Department of Civil Aviation of the Kyrgyz Republic v Finrep GmbH [2006] APP.L.R. 05/22

JUDGMENT : Mr Justice Tomlinson: Commercial Court. 22nd May 2006.

1. By an Arbitration Claim Form dated 31 January 2006 the Claimant sought pursuant to Section 67 of the Arbitration Act 1996 to challenge an arbitration award made by Sir Franklin Berman Q.C on 7 December 2005. The award is a preliminary award on jurisdiction over a commercial dispute arising out of foreign investment in a joint venture for the formation and operation of an airline, Kyrgyz Air, in and from the Kyrgyz Republic. One of the parties to the joint venture was the Defendant, an Austrian corporation. The arbitrator found and held that the other party to the joint venture was the Respondent in the arbitration described as "The Kyrgyz Republic (Ministry of Transport and Telecommunications Civil Aviation Division)." By his preliminary award the arbitrator rejected various challenges as to the efficacy of the agreement and held that he had jurisdiction over the named respondent in the arbitration.

2. The Claimant in this application is *"The Department of Civil Aviation under the Ministry of Transport and Communications of the Kyrgyz Republic,"* a legal entity constituted under Kyrgyz law. The agreement, if there was one, was made between the Defendant, Finrep, and *"The Civil Aviation Division of the Ministry of Transport of the Kyrgyz Republic."* The Claimant in this application describes itself colloquially as the CAA, says that that is a legal entity separate from the Kyrgyz Republic, and says that it, the CAA, was in fact the Respondent in the arbitration, not the Kyrgyz Republic itself.

3. There is a dispute between the parties as to whether the Claimant in this application is the same entity as the Respondent in the arbitration. The Claimant says, as I understand it, that it and the Respondent in the arbitration are one and the same entity and that that entity is distinct from the Kyrgyz Republic. If and insofar as the arbitrator held that he had jurisdiction over the Kyrgyz Republic that conclusion is challenged by the Claimant on various grounds and it is in any event denied, again on various grounds, that there was any valid agreement with either the Claimant or the Kyrgyz Republic pursuant to which the arbitrator could derive jurisdiction.

4. The application before me was heard in private. I am giving judgment in public because the application raises some points of general interest and everyday practice in the field of arbitration. However, in order to preserve the confidentiality of the arbitral process, I shall not describe in any more detail either the issues thus far or the arbitrator's conclusions on the issues which were debated before him at a hearing in October 2004, which led in due course to the issue of his preliminary award. At that arbitration Finrep was represented by English leading and junior counsel including Mr Charles Haddon-Cave, Q.C., instructed by New York attorneys, Messrs Salisbury & Ryan. Messrs Salisbury & Ryan have no office in the United Kingdom. The Respondent to the arbitration, which I shall for convenience but without deciding any disputed point call "the CAA," was represented by English junior counsel instructed by Messrs Thomas Cooper & Stibbard, a well-known firm of solicitors in the City of London.

5. The arbitrator's preliminary award was, as I have said, issued on 7th December 2005, and on 31st January 2006 the Claimant issued its application pursuant to s.67 challenging the award on grounds all of which go to the arbitrator's jurisdiction. The application took the form of an Arbitration Claim Form marked *"Not for service out of the jurisdiction"*. The Claim Form included at paragraph 6, under the rubric *"the relief sought"* the following:

   "By this application the CAA seeks the following relief:
   (1) At the interlocutory stage (a) (if FINREP does not instruct solicitors to accept service of this arbitration claim form within the jurisdiction) permission to serve this arbitration claim form on the defendant at the address of its legal representative in the arbitration, Mr Charles Haddon-Cave Q.C., Quadrant Chambers, Quadrant House, 10 Fleet Street, London EC4Y 1AU."

   At paragraphs 24 and 25 of the Claim Form, under the rubric "Application for substituted service" there appears the following:

   "24. Finrep's registered address is Wachtegasse 1, 1010, Vienna, Austria. Its legal representatives for the arbitration are Salisbury & Ryan LLP, a firm of New York Attorneys at Law whose address is Suite 704, 1325 Avenue of the Americas, New York, New York 100196026 and Mr Charles Haddon-Cave Q.C., Quadrant Chambers, Quadrant House, 10, Fleet Street, London EC4Y 1AU. Mr Haddon-Cave is understood to remain instructed in this matter as he recently signed the consent order extending time for making this application on Finrep's behalf.

   25. In order to avoid the delay and expense of serving FINREP in Austria, in the event that FINREP does not authorise a firm of English solicitors to accept service on its behalf the claimant seeks permission to serve the arbitration claim form on FINREP at Mr Haddon-Cave's address at Quadrant Chambers, pursuant to CPR 6.8 and CPR 62 Practice Direction paragraph 3.1."

   The rest of the Claim Form deals with the background, the issues arising, the remedy claimed and the grounds upon which the claim for relief is made. The claim form contains a statement of truth signed by Mr George Lambrou, an assistant solicitor with Messrs Thomas Cooper & Stibbard.

6. The Arbitration Claim Form was, I am told, filed at court on 31st January 2006 with certain attachments which included a copy of the award which runs to 120 odd pages, but there was not included any or any relevant correspondence between the parties' legal advisers. On the same day, 31st January 2006, Messrs Thomas Cooper & Stibbard wrote, or more accurately I should say sent a facsimile message, to Messrs Salisbury & Ryan, for the attention of Mr Andrew Ryan, to Mr Haddon-Cave, to Finrep, to Sir Franklin Berman and also to the Director General and Registrar of the London Court of International Arbitration. The short fax message, had however twelve pages of attachments, which read as follows:

"Please find herewith a copy of the claim form issued today by the English High Court. We invite Finrep to appoint English solicitors to accept service of the claim form as English solicitors will in any event be required for proceedings before the court. We have meanwhile applied to the court for permission to serve the application on Mr Charles Haddon-Cave Q.C. in the event Finrep does not authorise English solicitors to accept service."

