Neutral Citation Number: [2026] EWHC 2031 (Comm)

Case No: CL-2026-000063

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

AND IN THE MATTER OF THE ARBITRATION ACT 1996
AND
IN THE MATTER OF AN ARBITRATION

Date: 31st July 2026

Before :

THE HONOURABLE MRS JUSTICE DIAS DBE

- -

Between :

JKD **GMT**	**Claimants**
- and -	
IKC	**Defendant**

- -
- -

Mr Laurence Rabinowitz KC, Mr Mark Wassouf and Ms Devon Jane Airey (instructed by Mayer Brown (International) LLP) for the **Claimants**
Ms Nehali Shah KC and Mr Moritz Grimm (instructed by White & Case LLP) for the **Defendants**

Hearing date: 16th July 2026

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Approved Judgment

This judgment was handed down remotely at 10am on 31st July 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Dias :

1. This is an application by the Claimants (jointly, "**JHA**") seeking to challenge the decision of an arbitration tribunal made in arbitration proceedings brought by JHA against the Defendant ("**IKC**"). The decision in question refused an application by JHA for interim measures and was embodied in a document titled *"Procedural Order No. 4"* (hereafter, "**PO4**"). JHA assert that PO4 was not in fact a procedural order at all but an award, and that it should be set aside and remitted to the Tribunal on grounds of serious irregularity within sections 68(2)(b) and/or (c) of the Arbitration Act 1996 (the "**Act**"), namely an excess of power and/or a failure to conduct the arbitral proceedings in accordance with the procedure agreed between the parties. Both irregularities are said to arise from the Tribunal's failure to give effect to an alleged agreement between the parties as to the merits threshold to be applied to applications for interim measures and instead adopting a different, more stringent test.

2. There is a large measure of agreement between the parties as to the procedural history and it is therefore necessary only to give the following brief summary of the background to the application.

3. The underlying dispute in this case relates to the construction of a power plant in country C by JHA as contractor pursuant to a suite of contracts concluded on 5 March 2021 collectively referred to as the **EPC Contract**. In the usual way, JHA procured the issue by Santander of on demand bonds in favour of IKC, including an Advance Payment Bond and a Performance Bond (collectively, the "**Bonds**").

4. In March 2024, the project site was hit by a storm which JHA alleges caused substantial delay to the project works. On 3 April 2025, JHA terminated the EPC Contract and demanded return of the Bonds, asserting a contractual entitlement to do so under the *force majeure* provisions in the contract. IKC disputed the validity of the termination and in turn alleged that the purported termination was itself a repudiatory breach. On the following day, 4 April 2025, IKC made a call on the Bonds. There is no dispute that the calls were compliant in form and content. However, JHA contend that in circumstances where they had validly terminated the EPC Contract for prolonged *force majeure*, IKC was under a contractual obligation to return the Bonds and accordingly was not lawfully entitled to make a call on them.

5. The validity of JHA's termination and their entitlement to the return of the Bonds on the one hand, and the validity of IKC's call on the Bonds on the other are thus the critical issues in dispute between the parties.

6. On 7 April 2025, JHA made an *ex parte* application in Spain to restrain Santander from paying out under the Bonds pending resolution of the underlying dispute. An interim injunction was granted and remains in force effective in Spain, albeit currently under appeal.

7. Pursuant to an undertaking given to the Spanish court, JHA commenced arbitration proceedings against IKC pursuant to an arbitration clause in the EPC Contract which provided for disputes to be referred to arbitration in London under ICC Rules. The Request for Arbitration was lodged on 15 May 2025.

8. On 29 October 2025, IKC issued proceedings against Santander in the Commercial Court seeking payment under the Bonds. JHA applied to intervene in those proceedings on the basis that they were interested parties, but their application was refused and their appeal against its dismissal was rejected by the Court of Appeal. The current position is accordingly that there is no impediment to IKC seeking payment under the Bonds outside Spain.

9. The hearing before me arises from an application filed in the arbitration by JHA on 12 November 2025 seeking interim measures. As originally formulated, the application asked the Tribunal for orders (in essence) that IKC immediately suspend and withdraw its Commercial Court proceedings against Santander, withdraw its call on the Bonds; and refrain from making any further calls on the Bonds. The application was subsequently amended to abandon the application for wholesale withdrawal of the Commercial Court proceedings and any relief in respect of the Advance Payment Bond but otherwise the relief sought remained materially the same.

10. By its reasoned decision contained in PO4, the Tribunal refused the application.

11. Article 28.1 of the ICC Rules provides as follows:

"Unless the parties have otherwise agreed… the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate… Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate."

