OPINION OF LADY PATON : OUTER HOUSE, COURT OF SESSION : 29th May 2007

Arbitration governed by UNCITRAL rules: whether judicial review of arbiters' decision time-barred

[1] In June 1999, the petitioners entered into a contract with the first respondents, undertaking to act as managers of a semi-submersible drilling unit owned by the respondents and known as the Kan Tan IV. In 2000 the first respondents purported to terminate the contract. The petitioners contested the legality of that termination. They raised a commercial action. Eventually, in terms of Clause 9(a) of the contract, the parties' dispute was referred to arbitration and the commercial action was sisted. In the debate before me, counsel expressly agreed that the arbitration was governed by model rules adopted by the United Nations Commission on International Trade Law (UNCITRAL), in particular the following:

"31(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated ...

34(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award ..."

Counsel also agreed that in Scots law, an "*application for setting aside*" comprised a petition for judicial review of the arbiters' award.

[2] After sundry procedure in the arbitration, the arbiters made an award. That award was initially attached to an e-mail sent to the petitioners on 15 May 2006. A written and signed copy of the award was then sent to the petitioners by letter dated 17 May 2006, received by them on 18 May 2006.

[3] The petitioners wish to challenge the arbiters' award. They took legal advice, and instructed proceedings for judicial review. They maintain that they lodged their petition for judicial review with the Petition Department of the Court of Session on 15 August 2006. However the petition itself is date-stamped 21 August 2006, and the Court of Session computerised Petition Register shows the first date relating to the petition as 21 August 2006. As a result, the first respondents contend that the petition is time-barred in terms of Article 34(3) of the UNCITRAL rules. The issue of time-bar was debated at the first hearing in the judicial review. Reference was made to affidavits and productions lodged by the petitioners. No answers, affidavits, or productions had been lodged by the first respondents. There was no appearance for the arbiters.

The Rules of the Court of Session

[4] The Rules of the Court of Session provide *inter alia* as follows:

"Lodging of processes

4.3 *A process shall be lodged in every cause commenced by summons or petition when -*

(a) in the case of a summons, the summons is presented for signeting; and

(b) in the case of a petition, the petition is presented to the Petition Department ...

First order

58.7 *On being lodged, the petition shall, without appearing in the Motion Roll, be presented forthwith to the Lord Ordinary in court or in chambers for -*

(a) an order specifying -

(i) such intimation, service and advertisement as may be necessary;

(ii) any documents to be served with the petition;

(iii) a date for the first hearing, being a date not earlier than seven days after the expiry of the period specified for intimation and service; or

(b) any interim order;

and, having heard counsel or other person having a right of audience, the Lord Ordinary may grant such an order."

Excerpts from the petitioners' affidavits

[5] What follows are excerpts from the affidavits lodged by the petitioners:

Affidavit of Claire Baird or Dickson (court runner for Tods Murray LLP)

"2. I have no specific recollection of the events surrounding this matter. Accordingly my recollection comes from my time recording sheets and my court diary.

3. In my diary I have an entry on Tuesday 15 August 2006 which says:

"PET Tor Corporate for Jud Rev - lodge petition."

There is a tick next to this indicating that I completed that task on that date. If the petition had been handed back to me I would have marked a "X" next to the entry and I would have made an entry on another date.

4. Moreover in my time recording there is an entry for 15 August which is in the following terms: "Had counsel sign petition, thereafter lodged and checked counsel's availability for motion."

If the petition had been handed back to me it is likely that the relevant part of my time entry would have been something like, "tried to lodge petition" and there would have been an entry on a later date showing that I had lodged the petition unless, of course, it was dealt with on one of the days when I am not at work.

5. That entry in my time recording means I arranged for counsel to sign the petition. The petition was in fact signed by Euan G. Mackenzie who is an advocate in the same stable (the Ferguson stable) as Alistair Clark. What probably happened was that I asked one of the clerks at the Ferguson stable to get the petition signed and they went in to the Advocates' Library to arrange that while I waited in Parliament Hall. I then lodged the petition and enrolled the motion. I was probably advised by the petition department that counsel would require to appear to move the motion. I may have known from the signature on the petition that Alistair Clark [Advocate] was to be instructed but it is much more likely that I spoke to Michael Simpson [the petitioners' solicitor] (either on my mobile telephone or on my return to the office) and that he asked me to arrange for Alistair Clark to move the motion. Hence I checked Alistair Clark's availability and I probably noted a range of suitable dates. On the time recording sheet Mr Simpson's entry noting that counsel was to appear to move the motion appears after my own entry but that is likely to be because I entered my time for that date (15 August 2006) onto the system first.

6. There are no more entries in my diary in relation to this matter. That means the petition was not returned to me for revision and was accepted in the form it was presented on 15 August 2006.

7. The next entry in my time recording is on 17 August 2006 and it is in the following terms:

" Spoke to Christine at Ad Clerks, put entry in A. Clark's diary and spoke to Pet Dept about the date."

This means that I spoke to Christine Ferguson, the head clerk of the Ferguson stable, about the most suitable date for Mr Clark and made an entry in his diary. I would then have told the Petition Department when counsel was available to move the motion and thereafter the hearing would have been arranged.

8. I would then have advised Mr Simpson about what I had done and he would have dealt with the remaining matters ...'

Affidavit of Michael Simpson (member of Tods Murray LLP at the relevant times)

" 5. On or around 11 August 2006 I asked my secretary to engross the petition for lodging and I asked for an Inventory of Productions to be prepared. I also prepared a motion to be enrolled for a first order and for service on the persons mentioned in the schedule for service, those persons being [the first respondents] and the three arbiters. On or before 15 August 2006 I handed the petition, the Inventory of Productions and the motion to my firm's court runner, Claire Dickson. I almost certainly did this on 15 August because Mrs Dickson only works Tuesdays, Wednesdays and Thursdays and 15 August was a Tuesday.

6. On 15 August 2006 Mrs Dickson returned and reported that the petition had been lodged and the motion enrolled and advised me that counsel had to appear to move the motion notwithstanding the fact it was simply a motion for a first order for service. I recollect being somewhat surprised that an appearance was required for a purely formal motion. I recall that because there were so many actions in the Court of Session in addition to the Arbitration between these parties their disputes were "notorious" and the Petition Department clerk suggested that we might check when Mr Clark would be free to appear. Consequently I asked her to check (i) Mr Clark's availability, and (ii) the availability of the court and thereafter to arrange for him to appear to move the motion on a suitable date.

