JUDGMENT : MR JUSTICE TOMLINSON: Commercial Court. 5th September 2003

1. This is an application made by the applicants, C & M Farming Limited, pursuant to section 70(7) of the Arbitration Act 1996, whereby the court is given a discretionary power to order that in circumstances where any application or appeal is brought under sections 67, 68 or 69 of that Act, the court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

2. The application, so far as my experience and I think that of counsel goes, is unprecedented, and raises some issues of principle as well as issues of discretion. The application has also been, if I may respectfully say so, exceptionally cogently argued on each side, and in the ordinary way I would wish to reserve my judgment in order to choose with some care the manner in which I express my conclusions, at any rate on the matters of principle. However, bearing in mind that I shall not be available to deliver any such judgment for some weeks and bearing in mind the nature of the application, it seems to me that it is probably of more assistance to the parties, both to enable them to know where they stand and to take any further steps which they may be advised, either in this jurisdiction or in other jurisdictions in which matters are also proceeding, if I give my decision straight away, together with my necessarily undigested reasons for reaching that conclusion. Furthermore, I think it appropriate to take that course since I am satisfied that, both as a matter of principle but also as a matter of discretion, having regard to the circumstances of this case, it is not appropriate that I should grant the relief sought.

3. The application arises out of an ICC award made on 10th March of this year, although apparently published to the parties on 13th March, in an arbitration in which C & M Farming ("C & M"), an Indian company as I understand it, to which I have already referred, was the claimant, and Peterson Farms Inc ("Peterson"), which I believe to be a company registered in Arkansas, was the respondent. I need not go into the facts. Suffice it to say that pursuant to a Sales Right Agreement dated 7th September 1996 Peterson had sold to C & M certain chickens, which are referred to (whether colloquially or more advisedly, I am not sure) as grandparent stock. The idea apparently is that the stock so supplied by C & M, all of which were males, would be mated with certain female stock in India, from which would be produced yet further male stock, which in due course would be mated with other females to produce chickens and, of course, eggs. As I understand it, the problem arose because the grandparent stock supplied by Peterson under the agreement, or at any rate some part of it, proved to be infected with a virus called ALVJ. As a result of the arbitration, C & M recovered damages in the sum of US$6.7 million. That was approximately 30% or so, or perhaps a little more, of its claim, which was in total US$16.29 million, although I note that there was also a claim for punitive damages which the tribunal rejected. The contract was governed by the law of Arkansas, but was subject to ICC arbitration, the seat of which was in London. There was appointed to resolve the dispute a distinguished tribunal, consisting of Mr Julian Lew, Judge Abraham Gaffney, and a Mr Joe Hershaw.

4. The damages awarded by the tribunal fall naturally into two parts. Firstly, there are losses which are accepted to have been suffered by C & M Farming Limited itself, the so-called grandparent losses, which amounted to about a million dollars, together with damages for lost market share and loss of future profits. Secondly, there were awarded by the tribunal what have been called by the advocates before me parent losses, i.e. losses amounting to $5.4 million or so, which were suffered by other entities within the same group of companies as C & M, which other companies within the group were apparently the companies who would be producing the parent birds, and indeed perhaps the grandchild birds, if that is the right way to put it, and who would therefore stand potentially to suffer loss in the event that, as occurred, there was a damaging virus in the grandparent stock.

5. It is the recoverability of the parent losses as opposed to the grandparent losses which has given rise to a further dispute between the parties as to the jurisdiction of the tribunal, because, as I understand it, at the hearing itself the respondent, Peterson, contended that the tribunal had no jurisdiction to award against it the damages which had been suffered by companies in the group other than C & M Farming Limited, which was itself the nominal party to the Sales Right Agreement.

6. Following the issue of the award, Peterson accordingly issued an application, pursuant to section 67 of the Arbitration Act 1996, challenging the award, or at any rate that part of the award which gave effect to the arbitrators' conclusion on this point as made without jurisdiction. The arbitrators have concluded that they did indeed enjoy jurisdiction to award the damages claimed as having been suffered by these other companies within the group. As I understand it, before the arbitrators themselves the way in which the matter was put was that, pursuant to what has been described as the Group of Companies doctrine, the arbitrators were entitled to conclude, in the light of the circumstances surrounding the negotiation, execution and so forth of the agreement, that the mutual intention of all the parties was to bind non signatories. The arbitrators concluded, in particular at paragraph 93 of their award, that that was indeed so, but the arbitrators also concluded that it was right, in the circumstances, to conclude that in contracting with Peterson, C & M Farming Limited had, to the knowledge of Peterson, acted as an agent on behalf of all of the companies within the C & M group. The companies within the group are identified a little earlier in the award at paragraph 40.

