The expression "legally and contractually bound as if [it] were a signatory to the Agreement" is very strong and was clearly intended to go beyond mere approval of the Agreement in the exercise of sovereign authority. On the face of it those words are evidence of an intention to undertake obligations of the same nature and extent as would arise from its being a party to the Agreement in the full sense. Unless there were some powerful indications in the pre-contractual negotiations or other extraneous evidence which significantly detract from that conclusion, therefore, its meaning is clear. However, the position is complicated in the present case by the fact that while the negotiations were going on Lithuania was undergoing radical constitutional and economic changes. The documents show that during 1990 new laws were passed dealing with commercial enterprises, joint stock corporations, state enterprises and foreign investment as part of the transition from a command to a market economy. The Republic of Lithuania formally declared its independence on 11th March 1991 and on the same day the state entity which had initiated negotiations with Svenska in September 1989, the Lithuanian Corporation of Geological Works ("LG"), a Soviet governmental enterprise, ceased to exist, being replaced by EPG. (EPG was itself later to be privatised in June 2000.) These constitutional and economic changes provide an important part of the background to the negotiations.

29. We shall return to this question later in the light of the evidence of the parties' negotiations, but in those circumstances we do not think that any assistance is to be gained from decisions based on other forms of wording found in other contexts.

(ii) The language of Article 9

30. The only arbitration clause to be found in the Agreement is that contained in Article 9. This refers in terms to disputes between "the Founders", provides for notice of a dispute to be given "by either Founder" and makes provision for the reference of that dispute to the courts of Lithuania or to arbitration under the rules of the ICC as may be agreed between "the Founders". The Agreement as a whole is described as the "Founders' Agreement", but without resorting to evidence of the parties' intentions outside the language of the document it is not possible in our view to construe the expression "Founder" in Article 9 as including the Government, despite the fact that the Government signed the Agreement in the manner indicated earlier. There are many reasons for that. In the first place, EPG and Svenska are identified in the preamble as the "Lithuanian Founder" and the "Swedish Founder" respectively, and other references to the "Founders" indicate that only two persons are included in that description: see, for example Article 10.2. Moreover, a clear distinction is drawn in Article 11 between the Founders and the Government. We therefore agree with the judge that, if one were not entitled to look beyond the language of the document itself, it would be impossible to construe Article 9 as extending to disputes involving the Government.

31. However, Mr. Bools submitted that extraneous evidence in the form of the negotiations which preceded the execution of the Agreement demonstrated clearly that it had been the intention of both parties that disputes under the Agreement involving the Government should be referred to arbitration under the procedure set out in Article 9. This argument involves an examination of the course of those negotiations and the changing circumstances under which they were carried on over a period of many months.

32. The judge had available to her the successive drafts which preceded the Agreement and various items of correspondence between the parties and other documents generated during the course of the negotiations. She also had the benefit of hearing evidence from some of those who had been directly involved in the negotiations, in particular Mr. Thalin, Svenska's legal adviser, and Dr. Motuza, the Director of the State Geology Service ("SGS"), who took a leading role in the negotiations on behalf of both EPG and the Government. In paragraphs 100–131 of her judgment she describes in considerable detail the course of the negotiations and the way in which the text developed and it is unnecessary for us to repeat all her findings here. However, it is necessary to consider the origins and development of the document in a little detail because they are said to provide reliable evidence of the parties' intention in executing the Agreement in its final form.

(iii) The course of the negotiations

A. The Letter of Intent and Addendum

33. The first contacts between Svenska and the Government took place in September 1989 when representatives of Svenska met a delegation from LG to discuss possible collaboration on the development of the Genciai oilfield. That led to an agreement in principle to enter into a joint venture agreement by 1st January 1990, but it proved impossible to proceed that quickly and in the event it was not until 31st January 1991 that the parties were in a position to sign a Letter of Intent which set out the broad terms on which they proposed to collaborate in the development of the reserves. The Letter of Intent identified the main heads of the proposed agreement and expressly recognised that Svenska would be entering into an agreement with the Republic of Lithuania through a state body to be nominated at a later date. At that stage it was envisaged that the agreement would be governed by Swedish law and that any disputes arising under it would be referred to arbitration in Stockholm.

34. Lithuania declared its independence on 11th March 1991. Following the dissolution of LG, Svenska, the Government and EPG entered into an agreement on 13th June 1991 confirming that EPG had succeeded to all the rights and obligations of LG, including those arising under the Letter of Intent, and that the parties intended to continue their co-operation in accordance with its terms. However, they also agreed that in the course of drafting the joint venture agreement all the terms of the Letter of Intent should be open to review and there subsequently ensued what turned out to be a protracted period of negotiations. In November 1991 there were discussions spread over two days between Svenska and EPG and SGS during which the essential terms of the joint venture arrangement were debated. On the second day the parties met the Minister of Energy, Mr. Asmantas. The records kept by both Svenska and SGS suggest that the purpose of that meeting was primarily to inform the minister of what had been agreed so as to enable him to sign the Addendum to the Letter of Intent dated 7th November 1991. The Addendum contained specific and detailed amendments to the original Letter of Intent and was intended to serve as the basis for a first draft of a joint venture agreement. The parties to the Letter of Intent and to the Addendum were identified as Svenska and EPG and it was they who signed as such. Mr. Asmantas and Dr. Motuza signed on behalf of the Ministry of Energy and SGS respectively, but only to signify "the consent and approval" of those authorities.

35. The original Letter of Intent had provided that the joint venture agreement (and indeed the Letter of Intent itself) should be governed by Swedish law and that disputes should be referred to arbitration in Stockholm, but that was no longer acceptable to the Lithuanians. In the Addendum that provision was replaced by a clause providing for the parties' contractual relations to be governed by the law of "a country to be agreed with an established tradition of contracts of this nature among private enterprises and which shall contain generally accepted principles of international business." Arbitration was still to take place in Stockholm, but under "internationally accepted arbitration rules". It was expressly provided, however, that these terms should not prejudice the normal rights of the state as a sovereign entity to pass and enforce new legislation of a public nature.

36. The judge found that at the stage of the signature of the Addendum the following position had been reached. The Government, as the holder of the right to exploit the country's oil reserves, had authorised EPG to negotiate with Svenska for the formation of a joint venture to develop the Genciai oilfield. To that end negotiations had been conducted by EPG under the supervision of the Government acting through the Ministry of Energy and SGS. The Government had been kept informed of the progress of the negotiations, had reviewed the results in the form of the Addendum and had authorised its signature by EPG. The evidence shows that at that stage it was not yet settled which state entity would be the contracting party under the joint venture agreement, but it was clear that the state was keen not to fetter its right to legislate. None of those findings was, or could be, challenged.

37. The judge then proceeded to draw certain inferences from the nature of the negotiations and the terms of the Addendum. She said this:

> "109. . . . . It is also clear that the arbitration clause was intended to cover disputes with the State: first, given that the negotiations had directly involved the State, it would have been very odd if it did not; and, secondly, the reservation in the second paragraph set out above would have been otiose if the first paragraph had not been intended to relate to the State.
>
> 110. . . . . the State must at this stage have envisaged that it would, in some way, be a party to and/or bound by the terms of the JVA: if the State was in no way bound by the JVA, there was no need for it to spell out that the choice of law and arbitration clause in the LOI was in no way intended to fetter its right to "issue and enforce new legislation"."

38. We find ourselves unable to agree with those findings which, as will be seen, played an important part in the reasoning that led the judge to the conclusion that the Government had agreed to ICC arbitration in accordance with the terms eventually contained in Article 9 of the Agreement. Normally an appellate court will be slow to depart from findings made by the trial judge, but these findings represent inferences drawn from the documents rather than an evaluation of witness evidence and in our view this court is as well placed as the judge to assess their significance. The judge concluded that the parties must have intended that the arbitration clause should cover

disputes with the state, both because the negotiations had directly involved the state and because the reservation of the state's right to legislate would otherwise have been otiose. However, we do not find either of those reasons persuasive.

39. It is true that the negotiations had involved representatives of the state and at one level that was inevitable since EPG itself was a state organisation. They also involved representatives of SGS (another state organisation and one that might be seen as more closely linked to central government) as well as the Minister of Energy, but since EPG enjoyed legal personality separate from that of the state, the question is whether at that stage the parties intended that the state as such should undertake obligations under the joint venture agreement. It is clear in our view that the Lithuanian representatives were careful to draw a distinction between the Government on the one hand, acting in the exercise of the state's sovereign powers and as guardian of the national interest, and EPG on the other, acting as party to the joint venture transaction, albeit as an organ of the state. That distinction is reflected in the original Letter of Intent which identifies as the parties to it only LG and Svenska (by whom alone it was signed) and which draws a distinction at various places between LG and the Government. Similarly, the agreement of 13th June 1991 is described as an agreement made between Svenska and EPG, although it was also signed on behalf of the Ministry of Energy and SGS, in that case without any express qualification. The Addendum contains a number of detailed amendments to the original Letter of Intent. Unsurprisingly it identifies the parties to the Letter of Intent (and by implication to the Addendum) as EPG and Svenska. Leaving aside for a moment the reservation of the state's right to pass new legislation, to which we shall return in a moment, it contains nothing to suggest that the Government or SGS was intended to become a party to the agreement contained in the amended Letter of Intent or any joint venture agreement to which it might lead. On the contrary, the terms in which the Addendum was signed on behalf the Ministry of Energy and SGS indicate that their role was confined to supervising the negotiations and approving the outcome. However, if the parties did not contemplate that the state would incur obligations under the agreement, there is no reason why they should have thought that it should be affected by whatever procedures were agreed for resolving disputes.

40. The reservation of the state's sovereign right to pass legislation of a public nature is not capable in our view of supporting the inference which the judge drew from it. It forms part of a clause which is primarily directed to establishing as the law governing the joint venture the law of a country other than Lithuania. The fact that EPG was a state organisation and that the joint venture was being formed to carry out operations in Lithuanian territory inevitably raised issues of sovereignty. It may well be that this clause was included at the request of those who had the state's interests in mind, but it would not be surprising if EPG itself had wanted to express a qualification of that kind. Either way, it does not in our view support the judge's conclusion.

