JUDGMENT : Mr Justice Aikens : Commercial Court. 21st April 2008.

1. The parties to these proceedings have been engaged in long running arguments which arise out of a Consortium Agreement dated 20th September 2005, to which all are parties. Disputes were referred to three arbitrators, in accordance with the provisions of Article 14 of the Consortium Agreement. That provided that all disputes, whether arising out of the interpretation or execution of the Consortium Agreement or in connection with it, should be settled by three arbitrators under the Rules of the London Court of International Arbitration ("LCIA"). It also provides that the arbitration is to take place in London.

2. On 29th November 2007, the arbitrators published their Third Partial Final Award. The claimant ("Sheltam") challenged this Award under sections 67 and 68 of the Arbitration Act 1996 ("the Act"). These applications were due to be heard on Monday, 14th April and Tuesday 15 April 2008. However, at about 1pm on Thursday, 10th April 2008, Nabarro LLP, the Solicitors for Sheltam, issued a Notice of Discontinuance of Sheltam's arbitration claim. The defendants to the arbitration claim ("Mirambo" and "Primefuels"), being confident that they could successfully defeat the applications under sections 67 and 68 of the Act, have retorted by asking the court to set aside the notice of discontinuance and to make orders under sections 67(3) and 68(3) of the Act, to confirm the arbitrators' Third Partial Final Award.

3. On Monday 14 April 2008 I heard argument from Mr Mildon QC on behalf of the defendants and Mr Hales on behalf of Sheltam. Upon Mr Hales' giving undertakings to the court on behalf of Sheltam (on which I will elaborate below), I decided not to set aside the Notice of Discontinuance. The further application of Mr Mildon did not, therefore, arise. Mr Mildon and Mr Hales stated that, so far as they were aware, the issue of when a Notice of Discontinuance could be set aside in arbitration proceedings was a novel point on which there was no authority. So I decided to give the reasons for my decision in writing. These are my reasons.

The background

4. Sheltam is a South African company. Mirambo is a Tanzanian company and Primefuels is a Kenyan company. The other parties to the Consortium Agreement are Comazar (Proprietary) Limited, a South African private company ("Comazar") and CDIO Institute for Africa Development Trust, which is a South African Trust ("CDIO"). Comazar and CDIO have not taken any part in the arbitration proceedings.

5. The Consortium Agreement provides that all the parties would jointly bid for 25 year concessions to run the railways of Kenya and Uganda. If the consortium were to be successful then all four parties would become shareholders in a new company, to be called "Rift Valley Railway Company". The Consortium Agreement provided that the interests of the parties in the consortium would be: Sheltam – 61%; Primefuels – 15%; Mirambo – 10%; Comazar – 10% and CDIO – 4%.

6. Article 12 of the Consortium Agreement sets out the principles that will govern if the consortium were successful in obtaining the concessions to run the railways. It provided that Sheltam, as "the Leader" of the consortium would arrange for the drafting of a proposed Shareholders Agreement as soon as possible after the consortium was nominated as the preferred bidder to run the railways. The draft could be considered and would then be signed by the parties. The present dispute centres on the obligations of Sheltam, as Leader, under Article 12 of the Consortium Agreement. Article 18 of the Consortium Agreement provides that the applicable law of the Agreement will be Kenyan law.

7. The consortium was successful in winning the railway concessions in late 2005. A holding company ("RVR") was formed in Mauritius in order to hold (on behalf of the parties to the Consortium Agreement) the shares in the railway operating companies in Kenya and Uganda respectively.

8. In January 2006, Sheltam purported to exclude Mirambo and Primefuels from the consortium and from participation in the RVR on the grounds that they had failed to sign a Shareholders' Agreement when asked to do so. Mirambo and Primefuels contested this. They argued that the document they had been asked to sign did not comply with the terms of the Consortium Agreement.

9. That dispute was referred to arbitration before three LCIA arbitrators. The three arbitrators, (Professor Dr Fidelis Oditah QC, Professor Dr Philippe Leboulanger and Mr Michael Lee, Chairman), issued their First Partial Final Award on 15th December 2006. The arbitrators found that Mirambo and Primefuels had not been validly excluded from the consortium and that they remained entitled to participate as shareholders in RVR.