7. Peterson challenge those conclusions, and it is that challenge which will form the subject matter of the proceedings under section 67 of the Act, which, it is right to point out, are proceedings which can be brought as of right without any need to obtain the leave of the court.

8. After the issue of the award, C & M, in relatively early course, took proceedings to seek to enforce it against Peterson. For reasons which I do not fully understand, and which were not entirely explained or attempted to be

explained, those proceedings began in Georgia, but in due course they were transferred to the State of Arkansas, where Peterson is incorporated. There appears to have been a certain amount of tactical positioning so far as concerns each party's behaviour subsequent to the issue of the award, since C & M, for their part, plainly did not wish to give colour to any suggestion that the damages awarded might naturally fall into two parts, in respect of one of which there might be any question. Whereas Peterson, for its part, wished to maintain that that was so. It may be for that reason that no formal demand was made by C & M for payment of what might be regarded as the undisputed part of the award, which I should say, although it does not really matter for present purposes, is an amount slightly less than the amount of damages awarded in respect of the grandparent losses, because there was a certain amount accepted to be due the other way from C & M to Peterson Farms.

9. However, the position has now been reached that, subject to the relevant cheque being cleared, Peterson Farms has paid to C & M the amount awarded to it as to which there is no dispute but that the tribunal had jurisdiction to make the relevant award. Mr Godwin suggests that the delay in Peterson meeting its undisputed liability as to that part of the award is one factor which I should take into account in the exercise of my discretion, but it seems to me that although obviously I must take all factors into account, that particular factor does not, in all the circumstances, weigh very heavily, bearing in mind that the parties have also been locked in combat in the United States in relation to other matters.

10. Those other matters arise out of the fact that immediately following the issue of the award, indeed on the next day, March 14th, Mr Lloyd Peterson, who is said by C & M to be the alter ego of Peterson, and who is, on any view, someone who has a very substantial interest in that company, filed a Uniform Commercial Code Financing Statement against all of the inventory, equipment and fixtures, including computer equipment, accounts receivables, general intangibles, payment intangibles, chattel paper, documents and other assets of Peterson Farms. That financing statement is apparently sufficient to perfect a lien in favour of Lloyd Peterson in respect of substantially all of Peterson Farms' tangible and intangible property other than real estate, which, as I understand it, would be superior to any lien that C & M may be able to obtain in respect of such assets under the law of Arkansas by virtue of the award which it holds in its favour.

11. Furthermore, on 19th March Mr Peterson filed a mortgage in respect of land owned by Peterson Farms in Benton County, Arkansas, the effect of which is, as I understand it, precisely the same as that which I have already described so far as concerns the property other than real estate.

12. C & M, not surprisingly, invite me to approach the filing of the financial statement and the mortgage as amounting to an attempt by Mr Peterson to ring fence the assets of Peterson, which would otherwise have been available to satisfy the award. In Arkansas C & M have gone somewhat further, in that they have launched proceedings which allege that those transactions amounted to fraudulent conveyances which are liable to be set aside, and pursuant to that application C & M has, for its part, filed what is described as a *lis pendens*, the effect of which, as I understand it, is that at any rate so far as concerns the real estate, although not I think the intangibles, in the event that the court sets aside as fraudulent the various transactions, C & M will have security in respect of those assets. It is not suggested that any of these assets, whether taken singularly or cumulatively, are sufficient to satisfy the disputed part of the award, but plainly they might go some way towards it.

13. Not unnaturally, Mr Godwin, who has appeared for C & M, and who has, as I have already indicated, argued the application with conspicuous skill and clarity, suggests that the execution of these transactions so soon after the issue of the award is a matter which should weigh very heavily in the exercise of my discretion. On the other hand, Mr Foxton, for Peterson, who has demonstrated no less skill in the argument of the application than Mr Godwin, points to the fact that at any rate so far as concerns the real estate mortgage, there appear to have been certain transactions which, on the face of it, may have been preparatory thereto, and, in particular, the execution of a promissory note evidencing the making available by Mr Peterson to Peterson Farms on 7th March 2003 of a line of credit agreement, pursuant to which some $2.5 million was drawn down on 7th March, some six days before the publication of the award.