41. In our view the only conclusion that can be drawn from this evidence is that at that stage the parties envisaged that there would be an agreement between EPG and Svenska for the development of the Genciai oilfield to which the state would not be a party, although it would inevitably exercise a degree of supervision over the activities of EPG.

B. The first draft agreement

42. The first draft of a joint venture agreement was produced by Svenska and handed to Dr. Rahdan, Lithuania's adviser, on 21st November 1991. It was expressed to be an agreement between EPG and Svenska who were described in it as "the parties". It is unnecessary to describe its terms in detail, save to say that Article XXIII provided for disputes to be settled by arbitration under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID"). The choice of governing law was left incomplete and the draft contained no signature page. Article IV provided that Svenska should be the operator and responsible as such for the conduct of operations under the agreement. Some Articles referred to the Government in terms and others (such as Article XII dealing with customs exemptions) would have required governmental action, albeit in a public capacity. The public and regulatory role of the Government was recognised in a number of other articles (e.g. Articles XVII, XVIII), but at least one article (Article XXI) expressly contemplated that the Government would acquire rights against Svenska under the agreement and another (Article XXII) contemplated that in certain circumstances EPG and Svenska might acquire rights against the Government.

43. EPG's response to this draft was contained in a letter to Svenska dated 2nd January 1992. It began by pointing out that the agreement ought to contain certain provisions in order to comply with Article 14 of the Law on Foreign Investments which had been enacted on 29th December 1990. Chapter 3 of the Law on Foreign Investments, of which Article 14 forms part, deals with joint ventures in the form of joint stock companies part of whose share capital is owned by a foreign investor. By Articles 12 and 13 such joint ventures must be established under an agreement between the original investors who are described as the "founders" of the company. Article 14 provides that an agreement for the establishment of a joint venture company must identify, among other things, the type of business to be carried on, details of the founders, the amount of the authorised capital and the terms governing the distribution of profits and losses between the founders and must also contain provisions relating to winding up and a procedure for resolving disputes. In order to comply with the requirements of Article 14 EPG suggested a number of amendments to the opening section of the draft, including the identification of itself and Svenska as founders. It is unnecessary to describe in detail the remainder of EPG's suggestions apart from its proposal that Article XXIII should be amended to provide for disputes to be resolved by arbitration in Lithuania with Svenska having the right to appeal to ICSID if it was unsatisfied with the outcome. There is nothing in that letter to suggest that the existing basis of the agreement should be changed.

44. EPG's letter led to a further meeting between Mr. Thalin and various representatives of EPG and SGS, including Dr. Motuza, in Vilnius on 15th and 16th January 1992. They began by discussing the legal form their proposed co-operation should take. Although Svenska favoured a simple operating contract, EPG preferred a joint venture and that became the basis of discussions. They then examined the first draft in some detail. Again, it is unnecessary to dwell on the details of the discussions; the debate about the procedure for resolving disputes was left unresolved.

45. The judge thought that many of the provisions of the draft then under consideration demonstrated that the state was intended to be a party to the agreement, but again we find it difficult to accept that conclusion. She placed a good deal of weight on Article XXVII.3 which provided that after signature by the parties and the Government the

agreement should have the status of law in Lithuania. Of course, that could only be achieved with the Government's co-operation, but it would involve the exercise of the state's sovereign power of legislation rather than a mere contractual obligation. The fact that Article XXIII, on which the judge also relied, refers to "any dispute" is in our view entirely equivocal since it tells one nothing about the identity of the persons who have incurred rights and obligations under the agreement. We agree that the reference to arbitration under the auspices of ICSID is inappropriate, but it may be that it is to be explained by the fact that EPG was then known to be a state entity. In our view it is impossible to infer from all this either that when producing the first draft agreement Svenska had deliberately departed from what the parties had contemplated when signing the Letter of Intent or that EPG or the Government recognised that the basis of the negotiations had changed and accepted that the Government should become a party to the agreement.

C. The second draft agreement

46. In the light of the discussions in Vilnius Svenska produced a second draft of the agreement which it delivered to EPG on 28th March 1992. To a large extent the draft incorporated the changes sought by EPG at the meeting. The new matters that had to be included in the agreement in order to comply with Article 14 of the Law on Foreign Investment, such as the name of the company, its area of operation and the identity of the founders, were inserted at the beginning of the draft. EPG and Svenska were identified as "Founders and Parties to the Agreement of the Joint Venture". Nonetheless, there remained a number of articles (for example, Articles XXI and XXII) which gave the Government rights and assumed the existence of obligations of a kind that would normally only be assumed by a party to the contract. Article XXIII (Consultation, Arbitration and Governing Law) was altered in two important respects: by the inclusion of a waiver of sovereign immunity on the part of both the Government and EPG and an express submission to the jurisdiction of ICSID; and by the inclusion as Article XXIII.4 of a provision making the law of Lithuania the governing law, subject to rules of international business activities generally accepted in the petroleum industry which were to prevail in the event of a conflict.

47. This draft was discussed at a meeting in Vilnius on 18th and 19th May 1992. Most of the discussion was concerned with financial and economic matters to which it is unnecessary to refer. However, there was some discussion of Article XXIII.4 which the Lithuanians wanted to delete in its entirety. Svenska made it clear both at the meeting and in a subsequent letter that it considered it vital that the governing law clause should contain a reference to international practice.

48. The judge thought that it was clear from the terms of this draft that the parties intended that the state should have rights and obligations under the joint venture agreement. However, there is little to suggest that either side directed its attention to the nature of the Government's involvement and whether it should be a party to the agreement, either generally or for some limited purpose. The terms of Article XXIII.3 certainly can be taken to indicate that the Government was contemplating that Svenska would be entitled to take proceedings against it in arbitration, but if that was the case it is surprising that no one seems to have thought that the Government should be identified as a party to the agreement or that the nature of its involvement should be more clearly identified.

D. The third and fourth draft agreements

49. On 2nd July 1992 after considering the second draft of the agreement the Government's Oil Works Licensing Committee decided to propose certain amendments. These included the addition to Article XXIII.4 of a reference to Articles 6 and 7 of the Law on Foreign Investment which, broadly speaking, prohibited the expropriation of the assets of foreign investors without proper compensation and provided that in cases where the state had entered into an international agreement which was inconsistent with the rules of domestic law the terms of the agreement should prevail.

50. In early August 1992 Svenska produced a third draft of the agreement which reflected most of the changes proposed by EPG at the meeting in May. The only change made to Article XXIII was the addition of the reference to the Law on Foreign Investment which had been proposed by the Oil Works Licensing Committee. However, the third draft was soon overtaken by a fourth draft which was prepared by Svenska and sent to Dr. Motuza on behalf of EPG and SGS on 13th August. The judge made no findings about the circumstances which prompted this draft which in terms of both structure and content differs significantly from the previous drafts. It begins with a declaration of the establishment of a joint venture company called Genciu Nafta of which the founders are EPG and Svenska. Articles 1 to 12 deal with the purposes for which the company is incorporated, its organisation and internal administration (including some aspects of the appointment of officers), the allocation of profits and losses between the founders and matters relating to its liquidation. The remainder of the draft, which begins with a definition section, Article 13 (Article I in the third draft), is almost entirely concerned with the exploration and production operations to be carried out by the joint venture company in the Gargzdai area, though Article 17 also deals with the composition of the company's board of directors. With the exception of Article 35 these articles reproduce in the same order and almost word for word the provisions contained in Articles I to XXXI of the previous draft, although a few amendments were made to reflect the existence of the new company, as one can see from a comparison between Article III of the third draft and Article 15 of the fourth draft, as well as a few other minor amendments.

51. The inference we draw from this document is that someone on Svenska's side realised that, if the joint venture was to take the form of a joint stock company incorporated under the Law on Foreign Investment, it was necessary for the agreement to deal in greater detail with various aspects of the company's structure and administration and for the provisions relating to the operations of the joint venture to reflect the company's existence. That was achieved, perhaps in some haste, by inserting at the front of the third draft twelve new articles and re-numbering the remainder accordingly. However, the logical consequences of creating a joint venture company do not appear to have been thought through, hence the frequent references to "the joint venture" in Articles 17 and following where references to "the company" would have been more appropriate.

52. It is in this context that the introduction of Article 9 and the corresponding amendment to Article 35 fall to be considered. Article XXIII as it appeared in the third draft provided as follows:

"ARTICLE XXIII

CONSULTATION, ARBITRATION AND GOVERNING LAW

1. Periodically EPG and Svenska and, as necessary, Government shall meet to discuss the conduct of activities under this Agreement and will make every effort to settle amicably any problem arising therefrom.

2. Any dispute, controversy or claim arising out of or relating to this Agreement or the breach, termination, or invalidity thereof which cannot be settled amicably, shall be settled by arbitration in Lithuania in accordance with applicable Lithuania legislation.

3. Following receipt of the Lithuanian arbitration award Svenska shall have the right, during one (1) month to challenge the award by initiating arbitration proceedings under the auspices of ICSID (International Center for Settlement of Investment Disputes) or, if ICSID is no longer available, another internationally recognized and accepted institution. Such arbitration shall, unless otherwise agreed, be conducted in Oslo, Norway, under the English language.

   Government and EPG hereby waives [sic] all rights to sovereign immunity and submit to the full and final jurisdiction of ICSID (or another institution as aforesaid).

4. This agreement shall be governed by the laws of Lithuania provided that the rules of international business activities generally accepted in the petroleum industry shall apply in cases of conflict."

53. In the fourth draft only the second part of clause 3 and clause 4 were retained in what became Article 35, to which was added a cross-reference to Articles 9.2 and 9.3 in place of the words "as aforesaid" at the end of clause 3. The article was then entitled simply "Governing Law and Sovereign Immunity". The remainder of Article XXIII was discarded and a new arbitration clause was drafted as Article 9. It provided as follows:

"ARTICLE 9

SETTLEMENT OF DISPUTES

9.1 Disputes between the founders concerning the carrying out of this Contract are settled in accordance with the Statute of the Company or through negotiations between the founders.

9.2 In the event that disputes cannot be settled through negotiations, they shall be settled in the Courts of Law of the Republic of Lithuania.

> 9.3 The judgement given by a Lithuania Court of Law may be challenged by SVENSKA during one (1) month after receipt thereof by initiating arbitration proceedings under the auspices of ICSID or, if ICSID is no longer available, another internationally recognized and accepted institution. Such arbitration shall unless otherwise agreed be conducted in Oslo, Norway in the English language."