10. The arbitrators also held that Sheltam had failed to serve a "contractually compliant" Shareholders' Agreement for execution by Mirambo and Primefuels in accordance with Article 12.2 of the Consortium Agreement. Therefore, in early 2007 Mirambo and Primefuels sought orders for Specific Performance and Injunctive Relief against Sheltam from the LCIA arbitrators. In particular, they sought an order for Specific Performance of Sheltam's obligations to circulate for comment and signature a Shareholders' Agreement which complied with the Consortium Agreement's terms. Mirambo and Primefuels also sought injunctions concerning the shares in RVR.

11. The arbitrators issued their Third Partial Final Award on 30th November 2007. In it they declared that Sheltam was in breach of its obligations under Article 12.2 of the Consortium Agreement to tender to Mirambo and Primefuels, for comments, a contractually compliant draft Shareholders' Agreement. It ordered that such a draft Shareholders' Agreement be circulated within 28 days of the date of the Award. The arbitrators also declared that Sheltam was not entitled to issue, allocate, sell, charge or transfer or otherwise deal with or vote the relevant shares in RVR in a manner which would prevent Mirambo and Primefuels from ultimately participating as a shareholder in RVR in accordance with the terms of the Consortium Agreement.

12. The Award also provided that if Sheltam did serve a draft Shareholders' Agreement, but a dispute arose as to whether or not it was contractually compliant, then Sheltam would not be held to be in breach of the orders made under the Award until the tribunal had first determined whether or not the document complied with the orders of the arbitrators. If the arbitrators identified any deficiencies, then Sheltam would be given a reasonable opportunity to rectify them.

13. On 21st December 2007, Sheltam launched its arbitration claims under sections 67 and 68 of the Act. Under section 67 of the Act, Sheltam challenged the Third Partial Final Award on the ground that the tribunal lacked substantive jurisdiction to grant equitable and declaratory relief in the terms set out in the Award. Sheltam challenged the Award under six paragraphs of sections 68(2) of the Act. The most important allegation was that the tribunal had exceeded its powers and that this serious irregularity had caused or would cause substantial injustice to Sheltam: section 68(2)(b).

14. Sheltam took no steps to conform with the order of the arbitrators to produce a contractually compliant draft shareholders agreement, either before or after the arbitration claim form was issued.

The statutory provisions and the CPR

15. Under sections 67 and 68 of the Arbitration Act 1996, a party can challenge an arbitration award on grounds of lack of jurisdiction or serious irregularity without first obtaining the leave of the court. This contrasts with section 69, which provides that a party can only appeal an arbitration award on a point of law with the leave of the court, unless it has the agreement of all the other parties to the proceedings. Leave to appeal on a point of law is only given if stringent conditions, laid down in section 69(3), are satisfied. It is now well established that if a party challenges an Award under section 67, on the ground that the tribunal lacked substantive jurisdiction to make the award, then the court will re-hear the jurisdiction issue and the parties can adduce evidence and can re-argue entirely the issue of jurisdiction. This exercise can involve both sides in considerable effort and expense. The same is true for mounting or defending a challenge to an award under one or more paragraphs of section 68 of the Act.

16. The aim of a respondent to an arbitration claim under sections 67 and 68 of the Act must always be to maintain the award. Ultimately it may have to be enforced through the courts, either in the country where the award was made or in another country, usually a state that is party to the New York Convention (1958) on the Recognition and Enforcement of Foreign Arbitral Awards.

17. CPR Part 38 deals with discontinuance of claims. CPR Part 38.2(1) and (3) provide as follows:

"(2) A claimant may discontinue all or part of a claim at any time…

…….

(3) Where there is more than one defendant, the claimant may discontinue all or part of a claim against all or any of the defendants".

18. CPR 38.3 provides for the procedure for discontinuing a claim. A claimant only has to file a Notice of Discontinuance and serve a copy of it on every other part to the proceedings.

