Neutral Citation Number: [2020] EWCA Civ 145

Case No: A4/2019/2690

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
Mr Justice Phillips
[2019] EWHC 1994 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/02/2020

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE NEWEY
and
LORD JUSTICE MALES

- -

Between:

MINISTRY OF DEFENCE & SUPPORT FOR ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN	**Appellant**
- and -	
INTERNATIONAL MILITARY SERVICES LIMITED	**Respondent**

- -
- -

Lord Anderson QC and Mr David Heaton (instructed by **Stephenson Harwood LLP**) for the **Appellant**
Mr Joe Smouha QC and Mr Tom Ford (instructed by **Clifford Chance LLP**) for the **Respondent**

Hearing dates: 22-23 January 2020

- -

Approved Judgment

Lord Justice Newey:

1. This appeal concerns the liability of the respondent, International Military Services Limited ("IMS"), for interest on sums which an arbitral panel has found to be due to the appellant, Ministry of Defence & Support for Armed Forces of the Islamic Republic of Iran ("MODSAF"). MODSAF has since 2008 been subject to the European Union ("EU") sanctions regime now embodied in Council Regulation (EU) No 267/2012 ("the 2012 Regulation"). In a judgment dated 24 July 2019, Phillips J concluded that MODSAF is precluded from enforcing the interest component of the relevant arbitration award as regards the period since it became subject to the sanctions regime. MODSAF appeals against that decision.

2. It is worth stressing the limited ambit of what we are deciding. In the first place, there is no issue before us as to whether IMS can make any payment to MODSAF. MODSAF is frustrated that, four decades on from the events giving rise to arbitration awards in its favour and 18 years after those awards were made, it has still received nothing. However, it is common ground between the parties that, as things stand, the 2012 Regulation means that IMS cannot lawfully pay MODSAF anything. The question we have to determine relates to liability, not payment.

3. A second point is that the appeal does not concern either the principal sum awarded to MODSAF or interest up to 2008. The appeal is limited to liability for interest in respect of the period since 2008 and so relates to a relatively small proportion of the sums which MODSAF claims pursuant to the arbitration awards. We were told that the amount at stake on the appeal is in excess of £20 million. That is a significant sum, but it represents only a fraction of the £127,651,823 plus interest from 1984 to which MODSAF has been found to be entitled.

4. In essence, the issue raised by the appeal is whether the 2012 Regulation operates to deprive MODSAF of any right to interest as regards the period during which it has been subject to the EU's sanctions regime.

Basic facts

5. In the 1970s, IMS, whose shares are held by the United Kingdom's Ministry of Defence and Treasury, contracted to supply tanks and armoured recovery vehicles to what is now MODSAF. Each contract contained an arbitration clause providing for disputes to be determined by way of International Chamber of Commerce ("ICC") arbitration with The Hague as the place of arbitration.

6. The contracts were terminated following the Iranian Revolution of 1979. Disputes subsequently arose as to the balance of accounts between the parties in consequence of which MODSAF (in 1990) and IMS (in 1996) both initiated arbitrations. On 2 May 2001, the arbitral tribunal rendered a final award in each arbitration. As regards the MODSAF claim, the tribunal determined that IMS was liable to pay MODSAF £140,599,570 in respect of the termination of the contracts, that interest on that sum should be paid "from 28 July 1984 to the date of payment at the LIBOR rate + 0.5%", that IMS should pay MODSAF US $6,255,404 in respect of the latter's costs of the arbitration and that IMS was responsible to the ICC for US $1,143,750 for arbitration costs and expenses ("the 7071 Award"). As for IMS's claim, the tribunal concluded

that this should be dismissed and that IMS should pay MODSAF US $3,127,701 in respect of costs ("the 9268 Award").

7. MODSAF made without notice applications in the Commercial Court for permission to enforce the 7071 and 9268 Awards (together, "the Awards") in the same manner as judgments or orders of the High Court pursuant to section 101 of the Arbitration Act 1996. Morison J acceded to the applications on 31 July 2001, but IMS applied to set his orders aside. On 5 December 2002, the proceedings were stayed by consent pending the resolution of challenges to the Awards that IMS had brought in the Dutch Courts. The consent order provided, however, for IMS to pay into Court £382,500,000 by way of security in respect of any sums that might ultimately be determined to be due to MODSAF. The requisite payment into Court was made on 18 December 2002 and, with interest, the sum in Court had risen to more than £500 million by the time of the hearing before Phillips J.

8. IMS enjoyed only limited success in the Dutch proceedings. On 21 December 2006, the Dutch Court of Appeal reduced IMS's liability under the 7071 Award from £140,599,570 to £127,651,823. In other respects, however, the Awards were upheld and on 24 April 2009 the Supreme Court of the Netherlands dismissed an appeal from the Court of Appeal's decision.

9. By then, MODSAF had been added to the list of entities subject to the EU's sanctions regime relating to Iran. As I have already indicated, it is common ground that, in consequence, IMS has been (and remains) unable to make any payment to MODSAF under the Awards. MODSAF, however, maintains that there is no bar to the Court entering judgment in its favour and declaring the funds in Court to be held for its benefit. On that basis, it issued an application seeking such relief in 2012. On 1 May 2019, Moulder J gave directions for certain issues to be determined in advance of the full hearing of MODSAF's application. One of these was what has been called "the interest during the sanctions period issue", namely:

> "Should the Court refuse enforcement of any post-award interest element of the Awards pursuant to Articles 42 and/or Article 38 of the [2012 Regulation] and/or s. 103(3) of the [Arbitration Act 1996] in relation to the period since MODSAF became a designated entity (it being agreed that IMS is and has been unable to make payment to MODSAF since MODSAF was designated as a specific target of EU sanctions on 24 June 2008)?"

10. It was this issue which Phillips J determined in the judgment now under appeal. He held that article 38 of the 2012 Regulation precluded MODSAF from enforcing the interest component of the 7071 Award as regards the sanctions period and, hence, that the amount due pursuant to the Awards should be recalculated on that basis. MODSAF, however, challenges that conclusion in this Court.

11. For completeness, I should mention that, although IMS relied on article 42 of the 2012 Regulation before Phillips J, it did not pursue any argument founded on the provision before us.

The 2012 Regulation

12. The 2012 Regulation has its origins in the United Nations Security Council's resolution 1737 (2006) ("Resolution 1737"). This was passed in response to Iran's nuclear programme and decided, among other things, that all UN Member States should freeze funds, financial assets and economic resources of specified persons linked to that programme. Subsequent Security Council resolutions have emphasised "the importance of all States … taking the necessary measures to ensure that no claim shall lie at the instance of" a specified person "in connection with any contract or other transaction where its performance was prevented by reason of the measures imposed by" Resolution 1737 and its successors (see paragraph 17 of resolution 1803 (2008) and paragraph 35 of resolution 1929 (2010)).