7. She did as I asked her. She informed me that the motion would be heard on 24 August 2006. I then dictated a letter of instruction to Mr Clark advising him that the motion for the first order was to be heard on Thursday 24 August 2006 and instructing him to appear. I do not have any specific recollection as to when I dictated the letter to Mr Clark but it is dated 18 August 2006 and it was typed in the early morning of 18 August 2006 by my secretary, Mrs Helen Henderson. I believe it was delivered to Mr Clark's box on Monday 21 August 2006 by my then summer student because Mrs Dickson was not in the office on either 18 or 21 August, those days being Monday and Friday respectively which are days when she does not work.

8. The motion was then heard by Lord Drummond Young on 24 August 2006 and was granted. Mr Clark moved the motion and I attended the hearing. I subsequently sent (on 26 August 2006) a courtesy copy of the petition to [the first respondents'] solicitor, Mr Douglas Russell of Messrs. Simpson & Marwick, solicitors, Edinburgh. By letter dated 7 September 2006 they advised me that they had not authority to accept service and suggested that in order to avoid delay I should simply serve the petition on [the first respondents'] head office. Accordingly I set about arranging to effect service of the petition in Beijing ..."

Affidavit of Gavin McLeod (petitions manager in the Petition Department, the Court of Session)

"2. ... I have no recollection of the actual events which took place in August 2006. I process a number of petitions each day and unless there is something particularly memorable about such a petition I would have no cause to recall what happened with it.

3. The process reveals that there is a petition in process together with a motion for first orders and a subsequent interlocutor granting that motion. The date of enrolment of the motion is stated to be 15 August 2006. There is no way of telling from the process when the motion was actually enrolled. However, I understand that Tods Murrays' court runner, Claire Dickson, states that the motion was enrolled on 15 August 2006 and I am happy to accept that statement. The petition is date-stamped 21 August 2006. The subsequent interlocutor is dated 24 August 2006.

4. Generally in this type of case, once I receive the petition and once I know counsel is available to move the motion I check the petition to ensure that it is procedurally valid and I then pass it to the Keeper to arrange the hearing of

the motion. If the motion is granted, then the date for the first hearing is added later, in consultation with the Keeper's office, and by reference to the court diary and counsel's diary. I have no involvement in that aspect.

5. I am aware it is contended that the petition in this case was actually presented on 15 August 2006 notwithstanding (i) the date of the stamp on the petition, and (ii) the date of the interlocutor. I am unable to state whether or not that is the case as I have no specific recollection. It would not be particularly unusual to have such a delay between the petition being presented, the motion enrolled, and the interlocutor being granted and certainly not unusual enough to make this memorable enough to recall specifically. I have no reason to doubt Claire Dickson's recollection of events but equally I cannot confirm them either.

6. I have considered what may have happened in August and it seems to me that there are three possibilities, namely: (i) I may have seen the petition on 15 August 2006, advised Mrs Dickson that a hearing would be required, and returned the petition to her while she arranged a date for the hearing; or (ii) I may have taken the petition on 15 August 2006 and held it in my pending tray with a note stating that I was awaiting a date for the hearing of the motion for first orders; or (iii) I may have seen it for the first time on 21 August 2006. I am unable to say whether one possibility is more or less likely than the others. As far as I am concerned, I have no specific recollection and all three are equally likely possibilities.

7. I have been asked about the date of the motion. As indicated in paragraph 3, I am happy to accept Claire Dickson's position that the motion was enrolled on 15 August 2006. In a case such as this there is no need for me to check the date of enrolment of the motion because there is no need for intimation of it. I would simply check the terms of the motion to see whether any interim orders were sought and if there was a request for interim orders I would then check the caveats. I would also check the reference on the motion in order to log it on our feeing system. In this case the cost of the petition would be chargeable but there would be no charge for the motion because it relates to a procedural step."

Opening submissions for the petitioners

[6] Senior counsel submitted that there were, in general, no time-limits to applications for judicial review. However the present case was governed by the UNCITRAL rules, including Article 34(3). Thus it was accepted that the petitioners' application for judicial review of the arbiters' award had to be made within three months of the petitioners' receipt of that award.

[7] Counsel suggested that there were three points which had to be resolved: First, the date on which the award was received. The signed copy of the award was received on 18 May 2006. However on 15 May 2006, an electronic version had been e-mailed to the petitioners, and indeed the petitioners in their petition referred to 15 May 2006 as the date of receipt of the award. The petitioners' submission was nevertheless that the relevant date was 18 May 2006, when the written and signed award was received.

[8] The second point made by the petitioners was that the petition had been lodged on 15 August 2006, although the first order was not granted until 24 August 2006.

[9] The third point was that the appropriate date when assessing time-bar was the date of the lodging of the petition (not the date of the first order). That date being 15 August 2006, the petition was not time-barred.

[10] If the court was satisfied on the basis of affidavits, productions, and submissions, that the petition was not time-barred, the first respondents' plea of time-bar should be refused, and the petition allowed to proceed. If the court required further material in order to determine the issue, the appropriate course was to continue the first hearing to another day, and (if so minded) to order any relevant matters of fact not already covered in the affidavits and productions to be dealt with by affidavit. Reference was made to Rule of Court 58.9(2)(b)(i) and (vi). The court could also order oral evidence, if thought necessary. However petitioners' primary position was that the court had sufficient material.

Submissions for the first respondents

[11] Senior counsel for the first respondents confirmed that no answers had been lodged. Service of the petition had been accepted recently, and the time-bar point might result in the case going no further. If the case were to proceed to a continued first hearing, the first respondents intended to lodge answers.