7. On instructions from Mr Lambrou, Miss Clarke, who appeared before me for the Claimant, told me that on or before 14th February 2006 Mr Lambrou received a telephone call from an administrative officer of the court who told him that the judge had seen the papers and had asked for a draft order. Mr Lambrou had three separate attempts at instructing Miss Clarke as to what information was imparted to him in the course of this telephone conversation. However, I infer from what I was told that the conversation went something along the lines that the judge had observed that the Claim Form included an application for substituted service and had asked to be supplied with a draft order. It is not now suggested that Mr Lambrou was told that the court would grant the order for substituted service. Miss Clarke told me that Mr Lambrou formed the view that the court wished to deal with the matter. I am not sure whether Mr Lambrou realised that CPR 6.8, which is the rule enabling the court to permit service by an alternative method, also provides that the application must be supported by evidence and that the notes to the rule indicate that the better practice is for the evidence to be reduced to writing in the form of a witness statement or affidavit. Mr Lambrou may have thought that the Claim Form supported by his statement of truth was sufficient. At all events Mr Lambrou responded to this telephone conversation by writing a letter of 14th February addressed to the court, not copied to the Defendant or to anyone representing it notwithstanding that by this stage, as I shall describe, Mr Lambrou was aware that in addition to the continuing involvement of Messrs Salisbury & Ryan and Mr Haddon-Cave the Defendant had consulted London solicitors in relation to the dispute with the Claimant.

8. Mr Lambrou's letter to the court of 14th February 2006 reads as follows: *"Dear Sirs, The Department of Civil Aviation under the Ministry of Transport and Communications of the Kyrgyz Republic v Finrep Gmbh, claim no. 2006 folio 76. We are solicitors acting for the claimant in this matter. It has become necessary to apply to the court in relation to service of our client's arbitration claim form, claim no. 2006 folio 76, issued 31st January 2006. The defendant, Finrep Gmbh, (Finrep) is an Austrian investment company who is the claimant in the arbitration. Finrep's legal representative in the arbitration is Mr Charles Haddon-Cave Q.C. of Quadrant Chambers and U.S. Attorney Mr Andrew Ryan of Salisbury & Ryan. In a letter dated 31st January 2006 Finrep and its legal representatives were invited to appoint English solicitors to accept service of the claim form. In an email dated 7th February" 2006 we asked Finrep to agree Mr Haddon-Cave Q.C. accept service until such time as solicitors are appointed. In response, Mr Ryan, in an email dated 8th February, indicated he would provide a name of solicitors the following day. On 9th February Mr Haddon-Cave Q.C. and Mr Ryan informed us orally and later Mr Ryan confirmed in writing the appointment of Mr Peter Stewart and Alexandra Underwood of Field Fisher Waterhouse of 35 Vine Street in London. Later in the day however we received a letter from Field Fisher Waterhouse indicating that they were not in fact instructed to accept service of the claim form. Mr Stewart confirmed this position orally later that day and Field Fisher Waterhouse have again confirmed the position in a letter dated 13th February 2006. Finrep have made contact with English solicitors but those solicitors are not instructed to accept service. At paragraph 6 of the claim form our client anticipated the need to seek permission to serve the form on the defendant at the address of its legal representative. In the event solicitors were not appointed to accept service. The defendant has not within a reasonable time appointed solicitors to accept service of the arbitration claim form. Mr Haddon-Cave Q.C. is still involved in the arbitration. We therefore respectfully request the court to issue the attached order."*

There was attached thereto a draft order which I am told was in the same form as the order subsequently approved by Mr Justice Aikins, probably on 17th February. That order reads: *"On the Claimant's application dated 31st January 2006 and on reading the Claimant's letter dated 14th February 2006 it is ordered that*

(1) The Claimant is granted permission to serve its arbitration claim form on the Defendant at the address of its legal representative in the arbitration, Mr Charles Haddon-Cave Q.C., Quadrant Chambers, Quadrant House, 10 Fleet Street, London EC4Y 1AU. Costs of the application are reserved."

9. It so happens that Mr Haddon-Cave's name is misspelt in the order and therefore I suppose in the draft supplied to the court, in that Haddon is rendered with an "e" between the "d" and the "n" rather than an "o". Leaving aside the misspelling of Mr Haddon-Cave's name, that order is in fact defective in two respects. First, CPR 6.8(3) provides: *"An order permitting service by an alternative method must specify (a) the method of service, and (b) the date when the document will be deemed to be served."*

Manifestly the order specifies neither. Furthermore, CPR 23.9 provides:

"1. This rule applies where the court has disposed of an application which it permitted to be made without service of a copy of the application notice.

2. Where the court makes an order, whether granting or dismissing the application, a copy of the application notice and any evidence in support must, unless the court orders otherwise, be served with the order on any party or other person (a) against whom the order was made, and (b) against whom the order was sought.

3. The order must contain a statement of the right to make an application to set aside or vary the order under Rule 23.10."

The order does not so inform the Defendant of its right in that regard. Furthermore I am told that there was not served with the Arbitration Claim Form the evidence in support of the application to serve it in the manner described.

10. Although Mr Lambrou's letter of 14th February 2006 does not so indicate it was apparently accompanied by a clip of correspondence exchanged since 31st January 2006 on the question of the nomination of a representative to accept service of the Arbitration Claim Form on behalf of the Defendant. Messrs Thomas Cooper's letter of 14th February 2006 would I think have given to the judge the impression that Mr Ryan and perhaps Mr Haddon-Cave had misled Mr Lambrou as to the nature and extent of the instructions which were to be and had been given to the solicitors who in the event turned out to be Messrs Field Fisher Waterhouse. A careful perusal of the correspondence, including email correspondence by Blackberry, reveals that this is not so, although I can understand why Mr Lambrou may in fact have misunderstood the import of what he had been told. Moreover, the sequence in which the correspondence was put together and supplied to the court was misleading in that the impression was given that a letter written by Messrs Field Fisher Waterhouse to Mr Lambrou on 9th February was sent and received after Mr Lambrou had indicated that he would proceed to serve Messrs Field Fisher Waterhouse with the s.67 application. In fact the sequence of events was the other way around and moreover the judge was not told of the full content of an important telephone conversation between Mr Stewart of Messrs Field Fisher Waterhouse and Mr Lambrou which took place at 17.20 hours on 9th February.