13. In line with Resolution 1737, the EU's Council Regulation (EC) No 423/2007 ("the 2007 Regulation") provided for the freezing of funds and economic resources of various persons, entities and bodies. MODSAF was so designated with effect from 24 June 2008 pursuant to Council Decision 2008/475/EC.

14. The 2007 Regulation was amended to include a "no claims" provision by Council Regulation (EC) No 1110/2008 ("the 2008 Regulation"). A new article 12a of the 2007 Regulation now provided:

> "1. No claim for indemnity or any other claim of this type, such as a claim for compensation or a claim under a guarantee, notably a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, of whatever form, made by:
>
> (a) designated persons, entities or bodies listed in Annexes IV, V and VI;
>
> (b) any other person, entity or body in Iran, including the Iranian government;
>
> (c) any person, entity or body acting through or on behalf of one of these persons or entities
>
> in connection with any contract or transaction the performance of which would have been affected, directly or indirectly, wholly or in part, by the measures imposed by this Regulation shall be satisfied.
>
> 2. The performance of a contract or transaction shall be regarded as having been affected by the measures imposed by this Regulation where the existence or content of the claim results directly or indirectly from those measures.
>
> 3. In any proceedings for the enforcement of a claim, the onus of proving that satisfying the claim is not prohibited by paragraph 1 shall be on the person seeking the enforcement of that claim."

Recital (4) to the 2008 Regulation explained:

> "Regulation (EC) No 423/2007 imposed certain restrictive measures against Iran, in line with Common Position 2007/140/CFSP. As a result, economic operators are exposed to the risk of claims and it is therefore necessary to protect such operators permanently against claims in connection with any contract or other transaction the performance of which was affected by reason of the measures imposed by that Regulation."

15. The 2008 Regulation was foreshadowed in Council Common Position 2008/652/CFSP ("the 2008 Common Position"). Recital (10) to that stated:

> "The necessary measures should also be taken to ensure that no compensation is granted to the Government of Iran, or to any person or entity in Iran, or to designated persons or entities, or to any person claiming through or for the benefit of any such person or entity, in connection with any contract or other transaction where its performance was prevented by reason of the measures decided on pursuant to UNSCR 1737 (2006), 1747 (2007) or 1803 (2008), including measures of the European Communities or any Member State in accordance with, as required by or in any connection with the implementation of the relevant decisions of the Security Council."

Further, the 2008 Common Position provided for the amendment of the Common Position which had preceded the 2007 Regulation to include an article in these terms:

> "No compensation or other claim of this kind, such as a claim of set-off or a claim under a guarantee, in connection with any contract or transaction the performance of which was affected, directly or indirectly, wholly or in part, by reason of measures decided on pursuant to UNSCR 1737 (2006), 1747 (2007) or 1803 (2008), including measures of the European Communities or any Member State in accordance with, as required by or in any connection with the implementation of the relevant decisions of the Security Council, shall be granted to the designated persons or entities listed in Annexes I or II, or any other person or entity in Iran, including the Government of Iran, or any person or entity claiming through or for the benefit of any such person or entity."

16. The EU's restrictive measures against Iran are now embodied in the 2012 Regulation. As its heading indicates, chapter IV of the 2012 Regulation, comprising articles 23-29, relates to "Freezing of funds and economic resources". Article 23(1) and (2) provide for "All funds and economic resources belonging to, owned, held or controlled" by the persons, entities and bodies listed in Annexes VIII and IX to be "frozen". Article 23(3) then states:

> "No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of the natural or legal persons, entities or bodies listed in Annexes VIII and IX".

MODSAF is listed in Annex IX.

17. Article 23(3) is, however, qualified by article 29. In its present form, that provides:

> "1. Article 23(3) or Article 23a(3) shall not prevent the crediting of the frozen accounts by financial or credit institutions that receive funds transferred by third parties to the account of a listed person, entity or body, provided that any additions to such accounts shall also be frozen. The financial or credit institution shall inform the competent authorities about such transactions without delay.
>
> 2. Provided that any such interest or other earnings and payments are frozen in accordance with Article 23(1) or (2) or Article 23a(1) or (2), Article 23(3) or Article 23a(3) shall not apply to the addition to frozen accounts of:
>
> (a) interest or other earnings on those accounts; or
>
> (b) payments due under contracts, agreements or obligations that were concluded or arose before the date on which the person, entity or body referred to in Article 23 or Article 23a has been designated by the Sanctions Committee, the UN Security Council or by the Council."

18. The provision at the heart of this appeal is article 38, which is to be found in chapter VII, headed "General and final provisions". In its present form, article 38 is in these terms:

> "1. No claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this Regulation, including claims for indemnity or any other claim of this type, such as a claim for compensation or a claim under a guarantee, notably a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, of whatever form, shall be satisfied, if they are made by:
>
> (a) designated persons, entities or bodies listed in Annexes VIII, IX, XIII and XIV;
>
> (b) any other Iranian person, entity or body, including the Iranian government;
>
> (c) any person, entity or body acting through or on behalf of one of the persons, entities or bodies referred to in points (a) and (b).

> 2. The performance of a contract or transaction shall be regarded as having been affected by the measures imposed under this Regulation where the existence or content of the claim results directly or indirectly from those measures.
>
> 3. In any proceedings for the enforcement of a claim, the onus of proving that satisfying the claim is not prohibited by paragraph 1 shall be on the person seeking the enforcement of that claim.
>
> 4. This Article is without prejudice to the right of the persons, entities and bodies referred to in paragraph 1 to judicial review of the legality of the non-performance of contractual obligations in accordance with this Regulation."

19. Definitions of "claim" and "transaction", both of which feature in article 38, are given in article 1. By article 1(c), "claim" means:

> "any claim, whether asserted by legal proceedings or not, made before or after the date of entry into force of this Regulation, under or in connection with a contract or transaction, and includes in particular:
>
> (i) a claim for performance of any obligation arising under or in connection with a contract or transaction;
>
> (ii) a claim for extension or payment of a bond, financial guarantee or indemnity of whatever form;
>
> (iii) a claim for compensation in respect of a contract or transaction;
>
> (iv) a counterclaim;
>
> (v) a claim for the recognition or enforcement, including by the procedure of exequatur, of a judgment, an arbitration award or an equivalent decision, wherever made or given".

By article 1(d), "contract or transaction" means:

> "any transaction of whatever form and whatever the applicable law, whether comprising one or more contracts or similar obligations made between the same or different parties; for this purpose 'contract' includes a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, and credit, whether legally independent or not, as well as any related provision arising under, or in connection with, the transaction".

20. Recital (26) to the 2012 Regulation states:

> "This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and in particular the right to an effective remedy and to a fair trial, the right to property and the right to protection of personal data. This Regulation should be applied in accordance with those rights and principles."

The judgment

21. Phillips J considered that the language and purpose of article 38 of the 2012 Regulation both support the view that the article precludes MODSAF from enforcing the interest component of the 7071 Award in respect of the sanctions period.