12. Section 68 of the Act provides in material part as follows:

"(1) A party to arbitral proceedings may… apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –

> …
>
> *(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);*
>
> *(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties.*
>
> *…"*

13. Challenges are mounted by JHA under sections 68(2)(b) and 68(2)(c). Both are premised on the assertion that there was an agreement between the parties that applications for interim measures would be determined by reference to *"international standards"* as set out in Professor Gary Born's textbook on *International Commercial Arbitration (3rd ed., 2021, supp. 2024)*, and in particular by reference to a merits threshold which only required JHA to show a *prima facie* case (the "***prima facie* test**"). JHA's case is that this agreement both delimited and circumscribed the otherwise wide power conferred on the Tribunal by Article 28.1. Instead, however, the Tribunal held that a higher merits threshold applied (the "**enhanced test**") and found that JHA failed to surmount this threshold with the result that relief was refused. JHA argue that application of the enhanced test was contrary to the parties' agreement and that the Tribunal thereby necessarily exceeded its powers and failed to conduct the proceedings in accordance with the agreed procedure. As to the requirement in section 68 to show substantial injustice, the Tribunal made clear that, had it been necessary to do so, it would have held that all other requirements for relief had been met by JHA and that it would therefore have been *"more likely"* to grant the application if the merits threshold had also been surmounted. JHA submit that it is self-evident in these circumstances that the irregularity has caused or will cause substantial injustice.

14. JHA's case is denied in every particular by IKC. First, it says that the challenge fails *in limine* because section 68 only permits challenges to "awards" and PO4 was not an award but, as its title suggests, a procedural order dealing with interlocutory matters. Secondly, it says that there was no agreement as alleged but, thirdly, if there was it was not an agreement which circumscribed the Tribunal's powers or related to "procedure". Fourthly, JHA cannot show substantial injustice. Fifthly, JHA have in any event waived their right to bring a challenge by operation of section 73 of the Act.

15. In short, Ms Nehali Shah KC, who appeared for IKC, contends that this is in reality a thinly-disguised attempt by JHA to challenge the Tribunal's conclusion of law as to the appropriate merits threshold to be applied. This is refuted by Mr Laurence Rabinowitz KC on behalf of JHA. He accepted that under the ICC Rules, appeals on questions of law are precluded. He also accepted that the question of whether PO4 is an award, and whether there was in fact any agreement between the parties are both fundamental threshold issues and that JHA have to succeed on both if their challenge is to get off the ground.

16. I propose to address the issues in the following order:

    (a) Award or no award

    (b) Section 68:

        (i) Was there an agreement and, if so:

        (ii) Did it have the effect of circumscribing the Tribunal's powers for the purposes of section 68(2)(b)?

        (iii) Did it relate to "procedure" for the purposes of section 68(2)(c)?

    (c) Substantial injustice

    (d) Waiver

Award or no award

17. The question of whether a particular determination by a tribunal amounts to an award or not is nothing new. The Act itself does not contain any definition of an award and it was common ground before me that the applicable guidelines in this respect were accurately summarised by Cockerill J (as she then was) in *ZCCM Investment Holdings plc v Kansanshi Holdings plc,* [2019] EWHC 1285 (Comm); [2020] 1 All ER (Comm) 132 at [40] as follows:

    "(a) The Court will certainly give real weight to the question of substance and not merely to form: Emmott *at [18] (by concession);* Russell on Arbitration *(24th edn, 2015) at [6–003].*

    (b) Thus, one factor in favour of the conclusion that a decision is an award is if the decision is final in the sense that it disposes of the matters submitted to arbitration so as to render the tribunal functus officio, *either entirely or in relation to that issue or claim:* Cargill *at 5,* The Smaro *at 247;* Enterprise Insurance *at [39].*

    (c) The nature of the issues with which the decision deals is significant. The substantive rights and liabilities of parties are likely to be dealt with in the form of an award whereas a decision relating purely to procedural issues is more likely not to be an award. Brake *at [25],* The Smaro *at 247–248;* Emmott *at [19]–[20],* Cargill *at 5,* The Trade Fortitude *at 175.*

(d) There is a role however for form. The arbitral tribunal's own description of the decision is relevant, although it will not be conclusive in determining its status: The Trade Fortitude *at 175,* Emmott *at [19]–[20].*

(e) It may also be relevant to consider how a reasonable recipient of the tribunal's decision would have viewed it: Emmott *at [19];* Ranko *at 4.*

(f) A reasonable recipient is likely to consider the objective attributes of the decision relevant. These include the description of the decision by the tribunal, the formality of the language used, the level of detail in which the tribunal has expressed its reasoning: Emmott *at [19]–[20];* Uttam Galva Steels *at [29];* The Trade Fortitude *at 175;* The Smaro *at 247.*

(g) While the authorities do not expressly say so I also form the view that:

(i) A reasonable recipient would also consider such matters as whether the decision complies with the formal requirements for an award under any applicable rules.