11. The impression that Mr Justice Aikens would have had from a study of the correspondence supplied to him, would have been that the relevant sequence went like this. First of all at 17.47 on 7th February Mr Lambrou sent an email to Andrew Ryan of Messrs Salisbury & Ryan which reads: *"Dear Andy, I refer to our letter of 31st January in which we invited FINREP to appoint English solicitors to accept service of our client's application under s.67 of the Arbitration Act. Until such time as solicitors are appointed can your clients agree that Charles Haddon-Cave Q.C. accepts service of the application on their behalf? If we have not had a positive response from your clients in regard to service by the end of the day on Thursday we will proceed to apply to the court for permission to serve on your clients at the address of Mr Haddon-Cave at Quadrant Chambers."*

    I interpose to point out that 7th February was a Tuesday and thus the Thursday there referred to would have been 9th February.

12. Mr Ryan responded to this email by an email of his own to Mr Lambrou, timed 15.28 hours on 8th February which read: *"George, we will have a name for you Thursday of our solicitors. Regards A R."*

13. At 13.15 hours on 9th February Mr Ryan sent a further email to Mr Lambrou. It read as follows: *"George, Solicitors contacts are Peter Stewart and Alexandra Underwood at 35, Vine Street, London EC3N 2AA, Telephone 2074814841. Firm is Field Fisher Waterhouse. Regards A.R."*

14. At 18.10 hours on 9th February Mr Lambrou sent an email to Mr Ryan which reads: *"Andy, Thank you for providing these contact details. I therefore confirm we will be serving Field Fisher Waterhouse with our client's application under s.67 of the Arbitration Act."*

15. From the clip of correspondence supplied to the court the learned judge would have then imagined that that message was followed by a letter written on 9th February by Messrs Field Fisher Waterhouse to Messrs Thomas, Cooper & Stibbard. That letter, which indicates at the top that it is "*By hand delivery and fax"* reads as follows:

    "Dear Sirs" – then there is a subheading giving the name of this case. "We have been instructed on behalf of Finrep Gmbh to represent their interests. We understand that you have issued an arbitration claim form no 2006 folio 76 with the above heading on behalf of 'The Department of Civil Aviation under the Ministry of Transport and Communications of the Kyrgyz Republic', making a s.67(1) application to the court, challenging an award by Sir Franklin Burman Q.C. dated London 7th December 2005 in an arbitration between Finrep Gmbh and the Kyrgyz Republic (Ministry of Transport and Telecommunications Civil Aviation Division). In his award the learned Arbitrator dismissed the challenge of the respondents to jurisdiction. We are currently taking full instructions from our client and their New York lawyers, Salisbury & Ryan LLP. We should therefore make it clear that we are not presently instructed to accept service of the proceedings represented by claim form no. 2006 folio 76. In the meantime we should be grateful if you would explain the disparity between the nomenclature of the applicant in the arbitration claim form and the respondent in the arbitration. No doubt you have already explained this to the court when you issued the proceedings."

16. Continuing in the sequence as it would have appeared to the judge, at 18.35 hours on 9th February Mr Ryan sent an email to Mr Lambrou which reads: *"George, Per FFW's letter of a few hours ago, they have not been instructed with regard to service. I am in the process of liaisoning (sic) with FFW and our client on their instructions. Regards, A.R."*

17. At 19.13 hours on 9th February Mr Lambrou responded to that email as follows: *"Andy, This is surprising considering both counsel's direct comments to me this morning and the contents of your email a few hours ago. Can you please sort out who your clients are instructing to accept service, either FFW or another firm, tomorrow, or we will have to apply to the court next week."*

18. Mr Ryan responded to that email at 09.26 hours on the next day, 10th February. His response reads as follows: *"George, Perhaps I can cut through the litigation rhetoric and be clear on our current position. I met with FFW yesterday afternoon and heard their advice. Finrep has not spoken to FFW as the father of Sergei and Vasili Tolstunov died Wednesday and is being buried today. All of the Finrep people are preoccupied related to these events. I have various engagement letters and other FFW documents to attend to with Finrep but none of that will be attended to today. I note that I waited weeks for TCS to get instructions from its client with consequent impact on my travel arrangements. This matter has been ongoing now for two years. I am not inclined to gamesmanship or imposing*

unnecessary deadlines. If you feel compelled to proceed in the High Court then by all means do so. FFW will get instructions after liaisoning with and advising Finep when appropriate. Regards, A.R."

19. Mr Lambrou responded at 10.43 hours on 10th February in these terms: *"Andy, I am grateful for your explanation and I hope you will please accept condolences for the Tolstunov family. Kind regards, George."*

20. Mr Ryan then responded to that at 10.51 on 10th February: *"Thanks George, I will do that and we will resolve the instructions issues next week. Kind regards, A.R."*

I interpose again to point out that 10th February was a Friday.

21. Finally in the clip of correspondence placed before the court there is a letter of 13th February 2006 written by Messrs Field Fisher Waterhouse to Messrs Thomas, Cooper & Stibbard, apparently sent by fax and by post, which reads as follows: *"Further to our letter of 9th February and the subsequent telephone conversation between your Mr Lambrou and our Mr Stewart we trust that it is now clear that we do not as yet have instructions to accept service in this matter. However we are taking steps to understand the background to the matter in order to advise our client. In this regard we note that we have not had a response to our enquiry set out in our previous letter. We require an explanation from you of the disparity between the nomenclature of the applicant in the arbitration claim form and the respondent in the arbitration. We look forward to receiving your response by return."*

The final letter in the clip of correspondence is the letter written by Messrs Thomas Cooper & Stibbard to the court, to which I have already referred.