22. So far as article 38's language is concerned, the judge considered that MODSAF's application for judgment to be entered in terms of the Awards is plainly one "for the recognition or enforcement … of … an arbitration award" within article 1(c)(v) of the 2012 Regulation (see paragraph 44 of the judgment) and is "in connection with any contract or transaction" on the basis that "[t]he relevant 'transaction' is the arbitration award that MODSAF seeks to enforce" (paragraph 49). In that regard, the judge observed that the 2012 Regulation "defines the term 'transaction' fairly broadly" and that the definition of "claim" in article 1(c) "appears to presuppose that, for the purposes of [the 2012 Regulation], judgments, arbitration awards and equivalent decisions do fall within the expression 'contract or transaction'" (paragraph 49). The judge further agreed with a submission that "even though the existence of the claim may not have been based on the sanctions, its content (insofar as it concerns interest) did result from the sanctions" (paragraph 51). The judge went on:

> "during the sanctions period IMS was precluded from making payments to MODSAF to discharge its liability under the Awards. Thus, insofar as MODSAF seeks interest from IMS in respect of the sanctions period, it is seeking to enforce a liability of IMS whose content (i.e. the quantum of interest) is conditioned by, and in that sense 'results directly or indirectly from', the sanctions."

23. Turning to article 38's purpose, the judge said this at paragraph 59 of his judgment:

> "I consider that the purpose of Article 38 is to prevent civil claims being brought against a party as a result of the fact that their performance of a contract or transaction was impeded by the operation of the sanctions. I am satisfied that the application of Article 38 to prevent MODSAF from enforcing the interest component of the 7071 Award in respect of the sanctions period falls well within that purpose. As noted previously, the relevant transaction for these purposes is the 7071 Award. During the sanctions period, the existence of the sanctions prevented IMS from discharging its liability to pay the sums due under the Award. That is the reason why, during the sanctions period, IMS came under a liability to pay interest on the principal sum due under the Award. By seeking leave to

> enforce the interest component of the 7071 Award in respect of the sanctions period, MODSAF is now bringing a claim to hold IMS liable as a result of the fact that IMS's performance of the relevant transaction, i.e. discharge of the debt due under the Award, was affected by the existence of the sanctions. In my view, that runs counter to the object of Article 38."

In a similar vein, the judge said in paragraph 64:

> "regardless of the objective that [the 2012 Regulation] as a whole seeks to achieve, I consider that Article 38 serves a specific purpose. As explained above, that is to protect parties against claims being brought against them by virtue of their non-performance of a contract or transaction that was caused by the sanctions. Put differently, the objective of Article 38 is to ameliorate the impact of the sanctions regime on private relationships."

The judge further explained as follows in paragraph 65:

> "in any case, I am not persuaded that depriving MODSAF of its right to claim interest during the sanctions period is inconsistent with the objective of the Regulation as a whole i.e., to persuade Iran to comply with UN Security Council Resolution 1737 (2006). On the construction of Article 38 that I regard as being correct, the longer Iran continues to remain non-compliant with Resolution 1737, the longer [the 2012 Regulation] remains in place, and the longer is the period for which MODSAF is deprived of post-award interest under the 7071 Award. It is difficult to see why this is inconsistent with what [counsel for MODSAF] described as the 'carrot and stick' approach of the sanctions regime."

The parties' positions in brief outline

24. Lord Anderson QC, who appeared for MODSAF with Mr David Heaton, argued that Phillips J was wrong to regard the Awards as "transactions" within the meaning of the 2012 Regulation. The judge's construction of the Regulation, Lord Anderson submitted, runs contrary to both the language and the purpose of the legislation. Further, the judge's interpretation of article 38 would render the provision disproportionate to the objectives of the Regulation and also mean that it represents a disproportionate interference with MODSAF's right to property. Finally, Lord Anderson relied on the principle of legal certainty, which, he said, would be infringed by the judge's approach.

25. For his part, Mr Joe Smouha QC, who appeared for IMS with Mr Tom Ford, supported the judge's decision, which, he said, was borne out by both language and purpose and involved neither disproportionality nor infringement of the principle of legal certainty. Additional justification for considering arbitration awards to be "transactions" is to be found, Mr Smouha suggested, in the parties' contractual obligations to perform them. In the alternative, Mr Smouha argued that performance

of "contracts" should be taken to have been affected by the measures under the 2012 Regulation. In that connection, Mr Smouha relied on, first, the original contracts for the supply of military equipment; secondly, the agreements to arbitrate found in those contracts; and, thirdly, the arbitration agreements themselves as severable contracts.

Interpretation of EU instruments

26. When interpreting an EU instrument such as the 2012 Regulation, regard must be had to both wording and purpose. In Case C-285/12 *Diakité v Commissaire Général aux Réfugiés et aux Apatrides* [2014] 1 WLR 2477, the Court of Justice of the European Union ("the CJEU") noted at paragraph 27 of its judgment that the Court had "consistently held" that the meaning of legislation fell to be determined "by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part". Advocate General Mengozzi had made essentially the same point in a sanctions context in Case C-117/06 *Möllendorf and Möllendorf-Niehuus* [2008] 1 CMLR 11, observing in paragraph 68 of his opinion that, "for the purposes of interpreting a provision of Community law, account must be taken not only of the letter of the provision but also of its context and of the aims pursued by the legislation of which it forms part".

27. Of course, a United Kingdom Court construing domestic legislation may also consider context and purpose. However, in *Shanning International Ltd v Lloyds TSB Bank plc* [2001] UKHL 31, [2001] 1 WLR 1462 Lord Steyn referred in paragraph 24 to the fact that the then current edition of Cross, *Statutory Interpretation* stated that "the British doctrine of purposive construction is more literalist than the European variety, and permits a strained construction only in comparatively rare cases". "Judges," Lord Steyn said, "need to take account of this difference."

28. Considerations of proportionality and certainty can also bear on the interpretation of EU instruments. With regard to the former, "the principle of proportionality is one of the general principles of European Union law and requires that measures implemented through provisions of European Union law be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them" (Case C-380/09 P *Melli Bank plc v Council* EU:C:2012:137, at paragraph 52 of the CJEU's judgment). The principle is commonly relied on as a basis for impugning validity, but there may be cases in which it is relevant to interpretation (where, say, a provision is susceptible to two possible constructions of which one, but not the other, would infringe the principle of proportionality). However, those promulgating EU legislation are recognised as having a substantial degree of discretion. In Case C-72/15 *R (PJSC Rosneft Oil Co) v HM Treasury* [2018] QB 1 ("*Rosneft 1*"), the CJEU said this in paragraph 146 of the judgment:

> "with regard to judicial review of compliance with the principle of proportionality, the court has held that the European Union legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. The court has concluded that the legality of a measure adopted in those areas can be affected only if the measure is manifestly

> inappropriate having regard to the objective which the competent institution is seeking to pursue."