(ii) The focus must be on a reasonable recipient with all the information that would have been available to the parties and to the tribunal when the decision was made. It follows that the background or context in the proceedings in which the decision was made is also likely to be relevant. This may include whether the arbitral tribunal intended to make an award: The Smaro *at 247,* Ranko *at 4."*

18. I bear in mind, of course, that these are only guidelines and that there are no hard and fast rules. The assessment is intensely fact-specific and depends on the particular circumstances of the individual case. Moreover, while the Tribunal's own description of its decision as a "Procedural Order" is a factor to be taken into account, it is not determinative.

19. In the present case, it is undoubtedly true that PO4 was a final order in the sense that it finally determined JHA's application for interim measures. However:

(a) The application was expressly described as an application for *"interim and conservatory measures".* There is no hint that JHA were inviting the determination of any preliminary issues on a definitive basis. On the contrary, JHA's own written and oral submissions to the Tribunal asserted repeatedly, in both the initial application and in reply, that they were *not* seeking any substantive relief and were *not* asking for any finding or pre-judgment on the merits but were merely seeking to preserve the *status quo* until a final award.

(b) JHA further emphasised on multiple occasions the conservatory nature of the relief sought. Indeed they made clear that they were not seeking the return of the Bonds as part of the application but were willing to extend them as a condition of obtaining the relief sought. Mr Rabinowitz sought to place weight on the fact that IKC argued that the relief sought by JHA was not in fact interim or conservatory because it carried a substantial risk that IKC would be permanently precluded from receiving the bond proceeds. However, the way in which IKC sought to characterise JHA's application for its own forensic purposes is, with respect, irrelevant.

(c) The Tribunal expressly declined to decide whether IKC had a right to call on the Bonds pending resolution of the dispute. At paragraph 73 of its Reasons, it stated that:

"These matters give rise to complex factual and legal arguments that it is not possible or appropriate for the Tribunal to address at this stage of the proceedings. The issues are those that the Tribunal will ultimately have to determine in its final award. Further, a finding to the effect that JHA had clearly established that IKC was precluded

from calling on the Performance Bond would run the risk of prejudging the merits of what is a complex dispute as to whether JHA was entitled to terminate the EPC Contract and, if so, as to the consequences of that termination. Nor could JHA establish a right to the relief sought without making good its case on termination. This is because if IKC's, not JHA's, termination of the EPC Contract was valid then JHA was only able to argue that the call on the Performance Bond was "premature" on the basis that it pre-dated a determination of the sums due to JHA from IKC upon a termination for default.

(d) In no sense could it therefore be said that the Tribunal was *functus officio*. On the contrary, as Mr Rabinowitz accepted, it was still open to the Tribunal to find in JHA's favour on the construction of the EPC Contract and hold that IKC's calls were in fact unlawful and make an award of damages by way of compensation.

(e) As such its decision did not dispose finally of any substantive rights. The most that could be said is that it confined JHA to a remedy in damages in the event that IKC managed successfully to draw down on the Bonds prior to a final award.

(f) The grant or refusal of interim relief is a matter of discretion. The Tribunal's refusal of relief in the exercise of its discretion in this case was an archetypal discretionary interim ruling which did not preclude a further application by JHA in the future.

(g) Article 28.1 provides that an order for interim measures may take the form of order or an award as the tribunal considers appropriate. In this case, it must be supposed that the Tribunal considered it appropriate to embody its decision in a procedural order rather than an award.

20. This is an unpromising start for an argument that PO4 is nonetheless an "award". Indeed, it might well be thought to be all but unarguable, but that would be to underestimate the persuasive powers of Mr Rabinowitz. His altogether more subtle argument was that PO4 did have substantive effect because it effectively determined the contractual allocation of risk in so far as the Tribunal refused to restrain IKC from calling on the Performance Bond. He submitted that pending trial, the risk of termination should fall on IKC.

21. Attractively as the argument was presented, I am unable to accept it, not least because it begs the question. The contractual allocation of risk depends on the provisions of the contract. It is therefore inextricably tied to the construction of the contract and flows automatically once that construction has been determined. To say that the contractual allocation of risk can be decided before the underlying question of construction has been resolved is a logical nonsense. However, the Tribunal in this case expressly declined to determine the latter at this stage.

22. Undeterred, Mr Rabinowitz nonetheless argued that the Tribunal's decision materially impacted JHA's substantive rights because (as the Tribunal accepted) there was a real risk that if IKC called on the Bonds it might be unable to repay if JHA were ultimately successful. The refusal of interim relief thus had the effect of *"hollowing out"* JHA's rights and rendering them nugatory. He argued that this in itself was a matter of substance because, even if the decision did not dispose of the underlying issue as a matter of law, it determined whether JHA's rights had any value in practical terms.

23. The problem with this is that commercial impact is entirely distinct from substantive determination of a contractual right. Indeed, commercial considerations of this nature are simply part and parcel of the balance of hardship assessment that every court or tribunal necessarily has to conduct when deciding – as a matter of *discretion* – whether or not to grant interim relief.

