JUDGMENT : MR. JUSTICE CLARKE: Commercial Court. 24th February 2006

1. On 29th May 1997, the vessel ATHENA, which was owned by Sea Trade Maritime Corporation (which I will call "Sea Trade"), was damaged, allegedly by an explosion caused by Tamil Tiger Terrorists when she was at Trincomalee in Sri Lanka. Sea Trade presented a war risk claim to the Hellenic Mutual War Risk Association (Bermuda) Limited (which I will call "the Association") which insured the vessel against war risks.

2. Sea Trade's claim accepted that Sea Trade had failed to give the notice required under the Association's rules that the vessel was going to Sri Lanka, which was, at the time, an additional premium area. The directors of the Association were, however, invited to exercise their discretion under the rules to accept the claim. The directors decided that the Association should make a discretionary payment up to the amount of $3.4 million in respect of the casualty, and in due course the Association made that payment in two tranches. Although invited to reconsider, the directors did not agree to the Association making any further payment.

3. Thereafter, Sea Trade commenced three sets of legal proceedings in Greece against the Association and some of its directors for declining to pay in full. Each of the last two was commenced after the withdrawal of the immediately preceding proceedings. These were followed by further proceedings in New York. The last of the Greek proceedings is still on foot. The New York proceedings were stayed by an order of the New York Supreme Court, on the ground that rule 44 of the Association's rules called for arbitration in London. Appeals to the Appellate Division of the New York Supreme Court and the New York Court of Appeals failed.

4. Thereafter, arbitration proceedings were commenced against Sea Trade by the Association. Sea Trade continued to contend that the arbitration tribunal had no jurisdiction over it. In January 2005 the tribunal, consisting of Mr. Jonathan Hirst QC, Mr. George Henderson and Sir Christopher Staughton (the third arbitrator and Chairman), ordered the trial of a number of preliminary issues, including all issues going to the jurisdiction of the tribunal. The hearing of those issues took place in May and June 2005. On 1st July 2005 the tribunal issued its first interim award. The tribunal found unanimously in the Association's favour on all issues going to jurisdiction, save for one minor one, and on the other non-jurisdictional issues the subject of the hearing.

5. Sea Trade then began an arbitration claim (the first arbitration claim) in which it asked for the whole of the award of 1st July 2005 to be set aside for lack of substantive jurisdiction, for leave to appeal under s. 69 in respect of a number of issues determined against it by the tribunal, and for the award to be set aside in two specific respects for serious irregularity.

6. On 25th November of 2005, Morison J. gave directions for dealing with the first arbitration claim. Those directions included, firstly, providing for the trial of a number of preliminary issues in relation to issues of jurisdiction, secondly, a stay of the serious irregularity question, and, thirdly, a direction that Sea Trade's application for permission to appeal should, with one exception, be dealt with on paper. On 17th February of this year, Langley J. dealt with the paper application and refused permission to appeal. The s. 69 application that was not to be dealt with on paper was due to be determined today but that application has been abandoned.

7. Paragraphs 99 to 101 of the award of 1st July read as follows,

   "99. We reserve our decision as to costs, how they shall be borne and who shall assess them (except for the costs of the tribunal) until some future occasion.

   "100. We assess the costs of the tribunal in the sum [a sum is mentioned and then another sum for room hire plus Value Added Tax, if applicable] ... which shall be borne for the time being by the parties in equal portions, provided that if either party shall have borne more than an equal share, they shall be reimbursed forthwith as to the excess together with interest at 4 per cent per annum from the date of payment to the date of reimbursement.

   "101. This award is final as to what it decides. Any remaining issues which we have to decide shall be determined on a further occasion if required."

8. Sea Trade have what has been described as a broad ground for challenging the tribunal's decision, namely, that it lacks jurisdiction to make an order as to costs for the same reason as it lacked jurisdiction on the substantive dispute. That broad ground is not now before me. Sea Trade have, however, a narrower ground of objection. They contend that in the events which have happened, the tribunal lost the power to make any

order as to costs. They rely in this respect on the provisions of s. 57 of the Arbitration Act 1996. That section reads as follows:

"1. The parties are free to agree on the powers of the tribunal to correct an award or make an additional award.

"2. If or to the extent there is no such agreement, the following provisions apply.

"3. The tribunal may on its own initiative or on the application of a party:

"(a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or

"(b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award. These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal.

"4. Any application for the exercise of those powers must be made within 28 days of the date of the award or such longer period as the parties may agree.

"5. Any correction of an award shall be made within 28 days of the date the application was received by the tribunal or, where the correction is made by the tribunal on its own initiative, within 28 days of the date of the award or, in either case, such longer period as the parties may agree.

"6. Any additional award shall be made within 56 days of the date of the original award or such longer period as the parties may agree.

"7. Any correction of an award shall form part of the award."

9. No application was made by the Association to the tribunal that it should exercise powers under s. 57 within 28 days of the date of the award. The Association's application to the tribunal to deal with the question of costs appears to have been made at the earliest by their solicitor's letter of 29th September 2005. Nor did the tribunal make any award of its own initiative within 56 days of the original award. Accordingly, so it is submitted, it was, by the end of 2005, simply too late for the tribunal to make an additional award of costs. The relevant time limits had all expired and, in the absence of the agreement of the parties, could not be extended.

