JUDGMENT : The Hon. Mr Justice Morison: Commercial Court. 22nd October 2004

1. Section 72 of the Arbitration Act 1996 [the Act] provides:

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

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, or

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

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

2. On 3 September 2004, the Arab National Bank [the Bank] issued proceedings in this court in exercise of their right to do so under section 72 of the Act. The Defendant to the claim is a Mr El Abdali. The relief sought in the proceedings is for a declaration that a *"purported [Arbitration] Award made by HRH Prince Adel El-Hashemite [the Prince] in favour of the Defendant against the Bank and dated 13 January 2002 is not binding on the Bank or enforceable against it";* and "*a declaration that a purported deed of fixed and floating Mortgage made by Order of the Prince in favour of the Defendant against the Bank dated 30 January 2002 is neither binding on the Bank nor enforceable against it.*" The third and fourth heads of relief are for injunctions against the Defendant to restrain him from taking steps whether directly or indirectly to enforce or publicise either the purported Award or the purported charge. The defendant has not entered an appearance to these proceedings nor filed any evidence to resist the applications which are now made. This is the trial of the application.

3. I must consider first the question whether these proceedings have been properly served on the Defendant. Last evening, a firm of solicitors, Forum Law, wrote to the Bank's solicitors, and said this: *"We have already made it clear to you that we have no instructions to accept service nor are we instructed by the respondent to act on his behalf."*

4. The facts relating to service are these. There was correspondence between the parties' solicitors in May/June as to the enforceability of the Award in question and the Mortgage purportedly issued pursuant to the Award. The Bank's solicitors asked for undertakings that steps would not be taken to enforce the Award or to disclose it without 14 days' prior notice in writing. They indicated that in the absence of satisfactory undertakings *"… we will be considering with our client whether to obtain the appropriate injunctive and other relief against your client, in respect of which we reserve the right to apply to Court without further notice to you."*

5. By their response in a letter dated 7 June 2004, the Defendant's solicitors said that their client was not prepared to give the undertakings requested

".. and for the avoidance of doubt he takes very seriously the allegations contained in your letter that this claim is tantamount to a fraudulent claim against your client.

Nonetheless, until we have carried out further enquiries we will not be seeking to carry out the proposed action (including publication) set out in our letter dated 25 May 2004. If we do proceed, we will provide you with 14 days clear notice of any intended action.

Please note that if this is not acceptable to your client we are willing to accept service of proceedings for the injunctive relief which you may seek."

6. There was further correspondence in which the parties' positions were advanced. The 'Arbitrator' made a statutory declaration which the Defendant's solicitors forwarded to the Bank's solicitors and the Bank pressed for disclosure of the original documents purporting to show the Bank's 'acknowledgment' of the arbitration procedure and the Mortgage so that there could be a forensic examination of them. Inquiries were made of the LCIA to ascertain whether the prince was a member and the position appears to be that he applied for membership, was granted it but never paid his membership fee.

7. On 6 September 2004 the Bank's solicitors wrote to Forum Law Limited enclosing by way of service upon them the Arbitration Claim Form. They said: *"In your letter dated 7 June 2004, you confirmed that you were instructed by your client to accept proceedings for the injunctive relief our client is seeking. You have not written to us since to indicate that this is no longer the case."*

8. By letter dated 10 September 2004 Forum Law wrote back saying

"We have requested our client contact us with his instructions in relation to this, but regrettably we have not received a response.

We would be grateful if you would grant an extension of 7 days from the date of this fax in order that we may take our client's instructions."

9. An extension of time was duly granted until 4 October 2004. On 5 October 2004, the Bank's solicitors wrote as follows:

"Further to our telephone conversation yesterday … we are writing to confirm that our client has agreed to give you a further short extension until close of business today in order for your client to serve its acknowledgment of service form. We believe that we have given you ample time to obtain instructions on whether your client wishes to resist or accept the claim form.

In total your firm will have had 29 days to have obtained instructions from your client on the acknowledgment of service form. In the circumstances, we believe this is ample time for your client to provide you with instructions.

We put you on notice that we intend to make an application for default judgment should you fail to serve your client's acknowledgment of service form today."

10. The response to this letter from Forum Law was as follows:

"Thank you for your fax. We are disappointed that you have adopted this stance when you are fully aware that we have no instructions from our client to acknowledge service.