[12] The parties had an action in the commercial court. That action had been sisted pending the arbitration. There had been a lengthy arbitration, and it was a matter of agreement that the UNCITRAL rules applied to that arbitration. A final determination in the arbitration was made in May 2006. An application was then made by the petitioners to judicially review that award. Meantime the commercial action had been reawakened. Hearings had taken place before Lord Reed on 6 October 2006, and 16 January 2007. On those occasions, the first respondents drew attention to the fact that the application for judicial review was out of time. Counsel for the petitioners seemed taken-aback, and indicated that their argument would be that the UNCITRAL rules gave way to a party's right in Scotland to review without limit of time. That was therefore the argument which the first respondents had expected to face at the first hearing. However the petitioners' counsel had recently indicated that their agents had raised the possibility of a factual argument. On the day before the first hearing, the petitioners' agents sent the first respondents' agents certain affidavits and productions. The first respondents had then been able to discern what the petitioners' argument was likely to be. No criticism was directed at the last-minute nature of the argument or the late lodging of affidavits and productions, but as a consequence, the first respondents had no answering affidavits or productions directed to the issue now in dispute. Counsel expected in the course of his

address to make observations about court procedures. If those observations proved controversial, matters could be checked with the clerks of court.

[13] The first respondents' position was that the arbiters' award had been received by the petitioners on 15 May 2006. That was in fact the petitioners' averment in their petition. Probably little turned on whether the award was received on 15 May or 18 May 2006, but the first respondents did not accept that the award had not been received until 18 May 2006.

[14] For the purposes of the present argument only, the first respondents were willing to accept that the phrase "from the date" in Article 34(3) of the UNCITRAL rules might mean "*after the date*". The result was that if the petition was lodged with the Court of Session on 15 August 2006, it was lodged within the three month time-limit (calculated in calendar months), and would be timeous.

[15] The first respondents did not contend that the date of the first order (24 August 2006) was the relevant date for time-bar purposes. Counsel submitted that the relevant date for the court's consideration was the date when the court itself bore to have received the petition, i.e. 21 August 2006. That was the date when the petition was stamped as received by the Court of Session. Thus even if the petitioners were correct in their argument that they had not received the arbiters' award until 18 May 2006, their application for judicial review of that award was out of time if lodged on 21 August 2006.

[16] No-one disputed the date-stamp on the petition. The real issue for the court was whether the court could go behind the date-stamp at the invitation of the petitioners, who would ask the court to look at the circumstances and events surrounding the lodging of the petition. Hence the petitioners' affidavits, which (it should be noted) revealed that the deponents had no actual recollection of the events, but were stating what they thought had happened.

[17] Counsel then drew attention to the affidavit from Mr McLeod, the manager in the Petition Department. Mr McLeod set out three possible explanations for what had occurred in August 2006. The first respondents' position was that whichever possibility applied, the application for judicial review was out of time.

[18] Counsel outlined the procedure which took place when a petition was lodged in the Court of Session. When a petition was to be lodged, it had to be registered (effected formerly by manuscript entry in a book, but now by computer entry in a computerised Petition Register). That registration was the court's acknowledgement that it had accepted the petition. Three matters were entered: (i) details of the relevant petition or application; (ii) the date for the first hearing (which might involve ascertaining the availability of counsel); and (iii) payment of the fee fund dues of £106. The petition would not be accepted without payment of the fee fund dues. It was not usually necessary for the court runner to offer cash, as each Edinburgh firm had an account which would be debited accordingly. The fee fund dues in the present case had been charged to the petitioners' agents' account on 21 August 2006 - the same date as the date stamped on the petition. From the court's perspective therefore, the petition had been lodged on 21 August 2006.

[19] Once the court was satisfied that a petition had been lodged with the fee fund dues paid, the ensuing procedure was automatic. The petitioners were not required to serve the petition in order to achieve further procedure: the petition would automatically be placed before a Lord Ordinary in chambers with a motion for a first order for intimation, service and the fixing of a first hearing. By contrast, if a petition were not lodged, nothing would happen. Counsel submitted that various situations could be envisaged in which a petition was not lodged: a court runner could go to the Petition Department, physically leave the petition on the counter and then (for some reason) leave the department: the petition was not lodged. A court runner could hand the petition to a member of staff in the Petition Department, explain that it was to be lodged, but apologise for the fact that the fee fund dues could not be paid: the petition was not lodged. A court runner could agree that the petition be put in a pending tray while counsel's availability was ascertained: the petition was not lodged. Counsel pointed out that, had the first respondents telephoned the Petition Department on 17 or 18 August 2006 to inquire whether any application had been made to review the arbiters' award, the answer would have been in the negative: the computerised record would have shown no entry.

[20] Reference was then made to Rule of Court 58.7 and to the table showing the level of fee fund dues (Parliament House Book pages C1201 to 1204). Counsel submitted that the wording of Rule 58.7 was such that lodging could not be effected by simply leaving the petition on the Petition Department counter, or leaving the petition in a pending tray in the Petition Department. The phrase "On being lodged", followed by the various procedural consequences set out in the rule, meant that a petition was not lodged if the various procedural consequences did not follow. Reference was made to the commentary on the Rules of the Court of Session by Sheriff N.M.P. Morrison Q.C., at paragraph 58.7.1.

[21] Counsel then referred to authorities. In cases relating to applications for the disqualification of company directors, the court had to consider the date on which an application had been made. ***Secretary of State for Trade and Industry v Josolyne,*** 1990 S.L.T. (Sh. Ct.) 48, showed that the order for service was simply a consequence which followed upon the making of the application for disqualification. Thus if no procedural consequences occurred, no application had been made. In ***Secretary of State for Trade and Industry v Normand,*** 1994 S.L.T. 1249, Lord Sutherland at page 1251 C-D noted that in an ordinary action, the court was not involved until the pursuer lodged the summons for calling; by contrast, in petition procedure (such as the present case), a consequence of lodging the petition in court was that the case was automatically put before a Lord Ordinary for a first order. The

order for service was merely an event consequential on an application which had already been made. That case was entirely in point with the present case, where Rule of Court 58.7 provided that upon being lodged, the petition would be put before a Lord Ordinary "forthwith".

[22] In ***Secretary of State for Trade and Industry v Campleman,*** 1999 S.L.T. 787 at page 789F, Lord Johnston referred to ***Josolyne*** and ***Normand,*** *cit. sup.,* and agreed that the date of the application was the date when the petition was presented to the court, and when the court took cognisance of the fact that there was an application to its jurisdiction. In ***Superdrug Stores plc v Network Rail Infrastructure Ltd,*** 2006 S.C. 365, 2006 S.L.T. 146, the court observed at paragraph [32] that an application with payment of fee fund dues demonstrated an intention that the matter should be processed by the court; otherwise persons presenting writs to court departments would be wasting their time. But in any event, in the present case, a key procedural feature was that an automatic process followed upon the lodging of the petition.