29. As for certainty, the CJEU explained in Case C-255/02 *Halifax plc v Customs and Excise Commissioners* [2006] Ch 387 that "Community legislation must be certain and its application foreseeable by those subject to it" and that "[t]hat requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them" (see paragraph 72 of the judgment). In *Rosneft 1*, the CJEU observed at paragraph 161 of the judgment that the principle of legal certainty "requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly". However, the CJEU went on to make these points:

    i) "since legislation must be of general application, its wording cannot be absolutely precise" so "while the use of the legislative technique of referring to general categories, rather than to exhaustive lists, often leaves grey areas at the fringes of a definition, those doubts in relation to borderline cases are not sufficient, in themselves, to make a provision incompatible with article 7 of [the European Convention on Human Rights], provided that the provision proves to be sufficiently clear in the large majority of cases" (paragraph 164 of the judgment) and "those considerations are equally valid" under article 52(3) of the Charter of Fundamental Rights of the European Union (which provides for rights in the Charter to have the same meaning and scope as corresponding rights guaranteed by the European Convention on Human Rights) (paragraph 165 of the judgment);

    ii) "the requirement that the law should be foreseeable does not mean that the persons concerned should not have to take appropriate legal advice in order to assess, to a degree that is reasonable in the particular circumstances, the consequences which a given action may entail" (paragraph 166 of the judgment); and

    iii) "the terms which are claimed by Rosneft to be lacking in precision, while they are not absolutely precise, are not such that it is impossible for an individual to know for which acts and omissions he may be criminally liable" (paragraph 166 of the judgment).

30. The respect to be afforded to other fundamental rights may also be of significance. Thus, in *R v R* [2015] EWCA Civ 796, [2016] Fam 153 Arden LJ said in paragraph 28 that the Regulations with which she was concerned "should so far as possible be construed consistently with the EU fundamental right to effective judicial protection". However, the right to property is not unqualified. The CJEU said this on the subject in paragraph 148 of the judgment in *Rosneft 1*:

> "the fundamental rights relied on by Rosneft, namely the freedom to conduct a business and the right to property, are not absolute, and their exercise may be subject to restrictions justified by objectives of public interest pursued by the European Union, provided that such restrictions in fact

> correspond to objectives of general interest and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very essence of the rights guaranteed".

Purpose

31. As already mentioned, Phillips J said in paragraph 64 of his judgment that article 38 of the 2012 Regulation "serves a specific purpose", namely "to protect parties against claims being brought against them by virtue of their non-performance of a contract or transaction that was caused by the sanctions". "Put differently," Phillips J said, "the objective of article 38 is to ameliorate the impact of the sanctions regime on private relationships".

32. Lord Anderson took issue with this description of article 38's purpose. Article 38, he submitted, is a subsidiary or ancillary provision. It is aimed, he said, at reflecting in private law the effects of articles 23 and 29 and so its purpose is to a large extent dictated by those provisions. Article 23 does not purport to confiscate funds or economic resources of a person designated under the sanctions regime but merely to prevent access to them for the time being, and article 29 specifically authorises a designated person to be credited with interest if it is paid into a frozen account. As it happens, MODSAF does not hold a relevant account, but article 29 shows that there is no objection in principle to a designated person receiving interest and article 38 should be interpreted consistently with such a payment being permissible.

33. Lord Anderson sought support for his contentions in a passage from the judgment of the General Court in Case T-715/14 *PAO Rosneft Oil Company v Council* EU:T:2018:544 ("*Rosneft 2*"). That case involved, among other things, a challenge to the validity of a "no claims" provision in a Regulation imposing sanctions on Russia in response to actions destabilising the situation in Ukraine. In paragraph 206 of its judgment, the General Court said this about the "no claims" provision, viz. article 11:

> "In so far as the applicants also challenge the proportionality of Article 11 of the contested regulation, as the Council contends, the provision precluding the satisfaction of claims laid down in that article is intended to prevent an entity targeted by the restrictive measures at issue from being able to procure performance of a prohibited transaction, contract or service or from obtaining a remedy under civil law for non-performance of such transactions, contracts or services. Such a provision thus ensures the effectiveness of the restrictive measures at issue, by reflecting in private law the effects of measures that have been properly adopted by the European Union, for so long as those measures are applicable. In that sense, Article 11 of the contested regulation must be considered a proportionate means of achieving the objective of the contested acts."

The "no claims" provision was thus seen, Lord Anderson said, as "ensur[ing] the effectiveness of the restrictive measures at issue" by "reflecting [the effects of the measures] in private law … for so long as those measures are applicable".

34. However, it is clear that "no claims" provisions such as article 38 of the 2012 Regulation do have confiscatory consequences. While article 23 may do no more than impose a freeze for the duration of the sanctions, article 38 goes further. In fact, Lord Anderson accepted, at least for the purpose of the hearing before us, that article 38 operates permanently to confiscate a claim where it applies. Authority for that is to be found in the decision of the House of Lords in the *Shanning* case. That concerned a Regulation adopted following a Security Council resolution which had included at paragraph 29 a decision by the Security Council that States should take measures:

> "to ensure that no claim shall lie at the instance of the Government of Iraq, or of any person or body in Iraq, or of any person claiming through or for the benefit of any such person or body, in connection with any contract or other transaction where its performance was affected by reason of the measures taken by the Security Council in resolution 661(1990) and related resolutions [i.e. resolutions imposing sanctions on Iraq]".

In keeping with that, article 2 of the relevant Regulation provided:

> "1. It shall be prohibited to satisfy or to take any step to satisfy a claim made by:
>
> (a) a person or body in Iraq or acting through a person or body in Iraq; …
>
> (e) any person or body making a claim arising from or in connection with the payment of a bond or financial guarantee or indemnity to one or more of the above-mentioned persons or bodies,
>
> under or in connection with a contract or transaction the performance of which was affected, directly or indirectly, wholly or in part, by the measures decided on pursuant to United Nations Security Council Resolution 661 (1990) and related resolutions.
>
> 2. This prohibition shall apply within the Community and to any national of a member state and any body which is incorporated or constituted under the law of a member state."

35. The European Commission had set out the object of the Regulation in an explanatory memorandum. The memorandum included this:

> "2. Paragraph 29 [of the Security Council resolution] thus provides for protection of economic operators against unjustified claims by Iraqi individuals, companies or organisations. In doing so, it prevents Iraq from obtaining compensation retroactively for the negative effects of the embargo. Regarding exposure to claims from Iraq, the banking sector as well as European international contractors, have

> pointed to the fact that a lifting of the embargo could give rise to an avalanche of requests for payment of performance bonds, guarantees, stand-by credits or similar instruments under existing contracts and transactions for reasons of non-performance. The estimated amount of money involved exceeds 500m ECU. Already now exposure of such a dimension seriously reduces the financial room for manoeuvre of contractors. If the corresponding claims would effectively have to be honoured, the consequences on companies would be dramatic. As regards the position of Iraq, obtaining payment would mean an important financial advantage which would clearly be in contradiction with the very objective pursued by the embargo.
>
> 3. Under these conditions, paragraph 29 gives a clear signal that both consequences of admitting claims (i e losses for non-Iraqi operators and compensation to Iraq) are unacceptable to the international community. It is important that in implementing the UN decision, the effect of this signal is not weakened…."