14. There is some reference to this in the evidence which has been filed on behalf of C & M by Mr John Harding, an attorney in the Rose Law firm of Little Rock, Arkansas, who refers to the fact on page 5 of a letter of advice of 24th June that in order to show actual fraud there is no requirement to show that Peterson Farms did not receive the equivalent value in exchange for the Peterson financing statement or the Peterson mortgage. *"It may be fraudulent even if Peterson Farms did receive a US$2.5 million line of credit, as stated in the mortgage."*

That, as it seems to me, recognises that whilst obviously I cannot decide today what is the position, it may be that certainly the execution of the real estate mortgage on 19th March was itself a preordained transaction, a preparatory part of which had taken place on 7th March. It may be, therefore, that whilst the inference sought to be drawn is a fairly obvious one of some attempt to place assets beyond the reach of the creditor C & M, at the end of the day it will be shown that that is not an inference which in fact should be drawn. Mr Godwin, of course, points not only to the real estate mortgage but also to the financing statement, which was actually dated 14th March itself, and says that even if there may have been some act preparatory to the execution of such instruments, nonetheless it is the filing of them on the very day following the award which gives rise to the inference of some attempt to remove the assets from the grasp of C & M. Whilst of course I understand why that point is made, I also note that Mr Nesbitt, the solicitor for C & M, in his first witness statement points out that in order to establish what is the position so far as concerns these allegedly fraudulent conveyances, there will be required a full and lengthy trial on the merits in Arkansas.

15. I do not think that it would be right that I should approach this application upon the basis that Mr Peterson has acted fraudulently and, to be entirely fair to Mr Godwin, he did not suggest that I should. He merely asked me to take into account, as I will, the fact that these various instruments were entered into immediately following the issue of the award, which may, if they cannot be set aside, have the effect of rendering enforcement by C & M more difficult. However, it does seem to me that that point does not really take Mr Godwin very far, because, of course, if the transactions are capable of being impugned, then C & M will obtain priority over Mr Peterson in respect of the relevant assets. If, however, they are not capable of being impugned, it must follow that, according to the law of Arkansas, they are regarded as entirely proper and appropriate agreements to have been made, and it would not be right to regard them for the purposes of the present application as made with some intent to render execution of the award more difficult than otherwise it would have been. It would, on the contrary, be right to approach them as transactions made at any rate in the ordinary course of business as between Mr Peterson and his companies.

16. In that latter regard it is apparent that over the last three years Mr Peterson has injected very substantial sums of money in the order of $46 million into the Peterson company in order to keep it afloat. He has apparently received loan stock by way of repayment of some of the amount so contributed but by no means all. It is also right to say that he has apparently injected in excess of $2 million since the issue of the award itself on 13th March 2003.

17. Mr Foxton submitted that, in all the circumstances, it was not appropriate to approach this case upon the basis that Mr Peterson was seeking to run away from or desert the company, which he apparently founded in 1947, and he also pointed out that, in any event, the substantial assets likely to be available in the company itself, such as land, chicken farms and the machinery associated with chicken farms, are not assets of the type which are readily dissipated.

18. In the forefront of his argument, however, Mr Foxton submitted that, as a matter of principle, the court should be extremely slow to impose as a condition of the making of the challenge pursuant to section 67, which is a challenge made as of right, a condition of payment or securing of the full amount of the impugned award. It is true that the power given under section 70(7) is available not just in relation to applications which require the leave of the court, but also applications under both sections 67 and 68, which require no leave. Mr Godwin showed to me a passage in the Departmental Advisory Committee report which preceded the enactment of the 1996 Act, paragraph 380, in which the Committee proposed, somewhat ironically as I think, that the power, which in the draft bill extended only to sections 67 and 68, should be extended so that the court could impose the requirement as a condition of granting leave to appeal under clause 69. I say that that is somewhat ironic since, as it seems to me, the court is in most cases rather unlikely to find it appropriate to impose such a condition under section 69, bearing in mind the stringency of the criteria which must be satisfied by an applicant for leave to appeal under that section. However that may be, the force of Mr Godwin's submission was that the Committee, which he rightly characterises as a committee of some distinction, headed as it was by Lord Saville and containing many other persons with enormous experience in the field, described the power to require money payable under the award to be brought into court or otherwise secured pending the determination of an application or an appeal as: *"A tool of great value, since it helps to avoid the risk that, while the appeal is pending, the ability of the losing party to honour the award may, by design or otherwise, be diminished."*