[23] Counsel referred again to Mr McLeod's affidavit and to the three possibilities set out in paragraph 6. He submitted that the court could not go behind the process and the dates recorded therein. If there were to be suggestions of bad faith, or negligence, on the part of Court of Session staff, specific averments would be required, and possibly a specific type of remedy. The word "lodged" was not some loose term. The lodging of a petition was an action from which certain consequences automatically flowed. By what authority could a court go behind its own date-stamp and entry in the Petition Register? What would be the implications for other court processes?

[24] In conclusion, counsel submitted that it made no difference whether the date of receipt of the arbiters' award was 15 May or 18 May 2006, because the date upon which an application to review that award had been made was 21 August 2006. The first respondents' motion was accordingly that the court should dismiss the petition. If the court found it necessary to hear further evidence, a continued first hearing should be fixed with a direction for further evidence. The question of time-bar should be disposed of before proceeding to the merits.

Submissions for the petitioners

[25] Senior counsel for the petitioners confirmed that the only issue currently before the court was the date on which the petition was lodged. A side-issue (possibly of no significance in the present case) was the date on which the petitioners received the arbiters' award. Article 31 of the UNCITRAL rules defined the award as being "in writing" and "signed". Those were mandatory requirements. Counsel submitted that an e-mail communication did not fulfil those requirements. Accordingly the date of receipt by the petitioners was the date when the written and signed version of the award arrived, namely 18 May 2006.

[26] In relation to the lodging of the petition, counsel commented that the first respondents' argument was in effect that "lodging" required some sort of act on the part of the court. By contrast, the petitioners' position was that all that was required was an act by the petitioners. There was no inference in the Rules of Court or the authorities that anything had to be done by the court. Accordingly the inquiry in the present case ought to focus on what had been done by the petitioners.

[27] It was clear from the affidavit of Mrs Dickson, read with her time-recording sheet and diary entries, that she had lodged the petition and enrolled the motion on 15 August 2006. Subsequently, on 17 August 2006, she had spoken to an Advocates' Clerk and ascertained the relevant counsel's availability. She had then told the Petition Department when counsel would be available for the hearing for a first order. Mrs Dickson's evidence was quite clear, and her evidence was supported by her diary and her time-recording sheet. She had lodged the petition on 15 August 2006, and enrolled the necessary motion on the same date. That satisfied the relevant Rule of Court.

[28] The question of the date-stamp was a matter of internal court administration. It was not an issue within the petitioners' knowledge. The petitioners had no control over a date stamp being applied to the petition. There was the possibility of prejudice to the petitioners if procedural matters over which they had no control were to govern the relevant date. While acknowledging that the Court of Session contained many documents upon which dates had been stamped, counsel submitted that a date-stamp had no official standing, and was not conclusive for any purpose, let alone lodging. By contrast, in other public registers, such as the Register of Titles, or the Register of Company Charges, the date had authority, often by reason of a specific statutory provision. There was no such provision in relation to the date-stamp on the petition. There was no provision stating that the date-stamp was conclusive. Thus, in the light of the other evidence, notwithstanding the date-stamp, the court should conclude that the petition was lodged in the Court of Session on 15 August 2006. All that a petitioner could do was lodge the petition: the question of what stamp was applied, on what date, were matters outwith a petitioner's control.

[29] Furthermore, the date of the enrolment of the relevant motion was 15 August 2006. The Motion Sheet was a document completed by a petitioner's solicitors, and, possibly for that reason, Mr McLeod had been unable to explain the date "15 August 2006" where it appeared on the Motion Sheet. The completed Motion Sheet was physically handed to the Petition Department staff along with the petition. The sheet became part of the petition process. The motion could not be enrolled until the petition had been lodged. If the petition and the motion were in fact lodged and enrolled on a date other than 15 August 2006, counsel suggested that either the court runner or the Petition Department would have changed the date on the Motion Sheet. Again therefore the Motion Sheet supported the evidence contained in the affidavits, and in particular the affidavit of Mrs Dickson.

[30] Counsel then turned to the time-recording sheets lodged in process. The entire time-recording sheet for the petitioners for the month of August 2006 had been lodged. It was significant that the sheet recorded that the petition had been "lodged" on 15 August 2006. There was no entry suggesting that the petition awaited further action. The accuracy of the time-recording sheet was demonstrated by other entries, such as the entry relating to the first order hearing (24 August 2006, which was correct).

[31] Reference was made to the affidavit by the Petition Department manager, Mr McLeod. He had no recollection of the actual events in August 2006. He did not assert that the date-stamp was conclusive. In paragraph 5 of his affidavit, he acknowledged that the petitioners contended that the petition was actually presented on 15 August 2006 notwithstanding the date-stamp on the petition and the date of the interlocutor. He could not confirm or deny that contention, but added that he had no reason to doubt Mrs Dickson's recollection of events. He also indicated that it was not particularly unusual to have a delay between the presentation of a petition, the motion being enrolled, and the interlocutor being granted. In this context, counsel accepted that there might be a difference between "presentation" and "lodging": the former might refer to the court runner's appearance at the Petition Department counter with the petition, but not necessarily to the actual lodging of the petition.

[32] In relation to the three possibilities set out by Mr McLeod in paragraph 6 of his affidavit, counsel for the petitioners confirmed that no other possibility was contended for by the petitioners. The first possibility did not accord with Mrs Dickson's records, which did not indicate any physical return of the petition to her. The second possibility was closer to Mrs Dickson's records and her records-based recollection. Accordingly it was possible that the petition had been placed in a pending tray on 15 August 2006 to await further clarification about dates suitable for counsel. The third possibility (namely, that Mr McLeod had not seen the petition until 21 August 2006) did not accord with Mr McLeod's general acceptance of Mrs Dickson's records and her records-based recollection. Also paragraphs 3 and 7 of Mr McLeod's precognition did not seem to be consistent with the third possibility.