54. The structure of the draft as a whole, as well as the language of Article 9 itself, suggests that that article was intended by the draftsman to be the mechanism for resolving disputes between EPG and Svenska in relation to the establishment and operation of the joint venture. The separate submission to arbitration under the auspices of ICSID by both the Government and EPG in Article 35 is perhaps anomalous as a far as EPG is concerned, but does at least indicate a clear intention that disputes with the Government should be submitted to arbitration under the ICSID regime.

55. During October the two sides exchanged comments on the text of the fourth draft by fax. Neither Article 9 nor Article 35 appears to have excited much comment apart from the fact that the Lithuanians were unwilling to agree that in the event of conflict Lithuanian law should give way to the rules of international business activities generally accepted in the petroleum industry. The draft was discussed at another meeting in Vilnius on 10th November 1992. As a result of those discussions Article 9.3 was amended (as the judge found) at the request of Dr. Motuza to provide for arbitration under the rules of the ICC rather than ICSID, but no corresponding change was made to the cross-reference in Article 35.1, probably because it was overlooked.

56. According to Mr. Thalin, it was at some time after the fourth draft had been prepared that the Government made it clear that it did not intend to sign the agreement in unqualified terms. As a result Svenska devised the rubric qualifying the signatures of the Government and SGS to which we have already referred. It appeared for the first time as a manuscript addition to the fourth draft and was probably agreed at the meeting on 10th November.

E. The fifth draft agreement

57. Following the meeting on 10th November a fifth draft of the agreement was prepared incorporating the amendments agreed at that meeting, including the amendments to Article 9 and the rubric providing for the Government's signature. The draft was then sent to various ministries for their comments. Someone at the Ministry of International Economic Relations noticed the inconsistency between Article 9 and Article 35 which was thus drawn to the parties' attention.

F. The sixth draft agreement

58. This and other criticisms raised by the various ministries to which the draft had been sent necessitated the production of a sixth draft which was delivered to the Lithuanian negotiators on 4th February 1993. In this version Article 9 remained largely in its previous form, but for the first time all references to arbitration were omitted from Article 35. The objection raised by the Ministry of International Economic Relations was thus met, but on 10th February 1993 the Ministry of Justice objected strongly to

the terms of Article 9.3 on the entirely reasonable grounds that a decision of the Lithuanian courts could be subject to appeal only in accordance with Lithuania's own procedural code. That led to a further alteration to Article 9 which is recorded only in the form of a manuscript amendment to the sixth draft. The mandatory reference of disputes to the courts of Lithuania was removed and replaced by a provision which is substantially reflected in Article 9 of the Agreement as signed. It is significant that throughout this phase of the negotiations, during which the attention of both parties was directed to Articles 9 and 35, none of those to whom any of the drafts were sent (including the Ministry of Justice) suggested that it was inappropriate for the Government to waive its sovereign immunity or agree to arbitration or for it to sign the Agreement on the terms set out in the rubric.

59. The judge made no findings about circumstances in which the reference to arbitration came to be omitted from the sixth and final draft of the agreement. That is no criticism of her since there does not appear to have been any evidence of how it came about. All we know is that the Ministry of International Economic Affairs had drawn attention to the discrepancy between Articles 9 and 35.1 and that the Ministry of Justice had objected to parts of Article 9. When he reported to the Government on the changes made in the sixth draft Dr. Motuza simply stated that Articles 9 and 35.1 had been changed at the request of the Ministry of Justice. Neither he nor Mr. Thalin appears to have given any explanation of how the particular changes came to be made, though as one can see from the manuscript amendments to Article 9 in the sixth draft, substantial changes to that article were made at a late stage.

G. The language of the Agreement

60. The Agreement as executed contained the following two provisions:

> "ARTICLE 9
>
> SETTLEMENT OF DISPUTES
>
> 9.1 Disputes between the founders concerning the performance or interpretation of this Agreement are settled through negotiations between the Founders.
>
> 9.2 In the event that disputes cannot be settled through negotiations within 90 days as of the receipt of the written notice by either Founder about the existence of such disagreement the disputable matter shall be submitted upon agreement of the Founders for consideration to:
>
> a) the Court of the Republic of Lithuania or
>
> b) independent arbitration in Denmark, Copenhagen to be conducted in accordance with International Chamber of Commerce Rules of Arbitration in the English language.
>
> In case the Founders do not reach an agreement on the institution where the dispute is to be settled, the

> disputable matter shall be submitted for consideration to an independent arbitration provided in subparagraph b) of this paragraph.
>
> ARTICLE 35
>
> GOVERNING LAW AND SOVEREIGN IMMUNITY
>
> 35.1 GOVERNMENT and EPG hereby irrevocably waives all rights to sovereign immunity."

61. The only arbitration clause to be found in the Agreement is that contained in Article 9 and for the reasons given earlier we agree with the judge that, if one were not entitled to look beyond the language of the document itself, it would be impossible to construe Article 9 as extending to disputes involving the Government.

H. Conclusions

62. The question whether the parties intended that disputes between Svenska and the Government should be referred to arbitration is intimately bound up with the question whether the Government itself was to be a party to the agreement or was to incur obligations under it. In the course of their evidence Mr. Thalin and Dr. Motuza, as the principal negotiators for Svenska on the one hand and EPG and the Government on the other, each told the judge what his own intention and understanding had been in relation to these matters and why he was sure that the other must have realised what he had in mind. Needless to say, however, their evidence was in direct conflict and cannot have assisted the judge very greatly. Moreover, there seems to have been a marked absence of objective evidence outside the documents themselves of a kind that would enable a court to determine the extent to which the parties shared a common intention on these matters. For the reasons we have already given we do not think that the evidence is capable of supporting the conclusion that from the outset both parties intended that the Government itself should be bound by the agreement or incur obligations under it, much less that it should submit to some form of international arbitration. Moreover, whatever may have been the private intentions of the parties, there is little to suggest that these questions were openly discussed prior to the meeting on 10th November 1992 at which the rubric providing for and qualifying the Government's signature was agreed. However, the addition of that rubric and its continuing presence in the draft thereafter provides strong evidence that at least from that time the parties did intend that the Government should be bound by the Agreement in accordance with its terms. Indeed, we can see nothing in the parties' subsequent discussions to suggest that the terms in which the Government put its signature to the Agreement were not intended to be taken at face value. We are satisfied, therefore, that as from that time the parties did intend that the Government should be bound and accordingly it became relevant at that point to consider the means by which any disputes between the Government and Svenska should be resolved.

63. Svenska had included in the first draft of the agreement a provision for ICSID arbitration. It may have done so because it assumed that the Government itself would be a party to the agreement or because it thought that it was the appropriate body to determine disputes between a foreign investor and a state entity such as EPG, but

since it does not appear that the Government understood at that stage that it was to be a party to the agreement in the ordinary sense, one cannot infer from the presence of that provision that the Government itself intended to submit to ICSID arbitration, much less that it was willing to accept the principle of arbitration in general. However, in the second draft Article XXIII.3 contained an express waiver of sovereign immunity on the part of both the Government and EPG and a submission to the jurisdiction of ICSID, or in its absence another internationally accepted and recognised institution. The inclusion of this provision no doubt reflected Svenska's intention that the Government should be a party to the agreement and that any disputes with either the Government or EPG should be referred to international arbitration. The fact that it survived the discussions on the second draft, lends some support to the view that that was the intention of both parties, but, since the Government does not appear to have shared Svenska's understanding of its position, it is difficult to conclude that the parties had any such common intention at that stage.

64. The fourth draft involved a significant departure from what had gone before, but the retention of the waiver of sovereign immunity and submission to ICSID arbitration in Article 35 is in our view highly significant in view of the fact that it was as a result of the discussions on that draft at the meeting on 10th November 1992 that provision was made for the Government to sign the agreement on the terms set out in the rubric. If one takes the language of the rubric at face value it is difficult to resist the conclusion that at that stage both sides intended that the Government should undertake obligations to Svenska which Svenska should be entitled to enforce through the process of arbitration. The change from ICSID arbitration to ICC arbitration reflected in Article 9 of the fifth draft must have been requested at the meeting on 10th November 1992 or shortly afterwards. Unfortunately we do not know what, if any, discussions surrounded it, but there is no evidence to suggest that either side contemplated that disputes involving the Government should be referred to ICSID but that disputes involving EPG should be referred to the ICC. That would have been inconvenient and would almost certainly have given rise to some discussion if it had been proposed. No one suggested that it had been.

65. The discrepancy between Articles 9 and 35 was eventually noticed, of course, but even then it did not give rise to any objection in principle to arbitration on the part of the Government; nor, apparently, did anyone suggest that a reference to ICSID arbitration should be retained in Article 35. In those circumstances the deletion of all references to arbitration in Article 35 of the sixth draft is both striking and puzzling. There was no evidence that it reflected any specific discussions between the parties and Mr. Thalin explained it as a drafting error. We find that surprising. If, as the judge found, Svenska considered it essential for the agreement to contain an international arbitration clause binding on the Government, it is difficult to understand how anyone could have removed the provision for arbitration in Article 35 in its entirety or how the omission could have remained undetected in the sixth draft or the version of the document produced for signature.

66. Mr. Shackleton sought to argue that the amendment to Article 35 reflected the parties' recognition that the Government had by that time become amenable to arbitration under the auspices of ICSID by reason of the bilateral investment treaty between Sweden and Lithuania which had been concluded on 17th March 1992 and had come into force on 1st September that year. The difficulty with that submission, however, is

that it is pure conjecture since there is no evidence to support that conclusion. If that had been the case, one would have expected someone to have raised the point in the course of discussions and to have put it forward as a reason for altering Article 35. However, no one suggested that had happened. Although there is evidence that in August 1992 Mr. Thalin drew the board of Svenska's attention to the existence of the treaty, there is, as the judge pointed out, nothing to suggest that it played any part in the Government's thinking or that it was mentioned in the context of the discussions on Articles 9 and 35. If the Government had been of the view that the treaty rendered any reference to ICSID arbitration redundant, one would not expect it to have appeared in the third draft which was produced following the discussions between the parties in May 1992 and would certainly not expect it to have been retained right through to the fifth draft which was not produced until November. Like the judge, we would reject this submission.