19. Mr Foxton, for his part, has usefully reminded me that what the committee evidently did not have in mind was that by the use of this jurisdiction the court should actually improve the ability of the winning party to enforce the award as opposed to taking steps to put it out of the power of the losing party to diminish his own ability to honour the award. Furthermore, he submits, as it seems to me with some force in the light of the considerations to which I have already referred, that it is one thing to make an order, the effect of which is to diminish the ability of the losing party to dishonour the award; it is quite another to require a third party, or a party associated with the losing party, to put the losing party in funds as a condition of the losing party being permitted to mount an application in relation to the award. Mr Foxton made that observation because he said, again as it seems to me with some force, that it was not really seriously disputed but that Peterson Farms Inc is in some financial difficulty. Again, the evidence here is not entirely conclusive, and Mr Godwin submits that the evidence before the court is really quite insufficient for the court to reach the conclusion that Peterson Farms Inc has insufficient assets to provide the security sought. However, the position is that Peterson Farms has placed before the court an unaudited consolidated operating statement and balance sheet, which shows, on the face of it, that in the year to May 2003 it sustained an operating loss of $11.3 million. It also appears to show that although there is, on the face of it, an excess of assets over liabilities of some $18 million, plainly when the outstanding losses are taken into account the position is not very rosy. Indeed, it is acknowledged by Mr Nesbitt that if that operating statement is to be taken at face value, the prospects of enforcement are not good. Having regard to the extent to which the company has evidently been shored up by Mr Peterson himself, it seems to me not unfair to proceed upon the basis that what really is here sought by C & M is an order which will require Mr Peterson himself to put up security as a condition of his company (if it is right so to describe it) being permitted to mount its challenge under section 67.

20. As I have indicated, Mr Godwin suggests that the evidence tendered by Peterson is unsatisfactory and not sufficient to enable the court to reach that conclusion. I understand why he so submits, but the court must do the best it can on the basis of the evidence before it. The evidence has been put in by Mr Ledley, the solicitor acting on behalf of Peterson Farms, upon the basis of his instructions, and having regard to the way in which the matter

has developed I do not think it appropriate to regard as inaccurate the statement made by Mr Nesbitt, on the advice of the Finance Director Mr Weir, that even the monies representing the undisputed amount of the award, now paid by means of a cheque not yet cleared, have been raised with great difficulty. Mr Ledley also says that he is advised by Mr Weir that the claimant, i.e the company, would not be in a position to provide security for the disputed amount of the award. He also suggests that the defendants' entire enforcement strategy implicitly recognises the claimant's financial plight, and he refers to the fact, to which Mr Foxton made oblique reference, that this was expressly referred to by the legal representatives of C & M in the course of the arbitration hearing. As Mr Foxton put it, without any noticeable dissent from Mr Godwin, the financial difficulties of Peterson come as no surprise to C & M.

21. All of those matters of course go to discretion. Mr Foxton's primary submission, however, as I indicated a few moments ago, is that the court should be very slow to require the giving of security as a condition for the making of an application under section 67, which is made as of right. Mr Foxton points to the fact that there are a number of different means pursuant to which a party to arbitration may mount a challenge to the jurisdiction. The part of the Act which is relevant to this begins at paragraph 30 under the rubric "*Jurisdiction of the arbitral tribunal*", whereby it is enacted at section 30: *"Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, but that any such ruling may be challenged by any available arbitral process of appeal or review, or in accordance with the provisions of this part."*

The provisions of this part which are relevant are both sections 32 and 67. Thus, under section 32: *"The court may, on the application of a party to arbitral proceedings, determine any question as to the substantive jurisdiction of the tribunal as a preliminary point."*

To that end, it is provided in section 31(5) that: *"The arbitral tribunal may, in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32."*

Furthermore, under section 32(4) it is provided: *"Where an objection is duly taken to the tribunal's substantive jurisdiction, and the tribunal has power to rule on its own jurisdiction, it may rule on the matter in an award as to jurisdiction or deal with the objection in its award on the merits."*

22. Thus, at the outset, there is the possibility that the court may be asked, if it is otherwise appropriate, to rule upon the jurisdiction of the tribunal, and of course it is obvious that the court has no express power under section 70 or under any other provision pursuant to which the court could impose, as a condition of the making of such a challenge, the bringing into court or the securing of the amount in dispute, or any other amount.