[33] Counsel referred to the affidavit of the petitioners' solicitor, Mr Simpson. In paragraph 6, Mr Simpson referred to his court runner's return from court, reporting that the petition had been lodged and the motion enrolled, but that it was necessary to instruct counsel to move the motion for the first order. Mr Simpson had been surprised by this requirement, for a purely formal motion. His recollection was that there were so many actions between the parties in the Court of Session (in addition to the arbitration) that the staff in the Petition Department had suggested that the solicitors should check when their counsel would be available to move the motion. Mr Simpson accordingly instructed Mrs Dickson to check counsel's availability and the court's availability. She was then to arrange for counsel to appear on a suitable date to move the motion for a first order.

[34] In answer to a direct question from the court, counsel acknowledged that the petitioners had been unaware at that time of the three month time-bar period running in terms of Article 34(3) of the UNCITRAL rules. But in any event, Mr Simpson had been specifically advised on 15 August 2006 by his court runner that the petition had been lodged, and the motion enrolled: the only issue was the timing of the hearing for a first order. As it was vacation, there were only certain days on which it was possible to move the necessary motion before a Lord Ordinary. The interlocutor for a first order ultimately pronounced on 24 August 2006 was granted by Lord Drummond Young, a commercial judge who was not acting as Vacation Court judge. It could be inferred that Lord Drummond Young had been specially requested to deal with the matter, perhaps because of the related action in the commercial court.

[35] Two authorities not referred to by the first respondents were ***Burgh of Millport, petitioners***, 1974 S.L.T. (Notes) 23, and ***Ritchie v Dickie***, 1999 S.C.L.R. 939. ***Burgh of Millport, petitioners***, concerned section 13 of the Bankruptcy (Scotland) Act 1913 which provided *inter alia* *"petitions for sequestration, presented without the concurrence of the debtor ... shall be competent only within four months of the date of the debtor's notour bankruptcy"*.

In that case, the petition was lodged in the Petition Department on a date prior to the expiry of the four months. However the first deliverance was not pronounced until a date outwith the four month period. Lord Keith held that the competency of the petition was to be judged by the date of the lodging of the petition within the Petition Department, and observed: *"The petitioner has at that stage brought the petition into court, and it is not within his control precisely when it is placed before the Lord Ordinary. It would be unreasonable and inconvenient to hold that a petition which has been lodged in due time is incompetent because circumstances internal to the court prevent it being brought before the Lord Ordinary for a few days, and I can find nothing in the language of the Act of 1913 to compel this result."*

Counsel submitted that similarly, in the present case, the only issue for the court was the date when the petitioners brought the petition into court. That was all that the petitioners could do: the court's machinery thereafter was outwith the petitioners' control. It would be unreasonable and inconvenient to hold that petitioners who had timeously presented a petition and done everything they could to meet the deadline were out of time because of the court's machinery which was outwith their control. There was no reason why the word "lodged" should be construed as meaning not only the presentation of the petition, but also the acceptance and processing of the petition by the Petition Department. There were no words in the Rules of Court making such a construction necessary, and it would be unreasonable and inconvenient for petitioners if such a construction were to be adopted. The critical question was whether the petition was presented on time: cf. ***Ritchie v Dickie***, 1999 S.C.L.R. 939, at pages 941E to 943E. The Rules of Court did not connote any act on the part of staff in the Petition Department. Although ***Burgh of Millport, petitioners***, dealt with a different statutory provision, the *ratio* was entirely in point, namely that once the petition was placed in the hands of staff in the Petition Department, the case was in

court. Counsel submitted that, in the present case, the petition was "lodged" when it had been discussed and then physically left with the staff in the Petition Department. The petition did not require the application of a date-stamp in order to be lodged. The first respondents had not pointed to any authority or rule justifying the proposition that a date-stamp or other procedural step was necessary for lodging: that was simply an assertion on their part.

[36] In relation to the authorities cited by the first respondents, *Secretary of State for Trade and Industry* v *Josolyne,* 1990 S.L.T. (Sh. Ct.) 48 was supportive of the petitioners' contention, namely that an application to the court (by way of lodging a petition) was an act of the petitioner. The petition had been presented to the Petition Department (and therefore lodged) on 15 August 2006. Anything which happened thereafter was *"consequential on an application which [had] already been made".* In ***Secretary of State for Trade and Industry v Normand,*** 1994 S.L.T. 1249, Lord Sutherland observed at page 1251: *"... Under [petition] procedure the petition is lodged in court and then in terms of Rule of Court 195 the case will automatically be put before a Lord Ordinary in order that a first order may be pronounced. From the moment the petition is lodged the rest of the procedure follows automatically ... In my opinion, there can be no doubt whatever that under the ordinary meaning of words "an application to the court" must be the date upon which the petition is lodged in court ..."*

Counsel adopted Lord Sutherland's *dicta*. The word "lodged" plainly referred to the positive act carried out by the petitioner. The word did not connote anything done by an officer of the court.

[37] In relation to ***Secretary of State for Trade and Industry v Campleman,*** 1999 S.L.T. 787, counsel submitted that whether the requirement was the presenting or the lodging of a petition, that requirement had been met on 15 August 2006. Unlike a summons in an ordinary action (which required to be served on the defender) nothing further had to be done in relation to the petition.

[38] When asked to comment on the first respondents' examples of a petition being physically within the Petition Department yet not "lodged", counsel made the following submissions:

(i) Court runner physically leaving the petition on the counter and for some reason departing: Counsel accepted that it was necessary for the court runner to draw the attention of the Petition Department staff to the petition: but that was all that was necessary.

(ii) Court runner handing over the petition but without payment of the fee fund dues: Counsel accepted that the lodging of the petition entailed the payment of the fee fund dues: but the contingency suggested would not arise in the present case, as the petitioners' agents had the requisite account which could be debited with the appropriate sum (£106). The contingency might arise in the case of a party litigant without the necessary account or money: but that was not the case here.

(iii) Court runner agreeing that the petition should be put in the pending tray to await dates of counsel's availability: Counsel pointed out that in such a situation, the petition would not automatically come before a Lord Ordinary, but in the present case it was a known fact that the petition did come before a Lord Ordinary.