67. That leaves for consideration the express waiver of sovereign immunity on the part of the Government in Article 35. Mr. Bools submitted that this was an echo of the parties' intention that disputes between Svenska and the Government should be resolved in a forum other than the courts of Lithuania in which sovereign immunity would not be a relevant concept. Mr. Shackleton submitted that it was nothing more than a reflection of the Government's willingness for EPG to waive any sovereign immunity which it would otherwise be entitled to assert. Moreover, as he pointed out, sovereign immunity would not be relevant in the context of any arbitration proceedings to which the Government had agreed.

68. The way in which Article 35 attained its final form does not in our view support Mr. Shackleton's submission. If the Government had not undertaken legally binding obligations towards Svenska under the Agreement, it might have been difficult to ascribe any other meaning to Article 35.1, but once it is accepted that the Government did incur obligations of that kind a waiver of sovereign immunity is consistent both with a recognition of the fact that the Government has incurred such obligations and with a recognition that proceedings to enforce such obligations might be taken otherwise than in the courts of Lithuania and might give rise to legal proceedings in other jurisdictions. The Government's waiver of its right to sovereign immunity, which no one has suggested was also an oversight, does therefore lend a modest degree of support to the conclusion that the parties' intention that disputes between Svenska and the Government should be resolved by international arbitration persisted despite the removal from Article 35.1 of the reference to ICSID arbitration.

69. It is always difficult for one party to a formal written agreement to establish that the document does not correctly reflect the true intentions of the parties simply because they can both be presumed to have given careful consideration to all its terms before executing it. However, we are satisfied in this case that, despite the omission of any reference to arbitration in Article 35, the evidence taken as a whole does point to the conclusion that at the time the Agreement was signed there was a common intention on the part of the Government, EPG and Svenska that any disputes arising under the Agreement, including any disputes involving the Government, should be settled by arbitration and that the procedure set out in Article 9 of the Agreement should apply to disputes between Svenska and the Government as well as to disputes between Svenska and EPG. We therefore agree with the judge's conclusion, albeit for slightly

different reasons. This makes it necessary to return to the principles of construction applicable under Lithuanian law.

70. The parties' submissions were primarily directed to the question whether Article 9, and in particular the word "Founder", could and should be construed as embracing the Government, a question which is naturally characterised as one of construction or interpretation. Viewed in that light it is not surprising that the Government argued strongly that in the case of a written contract the text is the primary source of evidence of the parties' intention and that prior negotiations are no more than an aid to the interpretation of the text. If the text is clear, so it was said, it must prevail. This was the basis for Mr. Shackleton's criticism of the judge, who, he submitted, had treated the parties' intentions as determinative of the correct interpretation of the Agreement without regard to the language they had used. He submitted that the task of the court is to interpret the text of the document with such assistance as may be derived from the evidence of the parties' intentions, not to substitute those intentions for the text where its meaning is clear.

71. The approach advocated by Mr. Shackleton maintains the important distinction between interpreting a written contract and reforming it, but it does not allow for the case where the parties have inadvertently omitted from the written document words that should have been included to reflect their true intentions. To apply the clear language of the text in such a case will not give effect to the parties' real intentions; on the contrary, it will frustrate them. But to treat the text as if it contained the missing words involves giving an extended meaning to the term 'interpretation'. The solution to this problem adopted by English law is that of rectification of the written document, an equitable remedy by means of which its terms are made to reflect the parties' true intentions. It is not a process which an English lawyer would regard as one of interpretation, although it is a means of ensuring that the obligations which the parties intended to undertake are enforceable through the medium of the written instrument. This solution reflects the importance attached by English law to the written instrument as the evidence and source of the parties' obligations, but other systems of law, including in this case Lithuanian law, attach greater importance to the need to identify those intentions from a wider range of evidence while still regarding the exercise as one of interpretation.

72. This becomes important in the present case because the real question, as we see it, is not what the parties meant by Article 9 or whether the word "Founder" can be construed as including the Government, but whether the parties inadvertently omitted from Article 35.1 the words necessary to embody their common intention that disputes involving the Government should be referred to arbitration in accordance with the procedure set out in Article 9. Unfortunately, the witnesses who gave evidence about the principles of construction applicable under Lithuanian law did not dwell in any detail on this question, but we note that the Government's expert, Professor Katuoka, emphasised the need for positive evidence of agreement on the part of the Government to arbitrate in order to justify the conclusion reached by the arbitral tribunal. That provides some additional support for the conclusion that, if such evidence exists, as in our view it does, it is permissible to interpret the Agreement as containing such an obligation.

73. Mr. Shackleton submitted that the judge's decision on this issue rested upon a finding that the Government had impliedly consented to arbitration whereas it is generally

recognised by tribunals dealing with international disputes that nothing less than express consent is sufficient to hold a state party to an arbitration agreement. He submitted that this rule of international law was one that the judge should have recognised and applied in the present case, both because it forms part of the law of Lithuania and because, by including a reference in Article 35.2 of the Agreement to "rules of international business activities generally accepted in the petroleum industry", the parties had demonstrated their intention that the contract should be interpreted in accordance with international legal principles.

74. We referred earlier to the terms of Article 35.2 and expressed the view that to reject all reference to international principles on the grounds that they either add nothing to the principles of Lithuanian law or contradict them does not pay sufficient regard to the fact that the parties must have intended to achieve something by the inclusion of these words. We therefore propose to examine briefly the main decisions on which Mr. Shackleton relied in support of his proposition. They are *Westland Helicopters (UK) v The Arab Republic of Egypt* (1991) Yearbook of Commercial Arbitration XVI, *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt* (1992) 3 ICSID Reports 102, *Joint Venture Yashlar and Bridas SAPIC v Government of Turkmenistan* (1999) (ICC Arbitration Case No. 9151) and *Bridas SAPIC v Government of Turkmenistan* (2003) (U.S. Court of Appeals, 5th Circuit).

75. *Westland Helicopters (UK) v The Arab Republic of Egypt* concerned litigation before the Swiss federal courts to determine whether the Republic of Egypt was party to an agreement to arbitrate under ICC rules contained in an agreement between Westland Helicopters and the Arab Organization for Industrialization ("AOI"), an entity enjoying separate legal personality created by treaty between Egypt, Saudi Arabia and two of the Gulf States. Egypt itself was not a party to the agreement containing the arbitration clause, but Westland argued that it was bound by it because it was closely identified with AOI. Not surprisingly, that argument was rejected. It is true that the Swiss Supreme Court stated in paragraph 16 of its judgment that "a sovereign state cannot be deemed to have waived its immunity from jurisdiction if it did not agree to an express waiver clause", but it is clear that the decision rested squarely on the fact that AOI enjoyed separate legal personality and did not bind its founders when entering into contracts with third parties.

76. Similar broadly-worded statements concerning the waiver of immunity and agreements to arbitrate can be found in the other cases on which Mr. Shackleton relied. In *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt* the question arose whether the state of Egypt was bound by an ICC arbitration clause in a contract which Southern Pacific had entered with the Egyptian General Organization for Tourism and Hotels ("EGOTH"). The contract had been countersigned by the Minister of Tourism against the words "Approved, agreed and ratified by the Minister of Tourism". Although EGOTH enjoyed separate legal personality, the arbitrators held that by signing the agreement the government had undertaken contractual obligations and had thereby become a party to it; and that by doing so it necessarily extended its agreement to the contractual mechanism for settling disputes.

77. It can be seen at once that the contractual position in that case was very different from the present case. In that case the Minister had signed the agreement in terms not wholly dissimilar to those in which the Ministry of Energy signed the Addendum to the Letter of Intent and which may be contrasted with the terms in which the

Government signed the Agreement itself. Moreover, in the *Southern Pacific* case there appears to have been no attempt, as there has in this case, to establish the parties' common intention in relation to the government's participation in the arbitral process. We do not find it surprising, therefore, that French courts later held that the Egyptian state had not undertaken obligations by signing the agreement in the terms described above and that by allowing EGOTH to enter into the contract on its own the government had intended to demonstrate that it was not willing to incur obligations itself or to submit to arbitration under ICC rules. There are in our view fundamental differences between the two cases which render this authority of little assistance.

78. *Joint Venture Yashlar and Bridas SAPIC v Government of Turkmenistan* arose out of an agreement between Bridas SAPIC, an Argentine company, and Production Association Turkmengeologia, a state-owned body nominated by the Government of Turkmenistan, to establish a joint venture to carry out oil exploration and production operations in the Yashlar region. The agreement provided for the arbitration of disputes between the parties to it under the rules of the ICC, but the Government was not designated as a party and did not sign the agreement. Nonetheless, Bridas contended that the Government was in fact a party to the agreement and must be taken to have agreed to refer any disputes to arbitration. That argument was rejected by the arbitrators. They noted, among other things, that both Turkmengeologia and its successor, Turkmenneft, were bodies with separate legal personality and thus liable for their own obligations and concluded that the Government had chosen to allow Turkmengeologia to enter into the agreement rather than to enter into it itself. That was obvious to Bridas at the time and made it impossible for it to show that the Government intended to be bound by the agreement. Once again, the circumstances are significantly different from those of the present case.

79. The next case to which our attention was drawn was *Bridas SAPIC v Government of Turkmenistan* which arose out of another joint venture agreement between Bridas and Turkmenneft for oil exploration and production, this time in the Keimir region of Turkmenistan. That agreement also contained an ICC arbitration clause and when a dispute arose Bridas sought to refer it to arbitration, seeking to make the Government a party as well as Turkmenneft. The Government maintained that it had not signed the joint venture agreement and was therefore not a party to the arbitration clause, but on this occasion the arbitrators by a majority held that they had jurisdiction to determine Bridas's claim for damages on the grounds that the Government had not taken any steps to extricate itself from the proceedings and the fact that the agreement contained many undertakings which only the Government could fulfil. In due course the tribunal made an award of damages in favour of Bridas for repudiation of the joint venture agreement.

80. In proceedings to enforce the award in the United States the Government once again raised the question of the tribunal's jurisdiction. The matter eventually came before the U.S. Court of Appeals for the Fifth Circuit which held that the Government was not a party to the arbitration agreement. It was not described as a party to the agreement and had not signed it and thus did not fall within the terms of the arbitration clause. The court could not discern an intention to bind the Government to the terms of the agreement and thus to arbitrate the dispute. Once again, therefore, there are significant differences from the present case.