23. I should have said that equally relevant is section 72 of the Act, which provides that: *"A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question whether there is a valid arbitration agreement, whether the tribunal is properly constituted, or what matters have been submitted to arbitration in accordance with the arbitration agreement, by proceedings in court for a declaration or injunction or other appropriate relief."*

By definition, that is a resort to the court which will take place after an award has been issued in circumstances where the party challenging the jurisdiction has taken no part in the proceedings, and again if resort is had to that subsection no express power is given by the Act to require the posting of security, since the power under section 70(7) is applicable only to applications under sections 67, 68 or 69 and, of course, subsection (2) of section 72 goes on to provide in terms that a party who may apply for declaratory or injunctive relief also has the same right as a party to the arbitral proceedings to challenge an award either under section 67 or under section 68.

24. Which course is taken by a party challenging jurisdiction will of course depend upon the nature of the proceedings and of the circumstances as they apply in the particular case, but, as Mr Foxton pointed out, Peterson Farms were only challenging a part of the jurisdiction of the arbitrators, or perhaps I should say they were not challenging the basic jurisdiction of the arbitrators to determine the dispute as between Peterson Farms Inc and C & M Farming Limited, but were only challenging the jurisdiction of the arbitrators to include within their consideration and within their award claims to recover losses which had been suffered by companies other than C & M Farming Limited itself. In such circumstances, it would certainly not have been appropriate for Peterson simply to take no part in the arbitral proceedings and then to resort to its rights under section 72(1). Nor, ordinarily, would it be regarded as really very satisfactory to make an application pursuant to section 32 for the determination of a preliminary point in circumstances where the arbitration was in any event to proceed in respect of the greater part of the dispute, and in circumstances where it would obviously be convenient for the arbitrators to deal with the entirety of the dispute with the partial objection to jurisdiction being reserved, dealt with by the arbitrators in the first instance, possibly to the satisfaction of the party raising the objection, but with the ability to ventilate the matter in court under section 67 in due course if that were appropriate.

25. What that review of the various different approaches which can be taken to an objection to jurisdiction demonstrates is that it may be a matter of accident, or at any rate a matter of happenstance, whether, in any given case, an objection to jurisdiction is brought pursuant to section 67, or pursuant to section 32, or pursuant to section 72(1). It is only in relation to section 67 that the court has the express power conferred by section 70(7), and it would, on the face of it, be somewhat surprising if certainly as a matter of course the court were to exercise its powers to require security to be posted under section 70(7) in relation to a section 67 application

when it was purely as a matter of good housekeeping or sensible approach to the arbitration that the challenge had been mounted in that fashion as opposed to at an earlier stage or in a different manner.

26. Furthermore, Mr Foxton points out that there is of course a conceptual difference between a challenge under section 67 and a challenge under sections 68 and 69. An award which is challenged either under section 68 as having been made in the wake of a serious irregularity, or an award which is alleged to be wrong in law under section 69, has a presumptive validity, unless and until set aside. The same is not true of an award challenged under section 67, as to which it is only possible to say of it either that it was made with jurisdiction or that it was not.

27. One can well understand why it is that it might be thought appropriate to require the posting of security in circumstances where a section 68 challenge is made, because if the parties have chosen to arbitrate their dispute it may be said that they have elected a procedure which will not necessarily contain all of the same formalities and safeguards which might be thought to attend proceedings in court. Something of that notion is apparent in the observations of Robert Goff J, as he then was, in ***Mondial Trading Company v Gill & Duffus*** [1980] 2LLR 376 at 380. That was in the context of the Arbitration Act 1979 and the question whether, as a condition of granting leave to appeal on a point of law, the court should impose a condition of payment into court, or otherwise securing the amount in dispute, or some part of it, section 1(4) of the 1979 Act giving a power to make any leave which the court gives conditional upon the applicant complying with such conditions as it considers appropriate. What Robert Goff J had to say was of course made in the pre-***Nema*** era, so that ordinarily these days it is, as I have already indicated, perhaps unlikely that the court would in most cases be persuaded to impose a similar type of condition having granted leave pursuant to section 69, since it is likely only to have come to the conclusion that a grant of leave is appropriate if it has decided either that the decision of the tribunal is obviously wrong, or at any rate that it is at least open to serious doubt. Nonetheless, in the context of his consideration of circumstances in which the giving of security might be appropriate, Robert Goff J referred to the fact that the parties have chosen the arbitrators as their tribunal, by which of course he meant to refer to the fact that, having chosen arbitration as their method of dispute resolution, it would be inappropriate, without more, for one of the parties then to seek to suggest that the matter had not been dealt with in precisely the manner in which it might have been dealt with in legal proceedings.