22. In fact the sequence of correspondence was not entirely as I have set it out above. After Mr Lambrou received Mr Ryan's email, timed 13.15 hours on 9th February, the next relevant communication was receipt by Mr Lambrou, by fax, of Messrs Field Fisher Waterhouse's letter of 9th February. The copy of this letter contained in the bundle which went to the judge has in the bottom left-hand corner what is recognisable as a fax time of 16.58 on 9th February. This is in fact the time that the letter was sent by fax by Messrs Field Fisher Waterhouse to Messrs Thomas Cooper & Stibbard. Furthermore, this provoked a telephone call by Mr Lambrou to Mr Stewart at Messrs Field Fisher Waterhouse. The undisputed evidence about this is contained in a witness statement of Mr Stewart. He says this:

"6. The order in which the correspondence appears in Exhibit GLC1 is with respect misleading because it is not strictly chronological. I met Mr Ryan for the first time when he attended my firm's offices for a consultation with myself, Miss Underwood and Mr Haddon-Cave Q.C. at approximately 16.00 on 9th February. My firm was instructed to consider the arbitration award of Sir Franklin Burman Q.C. but it was not instructed to accept service on behalf of the claimant. I was instructed that there was a discrepancy between the name of the claimant in the arbitration claim form and the name of the respondent in the arbitration. My firm was instructed to seek an explanation for the disparity from the claimant's legal representative and a letter was sent to Mr Lambrou's firm by hand and by fax. The fax was timed at 16.56 as indicated in the top right-hand corner of page 155 of the exhibit GLC1 referred to in Mr Lambrou's first statement dated 27th February. In that letter my firm wrote as follows: 'We are currently taking full instructions from our client and their New York lawyers, Salisbury & Ryan LLP. We should therefore make it clear that we are not presently instructed to accept service of the proceedings represented by claim form no. 2006 folio 76'.

7. At approximately 17.20 Mr Lambrou telephoned my office and I spoke to him. Mr Lambrou said that he had received our facsimile which contradicted an email he had received a few hours previously from Mr Ryan in which email Mr Lambrou claimed it was stated that my firm was instructed to accept service of proceedings. I said that I knew that both of Mr Ryan and Mr Haddon-Cave Q.C. advised that we were being consulted but I had not been told that we were instructed to accept service of proceedings. I asked Mr Lambrou to read me out the email and send me a copy. He said that there had obviously been a misunderstanding and that my letter now made the position clear. I commented that he did seem to me to be misrepresenting the position but that I would say no more about it for the time being.

8. A little over half an hour later Mr Ryan received a reply to his earlier email to Mr Lambrou in which Mr Ryan had set out my firm's contact details. The reply was timed at 18.10 and sought to confirm to Mr Ryan that papers would be served on Field Fisher Waterhouse. The email can be found at page 156 of Exhibit GLC1. This email was clearly disingenuous and designed to encourage Mr Ryan to confirm that consent had been given to serve the proceedings on my firm when in fact it had been made clear to Mr Lambrou that no such consent had been given.

9. At this point it had been made very clear to Mr Lambrou by letter and by telephone that my firm was instructed to provide advice to the defendant but had not been instructed to accept service of proceedings. This was again confirmed by Mr Ryan in an email timed at 18.35 which can also be found at page 156 of Exhibit GLC1.

10. Mr Lambrou states in paragraph 13 of his second statement that there was confusion between 9th and 13th February about whether my firm had been or would be instructed to accept service. This is simply incorrect as the analysis above shows. The position was made absolutely clear by me both in correspondence and by telephone on 9th February. The position was further confirmed by Mr Ryan in several emails which can be found at pages 155 to 163 of Exhibit GLC1. At all material times Mr Lambrou knew from Field Fisher Waterhouse's correspondence between 9th and 13th May (sic) that Field Fisher Waterhouse were not at that time instructed to accept service."

23. To complete the picture I should explain that on the morning of 9th February the parties attended before Sir Franklin Berman at his chambers to discuss the timetable for the future conduct of the arbitration. Mr Lambrou

describes this meeting and the aftermath as follows in his second witness statement dated 2nd May: *"On that day, Thursday 9th February 2006, the Arbitrator held a case management hearing to determine whether the arbitration should continue pending the court's decision on the CAA's s.67 application and if so to set a timetable for future progress.*

9. At the hearing Mr Ryan, FINREP's U.S. lawyer, said that FINREP's solicitors were Field Fisher Waterhouse. After the hearing he confirmed this in an email in further response to my email of 7th February regarding service of the claim form, and I replied that we would serve the claim form on Field Fisher Waterhouse.

10. The parties' submissions to the Arbitrator proceeded on the assumption that service of the arbitration claim form was imminent. The CAA's counsel, Miss Geraldine Clarke, asked the Arbitrators to stay the arbitration until the court had ruled on jurisdiction, failing which she proposed a timetable whereby expenditure on the arbitration would be kept to a minimum pending the court's expected ruling on the Arbitrator's jurisdiction in October 2006. She relied on information from the Court Service website that at that time the return date for a two week trial was October 2006. A copy of Miss Clarke's skeleton and the relevant website printout is at GCL2 pages 1 to 11.

11. FINREP on the other hand submitted that the arbitration should be progressed in the interim and proposed a timetable which was so short that if followed it would have led to the tribunal being in a position to rule on the merits before the court had ruled on jurisdiction (see Salisbury & Ryan's letter dated 12th January 2005 and the attached draft order no. 4 at GLC2 pages 12 to 15). It was FINREP's oral submission that the CAA had only made its s.67 application for illegitimate tactical reasons in order to delay the arbitration proceedings.