The memorandum then explained that article 29 of the Security Council resolution could be interpreted "either as making claims by Iraq non-enforceable, or as establishing a prohibition to honour such claims" and that the Commission proposed "a system of PROHIBITION TO HONOUR CLAIMS, which would allow to meet both the objective of preventing such retroactive compensation as well as the objective of an effective protection of non-Iraqi parties, and would establish clarity as regards the treatment of the contractual obligations concerned".

36. The House of Lords held that the "no claims" provision in the Regulation imposed a permanent prohibition. Lord Bingham remarked in paragraph 18 that:

> "Were the ending of the embargo to be accompanied by removal of the prohibition on satisfaction of claims against non-Iraqi contractors and suppliers, it is obvious that those who had been involuntarily prevented from performing their contracts would or might become liable to their Iraqi opposite numbers, with the result that the ultimate losers as a result of Iraq's gross violation of international law would be the non-Iraqi contractors and suppliers and not the Iraqi entities (including the government) which the embargo was intended to injure."

In Lord Hope's words at paragraph 38, it was "plain that anything less than a permanent prohibition would not relieve economic operators in the Community from the damaging effects of the embargo".

37. Lord Anderson pointed out that the sanctions regime at issue in *Shanning* did not include an equivalent to article 29 of the 2012 Regulation. I do not think, however, that that can matter. The fact that the 2012 Regulation, unlike that with which the House of Lords was concerned in *Shanning*, permits funds to be credited to a frozen

account where one is available does not mean that article 38 of the Regulation was not meant to protect "economic operators" in the same way as the "no claims" provision the House of Lords was considering in *Shanning* in circumstances where (as in the present case) no relevant account exists. A counterparty unable to avail himself of article 29 has the same need of protection as those in *Shanning*.

38. In fact, recital (4) to the 2008 Regulation confirms that what has become article 38 of the 2012 Regulation was intended to protect counterparties of designated persons. As can be seen from paragraph 14 above, the recital recorded that "economic operators are exposed to the risk of claims and it is therefore necessary to protect such operators permanently against claims in connection with any contract or other transaction the performance of which was affected by reason of the measures imposed by that Regulation".

39. A further point is that Lord Anderson did not advance a purpose for article 38 of the 2012 Regulation which could explain why the availability of protection for counterparties should depend on whether an arbitration award had already been made when the sanctions regime took effect. I did not understand Lord Anderson to argue that article 38 could not have afforded IMS protection if the Awards had not been rendered by 24 June 2008, when MODSAF became a designated entity. It would seem that, on that hypothesis, MODSAF's as yet undetermined claims in respect of the contracts for the supply of military equipment would clearly have been "claims in connection with any contract" and IMS could have invoked article 38 in answer to a claim by MODSAF to be compensated for being kept out of the money due to it during the period of the sanctions regime. On Lord Anderson's case, the existence of the Awards makes all the difference. It is that, it would appear, that prevents article 38 from applying. Lord Anderson did not seem to me, however, to provide any real explanation for why the purpose of article 38 should produce such a distinction.

40. In all the circumstances, Phillips J was, in my view, plainly correct that article 38 of the 2012 Regulation serves the purpose of "protect[ing] parties against claims being brought against them by virtue of their non-performance of a contract or transaction that was caused by the sanctions". That, in my view, provides a strong indication that article 38 should apply in the present case.

Language

41. It is clear from its opening words that article 38 of the 2012 Regulation applies only to "claims in connection with any contract or transaction". As I have said, Phillips J considered article 38 to apply in the present case on the basis that the "relevant 'transaction' is the arbitration award that MODSAF seeks to enforce". Lord Anderson submitted that that view is clearly inconsistent with the language of the 2012 Regulation.

42. The words "contract or transaction" are defined in article 1(d) of the 2012 Regulation, quoted in paragraph 19 above. It is also relevant to the interpretation of "contract or transaction", Lord Anderson suggested, that article 38 itself refers to the "performance" of the "contract or transaction" having been "affected".

43. Lord Anderson relied on a number of matters as showing that an arbitration award cannot be regarded as a "transaction" within the meaning of the 2012 Regulation.

Article 1(d) explains that "contract or transaction" refers to "any transaction … whatever the applicable law, whether comprising one or more contracts or similar obligations made between the same or different parties". Lord Anderson submitted that an arbitration award is not naturally referred to as having an "applicable law". Neither, he argued, is an arbitration award "made between" parties; it is rather something imposed on them. Again, an arbitration award is, so Lord Anderson said, incapable of being "performed". In short, the definition of "contract or transaction" is directed at contractual and similar obligations that the parties have voluntarily assumed, not at either arbitration awards or judgments.

44. With regard to the judge's observation that the 2012 Regulation defines the term "transaction" broadly, Lord Anderson commented that the fact that a definition is broad does not tell you what it means. The judge further thought that article 1(c)(v) "appears to presuppose that, for the purposes of [the 2012 Regulation], judgments, arbitration awards and equivalent decisions do fall within the expression 'contract or transaction'". Lord Anderson, however, submitted that article 1(c)(v) shows that a claim for the "recognition or enforcement … of a judgment, an arbitration award or an equivalent decision" can be one "under or in connection with" a *distinct* "contract or transaction" not that a judgment or arbitration award can *itself* be a "contract or transaction". The judge's logic would suggest that a judgment is always a "contract or transaction" and, hence, that a claim to enforce *any* judgment would fall within article 38, but that was obviously not the intention: article 38 was meant to deal with contractual and similar obligations, not with, say, a judgment on a personal injury claim.

45. For his part, Mr Smouha submitted that the judge was right to consider an arbitration award such as the 7071 Award to be a "transaction" within the meaning of the 2012 Regulation. Mr Smouha put forward five reasons. The first was that, since the Regulation refers to "contract or transaction", "transaction" must be intended to add to "contract" and so to encompass something that is not a contract. Secondly, the inclusion of the words "of any form" after "transaction" in article 1(d) further indicates an intention to be all-encompassing. Thirdly, the phrase "whether comprising one or more contracts or similar obligations made between the same or different parties" is also broadening, breaking the bounds of needing a contract, a point reinforced by the final words of the article 1(d), "as well as any related provision arising under, or in connection with, the transaction". Fourthly, no straining is necessary to characterise an arbitration award as a "transaction" because such an award is typically, albeit not exclusively, a product of contract. Fifthly, the concept of "contract or transaction" has only one function within the 2012 Regulation, namely, to identify obligations whose performance might be affected by sanctions and give rise to claims.