28. That consideration does not of course arise here, because the question at issue is whether in relation to the recoverability of losses sustained by the associated or affiliated companies the parties have chosen this arbitration tribunal as their selected tribunal to determine the dispute, the whole question being whether the arbitration agreement is, on its true construction or in the circumstances, apt to embrace those claims.

29. I am reluctant, whilst giving an unreserved judgment, to attempt to lay down any general principles or to give guidance as to the circumstances in which the court will be likely to exercise its power under section 70(7) where an application is made under section 67. However, it seems to me that Mr Foxton is right to point to the apparent anomaly that if the court were to exercise the power it would in many cases be a matter of complete accident or happenstance whether the power was available arising out of an earlier decision, either well informed or not well informed, by the relevant party, either to make the application challenging jurisdiction at an earlier stage or in a different manner at a later stage, which again might in turn simply arise or be dictated by the question whether the entirety of jurisdiction was challenged or only part of it, and whether, in all the circumstances, it was prudent or otherwise sensible for the challenging party to take part in the arbitral proceedings. Plainly what has happened here has been a sensible procedure, in the sense that Peterson did not challenge the entirety or even the greater part of the tribunal's jurisdiction, and plainly it was sensible for them to take part in these proceedings and indeed, under protest, to allow the arbitrators to investigate and make a non-binding determination in relation to their own jurisdiction. Mr Foxton is right to say that it is, in principle, somewhat odd to find that there should be a power in the circumstances which have here arisen which would not have been available had Peterson mounted their challenge to the jurisdiction in some other manner.

30. Having said that, it is quite clear to me that one circumstance which is likely always to weigh very heavily with the court in determining whether it is appropriate to exercise a power under section 70(7) will be the question whether the challenge appears to have any substance. Here Mr Godwin submitted that the challenge was without substance, or was, as he put it, flimsy. It is obviously undesirable that I should say too much about the nature of the challenge, since I have concluded that it is not flimsy and since it will fall to the judge hearing the full application in due course to reach his own conclusions. However, I cannot escape pointing out, as indeed I have already done, that the agency approach was not apparently advanced by C & M at the arbitration at all, their reliance at that stage being entirely upon what has been called the Group of Companies doctrine. Before me Mr Godwin has not focused upon the Group of Companies doctrine at all. He indicated that the arbitrators had relied upon the two matters, i.e. C & M had acted as agents for other members of the group and, secondly, that they had relied upon the Group of Companies doctrine, and he indicated that he did not wish to address me on that second basis, but merely wished to demonstrate that, even leaving that out of account, the attack upon the conclusions as to agency was itself flimsy. That is, as it seems to me, an unpromising starting point, bearing in mind that it was the Group of Companies doctrine upon which C & M apparently relied at the arbitration, and as to the validity of which they are at any rate shy of making submissions before me.

31. I have not heard full argument on the Group of Companies doctrine, and I therefore express no concluded views about it, but I am bound to say that, at first sight, I find puzzling paragraph 86 of the tribunal's award, which

refers to the separability and autonomy of arbitration agreements, and points out that a corollary to the separability doctrine is that the law applicable to the arbitration agreement may differ from the law applicable both to the substance of the contract underlying the dispute and to the arbitral proceedings themselves. The arbitrators proceed to say that, in the absence of any choice of law made by the parties with regard to the arbitration agreement itself, the tribunal will determine the question in accordance with the common intent of the parties. It therefore seems to me that, on the face of it, the arbitrators have applied not the proper law of the agreement, not the curial law, not yet even some third system of law as being the system of law applicable to the arbitration agreement, but have rather applied a doctrine which is not, at any rate on the face of the award, suggested to be grounded in any particular system of law. I need say no more about that, bearing in mind that Mr Godwin has not sought to address argument to me on it.