12. The arbitrator reserved his decision. By a letter to the parties dated on 15th February he acknowledged the link between progress on the s.67 application to the court and orders in the arbitration and he granted an order whereby the arbitration would continue pending the court's ruling but on a measured timetable which the CAA had sought based on the expectation that the hearing of the jurisdictional challenge would take place in October 2006."

Mr Stewart takes issue with the suggestion that the submissions of the parties to the arbitrator proceeded on any particular assumption as to the service of the Arbitration Claim Form. As I have already indicated, Mr Stewart also takes issue with the suggestion that there was between 9 and 13 February confusion about whether Messrs Field Fisher Waterhouse had been or would be instructed to accept service.

24. I can quite understand that Mr Lambrou would have believed as from 15.28 hours on 8th February that he was going to be given the name of a firm of solicitors who would accept service and that as from 13.15 hours on 9th February he would have believed that Messrs Field Fisher Waterhouse had been so instructed to accept service, although he was not actually told either of those things. However, Mr Lambrou was disabused of this at 17.20 hours on 9th February and he then accepted that there had been a misunderstanding. It is, I consider, unfortunate that Mr Lambrou did not similarly indicate in his letter to the court of 14th February 2006 that there had been such a misunderstanding.

25. The Arbitration Claim Form and the order were served personally on Mr Haddon-Cave at his Chambers. One of the defects in the order was pointed out to the Claimant, as was the fact that the Claimant failed also to serve upon Mr Haddon-Cave all of the evidence in support of the application. Mr Haddon-Cave was then re-served personally on 28th February 2006. Furthermore, on that same day, 28th February 2006, since the validity of the Arbitration Claim Form was about to expire and in the light of the fact that Finrep had contested the validity for service of the service, the CAA issued a protective application seeking an extension of time for service of the Arbitration Claim Form under CPR 7.6(2)(a) and permission to serve the Claim Form on Finrep out of the jurisdiction, pursuant to CPR 62.5.

26. By letter of 2nd March 2006 addressed to Messrs Thomas Cooper & Stibbard, Messrs Field Fisher Waterhouse accepted that the order had been properly served on Mr Haddon-Cave on the second occasion but maintained the position that the order permitting alternative service ought not to have been granted and should have been set aside and that service of the claim form on Mr Haddon-Cave was therefore invalid. Messrs Field Fisher Waterhouse also confirmed that if the order were set aside FINREP would not object to the CAA's application for permission to serve the Claim Form out of the jurisdiction, nor to the granting of an appropriate extension of time to permit service in that manner.

27. By application notice dated 7th March 2006 FINREP applied to set aside the order of Mr Justice Aikens made, I think, on 17th February, although issued on 21st February, whereby he gave permission to serve the Arbitration Claim Form on Mr Haddon-Cave. Since Finrep does not oppose the CAA's contingent application for an extension of time within which to serve the Arbitration Claim Form, nor its contingent application for permission to serve Finrep out of the jurisdiction, it will be apparent that Finrep pursues its application as a matter of principle and no doubt in order to preserve its position as to costs. Furthermore, Finrep does not oppose an order for substituted service on Messrs Field Fisher Waterhouse, an order for which Miss Clarke applied at the hearing after some encouragement from me.

28. I indicated at the outset of the hearing that I considered that what had occurred here was unfortunate and irregular and that I recognised that there had been an initial entirely explicable misunderstanding as to the nature of the instructions which the English solicitors when nominated would be given. I also indicated that whilst in my view one of the irregularities which had to be cured was the Claimant's initial failure to apply for and obtain permission to serve out of the jurisdiction, nonetheless I would be likely both to grant such permission and

thereafter not to require service actually to be effected upon the Defendant in Austria. In the light of the involvement of both Messrs Salisbury & Ryan and Messrs Field Fisher Waterhouse and the extent of their instructions this seemed to me a wholly unnecessary formality.

29. I also indicated at the outset of the hearing that in relation to arbitration applications concerning arbitrations which have their seat within the jurisdiction it is the almost invariable practice of the court to permit service upon a party's solicitor who has acted for that party in the arbitration, provided that that solicitor does not appear to have been disinstructed or absent other special circumstances. This practice is reflected in paragraph 3.1 of Arbitration Practice Direction 62.4 which provides, under the rubric "Arbitration Claim Form Service":

"3.1 Service. The court may exercise its powers under Rule 6.8 to permit service of an arbitration claim form at the address of a party's solicitor or representative acting for him in the arbitration."

It is worth noting that that paragraph replaces paragraph 7.2.3 of the former Practice Direction, "Arbitration", CPR 49G, which provided:

"Where the court is satisfied on an application made without notice that", and then I omit an irrelevant part, "3. The respondent to the arbitration application, not being an individual residing or carrying on business within the jurisdiction or a body corporate having a registered office or a place of business within the jurisdiction (a) is or was represented in the arbitral proceedings by a solicitor or other agent within the jurisdiction who was authorised to receive service of any notice or other document served for the purpose of those proceedings, and (b) has not at the time when the arbitration application is made, determined the authority of that solicitor or agent, the court may authorise service of the arbitration claim form to be effected on the solicitor or agent instead of the respondent."

I should perhaps for completeness at this stage also refer to CPR 6.8 itself which, under the rubric *"Service by an alternative method"* provides, at 6.8, paragraph 1:

"Where it appears to the court that there is a good reason to authorise service by a method not permitted by these rules the court may make an order permitting service by an alternative method.

2. An application for an order permitting service by an alternative method (a) must be supported by evidence, (b) may be made without notice."

30. I also indicated to the parties at the outset of the hearing that I would myself, if confronted with the paper application, almost certainly have authorised service on Finrep to be effected on Messrs Salisbury & Ryan by fax to their offices in New York.