24. For all these reasons, I reject JHA's submission that PO4 reflected any substantive determination of IKC's ability to call on the Performance Bond pending resolution of the underlying dispute. As stated above, this is still at large.

25. As for formal considerations, section 52 of the Act provides that the parties are free to agree on the form of any award. In this case their agreement imported the ICC Rules. Ms Shah relied strongly on the fact that the mandatory provisions of the Rules were not complied with in this case, in that the Tribunal did not send a draft of its decision to the ICC court as required by Article 34 in the case of an award, and further the ruling was not notified to the parties by the Secretariat as contemplated by Article 35.

26. It may be a nice question whether agreement to arbitrate under ICC Rules necessarily means that the form of an award prescribed under the Rules necessarily also determines whether a ruling is substantively an award for the purposes of section 68 of the Act. It could be said that a document which does not qualify as an ICC award may nonetheless still be an award within section 68. If all other indicia had pointed to this being an award as a matter of English law, I would have been inclined to hold that failure to conform to each and every formal requirement of the ICC Rules was not fatal. The decision of the Paris Court of Appeal in *Braspetro,* [2000] ASA Bull. Vol. 18 No. 2 p. 1056 provides some support for this view. Be that as it may, there is in fact nothing in the formal aspects of PO4 to suggest other than that it was (and was intended by the Tribunal to be) an interim procedural order which did not determine any substantive questions.

27. Nor can JHA derive assistance from authority. Mr Rabinowitz relied on two cases in particular. However, *YDU v SAB,* [2022] EWHC 3304 (Comm) was a completely different case where the decision in question was on any view an award and the only issue was whether the arbitrators' reservation of a power to revisit and vary it in the future meant that it was not final and binding. Mr Justice Butcher held that the award was final and binding since on a proper reading the tribunal had not intended that it could be revisited absent a change of circumstances. The facts were therefore a long way from the present and certainly did not raise the distinction between interim and substantive relief. *Lord v Kinsella,* [2023] EWHC 2748 (Ch), [2023] 2 Lloyd's Rep. 677 was likewise not concerned with any application for interim relief but with a substantive determination which was initially issued as an interim award and later re-issued as a final award thereby raising a question as to when time started running for limitation purposes.

28. Taking all these factors into account, there is in my judgment no proper basis for saying that PO4 was an award or that any reasonable recipient with all the information available to the parties and the tribunal would have so regarded it. The Tribunal's decision is therefore unchallengeable and JHA's application fails at the first hurdle.

29. In these circumstances, it is not strictly necessary for me to consider the remaining issues. However, I heard full argument on them and it is therefore right for me to express my views, if only as a matter of courtesy.

Section 68

30. I preface this section by noting that section 68 was included in the Act as a longstop provision designed to provide a remedy *"in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected"*: see *Lesotho Highlands Development Authority v Impregilo SpA,* [2005] UKHL 43; [2006] 1 AC 221 at [27] *per* Lord Steyn. Further, *"the list of irregularities under section 68 may be divided into those which affect the arbitral procedure, and those which affect the award. But nowhere in section 68 is there any hint that a failure by the tribunal to arrive at the 'correct decision' could afford a ground for challenge under section 68."* (At [29]). At [32], Lord Steyn identified the relevant distinction as being between an excess of power

and the erroneous exercise of an available power. The latter is not of itself an excess of power challengeable under the section, nor is a mere error of law.

31. None of this was controversial and indeed, as I have already noted, Mr Rabinowitz expressly accepted that he cannot complain that the Tribunal made a mistake of law, and that the mere erroneous exercise of a power which it did possess could not fall within section 68(2)(b).

32. However, he submitted, and I accept, that by virtue of sections 39(1) and 39(4) of the Act, the powers of an arbitration tribunal are both created and delimited by the agreement of the parties with the Act stepping in to fill any gaps where there is no relevant agreement. I also accept his further submission that the tribunal itself cannot be the arbiter of whether it is acting within its powers and that a mere assertion that it has power to do something is irrelevant if in fact it does not.

33. In the present case, the parties indisputably agreed to arbitrate under ICC Rules, including Article 28 which conferred a very broad discretionary power on the Tribunal so far as concerned interim measures. Article 28 itself said nothing about how the Tribunal should set about determining such an application. On the face of it, it was open to the Tribunal in the exercise of its discretion under the article to apply a *prima facie* merits threshold, or an enhanced threshold or even no merits threshold at all and it might therefore be thought difficult to characterise its discretionary refusal of interim relief as an excess of power.

34. Nonetheless, JHA argued that the apparently wide powers conferred by Article 28 were limited in this case by a specific agreement between the parties that applications for interim measures should be exercised in accordance with "international principles" as set out in *Born (supra)*. Both limbs of JHA's challenge under section 68 derive from this alleged agreement and if the agreement cannot be established, that is independently fatal to the entire application, irrespective of whether PO4 was an award or not.