10. On 16th December 2005, the tribunal made a second interim award. By that award they rejected, amongst other things, Sea Trade's contention that they could no longer award costs. They accepted that there had been an implied request for costs to be dealt with and that, in one sense, a claim for costs had been presented to the tribunal because a claim for costs had been included in the points of claim, and s. 61 of the Arbitration Act obliges the tribunal to determine by award the recoverable costs of the arbitration, which by s. 64 include their own fees. But they held that s. 57(3)(b) did not apply because they had not omitted costs from their award. On the contrary, they had dealt with them in paragraph 99 by postponing consideration of costs to a further occasion. They regarded themselves as having power to do so under s. 47 of the Act. They ordered Sea Trade to pay 90 percent of the Association's costs and gave directions as to their assessment by the tribunal.

11. Sea Trade initially sought to challenge the decision of the tribunal under s. 67 of the Act, on the ground that the tribunal did not have substantive jurisdiction to award costs outside the strict time limits imposed by s. 57, as well as seeking permission to appeal under s. 69 on the grounds that the tribunal had misinterpreted s. 57. The tribunal, it was said, had erred in law in assuming, and purporting to exercise, a power under s. 47 of the Act. Sea Trade have rightly abandoned their claim under s. 67, since on any view the question that divides the parties does not go to the substantive jurisdiction of the tribunal. But they seek to challenge the decision under s. 68 on the ground that the tribunal has exceeded its powers, and they have applied for permission to do so out of time. The Association did not oppose Sea Trade's application for permission, (a) to invoke s. 68, as opposed to s. 67, and, (b) to do so out of time, and I granted them permission in both respects. Nor would the Association oppose my granting leave to appeal under section 69 if the tribunal's conclusion was in error.

12. By s. 33(1)(b) of the Act, it is the duty of the tribunal to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined. Section 33(2) provides that the tribunal is to comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it. By s. 34(1), it is for the tribunal to decide all procedural and

evidential matters, subject to the right of the parties to agree any matter. Procedural and evidential matters include, by s. 34(2)(a), when and where any part of the proceedings is to be held. By s. 47(1), unless otherwise agreed by the parties, the tribunal may make more than one award at different times on different aspects of the matters to be determined. Section 47(2)(b) provides that the tribunal may, in particular, make an award relating to a part only of the claims or cross-claims submitted to it for decision.

13. Section 47 provides for no time limit within which an award other than the first award must be made. By s. 61, the tribunal is given a general power to make an award allocating the costs of the arbitration as between the parties subject to any agreement between them. Section 61 itself provides no time limit for such an award.

14. Mr. Brenton, on behalf of Sea Trade, submits that the critical question is whether in the events which have happened it is s. 47 or s. 57 that is to govern the rights of the parties. Those sections are, as he submits, directed to different situations. They are also mutually exclusive, since under s. 47 no time limit is applicable to a further award, whereas under s. 57 a time limit applies. Although s. 57(3)(a) is concerned with the correction of clerical mistakes or errors arising from a slip or omission and the clarification or removal of ambiguities, s. 57(3)(b) is, he submits, not limited to curing some oversight. Section 57 applies if, after a claim has been presented to the tribunal for determination at the hearing, the tribunal fails to deal with it. That is what happened here. A claim for costs was, as the tribunal held, presented to it by virtue of an implied request that the tribunal should deal with costs. That implication arises from the fact that an award is incomplete if it does not deal with the question of costs. But the tribunal, whilst dealing with its own costs, failed to deal with that claim. A reservation of the issue for further consideration does not deal with a claim; it postpones dealing with it. Accordingly, s. 57 applies and the time limits have the effect that the tribunal was not enabled to make a further award in respect of costs.

15. So far as s. 47 is concerned, he submits that that is an adjunct to the tribunal's power to regulate its procedure and to decide when and in what sequence issues shall be determined. The tribunal could, conformably to s. 47, have decided to restrict the hearing in May and June so as not to cover the question of costs. But it made no such order, and it was not open to it to do so in its award, or to reserve the question of costs for further consideration. This is because, firstly, it was the tribunal's duty to deal in its award with all the issues that were presented to it, and, secondly, because the tribunal could not unilaterally decide that it would leave the issue of costs for further consideration. It could have done so with the agreement of the parties or, having given the parties an opportunity to be heard prior to the making of the award, it could thereafter have decided to defer the question of costs for further consideration. But, in contradistinction to s. 57, s. 47 confers on the tribunal no power to decide on its own initiative to make the issue of costs the subject of an additional award. Further, general principles of fairness would require that, unless otherwise agreed, the parties should be given an opportunity to address the suggestion that the question of costs should be reserved for a further hearing. Case management decisions can, he submits, be made before the award is given but cannot be made in the award itself. Even if, therefore, contrary to his submission, the claim for costs was dealt with in the July award, that would not affect the position that s. 47 was not applicable and the tribunal's purported exercise of a power thereunder, however apparently sensible, was invalid.