You will appreciate that we have no instructions at all to accept service of the specific proceedings that have been issued, and we will forward to the court, if necessary, the appropriate documentation that has passed between the parties."

11. The Bank's solicitors accepted that the defendant's solicitors may not have had instructions to acknowledge service but *"...we do not accept your assertion that you have no instruction at all to accept service of our client's Claim Form. This is the first occasion that you have suggested this to be the case."*

12. They then refer to the correspondence and make the point that the Defendant's solicitors had requested an extension of time but did not say that they were not instructed to accept service; and that a further extension was granted, also without any suggestion that they had not been instructed. They further referred to a conversation between solicitors on 4 October in which the solicitor from Forum Law indicated that he would make an application to the court for an extension of time to serve an acknowledgment of service. Finally the letter concluded that: *"We note that when we wrote to you today indicating our intention to apply for a default judgment you raised for the first time the issue of service of the claim form."*

There was no response to this letter until the eve of the trial.

13. Under CPR 6.4(2) it is a requirement that documents must be served on the solicitor rather than his client when such solicitor is authorized to accept service on behalf of a party and has notified the serving party in writing that he is so authorized. CPR 6.5(5), which is dealing with the address for service, provides that where a document other than a claim form is to be served on a solicitor then the address for service is the solicitor's business address. Based upon this Rule it was argued that this meant that claim forms did not require to be served on an authorized solicitor. This argument was rejected by the Court of Appeal in ***Nanglegan v Royal Free Hampstead NHS Trust*** [2002] 1 WLR 1043 The result therefore is that a claim form such as this must be served on a party's solicitor if he is duly authorized to accept service on behalf of his client. It seems to me from the correspondence that Forum Law represented that they were authorized to accept service of these proceedings. The form of the proceedings seeking injunctive and declaratory relief is precisely what was contemplated when they wrote on 7 June stating that they were authorized to accept service of proceedings for injunctive relief. Further, having been formally served in accordance with the Rules of Procedure they acted on the basis that they were so authorized by seeking extensions of time. If Forum Law were not authorized to accept service it was their duty to say so when served; they only raised an issue about this very late in the day. The critical time for the purpose of the Rules is as at the date of service. I am satisfied that Forum Law were so authorized when the claim form was served on them in September.

14. The next question is whether this court has jurisdiction to deal with this claim. Section 72 of the Act falls within Part 1 of the Act This provision only applies *"where the seat of the arbitration is in England and Wales or Northern Ireland"* – section 2(1). Section 3 defines what is meant by "the seat of the arbitration" and it includes the seat designated by the arbitral tribunal if so authorized by the parties. The problem in this case is that it is the Bank's case that there was no arbitration agreement, no powers were vested by it in any arbitrator and that the arbitral tribunal was not authorized by it to designate any seat. On the face of it, therefore, none of the provisions of section 3(a), (b) or (c) appear to apply. On the other hand, there is what might be called a sweeping up clause which provides that the seat is that *"determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances."* In the *'Award'* the arbitrator appears to treat the seat of the arbitration as in England although he does not expressly make such a finding. He says that the law applicable to the arbitration *"shall be the Arbitration Law of the Seat of the Arbitration"* and *"in this case that this Arbitral Court is looking at, the English Language was and remains the contracting language between the disputed parties, that is, the governing law shall be the Laws of England."* It is not easy to understand the process of reasoning but it does not appear that any law other than English Law was applicable whether as the procedural law or the substantive law. The procedural law is normally that of the seat of the arbitration since the Courts have rejected the notion that an arbitration can take place in some kind of transnational void: see ***Union of India v McDonnell Douglas Corporation*** [1993] 2 Lloyd's Law reports 48, at 50 citing ***Bank Mellat v Helliniki Techniki SA*** [1984] 1 QB 291, 301. But there are other indicia which suggest that the seat of the arbitration was treated as England. First the arbitrator held himself out as a Member of the London Court of International Arbitration. Under their rules, there is a default mechanism which presumes London to be the seat in the absence of any agreement to the contrary. In the Award the Court relied on the Theft Act and as part of the Order made the Bank were required to publish the contents of the Award in English Newspapers and magazines and *"must record"* the Award at Companies House in Cardiff. The only steps which have been taken to enforce the Award have been taken in England, despite the numerous branches in Saudi Arabia. In my judgment taking all these circumstances into account it seems to me that England was the seat of this arbitration. If necessary, I would have gone further and said that section 3(c) applied because for the purposes of an application under section 72 the words *"if so authorized"* should be read as applying where the arbitrator has asserted the authority of the parties, even though that is in issue. Either way, I am satisfied that I have jurisdiction to make the orders sought.