[39] When asked about date-stamps in connection with other processes in the Court of Session, for example a date-stamp purporting to show the date on which a tender was lodged or withdrawn, counsel accepted that dates might be critical in certain cases, but submitted that there was no authority stating that the court was bound by the date-stamp. If there was evidence contradicting the date-stamp, the latter was not conclusive. *Omnia rite acta esse praesumuntur* was merely a presumption, a starting-point, which could be rebutted by evidence. Counsel submitted that all the other evidence indicated that the petition had been presented on 15 August 2006, not on 21 August 2006.

[40] In relation to the three possibilities set out by Mr McLeod in paragraph 6 of his affidavit, counsel submitted that the second possibility (the petition being placed in a pending tray awaiting a date for a hearing of the motion for a first order) clearly satisfied Article 34(3). The petition had been physically left with a member of court staff in the Petition Department. What happened to the petition thereafter was for the Petition Department, not the petitioners. The third possibility (that Mr McLeod saw the petition for the first time on 21 August 2006) did not permit any concluded view to be formed: it was not clear whether the petition had (or had not) been in the Petition Department on 15 August 2006, or whether the petition had been present in the department on 15 August 2006 but had been dealt with by someone other than Mr McLeod. So far as the first possibility was concerned (the petition being returned to Mrs Dickson while she arranged a date for a hearing), counsel accepted that it was difficult to form a clear view. However if Mrs Dickson's evidence about presenting the petition on 15 August 2006 was accepted, then Rule of Court 58.7 had been complied with, and the petition had been "lodged" although it may then have been returned to her.

[41] Counsel then referred to ***Superdrug Stores plc v Network Rail Infrastructure Ltd,*** 2006 S.C. 365, 2006 S.L.T. 146, paragraph [32]. In the present case, the evidence demonstrated that a petition had been presented on 15 August 2006, in proper form, with the means to pay the fee fund dues (as the agents' account could be debited). Furthermore, a Motion Sheet date 15 August 2006 seeking an order for intimation, service, and a first hearing, had been presented. It was quite clear from those circumstances that the agents wished to activate the usual procedures. To take a different view would be to suggest that those presenting petitions were simply wasting time. Thus the observations in ***Superdrug Stores plc*** supported the petitioners' approach. When ascertaining whether an application had been made in terms of Article 34(3) of the UNCITRAL rules, one should look to see when the petition had been presented. That focused on an act done by the petitioners' agents, and not on

something done by the court. It was important to avoid consequences which were "*unreasonable and inconvenient*" to court-users: cf. *dicta* of Lord Keith in ***Burgh of Millport, petitioners***, 1974 S.L.T. (Notes) 23.

[42] Counsel then made several concluding points:

(i) The letter of instruction to counsel dated 18 August 2006 (annexed to Mr Simpson's affidavit) advised counsel that the motion for the first order was to be heard on Thursday 24 August 2006, a date on which the agents understood counsel to be available. The information contained in the letter must have come from the court: thus the court had that information on or before 18 August 2006.

(ii) All the evidence (the documentary productions and the affidavits) were entirely consistent with the petition being lodged on 15 August 2006, despite the fact that the petition bore the later date-stamp. The date-stamp was simply one piece of evidence, with no statutory significance. The date-stamp was clearly outweighed by the remainder of the evidence.

(iii) In relation to the position adopted Mr McLeod, the manager in the Petition Department, counsel submitted that it was somewhat novel for Mr Keen Q.C. to attempt to introduce new evidence verbally, at the bar (see paragraph [44] below) without supporting affidavits or productions. It was questionable whether Mr Keen's additional information should be taken into account. In any event, Mr McLeod's reported preference for the phrase "*the motion was presented*" rather than "the motion was enrolled" was not significant. The ordinary practice when lodging a petition was to lodge all parts of the process along with the petition, including the Motion Sheet. Thus it was irrelevant whether it was said that the motion was "presented" or whether it was "enrolled". Reference was made to Rule of Court 23.2 (enrolment of motions). Presented, lodged, and enrolled, each referred to the same event, which had occurred on 15 August 2006.

[43] Counsel concluded by submitting that the evidence was clear and consistent. It all pointed to 15 August 2006 as the date on which the petition was lodged. No further evidence was required. The court was invited to refuse the first respondents' motion for dismissal, to continue the first hearing, and to put the case out By Order to discuss what should take place at the continued first hearing.

Final submissions for the first respondents

[44] Just before an adjournment, senior counsel for the first respondents reminded the court that the petitioners' affidavits had been received on the previous day at 2.30 p.m., while Mr Simpson's affidavit had been received on the morning of the first hearing. The first respondents had not therefore had time to make investigations and prepare answering affidavits. In the light of the apparent discrepancy in Mr McLeod's affidavit (in paragraphs 3 and 7 he appeared to accept that the petitioners' motion for a first order had been "enrolled on 15 August 2006", whereas in paragraph 6 he seemed to imply that the motion had not been enrolled on 15 August 2006), verbal inquiries had been made of Mr McLeod by Mr Russell of Messrs Simpson & Marwick. Counsel reported that Mr McLeod felt that it would be more accurate to state in paragraphs 3 and 7 of his affidavit that the petitioners' motion for a first order had been "presented on 15 August 2006": that did not necessarily mean that the motion had been formally enrolled on that date. In relation to paragraph 7 of his affidavit, Mr McLeod had confirmed verbally that he would not change any date on the Motion Sheet prepared by the agents. Thus if the Motion Sheet showed a date "15 August 2006" but the motion was formally enrolled on 21 August 2006, Mr McLeod would not change the date on the Motion Sheet.

After the adjournment, and following the final submissions for the petitioners (noted in paragraphs [42] and [43] above) senior counsel for the first respondents made some final points.

[45] Reverting to the question of the date on which the arbiters' decision was received, the first respondents' position was that the decision had been received on 15 May 2006, as indeed the petitioners stated in their petition. It was not necessary for the award to be signed prior to delivery: the award was made and delivered when the e-mail communication with a PDF file attached was received. In such circumstances, it would be a very narrow construction of the UNCITRAL rules to hold that the award had not been received. An award might be made and electronically delivered, yet six months might pass before the formal award was signed. In such circumstances, the petitioners' argument meant that the award remained in a limbo.