46. In the course of his submissions on this part of the case, Mr Smouha pointed out that an arbitration award can be seen as replacing the parties' previous obligations (see *Russell on Arbitration*, 24th ed., at paragraph 6-162). That, he said, indicates that the award's dispositive can appropriately be seen as comprising "similar obligations" to "contracts". He relied, too, on the existence of contractual obligations to perform awards. Thus, Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed., for example, notes at 409 that "[e]very submission to arbitration contains an implied promise by each party to abide by the award of the arbitrator",

citing *Bremer Oeltransport GmbH v Drewry* [1933] 1 KB 753. Further, an explicit undertaking to carry out an award is to be found in the ICC Rules.

47. Even so, the better view is, I think, that an arbitration award does not amount to a "contract or transaction" within the meaning of the 2012 Regulation. There is, as Mr Smouha argued, good reason to think that something that is not a contract can be a "contract or transaction". A non-contractual assumption of responsibility might perhaps provide an example. It is true, too, that an arbitration award will be rooted in an agreement between the parties and that they can be expected to have contractual obligations to perform it. It remains the case, however, that the word "transaction" is not obviously apt to refer to an arbitration award and that such an award would not conventionally be said to have an "applicable law" or to be "made between" the parties.

48. I also think there is force in the argument that, were an arbitration award to be considered to be a "transaction", so ought a judgment to be. After all, one of the reasons Phillips J gave for holding the 7071 Award to be a "transaction" was that the definition of "claim" "appears to presuppose that, for the purposes of [the 2012 Regulation], *judgments*, *arbitration awards* and equivalent decisions do fall within the expression 'contract or transaction'" (emphasis added). Yet it would be very odd if a judgment were itself a "transaction". Suppose, say, that a designated person were pursuing a claim for personal injuries he had sustained in a road traffic accident. In the absence of a judgment, there could be no question of article 38 of the 2012 Regulation applying because, even if the claim were the subject of a counterclaim (and so potentially within article 1(c)(iv)), it would not be one "under or in connection with a contract or transaction" as required by article 38 itself as well as by the opening words of article 1(c). Nor, as Mr Smouha accepted, could the fact that the designated person had obtained judgment change the position: article 38 would still be inapplicable. It seems to me that article 1(c)(v) refers to claims for the recognition or enforcement of judgments and arbitration awards, not because a judgment or arbitration award can itself be a "transaction", but because such a claim may be an aspect of the pursuit of a claim "under or in connection with" a *separate* contract or transaction. Article 1(c)(v) will be applicable in particular where a designated person has obtained a judgment or arbitration award on a contractual claim. It is meant to ensure that article 38 applies post-judgment/award as it did before judgment/award.

49. On the other hand, there is of course no doubt but that each of the 1970s contracts for the supply of military equipment was a "contract or transaction" for the purposes of the 2012 Regulation. It is also, I think, clear that MODSAF's application for judgment to be entered in its favour is a "claim" "in connection with any contract or transaction". The application is plainly "for the … enforcement … of … an arbitration award" within article 1(c)(v) and, since the Awards concerned the original contracts, the application for relief in respect of the Awards is fairly to be described as "in connection with" those contracts.

50. Lord Anderson argued that the contracts for the sale of military equipment are spent and that, accordingly, it cannot be said that their performance "has been affected … by the measures imposed under this Regulation" as required by article 38(1) of the 2012 Regulation. However, article 38(2) explains when the "performance of a contract or transaction" is to be regarded as having been affected by "the measures imposed under the Regulation". Article 38(2) operates as a deeming provision or, in

the words of Lord Anderson, a definition clause. The question whether performance of a contract has been affected by the measures is therefore to be answered, not by focusing on outstanding obligations under the contract as such, but by asking whether "the existence or content of the claim results directly or indirectly from those measures". On that basis, article 38 will bite on MODSAF's application if, construing article 38(2) correctly, "the existence or content of the claim results directly or indirectly from" the measures.

51. In that connection, Phillips J said this in paragraph 51 of his judgment:

> "For the purposes of the interest during the sanctions period issue, the relevant '*claim*' is MODSAF's application to enforce the interest component of the 7071 Award in respect of the sanctions period. As [counsel for MODSAF] rightly pointed out, since the Awards pre-dated the sanctions, it is difficult to see how the '*existence*' of the claim can be said to have resulted from the sanction. However, in response, Mr Smouha submitted that even though the existence of the claim may not have been based on the sanctions, its content (insofar as it concerns interest) did result from the sanctions. I agree. As noted previously, during the sanctions period IMS was precluded from making payments to MODSAF to discharge its liability under the Awards. Thus, insofar as MODSAF seeks interest from IMS in respect of the sanctions period, it is seeking to enforce a liability of IMS whose content (i.e. the quantum of interest) is conditioned by, and in that sense '*results directly or indirectly from*', the sanctions."

52. Lord Anderson suggested that this argument proves too much. Article 38(2) of the 2012 Regulation states that the performance of "a contract or transaction" is to be affected by sanctions where the content of the claim results from them. If, therefore, the "content" of MODSAF's claim could be said to have resulted from the sanctions merely because the interest element had gone up, performance of the relevant contracts *as a whole*, and so the totality of the claims in connection with them, would be in point. MODSAF would thus be barred, not merely from recovering interest in respect of the period since 24 June 2008, but from ever receiving any of what it was awarded by the arbitral panel.

53. As, however, Mr Smouha noted, the implications of this argument, if correct, would extend far beyond claims relating to arbitration awards. Suppose that a claim by a designated person for breach of contract were pending when the sanctions regime took effect and that, aside from the impact of article 38 of the 2012 Regulation, the counterparty's subsequent inability to discharge the claim has had the effect of increasing the amount of compensation payable to the designated person. Lord Anderson's contentions would seem to imply either that the designated person's claim is entirely lost or that the counterparty is wholly unprotected. Neither outcome would make sense. The true position has to be, I think, that article 38 can apply to *part* of a claim. More specifically, where, as in the present case, sanctions have served to increase the interest component of a claim, it must be the case that article 38 bars satisfaction of the claim to that extent and only to that extent.

54. I should mention that Lord Anderson relied on the fact that United Nations Security Council resolutions 1803 (2008) and 1929 (2010) referred to ensuring that a claim should not lie where performance has been "prevented" by sanctions and that a recital to the 2008 Common Position similarly spoke of performance having been "prevented". Lord Anderson contrasted those documents' use of the word "prevented" with the "affected" found in, for example, article 38(1) of the 2012 Regulation (in "No claims in connection with any contract or transaction the performance of which has been affected …"). Lord Anderson suggested that "affected" falls to be construed more restrictively in the light of the references elsewhere to performance having been "prevented". However, the Regulation which first introduced a "no claims" provision into the Iranian sanctions regime (viz. the 2008 Regulation) used the word "affected" in its recitals (see recital (4)) as well as in the new article 12a of the 2007 Regulation for which it provided. In any case, article 38(2) of the 2012 Regulation explains when the performance of a contract or transaction is to be regarded as having been "affected" and neither "affected" nor "prevented" features in the explanation. It follows that it could have made no difference if article 38 had said "prevented" in place of "affected".