31. Unfortunately these indications did not deter either Miss Clarke from seeking to uphold the order made by Mr Justice Aikens or Mr Haddon-Cave from seeking to set it aside, and moreover contending that the current practice of the court is wrong in that it fails properly to give effect to CPR 6.8(1) and guidance thereon given by the Court of Appeal in ***Knaut UK Gmbh v British Gypsum Ltd*** *[2001] EWCA 1570, [2002] 1 WLR 907.*

32. At the outset Mr Haddon-Cave contended that FINREP had been under no duty to nominate solicitors within the jurisdiction to accept service of the Arbitration Claim Form on their behalf. Miss Clarke controverted that proposition. She reminded me that on 9th February the parties had made contradictory submissions to the arbitrator on the question whether all further proceedings in the arbitration directed towards a determination on the merits should be stayed pending determination by the court of the s.67 application. In fact the arbitrator ruled on that matter on 15th February 2006 in the following terms:

"I am grateful to counsel on both sides for their comprehensive submissions, written and oral, on the future procedure in the light of the respondent's s.67 application to the court on the question of the Tribunal's jurisdiction, which I have carefully considered. I am not persuaded that there is a general practice that further proceedings should be stayed until a s.67 application has been determined by the court and I am unable therefore to make a ruling to that effect. The matter is rather, as the Act itself suggests, one for the Tribunal's discretion, to be exercised in the light of all the circumstances of the particular case, including the needs both of economy and of efficiency and the rights of both parties. It seems to me clear that the way in which those factors can best be reconciled in the circumstances of the present case is by a continuation of the proceedings on a measured timetable in accordance with the terms of Order No. 6 attached which are designed to preserve the integrity of the arbitral proceedings while respecting the ultimate authority of the court."

However, as at the date of the application for permission to serve by an alternative method, which was 14th February, only two weeks remained for service of the Arbitration Claim Form, and, submitted Miss Clarke, it looked as if the problem of who was to accept service would be resolved but it was not being resolved sufficiently quickly. Thus, Messrs Thomas Cooper & Stibbard said in their letter to the court that FINREP had not within a reasonable time appointed solicitors to accept service. Their duty so to do was, Miss Clarke submitted, derived from s.40 of the Arbitration Act 1996, which provides:

"1. The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.

2. This includes (a) complying without delay with any determination of the Tribunal as to procedural or evidential matters or with any order or directions of the Tribunal, and (b), where appropriate taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law (see ss. 32 and 45)."

The proper conduct of the arbitration, submitted Miss Clarke, depended upon the s.67 challenge being enabled to be heard expeditiously and before the arbitrator embarked upon a consideration of the merits of the dispute.

33. This is an ingenious argument but I cannot accept it. Although it will often and perhaps usually be convenient for a s.67 challenge to the jurisdiction to be determined before the parties spend further money in prosecuting the underlying arbitration, that will not always be so. I say nothing about the facts of this case but it will sometimes be that the s.67 challenge is so obviously weak that its making can be characterised as simply designed to impede the progress of the arbitration. In such circumstances the successful party may well wish to press on and it may not be inappropriate to allow it to do so, leaving the unsuccessful party to decide whether it is really worthwhile pursuing a hopeless s.67 application, perhaps after the expenditure of yet further costs in the arbitration itself. Everything must depend on the circumstances as s.67 recognises. That section provides by subsection (2): *"The arbitral Tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction."*

As the arbitrator here recognised, it is a matter for the discretion of the Tribunal how the arbitration is to be progressed in circumstances where one party thereto issues a challenge to the jurisdiction under s.67. In those circumstances it was not in my judgment necessary for the proper and expeditious conduct of the arbitral proceedings that Finrep nominate solicitors instructed to accept service of CAA's s.67 challenge. That conclusion is to my mind reinforced by the two examples of what is necessary for the proper and expeditious conduct of the arbitral proceedings which are given in s.40(2)(b) viz where appropriate taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law. Applications under ss.32 and 45 are, as s.40 indicates, preliminary and can only be made either with the agreement of all parties to the proceedings or with the permission of the tribunal. In such circumstances disposal of such applications is necessary for the proper and expeditious conduct of the arbitral proceedings. By contrast, it is not necessary for the proper and expeditious conduct of arbitral proceedings that a s.67 challenge be determined prior to further progress being made in the arbitration, notwithstanding this may often in fact be desirable. Accordingly I accept Mr Haddon-Cave's contention that Finrep was under no duty to nominate solicitors within the jurisdiction to accept service of the CAA's s.67 challenge made by the Arbitration Claim Form, whether within a reasonable time or at all.

34. Next Mr Haddon-Cave submitted that the decision in *Knaut* to which I have already referred stands as clear authority that in the context of CPR 6.8(1) a mere desire for speed is unlikely to amount to a good reason to authorise service by an alternative method. That principle, he submitted, is just as applicable in the context of an arbitration application in relation to an arbitration which has been or is being heard within this jurisdiction as it is to ordinary originating process which was of course what was in issue in the *Knaut* case. Were it otherwise, he suggests, the cross-reference to CPR 6.8 in paragraph 3.1 of the Practice Direction 62.4 would be entirely otiose.