19. CPR Part 38.4 provides for applications to set aside a Notice of Discontinuance. It states:

"(1) Where the claimant discontinues under rule 38.2(1) the defendant may apply to have the notice of discontinuance set aside.

(2) The defendant may not make an application under this rule more than 28 days after the date when the notice of discontinuance was served on him."

20. CPR Part 38.6 provides for a claimant's liability for costs if he discontinues against the defendant. Unless a court otherwise orders, a claimant who discontinues is liable for the costs which a defendant against whom he discontinues incurred on or before the date on which Notice of Discontinuance was served on him.

21. There is nothing in CPR Part 38 which prevents the Rules relating to discontinuance from applying to an arbitration claim. Nor is there anything in CPR Part 62 (Arbitration claims) to stipulate that CPR Part 38 does not apply to arbitration claims. Accordingly, I think that Mr Mildon QC was correct to accept that CPR Part 38 does apply to arbitration claims. Therefore, a claimant making an arbitration claim is entitled to discontinue without the leave of the court unless one of the circumstances set out in CPR Part 38.2 applies. Furthermore, I agree with the submission of Mr Mildon, which Mr Hales accepted, that a defendant to an arbitration claim is entitled to apply to set aside a Notice of Discontinuance of such a claim, within the terms of CPR Part 38.4.

22. Mr Hales submitted that a defendant who wished to apply to set aside a Notice of Discontinuance should do so on Notice and the application should be supported by evidence. I agree that this must generally be the rule, in accordance with CPR Part 23.3 and 23.4. I also agree that, in general, an application to set aside a Notice of Discontinuance will need to be supported by evidence. This is in accordance with paragraph 9 of the Practice Direction to CPR Part 23.

23. In this case I made an order that Mr Mildon's application to set aside the Notice of Discontinuance would be heard without service of an application notice or service of written evidence, pursuant to CPR Part 23.4(2)(c). This was because Sheltam and its solicitors, who remained on the record, were fully aware of Mirambo and Primefuels' intention to apply to set aside the Notice of Discontinuance and the reason for that application. These were set out in a letter of 10th April 2008 written by counsel for Mirambo and Primefuels to the courts and copied

to Nabarro, solicitors for Sheltam. However, for the record, a formal application notice and any evidence on which Mr Mildon relied in argument must be produced.

The parties' submissions

24. Mr Mildon submitted that the wording of CPR Part 38.4 was wide and that the court had a broad discretion as to the circumstances in which it would set aside a Notice of Discontinuance. In this case the arbitration claim of Sheltam sought to challenge an award in an international dispute. The three parties involved had neither assets nor a business presence in the United Kingdom. If the Third Partial Final Award had to be enforced through the courts then this would have to be in another state and one which is a party to the New York Convention. In circumstances where a challenge to the jurisdiction of the arbitrators had been made in the country where the hearing had taken place and the Award being given, this might leave the enforceability of the Award in doubt.

25. Mr Mildon pointed to Article 5 of the New York Convention which sets out the circumstances in which recognition and enforcement of an Award might be refused by a court in which recognition and enforcement is sought. Article V.1(c) provides that recognition and enforcement of the Award may be refused upon proof that:
"The Award deals with a difference not contemplated by or not falling within the terms of submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration …….. ".

26. Mr Mildon submitted that in the light of Sheltam's failures to comply with the orders made in the arbitrators' previous awards, then it was likely that Mirambo and Primefuels would have to enforce the award in either South Africa or Kenya or Mauritius (all New York Convention countries) in the future. He submitted that where a party has started an arbitration claim in order to challenge an award under section 67 of the Act, it should not be open to that party to subvert the supervisory jurisdiction of the English court at the last moment by entering a Notice of Discontinuance. To do so would enable the discontinuing party to keep the option of using the same jurisdictional objections to delay or resist enforcement in another New York Convention state.