The alleged agreement

35. There is no formal written agreement between the parties prescribing the test to be applied by the Tribunal in relation to Article 28. JHA attempt to spell one out of the fact that in a previous application made to the Tribunal by *IKC* for interim measures it was common ground that "international principles" should be applied. It is therefore necessary to describe the nature of IKC's application and how it arose.

36. On 1 September 2025, IKC applied to the Tribunal under Article 28.1 for an order that JHA should transfer their contractual rights to IKC so as to enable completion of the project. It also asked, among other things, for an order requiring JHA to release the performance bonds provided by IKC's sub-contractors, alternatively restraining JHA from calling on the sub-contractor bonds. In its application IKC submitted that *"The principles by which this Application should be determined can readily be derived from sources of international arbitral practice"* and then set out the following passage from *Born* Ch. 17 before going on to submit that the *prima facie* test was met:

> *"Stated generally, most international arbitral tribunals will order provisional measures only where the party requesting such relief has made showings of (a) a risk of serious or irreparable harm to the claimant; (b) urgency; and (c) no prejudgment of the merits, while some tribunals also require the claimant to establish (d) a prima facie case on the merits; (e) a prima facie case on jurisdiction; and (f) a balance of hardships weighing in its favor. Considered more closely, and as detailed below, most arbitral tribunals also look to the nature of the provisional measures that are requested, and the relative injury likely to be suffered by each party, in deciding whether to grant such measures."*

37. In response, JHA:

(a) emphasised that under Article 28.1, a grant of interim measures must be deemed *“appropriate”* by the Tribunal and that it *“must refuse an application for interim or conservatory measures if it deems that the requested measures would not be appropriate”*;

(b) accepted that an order for interim relief generally presupposed an urgent need for interim protection but also noted that tribunals had held that:

“the arbitrator must satisfy himself that irreparable harm would be caused to Claimant and that the measures are urgent; the arbitrator also has to be convinced of the likelihood of success of Claimant's position on the merits."

(c) further submitted that:

“transnational requirements for interim measures are generally agreed to involve consideration of at least the following:

(a) prima facie jurisdiction;
(b) likelihood of success on the merits;
(c) irreparable harm (that is harm that cannot be made good by an award of damages);
(d) urgency; and

(e) reasonableness and proportionality (which includes a consideration of the likely harm to the respondent and other factors, including as to whether an order to post security may be appropriate...”

but

(d) expressly recognised that even if these requirements were met, *“consideration of other factors may well still militate against the grant of interim relief.”*

38. In its reply submissions, IKC acknowledged that JHA had agreed with the applicable legal principles, but disputed their attempt to import a higher English law standard into the assessment of irreparable harm. It also maintained that JHA’s reference to a merits test of “likelihood” was based on a mistaken assumption that IKC’s application sought to pre-judge the merits of the dispute, which it denied.

39. The areas of disagreement between the parties in relation to IKC’s application thus related to (i) whether it was necessary for IKC to show a likelihood of success on the merits because the application was not in truth for purely interim relief; and (ii) the meaning of “irreparable harm”, i.e., whether it meant harm that could not be compensated by a monetary award as under English law (JHA) or whether it was sufficient that the harm was serious even if compensable in damages.

40. The Tribunal determined IKC’s application by its Procedural Order No. 1 (“**PO1**”) where it stated the following under the heading *“Applicable Legal Test”*:

“15. The Tribunal discerned at the CMC that the applicable legal test for the grant of interim relief was generally common ground, the only real difference between the Parties being as to the meaning of irreparable harm.

16. Article 28(1) of the ICC Rules provides that:

'Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.'

17. Both parties relied on the standards for interim relief in International Arbitration as listed in G Born, International Commercial Arbitration, "Chapter 17: Provisional Relief in International Arbitration", 3rd Ed at page 17. Stated generally those criteria require the party seeking interim relief to demonstrate:

(i) Prima facie jurisdiction to make the order;
(ii) No prejudgment of the merits;
(iii) A prima facie case on the merits;
(iv) A risk of serious or irreparable harm;
(v) Urgency; and

(vi) A balance of hardships weighing in favour of the applicant.

18. Born goes on to state, in the Tribunal's view rightly, that:

'Considered more closely, and as detailed below, most arbitral tribunals also look to the nature of the provisional measures that are requested, and the relative injury likely to be suffered by each party, in deciding whether to grant such provisional measures that are requested, and the relative injury likely to be suffered by each party, in deciding whether to grant such measures. In particular, some provisional measures (e.g. preserving the status quo or ordering performance of a contact or other legal obligation) will typically require strong showings of serious injury, urgency and a prima facie case, while other provisional measures (e.g. preservation of evidence, enforcement of confidentiality obligations, security for costs) are unlikely to demand the same showings.' "

41. The Tribunal's express citation at paragraph 18 of the further passage from *Born* is important because it demonstrates an acceptance that even the international standards previously identified in sub-paragraphs (i)-(vi) do not prescribe rigid tests but yield to the specific circumstances of the case.