35. Mr Haddon-Cave also suggested that FINREP, as a potential defendant within the European Union, is entitled to be served pursuant to the provisions of the European Union Service Regulation, Council Regulation no. 1348 of 2000. In that regard he relied upon the following passages from the judgment of the Court of Appeal in *Knaut*, beginning with a passage at page 921 of the report in the Weekly Law Reports:

> *"47. It was argued by Peters before the judge that the Hague Service Convention and the Bilateral Convention were a mandatory and exhaustive code --- proper means of service on German domicile defendants which therefore excluded alternative service in England. The judge did not accept that submission, pointing out that those Conventions were simply not concerned with service within the English jurisdiction. Peters did not repeat that submission on its appeal. Nevertheless it follows in our judgment that to use CPR 6.8 as a means for turning the flank at those Conventions when it is common ground that they do not permit service by a direct and speedy method such as post is to subvert the Conventions which govern the service rule as between claimants in England and defendants in Germany. It may be necessary to make exceptional orders for service by an alternative method where there is good reason but a consideration of what is common ground as to the primary method for service of English process in Germany suggests that a mere desire for speed is unlikely to amount to good reason, or else, since claimants nearly always desire speed, the alternative method would become the primary way."*

The court continued at page 923:

> *"54. In these circumstances we do not think that it is open, save perhaps in very special circumstances which we do not presently have in mind, for English law to arrogate to itself a discretionary approach under the rubric of good reason to advance the normal date at which the English court would be seized for the purpose of Articles 21 and 22. Although the principle of date of service would have been nominally preserved through the device of the alternative method of service it would have been abandoned in essence, and not for the sake of service as under the old RSC Order 65 Rule 54, because normal service had been found impracticable, but for the sake of arriving at a state of being first seized in order to oust the jurisdiction of a competing forum, in other words for the sake of jurisdiction."*

Finally at paragraph 59 of the judgment, page 924 of the report the Court said this: "*In our judgment there cannot be a good reason for ordering service in England by an alternative method on a foreign defendant when such an order subverts and is designed to subvert, in the absence of any difficulty about effecting service, the principles on which service and jurisdiction are regulated by agreements between the United Kingdom and its Convention partners. This is not a matter of mere discretion but of principle.*"

36. As those passages demonstrate and as I have already pointed out, ***Knaut*** was concerned with straightforward originating process in circumstances where the claimant German company wished to bring proceedings in England against the first defendant, an English company, and the second defendant, Peters, a German company, in circumstances where the claimant feared that once Peters knew that it might be served with English proceedings it would itself begin proceedings in Germany which would then have priority by virtue of Article 21 of the Brussels Convention. The claimant would then have to litigate in England against the first defendant, British Gypsum, and in Germany against the second defendant, Peters. That is a very different context than is provided by the issue of an Arbitration Claim Form relating to an arbitration which has its seat in England. In such circumstances the parties to the arbitration have already submitted themselves to the supervisory jurisdiction of the English court. An application for permission to serve by an alternative method is therefore most certainly not subversive of any principles upon which jurisdiction is regulated by agreement between the United Kingdom and its Convention or Community partners, a conclusion which is reinforced by the fact that proceedings relating to arbitration are in any event excluded from the ambit of the Convention, now the Regulation (see ***The Atlantic Emperor*** *[1992] 1Lloyd's LR 442*).

37. Furthermore I do not consider that in this context an order for service upon a party's representative acting for him in the English arbitration can properly be regarded as subversive of the Service Regulation. That Regulation provides the method by which service must be effected in a state other than that in which the process originates, if service in that second state is necessary. In the present context the Court must first be satisfied that the circumstances are such that it is appropriate to permit service of the overseas party out of the jurisdiction. CPR 62(5) deals with this situation. Whilst CPR 62(5) does not contain the same provisions as are contained within CPR 6(21) nonetheless this is a discretionary jurisdiction. Although an application under s.67 or indeed s.68 of the Arbitration Act 1996 is made as of right there might be circumstances in which, for example, the application appeared to the court to be so frivolous in nature as not to justify the court permitting service thereof out of the jurisdiction. Assuming however that that threshold is crossed, there is in my judgment nothing subversive of the Service Regulation in the court thereafter making an order for service by a method other than personal service outside the jurisdiction if satisfied that in all the circumstances personal service in that manner is not necessary or appropriate. Such a conclusion renders the provisions of the Service Regulation of no further relevance.

38. The discretion given to the court by CPR 6.8(1) is dependent upon there appearing to be good reason to authorise service by an alternative method. In the context of an arbitration which has its seat in England or Wales and where the party thereto sought to be served with an arbitration application relating to that arbitration has an agent within the jurisdiction who acts or acted for him in the arbitration and whose authority does not appear to have been determined there will in my judgment very often, and perhaps ordinarily, be good reason to permit service to be made upon that agent rather than requiring service to be effected out of the jurisdiction. In such circumstances an application to serve upon the agent is not motivated by a mere desire for speed in effecting service. It is inherently desirable and in the interests of all parties that if arbitration applications are made in relation to either pending or otherwise completed arbitrations they are determined by the court as soon as reasonably practicable, consistent with their being dealt with justly. Such disposal contributes to the achievement of finality of the arbitral process. Moreover, in the ordinary case where an overseas party to an English arbitration has or has had solicitors in England acting for him in that arbitration, service of the application and associated documents upon the English solicitors is the most reliable method whereby those documents will be brought expeditiously to the attention of the responsible persons within the relevant entity sought to be served. It will also usually be the most economical method of achieving that result.

39. I do not regard anything said by the Court of Appeal in the ***Knaut*** case as either preventing or indeed discouraging this Court from continuing to adopt this approach which underlies the practice of the court to which I have referred earlier. I should add that in a proper case there will often in my judgment be a good reason to permit service in such circumstances to be made on overseas lawyers rather than upon their clients, as where, for example, as often occurs, a party to a London arbitration is represented in that arbitration by a firm of New York attorneys. Everything must depend upon the circumstances.

40. For my part I do not consider that it will ordinarily be appropriate to permit service upon an English barrister in private practice. I do not rule out that in some circumstances that might be demonstrated, after the exclusion of other possibilities, to be the appropriate course, although I do not think that I would myself be likely to make such an order on a paper application without further enquiry. That is simply because barristers in private practice do not in the usual way have any retainer going beyond their instructions to carry out specific tasks and because they lack the resources and infrastructure which typically a firm of solicitors has, at any rate those typically involved in commercial arbitration such as spawns the great majority of the arbitration applications which this court has to consider. In the ordinary way the barrister has no direct contact with the client and he or she may not actually know to whom or in what manner communication can most reliably be made. In my judgment an order permitting service upon a barrister in private practice will ordinarily be inappropriate, not simply because it imposes an undue and inappropriate burden upon a sole practitioner but also because it will not ordinarily represent the most reliable manner in which the proceedings can expeditiously be brought to the attention of the relevant person or persons.