[46] Mr Johnston Q.C. had emphasised that it was an intrinsic part of an application for judicial review to apply for a first order. Counsel for the first respondents agreed: but it could only be an intrinsic part of what one had to do if it followed that one achieved a first order by virtue of the actions taken. If someone did something which would not lead to a first order, it followed that the person had not applied for judicial review. That position was borne out by the express terms of Rule of Court 58.7 (quoted in paragraph [4] above). If someone did what was envisaged by the rule, there would inevitably be a first order, unless the petition were to be dismissed as irrelevant or incompetent by the Lord Ordinary at the early stage of the hearing in chambers for a first order. While the petitioners contended that "presenting" a petition was the same as "lodging" a petition, it was a fact that a petition presented without the fee fund dues would not be lodged; and a petition presented without an accompanying process would not be lodged. A petition could easily be "presented" to the Petition Department who might refuse to take it, because there was something wrong with it. Reference was made to Rules of Court 4.3 and 58.7. Just because a petition was presented did not mean that it had been lodged. One required the full process; the fee fund dues; and the date for the hearing for the first order (which might entail checking the availability of counsel and the Vacation Judge). It was clear from the evidence that the date of counsel's availability was not given to the Petition Department on 15 August 2006. Reference was made to Mrs Dickson's time-recording sheet (in particular to the entry dated 17 August 2006: "Spoke to Christine at [Advocates'] Clerks,

put entry in [counsel's] diary and spoke to [Petition] Dept about the date." Counsel further referred to Mr McLeod's affidavit, paragraph 6, where he set out the three possible sequences of events which might have occurred. The second possibility was consistent with Mrs Dickson's entry dated 17 August 2006.

[47] Counsel for the first respondents agreed that there was no particular magic about the date-stamp. But it was the court's public acknowledgement of the date on which it had received the petition. It was the court's public acknowledgement of the petition being lodged. If a petition were rejected because it was not accompanied by a process, then it would not be stamped.

[48] Ultimately, counsel accepted that the petitioners' agents may well have taken certain steps with a view to lodging the petition on 15 August 2006: but the presentation of the petition at the Petition Department was not lodging. Lodging was a step from which it could properly be said that certain matters would follow. Thus a petitioner had to do what was required in terms of Rule of Court 58.7 in order to achieve having the matter put before a judge. Lack of fee fund dues, or a process, or a suitable date for a first order would mean that the petition would not be lodged. The petitioners could easily have asked for the petition to be lodged on 15 August with the first available date suggested by the Petition Department as being the date for the seeking of the first order. It was apparent that the petitioners' transactions had not been infused with a sense of urgency.

[49] In conclusion, counsel submitted that there was no convincing basis for the court to go behind the court record. There was no convincing evidence that, whatever may have been presented on 15 August, steps were actually taken by the agents to ensure that the petition was lodged on 15 August. The petition had not been lodged on that date; it was time-barred; accordingly, the petition should be dismissed.

Discussion

The making of an application for setting aside the arbiters' decision

[50] Article 34(3) of the UNCITRAL rules provides that an "application for setting aside may not be made after three months have elapsed from the date on which the party making that application has received the award". Counsel agreed that in Scots law the application is made by way of a petition for judicial review. Their dispute concerns the date on which the petitioners' application was made.

[51] Counsel did not refer to any provision or definition in the UNCITRAL rules which would assist in ascertaining at what stage in Scottish judicial review procedure an application for setting aside the arbiters' award might be regarded as "made". Nor were counsel able to cite any precedent directly in point.

[52] Counsel did however refer to helpful decisions made in other contexts. For example, in a case concerning an application to the court for disqualification of a company director (***Secretary of State for Trade and Industry v Normand***, 1994 S.L.T. 1249) Lord Sutherland emphasised the automatic procedural consequences following upon the lodging of a petition in the Court of Session, thus giving some support to the first respondents' contention that a possible way of testing whether a petition has (or has not) been lodged is to ascertain whether and when such automatic procedural consequences in fact occurred. At page 1251D-F, Lord Sutherland stated: *"There is no doubt that in an ordinary action the date of commencement of the action is the date of citation of the defender. In an ordinary action, however, the court is not involved until such time as the summons is lodged for calling. That being so, the action cannot be commenced by some unilateral action on the part of the pursuer where no formal intimation has been made to the defender and where the court has not been involved. The position, however, is different in petition procedure. Under that procedure the petition is lodged in court and then in terms of Rule of Court 195 the case will automatically be put before a Lord Ordinary in order that a first order may be pronounced. From the moment the petition is lodged the rest of the procedure follows automatically. I therefore find myself in complete agreement with Sheriff Principal Ireland [in* ***Secretary of State for Trade and Industry v Josolyne,*** *1990 S.L.T. (Sh. Ct.) 48] when he says that the order for service and the service on the respondent are merely events which are consequential on an application which has already been made. Section 7(2) [of the Company Directors Disqualification Act 1986] is concerned, not with the convening of a respondent into the process, nor with the commencement of an action as that is understood in ordinary procedure. What section 7(2) is concerned with is an application to the court and it is the date of that application that is relevant. In my opinion, there can be no doubt whatever that under the ordinary meaning of words "an application to the court" must be the date upon which the petition is lodged in court ..."*

Lord Johnston agreed with that approach in a subsequent company director disqualification case, ***Secretary of State for Trade and Industry v Campleman,*** 1999 S.L.T. 787.

[53] In a decision concerning a bankruptcy petition, also reported in 1999, namely ***Ritchie v Dickie***, 1999 S.C.L.R. 939, Lord Bonomy was concerned with section 16(4) of the Bankruptcy (Scotland) Act 1985, which provided *inter alia* that *"a petition under this section may be presented ... within ten weeks after the date of sequestration ..."*. At page 943E, he concluded: *"On the basis therefore of authority, common sense and the ordinary meaning of words, I consider this petition was 'presented' when it was lodged in the petition department. The petition is accordingly timeously presented for the purpose of seeking recall of the sequestration on a ground which requires presentation within ten weeks of the sequestration."*

[54] Against the background of those decisions (admittedly made in different contexts and in relation to differently-worded provisions), I turn to consider Article 34(3) of the UNCITRAL rules, the terms of the Rules of the Court of Session, and the parties' respective contentions.

[55] In terms of Article 34(3), an application to set aside the arbiters' award must be "made" within the three month period. Article 34(3) does not provide for an application being attempted, or about to be made, or put in train, prior to the expiry of the three month period: the application must be "made".