27. Mr Mildon pointed out that Sheltam had not given any undertaking, either to the Court or to Mirambo and Primefuels, that it would not use grounds set out in Article V.1 of the New York Convention to challenge recognition and enforcement of the Third Partial Final Award in a New York convention state. That, he submitted, was highly significant. Therefore, Mr Mildon submitted, the court should not only set aside the Notice of Discontinuance, but it should then proceed to determine the challenge under section 67 and make an order under sections 67(3) of the Act to confirm the Third Partial Final Award.

28. Mr Hales explained how the Notice of Discontinuance had come about. He stated (and he confirmed that this would be put into a witness statement) that Sheltam had intended to pursue its challenges to the Award under sections 67 and 68 of the Act. However, by about Wednesday 9th April 2008, Sheltam had run out of funds to instruct counsel to argue the case. Therefore a decision was made to discontinue the arbitration claim forthwith.

29. Mr Hales also explained (and confirmed that this would also be put in a witness statement) that Sheltam had served upon Mirambo and Primefuels a number of documents, including a draft Shareholders' Agreement. He said that Sheltam believed that this was compliant with the terms of Article 12.2 of the Consortium Agreement and the Third Partial Final Award. Therefore, he submitted, Sheltam had now (albeit late) complied with the principal order of the tribunal it its Third Partial Final Award. He said that Mirambo and Primefuels should consider this draft. If they decided that it was not contractually compliant, then the procedure set out at the end of the Third Partial Final Award must be followed, i.e. the dispute must go back to the arbitrators. Mr Hales also stated that Sheltam had fully complied with the orders of the arbitrators concerning the shares in RVR.

30. Mr Hales submitted that, in those circumstances, there was no basis for the court exercising its discretion to set aside the Notice of Discontinuance. He pointed out (correctly) that if the Notice of Discontinuance remained valid, then the court had no jurisdiction to make any orders under either section 67 or section 68 of the Act.

31. I asked Mr Hales whether or not Sheltam was prepared to give an undertaking to the court that Sheltam would not resist enforcement of the Third Partial Final Award in a New York Convention state by raising any argument based on lack of jurisdiction of the arbitral tribunal, such as had been advanced in Sheltam's application under section 67 of the Act. I pointed out that such an argument (although not a section 68 argument) might be available under Article V.1(c) of the Convention. Having taken instructions, Mr Hales stated that Sheltam was prepared to give such an undertaking.

Discussions and conclusions

32. As I have already stated, I am quite satisfied that CPR Part 38.2 and 38.4 apply to arbitration claims. The terms of CPR Part 38.4 give no guidance as to the circumstances when a court will make an order setting aside a Notice of Discontinuance. It would appear that there are no reported cases on the application of CPR Part 38.4.

33. When procedure was governed by the Rules of the Supreme Court, discontinuance of an action was dealt with by RSC Order 21 Rules 2 to 5. Under RSC Order 21 Rule 2, a plaintiff could at any time before the service of the defence upon him discontinue the action without the leave of the court. This was done by serving a Notice of Discontinuance upon the defendant. However, it was established in ***Castanho Brown & Root (UK) Ltd [1981] AC557*** that the court had a power to strike out a Notice of Discontinuance as being an abuse of the process of the court: see the speech of Lord Scarman at page 571 with whom all the other members of the House agreed. Lord Scarman agreed with the test adopted by the judge and Lord Denning MR in the Court of Appeal, to decide whether the Notice of Discontinuance was an abuse. That was: if leave to discontinue had been required, would the court have granted it unconditionally or on terms? That test was adopted by Hobhouse J in ***Fakih Bros. v AP***

Moller (Copenhagen) Ltd [1994] 1 Lloyds Rep. 103 at 109. In ***Ernst & Young v Butte Mining Plc [1996] 1 WLR 1605,*** Robert Walker J recognised that this test might not be useful in all circumstances: see page 1622G.