42. In the event, the Tribunal held that IKC's application was effectively for specific performance and not for interim or conservatory relief. For that reason, it held that a *prima facie* merits test was not appropriate and that an enhanced test should apply, namely that of a *"particularly strong case"*. It concluded that the enhanced test was not met and refused the application on that basis. It did not opine on the test that it would have considered appropriate if the application had been for purely interim relief but it can be inferred that it may well have applied the *prima facie* test subject to any case-specific factors.

43. Based on this material, JHA's argument ran as follows:

(a) IKC's position in the IKC application was that international standards as articulated in heads (a)-(f) in the passage from *Born* (see paragraph 36 above) applied without more and these principles (including the *prima facie* test) were agreed between the parties so far as applications for interim measures were concerned. IKC had not suggested that there might be possible exceptions.

(b) The Tribunal had recorded in PO1 that the applicable test was *"generally common ground"* except for the meaning of irreparable harm.

(c) At least in so far as IKC was seeking to restrain JHA from calling on the sub-contractor performance bonds, there was identity between the IKC application and JHA's application. If heads (a)-(f) of *Born* were thought appropriate by IKC for its own application it must be treated as agreeing that they were equally appropriate where the same relief was sought by JHA.

(d) There was therefore agreement as to the test to be applied in relation to applications for interim measures and nothing to suggest that a different test should be applied to restrain JHA's call on the Performance Bonds.

44. In their written submissions before me, JHA raised a further argument that IKC could not approbate and reprobate and that, having argued in the IKC application for a *prima facie* test, it could not now turn round and argue for an enhanced test in the JHA application. However, Mr Rabinowitz accepted that this added little to his argument other than superficial forensic appeal. Either he established an agreement or he did not. If he did, the approbation/reprobation argument was unnecessary; if he did not, it could not save him.

45. On the critical point, I find myself completely unable to discern any agreement between the parties in the first place for the following reasons.

46. First, whether or not there was an agreement must be determined objectively in accordance with ordinary contractual principles. However:

(a) The fact that a particular proposition may have been *"common ground"* (as recorded by the Tribunal) is not the same as an agreement with contractual consequences. There is, as it seems to me, a world of difference between accepting/not disputing a proposition for the purposes of a particular application under Article 28.1 and agreeing that it should apply across the board to all future applications under the article even if not then in contemplation.

(b) IKC's submissions in the IKC application about the test to be applied by the Tribunal were expressly limited to *"the principles by which **this Application** should be determined"* and to *"the **present Application**."* This offers no basis for saying that it was also agreeing that the same test should be applied to any subsequent application under Article 28, irrespective of when made, by whom or for what.

(c) Although Mr Rabinowitz argued that IKC did not suggest that there might be exceptions to *Born's* heads (a)-(f), this is not in fact true. Paragraph 20 of IKC's submissions (set out at paragraph 36 above) expressly referred to most arbitral tribunals *also* looking at the nature of the measures requested. But in any event, IKC had no particular reason to suggest that there might be exceptions since it did not understand its position to be substantially contested if in fact the application were regarded by the Tribunal to be truly interim rather than substantive.[1]

47. Secondly, I consider that an agreement must be clear if it is to have the effect of circumscribing the Tribunal's powers or prescribing a particular procedure. Yet the nature and extent of any agreement between the parties in this case is very far from clear:

(a) IKC's submission was that its application was for interim relief and that the *prima facie* test therefore applied. JHA's case was that it was not an application for interim relief and that an enhanced test of likelihood applied. In that regard, the parties were like ships passing in the night. Mr Rabinowitz submitted that they were nonetheless *ad*

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[1] It is true that an alternative part of IKC's application was for genuine interim relief restraining JHA from calling on the sub-contractor bonds pending determination of the dispute. However, this aspect of the application was not specifically addressed by the Tribunal and it seems likely that it was simply overlooked.

idem as regards the appropriate test for interim relief but even that is not entirely free from doubt, since JHA's submissions (set out in paragraph 37.(c) above) referred to the likelihood test as part of the international standards which they now say incorporated the *prima facie* test. I cannot find in this any unambiguous agreement as to the appropriate test to apply to a genuine application for interim relief. Whether the parties thought they were agreed or not cannot be determinative and in any event there was undoubtedly a difference between them on the meaning of irreparable harm. Once it becomes necessary to say that there was agreement on some aspects of international principles but not others, the suggestion that there was any agreement at all rapidly starts to lose credibility.

48. Thirdly, Mr Rabinowitz's submission before me that the parties had agreed to apply international standards as reflected in *Born*'s heads (a)-(f) without qualification is inconsistent not only with IKC's submissions (see paragraph 46.(c) above), but also with JHA's own express submission that the Tribunal must refuse interim measures if it deemed them inappropriate in the given circumstances and that in some cases other factors could be brought into account (see paragraphs 37.(a)37.(b)37 above). To my mind this is wholly inconsistent with an agreement that a *prima facie* test was to be applied in all cases.