16. Mr. Stephen Moriarty QC submits that s. 47 is a wide general power. It is not governed by any time limits, nor does it oblige the tribunal to have made a case management order prior to its first award before deciding in its first award that it will deal with costs in a subsequent award. The purpose of s. 57 is to allow the tribunal to correct errors, whether of commission or omission, so as to enable the tribunal in the latter case to supplement an original award which simply overlooked a particular issue, such as costs, by making a further award that dealt with what ought to have been dealt with in the first place. It was because that was the intended scope of the section that the section imposed a tight time limit. In the present case, however, there was no discussion of costs at the hearing, or in the submissions, so that a claim could not be said to have been presented to the tribunal, within the meaning of s. 57. Even if it could be said to have been presented, it was dealt with by the tribunal expressly reserving it for further consideration. Whilst in other contexts "***dealt with***" could mean completely adjudicated upon, in the present context, the words must be interpreted in accordance with the purpose underlying the section, namely, to afford a means of redress without having to resort to the court in circumstances where the tribunal, in breach of its duty, had wholly failed to address a particular claim.

17. I do not accept that s. 47 did not enable the tribunal to decide in its July award to deal with the costs of the preliminary hearing by a subsequent award. Section 47, in my view, confers an entirely general power to determine the issues arising in the reference in more than one award and to determine part only of the claims or cross-claims submitted to the tribunal for decision in its first award. There is nothing in s. 47 that indicates that the tribunal's decision to deal with the issue of costs in this way cannot be made in its first award. Nor do I accept that there was anything unfair in the tribunal, to whom neither party had addressed any submission on costs, deciding, without further reference to the parties, that it would deal with costs at a further hearing and in a further award.

18. So far as s. 57 is concerned, I do not regard the tribunal as having been in error in deciding that a claim for costs had been presented to it. Mr. Moriarty was disposed to accept that if it was clear that the tribunal was to deal in its award with all issues, but for some reason no one said anything to the tribunal about costs and the tribunal failed to deal with them, then a claim for costs could be said to have been at least impliedly presented, but the position, he submitted, was otherwise, where nothing was said by either side to the tribunal about costs and there was no necessary reason to suppose that costs would be dealt with in the award. It seems to me, however, that in the light of the tribunal's general duty to deal with costs, and the fact that they were claimed in the points of claim, the tribunal can be said, for the purposes of s. 57, to have had a claim for costs presented to them. Indeed, the fact that they reserved the question of costs indicates that they regarded that to be so.

19. But, in my judgment, the claim in respect of parties' costs was dealt with in the award and not omitted. I express myself in that way because in its December award, the tribunal said that the claim for costs was *"not omitted. It was dealt with in paragraph 99"*. The wording of the statute is "has not dealt with" but there is, in my view, no difference in substance between the statutory phraseology and the words used by the tribunal. The tribunal addressed its collective mind to the question of costs and determined that they would be the subject of another award. That is, in my view, for the purposes of s. 57, a dealing with the claim. That section is a remedial section. It reflects s. 33 of the UNCITRAL model law and, as the DAC report put it, at paragraph 261, *"This clause reflects article 33 of the model law. In our view, this is a useful provision, since it enables the arbitral process to correct itself rather than requiring application to the court. In order to avoid delay, we have stipulated time limits for seeking corrections"*, etc.

20. The purpose of the section is to avoid the situation that used to arise where an arbitrator could not, in respect of his final award, that is to say, an award that purported to deal with all the matters that had been referred to him, correct an obvious mistake, nor deal with something which he had left out, because he was functus officio, so that the affected party was compelled to go to the court in order to obtain relief. It is applicable in a case such as **Re Becker** [1921] 1 KB 391, where the arbitrator failed to deal with the question of the parties' costs at all. There may be cases where it is not clear whether the tribunal has left open the question of costs for further consideration or has intentionally said nothing about them because it intends to make no order. But this case is not one of them. The tribunal made its position entirely clear. It is not, in my judgment, either the purpose or the effect of s. 57 to impose upon the tribunal or the parties a timetable within which the tribunal must produce a second award on an aspect of the matters referred to the tribunal which differs from those the subject of the first award and which the tribunal has purposely left for determination on a separate occasion.

21. If the position were otherwise, the legislation would, as it seems to me, contain a trap and, on the facts of this case, a perverse effect. If Sea Trade are correct, the Association has lost any right to costs, because the tribunal's "entirely appropriate" decision to leave costs to a future occasion (I quote from Fox Williams, Sea Trade's solicitor's, letter of 7th October 2005) was a breach of their obligations. I also find it difficult to believe that when no one had addressed the tribunal on costs, its decision to reserve the question for further consideration came in any way as a surprise. If Sea Trade's analysis of the Act was correct, that result would follow, but it would, as it seems to me, be a reproach to the law.

22. Accordingly, I propose to dismiss the application and to refuse leave under section 69.

MR. T. BRENTON QC and MR. D. BAILEY (instructed by Fox Williams) appeared on behalf of the Claimant.
MR S. MORIARTY QC and MR. D. DALE (instructed by Richards Butler) appeared on behalf of the Defendant.