15. I turn to the merits. The Bank is a well respected international bank with 114 branches in Saudi Arabia and various overseas branches including one in London. It is concerned that its reputation may be damaged by the

publication of the Award The Defendant has threatened to publish and seek to enforce the Award, which has appears to have a value of $160 millions. The Award contains what the Bank regards as unfounded purported findings of fraud against it and it is concerned for its reputation were the Award to be published. Because of the circumstances of this unusual case, it would be right, I think, to accede to the Bank's application pursuant to CPR 62.10 that the this arbitration claim should be heard in public. This decision is in accordance with the Court of Appeal's guidance in the case of ***Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co*** [2004] 3 WLR 533. It is difficult to see why an application in this case should be heard in private.

16. The facts as I find them to be based upon the Bank's uncontradicted evidence are as follows. In 1994 the Bank provided banking services to the Defendant in Saudi Arabia. Disputes arose in relation to these services and litigation was commenced in the Commercial Papers Court in relation to two promissory Notes in the sum of about $6.6 millions. On appeal, the Bank were given judgment for this amount. There was also litigation commenced, I think, by the Defendant against the Bank, in relation to his Margin Trading Account, before the Saudi Arabian Monetary Agency [SAMA] and this litigation has not concluded although it is anticipated that judgment may be delivered later this year. SAMA regulates all disputes relating to banking and financial matters and a Committee for the Settlement of such disputes was established in March 1987 and all proceedings, including claims under arbitration agreements, must be submitted to the Committee for their approval. The Defendant did not refer his intention to start arbitration proceedings to SAMA.

17. There is no arbitration agreement in any of the agreements entered into between the Bank and the Defendant. Out of the blue, on 2 January 2002, the Bank received a fax via its general number which appeared to be from *"The International Fraud Bureau, Division of Human Rights Arbitration Forum Member of London Court of International Arbitration Independent Counsel Office."* The fax was 5 pages long and from the Prince. It purported to be an Order requiring the Bank to provide "*this Office with certified true photographic copies with the perjury penalty"* a number of documents. The Order contained a WARNING that the Order must be complied with within 10 working days from the date of service and receipt of the Order *"otherwise an Award shall be rendered against the said … Bank in event of default of the Bank to any of the above raised points."* There was no claim form enclosed and no provision for an *"acknowledgment of service"*. The dispute referred to appears to be the same dispute which the Defendant had already raised before SAMA and which was currently being considered. When the fax came the Bank decided to check whether the author of the fax [the Prince] was staying at the Hotel from which the fax apparently emanated. A Bank official [namely the Assistant General Manager and Head of Legal Affairs Division] spoke to a person at the Hotel who confirmed that he was the Prince. The witness says that although the Prince tried to engage him in conversation about the fax, he cut the Prince short. His only purpose in speaking with the individual was to satisfy himself that, at the least, the fax was not from someone it did not purport to be from. The Bank then informed SAMA of the fax and were told not to respond to it or to provide the information requested. In accordance with the law, SAMA confirmed that all banking disputes had to *"go through SAMA"*. The witness confirms that he never communicated with the Prince in writing. Despite this, the witness' signature has been taken from documents filed in the proceedings before SAMA and cut and pasted and photographed onto an acknowledgment document. This document was made available to the Bank's solicitors in May of this year. One of the reasons why the Court may conclude that the document is a forgery is that the job title of the witness below the signature had changed so that it was no longer his current title as at the date of the forged document. Further, the document is in English rather than Arabic and yet the signature is Arabic contrary to the normal practice that documents in Arabic contain Arabic signatures and documents in English, English signatures. Finally, on the evidence, the witness had no authority from the Bank to agree to arbitration. He has explained the system whereby lawyers in Saudi Arabia demonstrate their right to conduct a case by production of the necessary power of attorney. A special power of Attorney is required in relation to arbitration proceedings and that requires the express authorization of the Bank's Board.