49. I am fortified in this conclusion by the following further considerations:

(a) PO1 did not embody any finding by the Tribunal that there had been a specific agreement as to the merits threshold to be applied. It merely said that both parties had relied on the standards set out in *Born* and that this approach was *"generally agreed"*. It is instructive that the Tribunal itself then went on to quote the further passage from *Born* which indicated that there may be particular reasons in specific cases for taking other factors into account (effectively what it did in the JHA application).

(b) When it came to JHA's own application, JHA merely submitted that Article 28 was contractually binding and that the Tribunal could not go outside it. They never suggested in their submissions that there had been any *agreement* between the parties as to the appropriate merits test by virtue of PO1 with which the Tribunal was bound to comply to the exclusion of any case-specific factors that might otherwise have led to a departure from *Born*'s (a)-(f). On the contrary, JHA simply recited the Tribunal's own wording in PO1 that *"the applicable legal test for the grant of interim relief is* 'generally common ground'*",* and drew attention to the fact that IKC had previously accepted international principles without reservation in its *own* application. This not only begs the question as to what those international standards were and whether or not they could yield to any case-specific factors, but also casts doubt on any assertion that the supposed agreement extended beyond IKC's application.

(c) Since IKC's submissions in response to the JHA application referred to an enhanced test being applicable in exceptional cases even for genuinely interim relief, it might have been expected that JHA's immediate riposte would have been that this argument was not open to IKC because of their prior agreement. Instead, far from relying on any supposed agreement, JHA submitted orally – twice – that it did not matter whether a *prima facie* or an enhanced test applied because they could meet either. There was no suggestion that the enhanced test was only relevant if they failed in their primary submission that there had been agreement to the *prima facie* merits test.

(d) The Tribunal itself clearly did not believe that there had been any prior agreement arising from IKC's application which circumscribed its approach to PO4. In its Reasons, it stated that it had summarised the standards it considered generally applicable in paragraph 17 of PO1 but went on to say that the nature of the relief sought by JHA justified application of an enhanced merits threshold. It expressly said that it did not find the submissions previously made by IKC in relation to PO1 *"particularly helpful when those submissions were made in the context of a different application and different relief."* If the Tribunal had thought that it was precluded from applying an enhanced test by an agreement between the parties, it would surely have said so. Mr Rabinowitz accepted that the Tribunal did not apparently consider that there had been any such agreement but said that this was irrelevant if the court found that in fact there was. That, of course, is correct, but it is nonetheless indicative.

50. As it is, JHA's entire argument before me appears to be an ingenious, albeit misconceived, afterthought. There comes a point where it is simply impossible to make bricks without straw and in relation to the alleged agreement asserted by JHA the harvest appears to have been particularly meagre.

51. Looking at the matter objectively, I find that there was no agreement to the effect alleged.

Section 68(2)(b)

52. Even if the alleged agreement had been established, I do not accept that it had the effect of limiting the Tribunal's powers under Article 28 such that there was an excess of power within section 68(2)(b). Undoubtedly, the Tribunal had the power to grant or refuse interim measures in the exercise of its discretion. It may have been right about the correct merits threshold to apply, or it may have been wrong. That, however, was a decision on a question of law which it is not open to JHA to challenge. At the most, it was an erroneous exercise of a power which the Tribunal undoubtedly possessed, although even that seems to me to be something of a mischaracterisation. As pointed out by HHJ Waksman QC (as he then was) in *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd,* [2016] EWHC 2361 (Comm); [2017] Bus LT 227 at [42]:

"41. ... [T]he relevant power here is the undoubted power to award costs. If the arbitrator fell into error, it was an error as to the scope of such costs by reason of his allegedly erroneous interpretation of section 69(1)(c) and article 31(1).

42. I accept that, if one characterised the relevant power as being the power to order that one side pays the other side's costs of obtaining litigation funding, or conversely, the power to order by way of costs such sums which do not include the costs of litigation funding, one could say as a matter of language that he was exercising a power that he did not have. But, if that was the correct approach, one could re-describe many, if not all, errors of law in that way. Indeed, an erroneous exercise of power itself could in theory almost always be re-described as an excess of power. However, according to the Lesotho Highlands Development Authority *case [2006] 1 AC 221, there is a real and vital distinction to be made between the two. In my judgment, to characterise the arbitrator's error here in that way would be wholly unrealistic and artificial, and it goes against the grain of the strict and narrow confines in which section 68 is to operate."*

53. The same can be said of the present case.

Section 68 (2)(c)

54. For much the same reasons, I reject the submission that the alleged agreement related to the procedure by which the arbitration was to be conducted. JHA relied on *Dicey, Morris & Collins, Conflict of Laws* §32-191 in support of an argument that an application for interim relief is essentially procedural. They argued that the agreement was accordingly an agreement about procedure because it regulated what the Tribunal was to do.