41. Should then the order made by Mr Justice Aikens be set aside? Mr Haddon-Cave contends that notwithstanding my rejection of his attack on the court's practice it should nonetheless be set aside on four grounds: (1) the judge was not referred to the relevant principles or authorities, (2) the judge was not provided with a proper witness

statement as best practice requires, (3) there was no application for permission to serve out of the jurisdiction. There can, submits Mr Haddon-Cave, be no good reason to permit service by an alternative method unless first it has been determined that service by the primary method is in principle available; and there was no evidence before the judge that there would be excessive delay if service were to be required to be effected in Austria, and there was no disclosure of the real merits of the matter, such as would have been relevant to the exercise of the judge's discretion.

42. Unfortunately it is all too often the case that in relation to paper applications the court is not referred to the relevant principles or authorities. However, applications for permission to serve arbitration applications out of the jurisdiction are commonplace as are applications for permission to effect service by an alternative method. Such an application should ordinarily be supported by a witness statement setting out all the relevant and material considerations. However in the present case Mr Lambrou may have derived the impression that the court had itself indicated that all that was required before his application could be considered was submission of a draft order, so I would not be too critical of him on that score, especially since he very properly supplemented the material before the court with correspondence which updated the position since he had first filed his application.

43. Miss Clarke submits that it is not necessary in these circumstances that an order giving permission to serve out of the jurisdiction be applied for and obtained, that it is sufficient that the court is satisfied that it is an appropriate case in which to exercise the discretion pursuant to CPR 62.5 and that Mr Justice Aikens must have been so satisfied as he would not otherwise have made an order for service by an alternative method. In my judgment it is in these circumstances necessary both to apply for and to obtain an order for permission to serve out of the jurisdiction, but it will ordinarily be appropriate to apply simultaneously for an order for service by an alternative method, posited upon the court being first satisfied that it is an appropriate case in which to permit service to be effected out of the jurisdiction. I cannot be confident that had the application come before me as it was presented to Mr Justice Aikens I would have realised that this essential step had been omitted and I agree with Miss Clarke that it can be characterised as a technicality, albeit, I think, an important one. Ordinarily, permission to serve out of the jurisdiction will be axiomatic, particularly in relation to an application for relief which under the Arbitration Act can be made as of right, but that will not inevitably be so and that step in the procedure should not be overlooked. It will always be best practice to explain to the court what would be involved in effecting service overseas an what timescale is realistically involved, but for the reason which I have already given I would not regard that omission as ordinarily fatal, nor as leading to the conclusion in this case that the order should be set aside. The extent to which it is necessary in the supporting evidence to go into the merits of the application must depend upon the circumstances in any given case. Simply because an application under s.67 can be made as of right does not mean that when seeking to invoke the court's discretion the applicant is absolved of all duty of disclosure. What is required in any given case must be a question of judgment and degree.

44. I agree with Mr Haddon-Cave that it would have been preferable had some of the particular features of this dispute been drawn to the attention of the court, and it is no answer to that to point out that the judge was supplied with a copy of the award, which, as I have already indicated, is extremely lengthy. The Claim Form does identify the issues which will arise on the s.67 challenge to the jurisdiction of the Arbitrator. Without going into any further detail there is also indirect reference to the matters which, submits Mr Haddon-Cave, should have been spelled out more fully. It is sufficient for present purposes that I say that in all the circumstances of this case, including the fact that Mr Lambrou may have derived the impression that the court was content to deal with the application without further supporting material save only a draft order, I would not set aside the order on the basis of a failure to make appropriate disclosure concerning the merits of the case and of the application. I do however consider, for the reasons which I have already given, that the order was irregular in that it did not include an order permitting service out of the jurisdiction and that it was inappropriate insofar as it permitted service upon Mr Haddon-Cave, I suspect that Mr Justice Aikens may have made that order because of a belief that Mr Ryan and Mr Haddon-Cave had misled Mr Lambrou as to the nature of the instructions which were to be and had been given to the English solicitors, in the event Field Fisher Waterhouse. As I have sought to explain, no such criticism of Mr Ryan and Mr Haddon-Cave is in fact justified. That notwithstanding, I would myself, on the material before Mr Justice Aikens, almost certainly have made an order permitting service by fax or other means upon Messrs Salisbury & Ryan in New York, and that irrespective of whether I realised that the CAA had failed to apply for leave to serve out of the jurisdiction, although I might well have required the position in that regard to be regularised if I had realised that that was required.

45. In the circumstances I do not think it appropriate to leave in place the order permitting service on Mr Haddon-Cave and I set it aside. Change given upon that order being made an order extending time for service of the arbitration claim form is not opposed and I make such an order.

46. Mr Haddon-Cave makes no submission on the CAA's application to serve Finrep out of the jurisdiction, in Austria, which is now before the Court, and I make such an order. However, although there is no application there before the Court I also make an order pursuant to CPR 6.8 permitting service upon FINREP to be effected by service upon Messrs Field Fisher Waterhouse, their solicitors in London, who now have authority to accept such service. It would be an absurdity now to require service formally to be effected upon Messrs Field Fisher Waterhouse and I dispense with for the need for such service. I deem service to have been effected today. I shall leave it to counsel to draw up an appropriate order reflecting the effect of my judgment.

MR C. HADDON-CAVE, Q.C. (instructed by) for the Claimant.
MISS G. CLARKE (instructed by Messrs Thomas, Cooper & Stibbard) for the Defendant.