18. On 8 February 2002, the Bank received a further communication from the Prince. This document is on crested writing paper, in English. At the top right is the Prince's name, with his degrees. He is described as President and CEO Human Rights Arbitration Forum Member London Court of International Arbitration. On the left under the crest are the words *"Human Rights Arbitration"*. Under the Heading *"AWARD"* it is stated that the Award is granted by the Prince on 13 January 2002, giving as his address a suite at the Hotel in question. The Award stated that the applicable Law shall be the seat of the arbitration and that the governing law shall be the Laws of England. The apparent basis for the jurisdiction over the Bank is stated to be:

    "As the [Bank] in this case before this Arbitral Court did in fact sign and did return to this Arbitral Court the Form of Acknowledgment of service and the Acceptance to this Arbitral Proceeding initiated by the Plaintiff.

    Therefore the [Bank] did agree to the only overriding Authority and power and Jurisdiction of this Arbitral Court and [the Bank] did accept to be treated as having agreed not to apply to any state judicial court/ or other judicial authority other than to this existing Arbitral Court."

19. The Award is curious in a number of respects. First the forum specified as the arbitral body is different from that in the pre-hearing disclosure order: "*Human Rights Arbitration Forum*" is not the same as "*the International Fraud Bureau, Division of Human Rights Arbitration Forum*" and it is doubtful if any such recognized arbitral forum exists. The parties to the Trading Agreement never agreed on arbitration for the settlement of their disputes; this was never discussed; there was no agreement as to the forum, the applicable law or seat of arbitration; there was no notification of the appointment of an arbitrator and no indication that an arbitral process had commenced; there was no statement of claim served on the Bank. An acknowledgment of service procedure in arbitration is unusual if

not unique; the dispute in question was referred by the Defendant to SAMA; the intention to file an arbitration claim was never mentioned during the course of those proceedings and not mentioned, as it should have been, to SAMA for their consent. There has been no attempt to enforce the Award in Saudi Arabia, where the most of the Bank's assets are located.

20. It further appears that the Bank Official's signature has been forged on the Mortgage and the statement that the deed was couriered to the British Embassy in Rabat during the period 1 January to 28 February 2002 can be shown to be untrue from records held by the Bank's mailing department. It seems strange, to say the least, that the arbitrator himself should be seeking to enforce his own award, rather than the alleged successful party.

21. On the basis of these facts, I am satisfied that the Bank has established on overwhelming evidence that the arbitral award has been obtained by fraud; that there was no arbitration agreement in force; that the arbitral tribunal was not properly constituted and that there was never any agreement as to the scope of the arbitration. In my judgment this is plainly a case where I should make the declarations sought both in relation to the Award and the Mortgage. Neither is valid or enforceable. Each has been procured by use of forgery. Yet, Forum Law, solicitors in this jurisdiction threaten to try and make use of this material to embarrass the bank and thus obtain money from them for their client. In the light of this judgment they will no doubt wish to re-consider their position and take advice.

22. As to the form of the order as the Court is a public authority it must have regard to the provisions of the Human Rights Act, as it may apply. In this case, at the Bank's request the hearing has been held in public yet it seeks to enjoin the Defendant from publicising the Award. Is there a contradiction between these two positions? In my view there is not. Article 10 confers a right to freedom of expression. However Article 10.2 qualifies the right since the exercise of the freedom carries with it responsibilities and duties and may be subject to conditions and restrictions *"for the protection of the reputation or rights of others."* It is not the law that because some publicity to particular material has already been made, the right to the protection of reputation is thereby lost, although any such publicity will be a factor which the court must take into account when weighing the balance between the freedom on the one hand and the protections on the other. Although section 12 of the 1998 Act appears to give the right to freedom of expression a special place amongst the rights conferred under the Convention, by judicial authority at the highest level this misapprehension is corrected. The significance of section 12(4) in the 1998 Act is that even where the Court is concerned with bedrock freedoms such as journalism literary and artistic material, partial publication of the material concerned is just one factor to be weighed in the balance; a fortiori here when one is balancing the right of the Defendant to publish a manifestly false document on the one hand and the reputational right of the Bank on the other. I am prepared to make the orders as asked.

Antony White QC (instructed by Richards Butler) for the Claimant
The defendant did not appear and was not represented