81. In our view Mr. Shackleton's criticism of the judge was misplaced. The decisions to which he referred support the proposition that a government is not to be taken to be a party to an agreement or to have submitted to arbitration simply as a result of the fact that it has put forward a state organisation to contract with a foreign investor. In a case where the state organisation enjoys separate legal personality and the government is not named as a party to the agreement and has not signed it in the capacity of a party, we think it would be difficult to reach any other conclusion. None of the cases, however, supports any wider proposition than that and none of them raises considerations of the kind that arise in the present case. It is plain that the Agreement itself does not contain an express agreement on the part of the Government to submit disputes to arbitration; if it did, the question under discussion would not have arisen. Because she understood that in Lithuanian law the parties' intentions ultimately control the effect of an agreement, the judge set out to determine whether, at the time the Agreement was executed, it was the common intention of the parties that the Government should submit disputes arising under the agreement to arbitration. Her finding that it was their intention is one of fact based on the whole of the evidence, so Mr. Shackleton's argument must fail unless as a matter of law the Government cannot be treated as having intended to arbitrate in the absence of an express assurance to that effect. None of the cases cited to us supports any such proposition.

82. In these circumstances we think that the judge was right to hold that the Agreement must be interpreted in conformity with the principles of Lithuanian law in a way that gives effect to the common intention of the parties as she identified it. In our view that can best be achieved not by interpreting the word "Founders" in Article 9 as including the Government but by reading Article 35 as if it contained a submission on the part of the Government and EPG to arbitration in accordance with the provisions of Article 9, thus broadly reflecting the form which it took in the fifth draft.

I. Lithuanian decisions

83. At this point it is necessary to refer briefly to two decisions of the Lithuanian courts relating to the Agreement. In 2005 Geonafta brought proceedings in the Klaipeda District Court seeking a declaration that the Agreement as a whole, and particularly Articles 9 and 35.1, were null and void as being contrary to law and public policy. It is not clear from the materials before us whether the Government was an original party to those proceedings, but it is described in the judgment as a third party and clearly took an active part in the proceedings. The District Court delivered its judgment on 4th November 2005 holding that the Government was not a founder of Genciu Nafta, that the Agreement as a whole was void for want of notarisation, that the provision in Article 9 for ICC arbitration was void under Lithuanian law as purporting to refer to arbitration disputes relating to underground natural resources and that Article 35.1 was also void under Lithuanian law because a waiver of sovereign immunity would restrict the rights of the Government.

84. In due course the matter came before the Court of Appeal which delivered its judgment on 20th March 2006. It held that the Government was a participant in the Agreement, albeit not as one of the founders of Genciu Nafta, and that its rights and duties were not exclusively of a public nature, although many were of that kind. However, it upheld the decision of the District Court that the Government was not bound by the provisions of Article 9 on three grounds: first, because it considered it

clear from the language of Article 9 that it applied only to disputes between the founders of Genciu Nafta; second, because to construe Article 9 as applying to the Government would be contrary to the law prohibiting the Government from being the founder of a private limited liability company; and third, because disputes relating to underground natural resources are incapable of being referred to arbitration under Lithuanian law. It is interesting to note in passing that the Court of Appeal rejected the argument that the Government did not incur obligations of any kind under the Agreement for essentially the same reasons as those we set out earlier. Moreover, as we have already indicated, we agree that Article 9 itself is incapable of being read as referring to the Government. However, for some reason the wider issue as to the parties' true intentions, which was canvassed so fully before Gloster J. and on this appeal, does not appear to have been the subject of argument when the matter was before the District Court and for that reason, presumably, was not considered by the Court of Appeal.

85. Mr. Shackleton, who drew our attention to these decisions, did not go so far as to submit that they finally determined the issues in question as between these parties, but he did submit that they provided strong evidence of Lithuanian law which the court should take into account. We have read with interest and respect the decisions of both the District Court and the Court of Appeal, but the fact is that neither court was asked to consider the arguments that have been addressed to us and therefore their judgments provide no assistance on the question of construction now under consideration.

86. The question whether disputes relating to underground natural resources are incapable of being referred to arbitration under Lithuanian law is potentially of some importance because it might provide a basis for holding that the Government could not effectively submit disputes under the Agreement to arbitration. The argument proceeded on the basis that by virtue of the Law on Underground Exploitation (1995) and the Law on Commercial Arbitration (1996) disputes relating to the issue or revocation of oil exploration and production licences are incapable of being submitted to arbitration under Lithuanian law. If these laws had been in force at the time the Agreement was entered into, it might have become necessary to consider the effect of Article 35.2, but in fact both were passed long after the Agreement had been entered into. The argument therefore depended on the proposition that the subsequent legislation had rendered non-arbitrable that which had previously been arbitrable.

87. The question of the arbitrability of the dispute was raised in the proceedings which led to the first award. The arbitrators rejected the Government's argument in the main, but reserved for later consideration the question whether it had any validity in relation to Svenska's claim for an order requiring the Government to cancel certain existing licences and issue others in their place. However, by the time of the second proceedings Svenska had abandoned that part of its claim and the majority therefore considered it unnecessary to deal further with the point.

88. The Government's skeleton argument for the hearing before the judge did not raise this point as an independent ground for challenging the arbitrators' jurisdiction and in his report Prof. Katuoka had not suggested that the legislation in question had retrospective effect. However, in the course of his oral evidence Prof. Katuoka said that both laws had retrospective effect so as to render the disputes between Svenska and the Government non-arbitrable. The judge heard evidence from both sides on this

question and it is clear from what she says in paragraph 93 of her judgment that she was wholly unimpressed by Prof. Katuoka's evidence. She decided the issue in favour of Svenska.

89. The skeleton argument served by the Government for the purposes of this appeal did not raise non-arbitrability as an independent ground for challenging the arbitrators' jurisdiction and the point was not raised in oral argument. If such an argument had been raised, it would have been necessary to consider the evidence before Gloster J. as well as the recent decision of the Lithuanian Court of Appeal. That might have presented certain difficulties since the basis of the Court of Appeal's decision differs in some respects from that put forward by Prof. Katuoka. However, having regard to the way in which the case has developed we do not think it is necessary or appropriate to delve any further into this aspect of the matter. Mr. Shackleton did seek to rely on the non-arbitrability of the dispute in support of his argument on construction, but even in that limited form it does not assist the Government's case. If disputes arising under the Agreement were arbitrable at the time the contract was made, subsequent legislation is of no assistance in determining the parties' intentions.

3. The first award

90. It follows from what we have said already that in our view the judge was right to hold that the Government agreed to submit disputes with Svenska to arbitration under the ICC rules in accordance with the provisions of Article 9 of the Agreement. That is what the arbitrators themselves held in the first award and it follows that we think they were right, although we have reached the same conclusion for slightly different reasons. However, the question that must now concern us is not whether the arbitrators were right, but whether the first award finally disposed of the issue as far as these parties are concerned. In our view it did. Under Lithuanian law an arbitration clause is regarded as an autonomous agreement, that is, an agreement which gives rise to rights and obligations which existing independently of the contract within which it is found, and an agreement to arbitrate under the ICC rules confers on the arbitrators jurisdiction to decide whether they have jurisdiction in any given case. In the present case by agreeing to ICC arbitration the parties conferred on the arbitrators jurisdiction to determine that question and are therefore bound by their award.

91. Before the judge there was much debate about whether the first award had become 'final' for the purposes of giving rise to an issue estoppel. We prefer to ask whether that award finally determined as between these parties the question whether the Government had agreed to submit disputes under the Agreement to ICC arbitration. Putting the question in that way is more likely to lead to a correct understanding of the nature of the issues involved.

92. In the event, however, the debate about the effect of the first award ceases to have any significance once it is established that the Government had indeed agreed to refer disputes to arbitration since the only ground on which it has ever been suggested that the award might not finally determine the parties' rights is that it had not done so. The debate as to the finality of the award under Danish law therefore no longer matters and we do not think that there is a great deal to be gained from discussing it at length. However, since the question was fully canvassed in argument, we propose to express our views on it as briefly as we can.

(a) Danish law

93. The arbitration leading to the first award took place in Denmark in accordance with the parties' agreement and we think there can be little doubt that the curial law of the proceedings was Danish law. It was common ground that under Danish law the unsuccessful party can challenge an award in one of two ways: he may take legal proceedings to have it declared void, for example on the grounds that the arbitrators lacked jurisdiction, or he may wait until the successful party seeks to enforce it and then challenge its validity by opposing enforcement proceedings. The judge found that under Danish law the time for commencing proceedings seeking a declaration that an award is void is not subject to any specific limitation period, but that the courts may refuse the applicant relief if he does not apply within a reasonable time since the failure to act may be taken as evidence that he has accepted the validity of the award.

94. The judge summarised the evidence of the Danish lawyers in paragraph 59 of her judgment as follows:

> "59. Both reports expressly addressed the question of whether the right to challenge the Interim Award had been lost and both agreed as to the applicable test as a matter of Danish law. Messrs. Gronborg and Fogh stated that if a party had left "an unreasonably long time to pass" before challenging an award, that fact (taking into account all of the circumstances of the case) will be interpreted as an expression that the party has, in reality, accepted the award. [Gronborg and Fogh Report, §2.8.] Messrs Hakonsson and Frost put the test in much the same way:
>
> > "… if a party does not appeal an award within a reasonable time, the courts may find that the party due to unreasonable delay in asserting a right has forfeited his right to appeal the award" (Hakonsson and Frost Report, p.6)."

95. The only possible distinction we can see between these two views is that the principle formulated by Gronborg and Fogh appears to suggest that factors other than mere delay have to be taken into account because the underlying principle is that the applicant has demonstrated a willingness to accept the award as binding. However, since both experts were of the view that there was at least a serious possibility that the Danish courts would hold that in this case the right to challenge the award had been lost by delay, we do not think that the distinction matters greatly for present purposes.

(b) Should the judge have allowed Svenska to adduce evidence of Danish law?