34. Instead of the old practice of applying to strike out a Notice of Discontinuance as an abuse of process, CPR Part 38.4(1) now specifically provides for an application to be made to set the notice aside. The wording of the Rule does not impose any particular test that has to be satisfied before the court will set aside a Notice of Discontinuance that has been issued under Rule 38.2.(1) without the court's permission. However, I agree with the note at 38.4.1 of the 2007 Edition of Civil Procedure (volume 1) that a court may set aside a Notice of Discontinuance if it concludes that it is an abuse of the process of the court. I accept that this may not be the only circumstance in which the court exercises its powers under CPR Part 38.4(1). Further, even if it concludes that it is an abuse of process, a court must still have a discretion whether to set aside a Notice of Discontinuance. (Compare the comment of Robert Walker J in ***Ernst & Young v Butte Mining Plc [1996] 1WLR 1605 at 1622F).***

35. When considering whether or not a Notice of Discontinuance constitutes an abuse of the process of the court, I regard a useful question to ask (as under the old RSC): if the permission of the court had been required to issue a Notice of Discontinuance, would that permission have been granted unconditionally? However, that is not the only matter to consider before a court exercises its discretion to set aside a Notice of Discontinuance under CPR Pt 38.4. A court must also be entitled to consider both the circumstances in which the Notice of Discontinuance was issued and what the claimant is attempting to achieve by issuing and serving the Notice.

36. In this case the Notice of Discontinuance was issued in respect of an arbitration claim in which the claimant challenged the validity of the Third Partial Final Award. In doing so, the claimant had invoked the supervisory jurisdiction of the court over an LCIA arbitration which has its seat in England and Wales and which is continuing. I have no doubt that if the Rules of the CPR had provided that a Notice of Discontinuance of an arbitration claim challenging the validity of an Award required the permission of the court before the arbitration claim could be discontinued, then, in the circumstances of this case, unconditional permission would not have been granted. The court would have wished to ensure that the validity of the Third Partial Final Award could not be impugned by implication, that is by an assertion that a challenge had been made in the English court, but it could not be taken to its conclusion because the claimant had no funds to continue the challenge.

37. It is quite clear from paragraph 5 of the Outline Argument of Mr Hales that Sheltam still regards its challenges under both sections 67 and 68 as being – at the least – arguable. It is, I think, striking that Sheltam did not take the course (which it could have done) of agreeing to the dismissal of the arbitration claim. I infer from this that Sheltam was attempting to achieve a position where it preserved its ability to challenge the validity of the Third Partial Final Award if Mirambo and Primefuels moved to enforce it in another New York Convention State. Accordingly, if the CPR had provided that a Notice of Discontinuance of the arbitration claim could only have been issued with permission of the court, I would have granted permission only on terms that Sheltam undertook to the court not to challenge recognition and enforcement (by Mirambo and Primefuels) by using arguments raised in its section 67 application. This would preclude Sheltam from attempting to prove that the Award contained decisions on matters beyond the scope of the submission to arbitration, as provided for under Article V.I.(c) of the New York Convention.

38. As Sheltam has now given such an undertaking to the court, it seems to me that the Notice of Discontinuance should be allowed to stand. If Mirambo and Primefuels do have to enforce the Third Partial Final Award in a New York Convention State and if Sheltam attempts to resist such recognition and enforcement by raising issues that it might otherwise be entitled to do under Article V.1(c) of the Convention, then Mirambo and Primefuels can apply to this court. It will then be able to reconsider their applications to have the Notice of Discontinuance set aside and for a further order dealing with the substance of the sections 67 and 68 challenges to the Award.

Conclusion

39. For the reasons set out above, I concluded that Sheltam's Notice of Discontinuance should be allowed to stand, upon Sheltam giving the undertaking that is referred to above and which will be set out in the court order dealing with this application. Sheltam must, of course, pay the costs of Mirambo and Primefuels up to and including the date of service of the Notice of Discontinuance. Those costs include the costs of the hearing before me, as those had already been incurred. In fact I summarily assessed those costs at the end of the hearing.

Mr Michael Hales (Solicitor advocate of Nabarro LLP, Solicitors, London) for the Claimant
Mr David Mildon QC and Mr David Davies (instructed by Stephenson Harwood, Solicitors, London) for the Defendants