32. That, however, brings me to the tribunal's conclusions so far as concerns agency. At paragraph 91 the tribunal, after a review of the evidence, concludes that it supports C & M's contention that Peterson knew it was contracting with, and would have obligations to, all C & M group companies. It is, I think, axiomatic that when considering a question of this sort it is a most useful corrective to ask not just whether Peterson was contracting with and would have obligations to all C & M group companies, but also whether all C & M group companies were contracting with and would have obligations to Peterson. On the face of it, it is not immediately apparent to me that the tribunal has gone down that road. That impression is fortified by what the tribunal says in paragraph 92, which reads: *"The tribunal considers that it was logical to have the name of one member of that group [the C & M group] as the contracting partner with Peterson. One company had to take formal legal responsibility for the contract with Peterson. C & M group as such was not a legal entity and therefore could not contract in its own name. There would have been greater uncertainty had it sought to do so. Nassik contracted on behalf of and as the agent for the whole of C & M group. This was clearly understood by Peterson."*

I should say that Nassik is the name by which C & M Farming Limited was formerly known.

33. I am puzzled why, consistent with their conclusion, the arbitrators say that there would have been greater uncertainty had C & M group contracted in its own name, if it is suggested that it was clear upon the basis of the negotiations that it was all of the C & M group companies that were contracting with and would have obligations to Peterson. Furthermore, Mr Foxton has drawn to my attention that two of the companies identified in paragraph 40 of the award as having been comprised within the C & M group were, at the time of the agreement and for the first four years' currency thereof, partnerships, in which, as I understand it, there were two individual persons as partners. It may of course be the conclusion of the tribunal that each of the individual partners in those partnerships was intending and intended to be assuming liability to Peterson for the entire performance of the Sales Right Agreement, but that is not an immediately obvious conclusion.

34. For all those reasons, therefore, whilst I am in no position to express any concluded or final view about the correctness or otherwise of the arbitrators' conclusion on the question whether C & M acted as agent for and on behalf of all of the group companies so as to enable it to recover losses suffered by those companies, I am certainly in no position whatsoever to conclude that the challenge which is mounted by Peterson Farms is flimsy. It seems to me that it is far from flimsy, although that itself is far from saying that it will necessarily succeed at the end of the day.

35. It seems to me that, in most cases, it is likely that demonstration by the party against whom the jurisdictional challenge is made that the challenge is flimsy or otherwise lacks substance is likely to be regarded as a threshold requirement for the court's consideration whether in all the circumstances it is appropriate to require, as a condition of proceeding under section 67, that money payable under the award shall be brought into court or otherwise secured pending the determination of the application. That being the case, the threshold is not, in this case, crossed by C & M, and I would, for that reason alone, decline to grant the relief sought. I would, however, go further, which is to indicate that in the circumstances of this case, having regard to the evidence which has been placed before me, I would in any event not regard it as an appropriate exercise of my discretion to make an order which, on the basis of the evidence, partially unsatisfactory though it may be, would have the effect of requiring Mr Peterson himself to put up security in relation to the liability of the company Peterson Farms Inc. Particularly is that so in circumstances where C & M has itself initiated enforcement proceedings in the United States, which, if they are successful, will in any event enable that company to proceed immediately to enforce the entirety of the award without regard to the pending section 67 application. As I understand it, as recently as 28th August the Arkansas court heard C & M's motion to confirm, which included a hearing of Peterson's stay application pending the section 67 challenge, and in relation to which the Arkansas court has reserved judgment. If C & M are wholly successful in their arguments in that application, they will be in a position to proceed to enforce the award against such assets as they are able to find. So far as concerns the assets which are the subject of the *lis pendens*, i.e. the assets in relation to which Mr Peterson has filed a financing statement and a mortgage, Mr Peterson is, in any event, now precluded by the *lis pendens* from raising further sums on the security of those assets.

36. All of those factors, as it seems to me, militate against exercising my discretion to require the posting of security in this jurisdiction as a condition for the making of a challenge to the jurisdiction, which is brought both as of right by Peterson and at an appropriate stage in the proceedings, and upon grounds which I do not regard as lacking substance. For all those reasons, therefore, I decline to make the order sought.

MR GODWIN (instructed by Lovells) appeared on behalf of the CLAIMANT.
MR FOXTON (instructed by Baker & McKenzie) appeared on behalf of the DEFENDANT.