96. At this point it is necessary to digress for a moment to deal with a complaint made by the Government about the judge's decision to admit evidence of Danish law at the hearing before her. Mr. Shackleton submitted that the judge was wrong to do so having regard to the fact that that Svenska had not previously applied for, let alone obtained, permission to adduce evidence of that kind.

97. Following the dismissal of Svenska's application by the Deputy Judge it was necessary for directions to be given for the hearing of the Government's application under CPR Part 11. When the matter came before Cresswell J. for that purpose on 11th April 2005 Mr. Bools informed the judge that his clients would be relying only on the evidence that had been before the arbitrators, all of which the Government had seen before, and that he was making no application to call oral evidence. Later, in the context of an application by the Government to adduce expert evidence of Lithuanian law, Mr. Shackleton mentioned that Danish law might also be relevant. The judge pointed out that if either party wished to adduce evidence of Danish law it had to obtain permission to do so, but neither side made any application of that kind. It was only when Svenska served its skeleton argument three days in advance of the hearing before Gloster J. that it became clear that it intended to rely on the evidence of Danish law that had been before the Deputy Judge. This consisted of letters from the firms of Danish lawyers mentioned in the judgment describing, among other things, the grounds on which arbitration awards can be challenged in the Danish courts and the procedure by which such challenges can be made.

98. Mr. Shackleton complained that the Government had been taken by surprise, not having been warned that Svenska intended to argue questions of Danish law, and had not been given a proper opportunity to prepare and advance its own case. It appears that the Danish lawyers' reports that had been relied on before the Deputy Judge had been included in the bundles produced for the hearing on the assumption that all the material that had been before him ought also to be before Gloster J., but no one on the Government's side appears to have considered what the implications of that might be. At all events, the Government served a supplemental skeleton argument dealing with, among other things, the question of issue estoppel. In that skeleton it submitted that Svenska was bound by the outcome of the hearing before the Deputy Judge to accept that the first arbitration award did not finally determine the issue of the tribunal's jurisdiction, and that even if that were not the case, it would be an abuse of process for Svenska to re-open the matter. However, no doubt as a precautionary measure, the Government also dealt in its skeleton with the merits of the argument. The one thing it did not do was submit that it had been prejudiced by not having received earlier warning that Svenska intended to raise the issue.

99. The Government made no formal objection to the admission of evidence of Danish law until the fifth day of the hearing when Mr. Shackleton was in the course of making his final submissions. After some debate Mr. Bools accepted that Svenska needed permission to adduce the evidence, but because of the stage which had by then been reached the matter was left on the basis that the judge would rule in the course of giving her judgment on whether that evidence should be admitted. When she came to deliver judgment the judge decided that Svenska should be allowed to adduce the evidence of its Danish lawyers and allowed the Government to do the same. She therefore had before her the letters to which we have referred. In reaching her decision the judge was clearly influenced by the fact that both sides had previously adduced the same evidence before the Deputy Judge and that the parties' Danish lawyers were substantially in agreement. She rejected Mr. Shackleton's submission that the evidence needed to be tested in cross-examination and noted that no application had been made by the Government to cross-examine Svenska's experts or for an adjournment of the application in order to enable it to prepare its case on this issue more thoroughly.

100. In our view Svenska was at fault in failing to obtain permission from Cresswell J. to adduce expert evidence of Danish law at the hearing before Gloster J. It is necessary to obtain permission to call expert evidence of any kind and it is desirable for the court on the application for permission to consider whether the evidence which the applicant proposes to rely on is likely to assist the court and, if so, how it can most helpfully be adduced. If that had been done in this case, any apparent differences between the experts' views appearing from their earlier reports could have been considered and the judge might have directed that they be called for cross-examination. However, by the time the matter was raised before Gloster J. the opportunity for that had long gone. She had to decide what should be done in the circumstances as they presented themselves to her.

101. Mr. Shackleton submitted that there were apparent differences of view between the experts which could not properly be resolved in the absence of cross-examination, but such differences as there may be, which are in any event minor, must have been apparent ever since the hearing before the Deputy Judge and once it became apparent to those advising the Government that Svenska intended to argue issues of Danish law, the matter should have been raised with the judge at the outset of the hearing if it was thought that cross-examination was necessary. The Government could have applied for a direction excluding the evidence of Danish law altogether or for the whole or part of the hearing to be adjourned to enable the relevant issues to be determined separately on another occasion. Such an application might or might not have succeeded, but to object at the last minute to the admissibility of material that had apparently been included in the trial bundles by agreement meant that the options were limited. In the circumstances we do not think that the judge's decision can be criticised or that this court should interfere with her decision.

(c) Was the first award 'final'?

102. The judge found that by the time she came to give judgment in November 2005 sufficient time had passed since the publication of the first award for the Government to have lost its right to challenge that award under Danish law. In our view her decision, which involved the application of undisputed principles of Danish law to the facts of this case, cannot be faulted. Not only had there been a substantial lapse of time since the publication of the first award without any attempt to challenge it, but the Government had formally resolved in February 2004 not to challenge the second award, which depended for its validity on the correctness of the first award, and had formally communicated that decision to Svenska.

(d) Recognition

103. On the basis that the first award was no longer capable of being challenged in Denmark the judge held that it finally determined the question of the tribunal's jurisdiction. We agree with her conclusion, primarily because we are satisfied that the Government had agreed to refer disputes to arbitration under the ICC rules, but there is one other matter that must not be overlooked in this context and to which attention was drawn by Mr. Shackleton, namely the question of recognition.

104. Mr. Shackleton submitted that the Government's failure to challenge the first award before the Danish courts did not prevent it from challenging its recognition and enforcement in this country on any of the grounds set out in section 103(2) of the

Arbitration Act 1996. In support of that submission he drew our attention to two decisions of the courts of Hong Kong, *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39 and *Hebei Peak Harvest Battery Co Ltd v Polytek Engineering Co Ltd*, but the proposition is not one which we find difficult to accept as a matter of principle. In the first place, section 103 of the Arbitration Act is a mandatory provision which must be applied in accordance with its terms. It follows, therefore, that whenever an attempt is made to enforce or rely upon a foreign award the party against whom it is invoked is entitled to challenge its recognition on any of the grounds set out in the section. Quite apart from that, however, the first question a court has to ask itself whenever a party seeks to rely on an arbitration award is whether that award should be recognised as valid and binding. In the case of a New York Convention award, section 103(2) gives the court the right not to recognise the award if the person against whom it is invoked is able to prove any of the matters set out in that subsection and if the court is satisfied that the award should not be recognised, the matter ends there. In the present case, therefore, it was always open to the Government to challenge the recognition of the award by the English courts and therefore the fact that the award could no longer be challenged in Denmark does not lead inexorably to the conclusion that it can be relied on as giving rise to an issue estoppel. In fact, however, the Deputy Judge decided that the award should be recognised and there has been no challenge to that decision. Accordingly, for the reasons given earlier, we agree that the first award is now to be regarded as having finally disposed of the issue of jurisdiction.

4. The proceedings before the Deputy Judge.

105. This brings us to the application before the Deputy Judge and the effect of his judgment. That application was made by Svenska under CPR Part 24 in a bid to dispose summarily of the Government's application under CPR Part 11 for a declaration that its right to sovereign immunity precluded proceedings against it in this country to enforce the second award. As we have already indicated, it was not appropriate in our view for Svenska to have made a separate application for that purpose under Part 24, the primary purpose of which is to enable a claimant or defendant to obtain the summary disposal of proceedings begun by Part 7 claim form which would otherwise proceed to a full trial. The proper course in a case such as the present is to ask the court to give directions in the application itself for the hearing of the issue that is said to be determinative of its outcome. The court can then consider with the assistance of the parties whether that issue, or any other issues, might usefully be determined before the remainder of the application and, if so, how that can most conveniently and efficiently be achieved.

106. Svenska's application in the present case was for an order that the Government's application under CPR Part 11 be struck out or dismissed and that judgment be entered in its favour in the terms of the award. It therefore sought to obtain the relief already sought by the original application issued under CPR Part 62 on 2nd April 2004. The fact that the application notice asserts that "the first defendant [the Government] has no real prospect of successfully defending the claim" suggests that those acting for Svenska may have overlooked the distinction between Svenska's application under Part 62 for leave to enforce the award and the Government's application under Part 11 to which the application under Part 24 was ostensibly directed.

107. The importance of the Deputy Judge's decision lies in two matters: his decision that the first award should be recognised (to which we have already referred) and his rejection of Svenska's argument that the first award finally disposed of the question whether the Government had agreed to ICC arbitration. Before Gloster J. the Government contended that his decision gave rise to an issue estoppel and that she was therefore bound to hold that the first award did not finally determine the question. That in its turn opened the way for the Government to contest the issue of the tribunal's jurisdiction by reference to the Agreement itself and, if necessary, the evidence of the negotiations which had preceded it. However, since we have reached the conclusion that the Government did agree to ICC arbitration and that the first award was therefore valid and binding, the question whether the decision of the Deputy Judge gave rise to an issue estoppel has ceased to be of any significance as far as the disposal of this appeal is concerned. The Deputy Judge dismissed Svenska's application and, although he gave permission to appeal, Svenska did not pursue the matter. In those circumstances it is unnecessary to say any more about that aspect of his decision.

108. However, it is necessary to refer briefly to the way in which the judge dealt with this part of the argument. She noted in paragraph 54 of her judgment that the Deputy Judge was only deciding whether the Government's claim to immunity should be struck out or dismissed as being hopeless on the grounds of issue estoppel and that he was not himself considering the merits of the issues to which the claim of sovereign immunity gave rise. She also noted that in paragraph 37 of his judgment he had specifically drawn attention to the fact that, although there had been some discussion by the experts on Danish law of the circumstances in which the right to challenge an award may be lost, Svenska had not contended that such circumstances already existed in the present case.