55. I should also mention a decision of the Dutch Court of Appeal, *BAe Systems plc v Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran* (3 September 2013), to which we were taken by Lord Anderson. In that case, BAe challenged an arbitration award on, among others, the ground that the award violated the sanctions against Iran issued by the United Nations, the EU and the Netherlands. The Court, however, concluded in paragraph 39 of its judgment that BAe could comply with the award without risking violating the 2012 Regulation. It explained:

> "If [BAe] pays into a frozen account of Modsaf's, which account is held by a financial institution within the EU or credits such account, BAe will not make any funds available to Modsaf; the funds will remain frozen for as long as Modsaf is on said list. If Modsaf proves not to have such an account, it is possible to open an interest-bearing escrow account within the EU."

56. To my mind, this decision does not assist us in the present case. We were told that MODSAF does not have an account with a financial institution within the EU (or, in fact, anywhere else) and it is common ground that, as things stand, there is no way in which IMS can lawfully pay anything to MODSAF. In any case, the simple fact is that the decision says nothing about either the meaning of "claim or transaction" or the correct interpretation of article 38(2) of the 2012 Regulation.

57. In all the circumstances, it seems to me that, subject to the arguments as to proportionality, fundamental rights and certainty to which I shall turn in a moment, article 38 of the 2012 Regulation should be interpreted as barring MODSAF from enforcing the 7071 Award in so far as it relates to interest since 24 June 2008, on the basis that MODSAF's application is one in connection with the original contracts for the supply of military equipment. That view appears to me to be supported by both the purpose and language of the 2012 Regulation.

Proportionality, fundamental rights and certainty

58. Lord Anderson submitted that construing the 2012 Regulation in such a way as to deprive MODSAF of interest in respect of the period since it became a designated entity would both be disproportionate to the Regulation's aims and involve a disproportionate interference with the fundamental right to property recognised in article 17 of the Charter of Fundamental Rights of the European Union and article 1 of the First Protocol to the European Convention on Human Rights. The sole purpose of the asset-freezing measures in the Regulation, Lord Anderson said, was to freeze, not to confiscate or punish. Moreover, it would be arbitrary for a designated person's entitlement to interest to turn on whether he happened to have an account with a financial institution within the EU and so could avail himself of article 29 of the Regulation.

59. As, however, I have already said, article 38 of the 2012 Regulation evidently *was* intended to have confiscatory consequences. Nor is that surprising. The imposition of sanctions had implications for both designated persons and their counterparties. Article 38 was designed to ensure that, as regards contracts and similar obligations, the burden was borne by the designated persons rather than the counterparties. As was recognised in the explanatory memorandum quoted in paragraph 35 above, absent a "no claims" provision such as article 38, sanctions can have "dramatic" consequences for counterparties. To echo the words of Lord Bingham set out in paragraph 36 above, the "ultimate losers" would be the counterparties and not the designated persons whose behaviour the regime was seeking to influence.

60. It is true, as Lord Anderson stressed, that a designated person with an appropriate EU account can be credited with interest pursuant to article 29 of the 2012 Regulation. This has a rational basis in the fact that the money can be frozen once in the account. Further, where such an account exists, a counterparty can avoid liability for future interest by paying what he owes into the account. He therefore needs no protection. If, on the other hand, the designated person holds no qualifying account, the counterparty will be unable to pay and, in the absence of a provision such as article 38, could not escape accruing interest liabilities. It is therefore comprehensible that a counterparty should enjoy protection where the designated person has no relevant account but not where he does.

61. In the circumstances, I cannot see that the fact that the 2012 Regulation may not be intended to be confiscatory or punitive in other respects makes it disproportionate to interpret article 38 as barring MODSAF from enforcing the 7071 Award as regards interest in respect of the period since MODSAF became a designated entity. To the contrary, such a construction seems to me entirely consistent with the overall scheme of the Regulation.

62. That conclusion is reinforced by the "broad discretion in areas which involve political, economic and social choices" which the EU legislature enjoys (see paragraph 28 above). It is reinforced, too, by the decision of the General Court in *Rosneft 2*. As mentioned in paragraph 33 above, the General Court concluded in paragraph 206 of its judgment in that case that the "no claims" provision at issue was "a proportionate means of achieving the objective of the contested acts". The Court explained that the "importance of the objectives pursued by the contested acts" was "such as to justify the possibility that, for certain operators, which are in no way

responsible for the situation which led to the adoption of the sanctions, the consequences may be negative, even significantly so" (paragraph 209) and that, in the circumstances, "interference with the applicants' freedom to conduct a business and their right to property cannot be considered to be disproportionate" (paragraphs 209-210).

63. Further, I do not think the principle of legal certainty assists Lord Anderson. The 2012 Regulation is clear enough. As the CJEU explained in *Rosneft 1* (see paragraph 29 above), the wording of legislation cannot be expected to be "absolutely precise" and the fact that it may leave "grey areas at the fringes of a definition" is not fatal.

Reference?

64. Lord Anderson suggested that, if we felt unable to find in MODSAF's favour ourselves, there should be a reference to the CJEU. He pointed out that references remain possible despite the United Kingdom's departure from the EU and reminded us of the following passage from the judgment of Sir Thomas Bingham MR in *R v International Stock Exchange, ex p. Else (1982) Ltd* [1993] QB 534 at 545:

> "In relation to questions such as 1(a) and 2(a) [viz. issues of EU law], I understand the correct approach in principle of a national court (other than a final court of appeal) to be quite clear: if the facts have been found and the Community law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself. In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the Court of Justice in construing Community instruments. If the national court has any real doubt, it should ordinarily refer."

65. In my view, however, the way in which this appeal should be disposed of is sufficiently clear for a reference to be inappropriate.

Conclusion

66. I would dismiss the appeal.

Lord Justice Males:

67. I agree that this appeal should be dismissed for the reasons explained by Newey LJ which in my view accord with both the language and the purpose of the relevant provisions of the 2012 Regulation.

68. I add some observations on one aspect of the case, which arose (in part at least) from some comments of mine in granting permission to appeal.

69. When giving such permission it occurred to me that even if the arbitration award was not itself a "contract or transaction" within the meaning of Article 38 of the 2012 Regulation, and even if performance of the underlying contract to deliver the tanks and armoured vehicles was not affected by sanctions imposed long after the time for such performance, it might nevertheless be appropriate to uphold the judge's decision on the basis that an agreement to submit disputes to arbitration involves a contractual promise by the parties to abide by and perform the award and that a claim for interest during the sanctions period was a claim in connection with that contract which was so affected. Such an argument had been floated before the judge on the application for permission to appeal after delivery of the judgment and was developed by Mr Smouha on the appeal by way of Respondent's Notice.