55. It will immediately be appreciated that this submission sits rather uncomfortably alongside JHA's argument that PO4 was an award because it dealt with a substantive issue. But in any event, I regard it as unarguable.

(a) I accept Ms Shah's submission that the agreement as to procedure contemplated by section 68(2)(c) is focused on questions of due process such as: by whom the issues are to be determined, whether the tribunal should possess any particular qualifications or be independent[2], where and when any determination should take place, the scope and extent of any disclosure, the manner in which evidence is to be adduced, whether submissions are to be written and/or oral, or what time limits should be applied.

(b) If there was any agreement in this case, it was an agreement as to the applicable merits test to be applied as a matter of substantive law. True it is that an application for interim relief is generally a procedural matter but that cannot mean that the principles by which the application is to be determined themselves become procedural. In this connection, it should be noted that *Lesotho* at [29] refers to irregularities affecting the *"arbitral procedure"*, not the substantive legal principles to be applied by the arbitrators.

(c) Moreover, the mere fact that Article 28 was a procedural agreement does not mean (as Mr Rabinowitz sought to argue) that any carve-out or qualification to that agreement is itself a procedural agreement. I was not referred to any authority where a similar question was held to be a matter of procedure, and I agree with Ms Shah that if that were the case it would drive a coach and horses through *Lesotho* and controvert the settled position of English law that section 68 cannot be used to challenge an erroneous exercise of power or an error of law. In this connection, Mr Rabinowitz referred to a passage in *Secretary of State for Defence v Turner Estate Solutions Ltd,* [2014] EWHC 244 (TCC) where Mr Justice Ramsay stated at [84] that *"The procedure in an arbitration is generally aimed at setting out a process to define the issues to be determined and then establishing the process by which those issues are to be determined."* However, that seems to me, if anything, to support Ms Shah's submission that section 68(2)(c) is looking at due process. In that case there had been an agreement that the tribunal should determine liability and quantum in relation to certain Change Proposals. The tribunal held that the agreement did not apply where there had been a change of circumstances and a section 68 challenge failed on the basis that the agreement was as to the issues to be determined, not the procedure by which they were to be determined.

56. Accordingly, neither sub-section 68(2)(b) nor 68(2)(c) is triggered by the alleged agreement and the application fails for this reason as well.

57. In these circumstances, it is unnecessary to consider a further point raised by the court in relation to the requirement in section 5 of the Act that any agreement be in writing. The section further provides as follows:

"(2) There is an agreement in writing –

(a) if the agreement is made in writing (whether or not it is signed by the parties),
(b) if the agreement is made by exchange of communications in writing, or
(c) if the agreement is evidenced in writing.

…

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the

[2] As in *PAO Tatneft v Ukraine,* [2019] EWHC 3740 (Ch).

agreement.

(5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

(6) References in this Part to anything being written or in writing includes its being recorded by any means."

58. Mr Rabinowitz submitted that the agreement in this case was evidenced in writing by virtue of having been recorded in PO1 by the Tribunal which had the authority of the parties to do so as part of the necessary exercise of its functions. Alternatively, it was recorded by IKC in its reply submissions, alternatively made by an exchange of submissions.

59. Since it was no part of JHA's case that the agreement was made *"otherwise than in writing"*, I do not see how sub-sections (4) or (5) could possibly apply. It would therefore be necessary to establish that the agreement was made by an exchange of communications within sub-section (2)(b). However, the only written exchanges relied upon by Mr Rabinowitz were the submissions of the parties in relation to PO1. Written submissions are primarily documents provided to the court or tribunal for the purposes of a specific application or hearing. As such, I find it difficult to categorise them as "communications" and I suspect that most commercial parties and their advisers would be surprised and somewhat disconcerted by the idea that acceptance of a particular proposition for the purposes of a particular hearing could have the contractual consequences alleged here.

Substantial injustice

60. While it may only be cold comfort, I am quite satisfied that JHA would have comfortably cleared the hurdle of showing substantial injustice. The authorities are clear that a successful section 68 challenge does not require it to be shown that the application *would* have succeeded had the *prima facie* test been applied, merely that the outcome might well have been different and the latter is clear from the Tribunal's own Reasons.

Waiver

61. Since the application fails in any event, it is unnecessary to address the question of waiver.

Conclusion

62. PO4 is not an award. There was no serious irregularity on the part of the Tribunal whether by exceeding its powers or by failing to conduct the proceedings in accordance with a procedure agreed by the parties. The application accordingly fails.

63. I am grateful to Mr Rabinowitz and Ms Shah for their submissions. However, given the comparative paucity of advocacy opportunities available to junior barristers these days, I would hope that their juniors may have the chance to address me in relation to any consequential matters should that be necessary. The juniors of today are, after all, the leaders of tomorrow and it is important that they are able to gain sufficient experience to prepare themselves properly for that day when it comes.