109. The judge held that she was not precluded from deciding for herself whether the first award was final in the sense indicated earlier because "it is well-established that an interim, or interlocutory, decision of this type does not give rise to *res judicata* or issue estoppel". If she meant that a decision on an interlocutory application can never give rise to an issue estoppel, we are unable to agree. An application under Part 24 may be made on a variety of grounds, including the ground that the claim (or a defence, as the case may be) is bound to fail as a matter of law. If an issue of that kind is capable of being finally determined on such an application and is finally determined, that will give rise to an issue estoppel: see *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb* [1966] 1 Q.B. 630, 642, per Diplock L.J. However, we think that in this case the judge was really doing no more than pointing out that if an application under Part 24 is dismissed on the grounds that there is a real prospect of success at trial, there will usually have been no decision of that kind at all. Moreover, even where it is clear that some issues have been finally determined, it is important to identify with care what those issues are. It is in the very nature of issue estoppel that the party against whom the estoppel operates is prevented from putting forward a case which might otherwise deserve consideration and it is therefore important that it should be carefully confined to the actual subject matter of the decision; and even then there may be circumstances in which a rigorous application of the principle may have to give way to the demands of justice: see *Arnold v National Westminster Bank plc* [1991] 2 A.C. 93.

110. Although Svenska set out to persuade the Deputy Judge that the first award was final and thus itself gave rise to an issue estoppel, it is clear that the argument was advanced on the narrow basis that the tribunal itself no longer had any power to alter its award. The Deputy Judge decided that issue against Svenska and so dismissed the application. The judge clearly recognised that fact and her comment simply reflects the fact that the broader question whether the award was final had been left for determination on a later occasion. We therefore agree with her that the Deputy Judge's judgment did not preclude Svenska from arguing that the Government had lost its right to challenge the award in Denmark by failing to take the steps required to do so within a reasonable time.

5. Section 9 of the State Immunity Act 1978

111. Section 9(1) of the State Immunity Act 1978 provides as follows:

> "Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration."

112. Mr. Bools submitted that since the Government had agreed to ICC arbitration, Svenska's application to enforce the second award involved "proceedings which relate to the arbitration" within the meaning of section 9(1). Mr. Shackleton submitted, however, that the subsection calls for an agreement in writing on the part of the State to submit to arbitration (which he said does not exist in this case) and, moreover, is concerned only with proceedings relating to the conduct of the arbitration itself and does not extend to proceedings to enforce any award which may result from it. He submitted that the judge's approach to section 9 contradicted the presumption of immunity to be found in section 1 because her decision rested simply on the finding that the Government had failed to challenge the first award before the Danish courts and had thereby waived its right to object to the arbitrators' jurisdiction.

113. Mr. Shackleton was clearly right in submitting that section 1 of the State Immunity Act contains what may be described as a presumption of immunity which is subject to the specific exceptions set out elsewhere in the Act. We can also see the force of his argument that the mere failure by the Government to challenge the first award is not sufficient to bring the case within section 9(1). One can test the argument by asking what the position would have been if, contrary to our view, the Government had not agreed to arbitration at all. How could it then be said that its failure to challenge an award made without jurisdiction amounted to an agreement in writing on its part to submit the dispute to arbitration? In our view it could not. (We assume for this purpose that the award has not been recognised.) So to that extent we think Mr. Shackleton's submission was well-founded.

114. In our view two questions arise for decision: did the Government agree in writing to submit the dispute in this case to arbitration, and if so, is Svenska's application for leave to enforce the award as a judgment under section 101 of the Arbitration Act 1996 to be regarded as "proceedings which relate to the arbitration"?

(a) Agreement in writing to submit to arbitration?

115. The judge did not deal with the first of these questions at any length. Having held that the Government's failure to contest the first award had led to its becoming final, she took the view that it involved a binding decision that the Government was a party to an arbitration agreement falling within the terms of section 9(1). Although we were initially in some doubt about that, we are satisfied that she was right to do so. The Government was party to an agreement to arbitrate and from that agreement the arbitrators derived their jurisdiction to make the first award. At that stage, of course, they only had to decide whether they had jurisdiction to determine the substantive dispute which had been referred to them. They held that, by acknowledging itself to be legally and contractually bound "as if [it] were a signatory to the Agreement", the Government became bound as if it had been a Founder and was therefore bound by the terms of Article 9. It is clear from the following paragraphs of the award that they reached that conclusion by a straightforward process of construction. In other words, they held that on the true construction of the document the Government had agreed to refer disputes to arbitration.

116. It will be apparent from what we said earlier that, although we agree with the arbitrators' conclusion, we do not agree with their reasons for reaching it. However, that does not matter. If they had jurisdiction to decide whether the Government had submitted to arbitration, as we are satisfied they did, the award is binding for what it decides, right or wrong. The arbitrators, of course, did not have to decide whether the Government had agreed in writing to refer the dispute to arbitration within the meaning of section 9 of the State Immunity Act, but they did have to decide whether, and if so how, the Government was bound by an agreement to arbitrate. They held that it was a party to the Agreement and in our view the Government cannot go behind that decision. The first award therefore establishes that the Government agreed in writing to refer disputes to arbitration and is therefore sufficient to bring the case within section 9.

(b) 'Proceedings relating to arbitration'?

117. The judge held that there was no basis for construing section 9 of the State Immunity Act (particularly when viewed in the context of the provisions of section 13 dealing with execution) as excluding proceedings relating to the enforcement of a foreign arbitral award. We think that is right. Arbitration is a consensual procedure and the principle underlying section 9 is that, if a state has agreed to submit to arbitration, it has rendered itself amenable to such process as may be necessary to render the arbitration effective. Mr. Shackleton accepted that proceedings in support of the arbitral process itself as well as proceedings challenging the award fall within section 9(1), but submitted that proceedings to enforce the award do not. We are unable to accept that distinction. The Act itself draws a distinction between proceedings which relate to the arbitration (section 9) and process in respect of property for the enforcement of an award (section 13). In our view an application under section 101(2) of the Arbitration Act 1996 for leave to enforce an award as a judgment is, as subsection (1) recognises, one aspect of its recognition and as such is the final stage in rendering the arbitral procedure effective. Enforcement by execution on property belonging to the state is another matter, as section 13 makes clear.

118. Mr. Bools submitted that, if section 9(1) is ambiguous and its scope therefore uncertain, the position can be resolved by reference to the statements made in the House of Lords in the course of debates on clause 10 of the State Immunity Bill.

119. On 16th March 1978 during the Committee stage of the Bill the Lord Chancellor made the following statement when moving Amendment No. 15:

> "This Amendment is intended to remove the immunity currently enjoyed by States from proceedings to enforce arbitration awards against them. Clause 10(1) removes immunity from proceedings relating to arbitration where the State had submitted to the arbitration in the United Kingdom, or according to United Kingdom law, but by subsection (2) enforcement proceedings are excepted; that exception is now to be removed. If the Government Amendments to Clause 14 are accepted, the property of a State which is for the time being in use or intended for commercial purposes will become amenable to execution to satisfy and award. However, it would not be possible to proceed to such execution without first bringing enforcement proceedings to turn the award into an order of the court on which the execution could be levied, and unless the State had waived its immunity to enforcement, Clause 10(2) would prevent the necessary steps being taken. This Amendment will delete the subsection." (*Hansard*, 16th March 1978, Cols 1516-1517).

The amendment was agreed.

120. Mr. Shackleton also submitted that section 9 is impliedly limited to awards made within the territory of the United Kingdom, but the section itself contains no such restriction and it is unlikely that Parliament intended to limit it in that way having enacted only a few years earlier the Arbitration Act 1975 which was designed to give effect to the New York Convention on the Recognition and Enforcement of Arbitral Awards. Again, however, if there be any ambiguity in the text of the section it can easily be resolved by referring to the statement made by the Lord Chancellor during the debate on Commons Amendments on 28th June 1978. Clause 9 of the Bill as it stood immediately prior to the debate provided that there should be no immunity in respect of proceedings relating to arbitration where the State had submitted to arbitration "in or according to the law of the United Kingdom". Moving a Commons Amendment to delete those words the Lord Chancellor said

> "My Lords, I beg to move that the House doth agree with the Commons in Amendment No 2. Clause 9 of the Bill provides that where a State has agreed in writing to submit a dispute to arbitration in, or according to, the law of the United Kingdom, the State is not immune as respects proceedings which relate to the arbitration. The Amendment removes the links with the United Kingdom, and by deleting the reference to the United Kingdom or its law, it will ensure that a State has no immunity in respect of enforcement proceedings for any foreign arbitral award." (*Hansard*, 28th June 1978, Col 316)

The amendment was agreed.

121. In *R v Environment Secretary Ex p. Spath Holme Ltd* [2001] 2 A.C. 349 Lord Bingham drew attention at page 391 to the three conditions identified by Lord Browne-Wilkinson in *Pepper v Hart* [1993] A.C. 593 which must be satisfied before resort to Parliamentary materials can be justified and to the importance of insisting strictly on the first of them, namely, that the legislation in question is ambiguous or obscure or leads to an absurdity. Like the judge, we are not persuaded that section 9(1) is ambiguous or obscure in either respect when read in the context of the rest of the Act, but we also agree that, if it is, the two statements of the Lord Chancellor to which we have referred put the matter beyond any doubt. It is quite clear that it was the intention of Parliament in formulating section 9 of the Act in unrestricted terms that applications for leave to enforce arbitration awards should not attract sovereign immunity, whether the award was domestic or foreign.

122. Mr. Shackleton drew our attention to three decisions in the United States on the Foreign Sovereign Immunities Act (28 U.S.C. §1603(b)), *Verlinden B.V. v Central Bank of Nigeria* 488 F. Supp. 1284 (1980), *Obntrup v Firearms Center Inc.* 516 F. Supp. 1281 (1981) and *Zernicek v Petroleos Mexicanos* 614 F. Supp. 407 (1985). We hope we do not appear disrespectful to Mr. Shackleton's argument if we say that we did not obtain any assistance from these cases. The State Immunity Act 1978, which is the legislation with which we are concerned in this case, was enacted to give effect to the European Convention on State Immunity, but it departed from the Convention in certain respects, particularly in section 9. We have the benefit of access to the text of the Convention as well as to the Parliamentary materials relating to the passage of the Bill insofar as it is permissible to look at them. In those circumstances isolated observations of a general nature in decisions of foreign courts on their own domestic legislation can at best be of very limited assistance.

(c) Conclusion

123. We therefore agree with the judge that Svenska's application for leave to enforce the second award falls within section 9(1) of the State Immunity Act and that the Government is unable to claim immunity in respect of it. That is sufficient to dispose of this appeal, but in deference to the industry of the parties and the importance to them of this litigation we propose to express our views on the application of sections 2 and 3 of the Act, albeit rather more briefly.