70. It has long been recognised in English law that proceedings to enforce an arbitration award are founded upon a mutual promise by the parties, creating a contractual obligation, to abide by and perform the award. This analysis originated in the time when enforcement was by an action to enforce the award, although that procedure has in modern times been superseded by the more summary methods contained in section 66 and (for New York Convention awards) sections 100 to 103 of the Arbitration Act 1996 and their statutory predecessors. An early case was *Purslow v Bailey* (1704) 2 Ld Raym 1039, where Holt CJ said that:

> "as the law is now, the party might have an action upon the case for the breach of his promise in non-performance of the award. For the submission is an actual mutual promise to perform the award of the arbitrators; …"

71. In modern times the leading case is *Bremer Oeltransport GmbH v Drewry*, where a charterparty made in London provided for disputes to be submitted to arbitration in Hamburg and an award was made against the defendant. The claimant sought to enforce the award by action and obtained permission to issue and serve a writ on the defendant out of the jurisdiction. The issue was whether the action based on the award was for the enforcement of a contract made within the jurisdiction. The Court of Appeal held that it was. The action was to enforce the implied promise to abide by and carry out the award which was contained in the charterparty made in London rather than being an action on the award itself which had been made in Hamburg.

72. The explanation that an agreement to submit disputes to arbitration carries with it a promise by both parties to abide by and perform the award has been followed in later cases (see e.g. *F. J. Bloemen Pty Ltd v Council of the City of Gold Coast* [1973] AC 115 at 126C-F; *The Bumbesti* [2000] QB 559 at [9] to [12]; *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] UKPC 11, [2003] 1 WLR 1041 at [9]; *Gater Assets Ltd v Nak Naftogaz Ukrainiy (No. 3)* [2008] EWHC 1108 (Comm), [2009] Bus LR 396 at [23]; and *National Ability SA v Tinna Oil & Chemicals Ltd* [2009] EWCA Civ 1330, [2010] Bus LR 1058).

73. In the last of these cases Thomas LJ explained at [5] to [7] how the summary procedure for enforcement of an award under section 66 of the 1996 Act has in practice replaced the common law action on the award, but he went on to make clear that the statutory procedures are also founded on the parties' promise to perform the award:

> "14. … In the first place there is a clear distinction between an arbitration award and a judgment. An arbitration agreement [sc. award] is in essence enforceable because of the implied contractual promise to pay an arbitration award contained in the arbitration agreement; all measures of enforcement essentially rest upon the contract. The provisions of section 26 of the 1950 Act and section 66 of the 1996 Act must be seen in that context. They are simply procedural provisions enabling the award made in consensual arbitral proceedings to be enforced. This is quite different to the pronouncement of a judgment by a court where the state through its courts has adjudged money to be due."

74. Although Thomas LJ did not refer to sections 100 to 103 of the 1996 Act (or their predecessor the Arbitration Act 1975) which deal with the enforcement of New York Convention awards, there is at least a strong argument (although there is no need to decide it) that enforcement of such an award pursuant to these sections is founded upon the same principle. That appears to have been the view of Beatson J in the *Gater Assets* case, where he drew no distinction between enforcement under section 66 and section 101:

> "With regard to the third assumption, either an award may be enforced 'in the same manner as a judgment' (see sections 66(1) and 101(2) of the 1996 Act) or 'judgment may be entered in terms of the award'(sections 66(2) and 101(3)). The leave of the court to enforce 'in the same manner as a judgment' is a prerequisite of the power to enter judgment in terms of the award, but the two are separate. The essential difference is that the obligation to honour an award arises by virtue of the agreement of the parties, whereas in the case of a judgment it follows from the power of the court."

75. In the present case there is no need to resort to an implied obligation because there is an express obligation to the same effect contained in Article 24(2) of the 1988 ICC Rules, by which the parties agreed that:

> "By submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay.…"

76. The 1988 Rules were those in force at the time when the arbitrations were commenced and were therefore the applicable arbitration rules. Accordingly there was here an express contractual obligation governed by English law, the governing law of the contract including the arbitration agreement, to carry out (or perform) the award. Many widely used international arbitration rules, including not only the ICC but also the LCIA and UNCITRAL Rules, contain a similar provision.

77. Accordingly IMS's argument on this aspect of the case runs as follows:

(1) MODSAF seeks to enforce an arbitration award which IMS is (and since 24 June 2008 when MODSAF was designated under the then current 2007 Regulation has been) prevented from paying.

(2) The consequence of non-payment of the award is that the interest awarded by the arbitrators has continued to accrue during the sanctions period.

(3) A claim for such interest is barred by Article 38:

a) It is a claim in connection with a contract or transaction, namely the contractual obligation to perform the award.

b) The content of the claim for interest during the sanctions period results directly or indirectly from the EU sanctions.

c) Performance of IMS's obligation to pay interest was therefore affected by the measures imposed under the Regulation, even if performance of the underlying obligation to deliver the tanks and armoured vehicles was not.

d) Accordingly no claim for such interest "shall be satisfied", either now or (adopting the reasoning in *Shanning International Ltd v Lloyds TSB Bank plc*) when the sanctions period eventually comes to an end.

78. If it were legitimate to adopt a literal approach to the construction of Article 38 in the light of the English law of arbitration, this argument would have considerable force. However, the Regulation is a measure of EU law taking effect throughout the European Union and, as is common ground, a purposive rather than literal approach to its construction is necessary. There is no reason to suppose that the EU legislature had in mind the principle of English law that enforcement of arbitration awards is founded on a contractual obligation to perform the award.

79. Moreover, it is legitimate to test the argument by reference to its consequences. If the argument produces an odd result which the EU legislature cannot sensibly have intended, that would be a powerful reason to reject it. In my judgment that is the position.

80. For the purpose of IMS's argument on this aspect of the case, the critical feature which bars recovery of interest during the sanctions period is that the parties' original contract contained an arbitration clause and therefore a contractual obligation to perform an award. There is no equivalent contractual obligation in the case of a judgment. But if the parties' original contract in this case had not contained an arbitration clause, it would have been open to MODSAF to sue IMS in this country and obtain a judgment, on which statutory interest would have run until payment. It can hardly be supposed that in imposing sanctions under EU law, the EU legislature intended to draw a sharp distinction between the effect of an award and a judgment. There is no good reason why it should have intended that interest during the sanctions period would be payable in the case of a judgment but not in the case of an award. The fact that enforcement of a judgment and an award are referred to together and without distinction in the definition of "claim" in Article 1(c)(v) suggests strongly that it did not.

81. Accordingly I would reject the argument developed from the Respondent's Notice that the judgment can be upheld by reference to a contractual obligation to perform an arbitration award.

Lord Justice Moylan:

82. I agree that this appeal should be dismissed for the reasons given in both judgments above.