6. Section 2 of the State Immunity Act 1978

124. Section 2(1) of the State Immunity Act 1978 provides as follows:

> "A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom."

125. Mr. Bools submitted that Article 35.1 of the Agreement, which contains a general waiver of sovereign immunity by both the Government and EPG, amounted to a submission to the jurisdiction sufficient to bring the case within the scope of section 2(1). Mr. Shackleton submitted that Article 35.1 involved a waiver of jurisdiction in respect of Geonafta alone and in any event did not amount to a submission by the Government to the jurisdiction of the English courts.

126. We agree with the judge that it is impossible to construe Article 35.1 as a waiver of immunity on the part of Geonafta alone. The language does not admit of such a construction, especially in a case where the Government signed the Agreement in terms which indicate that it intended to incur legal obligations under it, and the evidence does not support the conclusion that the parties intended it to have such a limited effect. However, the question still remains whether by accepting the terms of Article 35 the Government submitted to the jurisdiction of the English courts. Mr. Bools argued that a general waiver of sovereign immunity of this kind amounted to a submission to the jurisdiction of the courts of any state in which Svenska could effectively commence proceedings. Some support for that view can be found in the commentators (see *State Immunity, Selected Materials and Commentary*, Dickinson, et al. at pages pp. 349-50) and in *A Company Ltd* v. *Republic of X* [1990] 2 Lloyd's Rep. 520 in which Saville J. held that an agreement by the Ministry of Finance of the Republic to waive "whatever defence it may have of sovereign immunity for itself or its property (present or subsequently acquired)" amounted to an agreement to put the State on the same footing as a private individual (page 523 col. 1).

127. The judge rejected that submission. She held that *A Company Ltd* v. *Republic of X* was distinguishable on the grounds that the contract also contained an express choice of English law and an express submission to the jurisdiction of the English courts. That was plainly sufficient to bring the case within section 2(1) of the Act; the only question for the judge in that case was whether the State had waived its immunity under section 13 to relief in the form of an interim injunction. Saville J. held that it had, but the question is quite different from that which arises in the present case.

128. Gloster J. recognised that, if the Government had in fact agreed to arbitration, no separate issue arose under section 2 of the Act. She therefore approached this part of the case on the assumption that there had been no agreement to arbitrate. We can understand why she did that, but we think that to exclude from consideration part of the contractual context creates a risk of giving a distorted meaning to the particular term under consideration. In our view it is better to construe the contract as a whole. The judge was unable to accept that a general waiver of immunity of the kind found in Article 35.1 amounted to a submission to the jurisdiction of the English courts within the meaning of section 2(1). We agree, not only because we think it is too imprecise, but because we think it must be read in the context of the Government's agreement to submit to ICC arbitration (which was in fact the context in which the waiver of immunity is found in the earlier drafts of the Agreement). In that context Article 35.1 is perfectly understandable, even though a lawyer well versed in such matters would say that a waiver of sovereign immunity is unnecessary if there is an agreement to arbitrate. In our view the judge was right to reject Svenska's argument on this point.

7. Section 3 of the State Immunity Act 1978

129. The material parts of section 3 of the State Immunity Act 1978 provide as follows:

> "(1) A State is not immune as respects proceedings relating to –
>
> (a) a commercial transaction entered into by the State;
>
> . . . . . .

> (3) In this section "commercial transaction" means
>
> (a) any contract for the supply of goods or services;
>
> (b) . . . . . ; and
>
> (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority;"

130. Mr. Bools submitted that the Agreement in the present case was a commercial transaction and that the application to enforce the award involved proceedings relating to that transaction. Mr. Shackleton submitted that it was a transaction into which the Government had entered in the exercise of its sovereign authority and that in any event the application did not involve proceedings relating to the transaction itself but involved proceedings directed at enforcement of an arbitration award.

(a) "Commercial transaction"

131. Before the judge Mr. Bools argued that the Agreement is to be regarded as a commercial transaction because it is a contract for the supply of goods or services. However, he did not pursue this argument before us, quite rightly in our view. We can see that in a broad sense it might be said that the contract was one under which Svenska provided a service to the Government of Lithuania, but in our view the language of section 3(3)(a) is not apt to describe what, both in legal and commercial terms, is a joint venture agreement between a state organisation and a private investor to exploit a commercial opportunity on a profit-sharing basis. In our view, therefore, the Agreement cannot be brought within subsection (3)(a).

132. More difficult is the question whether it falls within subsection (3)(c). The distinction drawn in section 3 of the State Immunity Act between a commercial transaction and a transaction entered into by a state in the exercise of its sovereign authority is drawn in almost identical terms in Article 2.1(c) of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which, although not yet in force, has been recognised as reflecting current international thinking on the subject: see *Jones v Ministry of the Interior* [2006] UKHL 26 per Lord Bingham at paragraph 8. Article 10 of the Convention provides that a State may not claim immunity in proceedings arising out of commercial transactions. Article 2.2 provides some assistance in drawing the distinction between commercial transactions and transactions entered into in the exercise of sovereign authority in any given case. It provides that in determining whether a contract or transaction is commercial in nature reference should be made primarily to the nature of the contract or transaction itself. This accords with the existing principle of English law that it is the nature of the transaction that determines whether it is to be characterised as one entered into in the exercise of the state's sovereign authority (jure imperii) or in the exercise of a commercial function (jure gestionis): see *I Congreso del Partido* [1983] 1 A.C. 244, 262-265 per Lord Wilberforce and *Holland v Lampen-Wolfe* [2000] 1 W.L.R. 1573 (HL). The distinction suggested by Lord Wilberforce in *I Congreso del Partido* between acts jure imperii and acts jure gestionis is between acts of a public law

character and acts of a private law character or between a governmental act and an act that any private person can perform.

133. We do not find the characterisation of the present transaction an easy matter. As the judge pointed out, the Agreement contains many of the hallmarks of a commercial transaction, but the fact that it relates to the exploitation of oil reserves within the territory of the state suggests that it involved an exercise by the state of its sovereign authority in relation to its natural resources and so falls outside the realm of activities which a private person might enter into. The position is further complicated by the fact that under the Agreement both Geonafta and the Government undertook obligations towards Svenska on behalf of the State. At the time the Agreement was entered into Geonafta (EPG), although a state body, had separate legal personality from the Government and was put forward by the Government for the express purpose of entering into the Agreement with Svenska. It seems odd to say that the agreement between Svenska and Geonafta is anything other than a commercial transaction (especially in the light of the fact that Geonafta is a private company), or that the Agreement can be characterised as a commercial transaction as far as Geonafta is concerned but as an exercise of sovereign authority as far as the Government is concerned. The reality is that at the time the parties entered into the Agreement (which is the point at which we think the transaction falls to be characterised) both Geonafta and the Government were playing their respective parts on behalf of the state in a transaction entered into for the purpose of exploiting the country's natural resources. However, this aspect of the matter was not explored very fully in argument and it is unnecessary to reach a final view about the characterisation of the Agreement in order to dispose of the appeal. In the circumstances we prefer to express no concluded opinion on the question.

(b) "Proceedings relating to a commercial transaction"

134. In *AIC Ltd v The Federal Government of Nigeria* [2003] EWHC 1357 (QB) the claimant sought to register a judgment obtained against the defendant in Nigeria under section 9 of the Administration of Justice Act 1920 ("the 1920 Act"). An order was initially made without notice for the registration of the judgment with liberty to the defendant to apply to set it aside. The claimant then took steps to enforce the judgment by way of a third party debt order in relation to the defendant's account with the Bank of England. Following the service on it of the order to register the judgment the defendant challenged both that order and the third party debt order on the grounds that as a state it was entitled to immunity from both jurisdiction and execution. That gave rise to two questions: whether section 1 of the State Immunity Act 1978 applies to an application to register a judgment under the 1920 Act; and, if so, whether, in a case where the underlying cause of action arises out of a commercial transaction, such an application involves proceedings "in relation to" the transaction within the meaning of section 3 of the Act.

135. In *Alcom Ltd v Republic of Colombia* [1984] 1 A.C. 580 Lord Diplock at page 600 drew attention to the fact that the State Immunity Act 1978 draws a distinction between the jurisdiction of the courts of the United Kingdom to adjudicate on claims against foreign states (the "adjudicative" jurisdiction) and the jurisdiction to enforce by legal process judgments pronounced in the exercise of that adjudicative jurisdiction (the "enforcement" jurisdiction). Stanley Burnton J. held that an application to register a foreign judgment under the 1920 Act involves the exercise of

the court's jurisdiction to adjudicate on matters before it, involving, as it does, consideration of certain aspects of the circumstances surrounding the judgment and an exercise of its discretion. We think that must be correct. More difficult is the question whether an application of that kind involves proceedings "relating to" the transaction on which the judgment is based. The judge in that case held that it does not, because the issues that arise on an application of that kind relate to the regularity of the judgment, not to whether it is correct as a matter of fact or law. He noted that in *Holland v Lampen-Wolfe* Lord Millett had drawn a distinction between claims arising out of a transaction and claims in tort arising independently of the transactions but in the course of its performance.

136. Mr. Bools submitted that *AIC Ltd v The Federal Government of Nigeria* was wrongly decided. He submitted that the expression "relating to" naturally bears a broad meaning and does not require that the proceedings arise directly out of the transaction in question. He argued that Svenska's application in the present case "related to" the Agreement and therefore fell within the scope of section 3. Construing section 3 in that way, he submitted, would ensure that proper effect was given to the principle that a state should not be immune from suit in relation to its commercial activities.

137. In our view the expression "relating to" is capable of bearing a broader or narrower meaning as the context requires. Section 3 is one of a group of sections dealing with the courts' adjudicative jurisdiction and it is natural, therefore, to interpret the phrase in that context as being directed to the subject matter of the proceedings themselves rather than the source of the legal relationship which has given rise to them. To construe section 3 in this way does not give rise to any conflict with section 9, which is concerned with arbitration as the parties' chosen means of resolving disputes rather than with the underlying transaction. In our view *AIC Ltd v The Federal Government of Nigeria* was correctly decided and Gloster J. was right to follow it in the present case.

8. Conclusion

138. For these reasons we think the judge was right to hold that the Government of Lithuania is not immune from proceedings to enforce the second award. We therefore dismiss the appeal.