[56] In my view, on a proper construction of Rule of Court 58.7 (quoted in paragraph [4] above) the automatic procedural consequences referred to by Lord Sutherland in ***Secretary of State for Trade and Industry v Normand*** *cit. sup.,* will occur only upon the petition being "lodged". Only when the petition has been lodged is the Court of Session (the reviewing body) engaged in processing and dealing with the application. Only when the petition has been lodged will anything be done by the reviewing body (for example, the placing of the petition forthwith before a Lord Ordinary for a hearing for a first order). Accordingly the question in issue in this case is whether and on what date the petition was lodged.

[57] The petitioners' argument in effect amounted to a contention that a petition is lodged if it is brought to the Petition Department counter, the attention of the Petition Department staff is drawn to it, some discussion takes place about it (for example, explaining that the availability of counsel to appear at the motion for a first order will have to be ascertained), and the petition is then put to one side, "on hold", whether in a pending tray or elsewhere in the department, until the unresolved matter is resolved. The petitioners do not accept that any processing of the petition by the Petition Department staff is required for the petition to be lodged. In the days following the petition being left in the department, the staff might take certain internal, administrative, steps (such as debiting the agents' account with fee fund dues, registering the petition on the computerised register, date-stamping the petition, permitting the accompanying motion to be enrolled, and putting the petition before a Lord Ordinary in chambers for a hearing for a first order): but the petitioners submit that these are steps taken at the will or convenience of the staff, steps beyond the control of counsel, solicitors or court runners, and it would be "unreasonable and inconvenient" in the words of Lord Keith in *Burgh of Millport, petitioners,* 1974 S.L.T. (Notes) 23, for such court-users to be prejudiced by "circumstances internal to the court".

[58] By contrast, the first respondents submit that a petition is not lodged during an initial exchange such as that described above. The petition is only lodged when accepted and processed by the Petition Department staff such that the following procedures do in fact happen as a consequence, namely: debiting of the fee fund dues; registration in the Petition Register; date-stamping the petition; the enrolment of a motion for a hearing for a first order; and the placing of the petition "forthwith" before a Lord Ordinary (usually in chambers) for the motion for the first order.

[59] In my view, the first respondents' submissions are to be preferred, for the following reasons:

[60] It is often necessary to be able to ascertain precisely when a document was formally lodged in the Court of Session. Such information may be important for many reasons: for example to establish whether a Minute of Acceptance of Tender was lodged prior to the withdrawal of the Minute of Tender; or to demonstrate whether a time-bar has been interrupted; or to prove on what date a significant time-period began to run. There is therefore a need for clarity and certainty. Clarity and certainty would not be achieved by defining the lodging of a petition in the way contended for by counsel for the petitioners. Adminicles of evidence would have to be gathered, memories searched and precognitions or affidavits obtained, and possibly a court ruling sought as to whether and if so when a document might be regarded as having been lodged. I am unable to accept that the Rules of the Court of Session, properly construed, either intend or permit such an approach. Thus I am not persuaded that a petition might be regarded as lodged where, for example:

- A petition is presented at the Petition Department counter, but is for some reason rejected by staff (for example, as being in unacceptable form; or as being unaccompanied by a process), and is handed back to the agents;
- A petition is presented at the counter and is (after discussion) placed by the Court of Session staff in a pending tray to await some event such as information from the agents about the availability of their counsel, or payment of fee fund dues, or some other matter;
- A petition is presented at the counter, and is simply not dealt with, but is left lying unattended to.

In my view therefore a petition cannot be deemed to be lodged until it has been accepted by the court staff and put into the court system such that it begins its journey through Court of Session procedure (cf. the circumstances in ***Burgh of Millport, petitioners,*** 1974 S.L.T. (Notes) 23). Rules such as Rule 58.7 envisage an acceptance of the petition by staff and a processing of the application embodied in the petition, including the registering of the petition in the Petition Register and the placing of the petition "forthwith" before a Lord Ordinary for the hearing for a first order: cf. the Commentary on the Rules of the Court of Session by Sheriff N.M.P. Morrison paragraph 58.7.1. Rule 4.3(b), quoted in paragraph [4] above, does not in my view assist the petitioners, as the rule provides that a process must be lodged when the petition is presented; the rule does not define what is required for the lodging of the petition itself.

[61] Furthermore, if the petitioners' submissions were to be accepted, a petition such as that in the present case could, in theory, be physically presented to the Petition Department and discussed with the department's staff, but because some problem had been identified or further information was required, put to one side on the counter (whether in a pending tray or not) and be left for some considerable time while the problem was tackled and possibly ultimately resolved. To suggest that such a situation amounts to "lodging" a petition so that the petition is effectively within the court machinery is unrealistic and impractical. As was pointed out by senior counsel for the

first respondents, if someone were to make an inquiry at that stage as to whether there was any application or petition seeking review of the relevant matter, a member of the Petition Department staff would check the court system, in particular the computerised Petition Register, and advise in the negative. By contrast, in the circumstances outlined in ***Burgh of Millport****, petitioners, cit. sup.,* such a check would have produced a positive response. Even if a member of staff were sufficiently omniscient to know about the petition lying in the pending tray, awaiting attention after the resolution of the problem or the obtaining of the information, that member of staff would in all likelihood advise the inquirer that a petition was about to be lodged, or was expected to be lodged. Moreover, in such circumstances the Petition Department staff could not comply with Rule 58.7 in that they would be unable to arrange that the petition (which had not yet been registered or processed in any way) be placed "forthwith" before a Lord Ordinary for a hearing for a first order: thus the automatic procedural consequences of a petition having been lodged (an application made), all as described by Lord Sutherland in ***Secretary of State for Trade and Industry v Normand****, cit. sup.,* would not be triggered.

The circumstances in the present case

[62] In my opinion, two undisputed facts form the starting-point in the present case: first, the Court of Session date-stamp appearing on the petition is 21 August 2006; secondly, the court's Petition Register (now computerised) shows the first entry in relation to the petition as 21 August 2006. The presumption *omnia rite acta esse* in my view applies to those undisputed facts, and accordingly the inference to be drawn - absent persuasive evidence to the contrary - is that staff in the Court of Session formally accepted and processed the petition on that date, with all the procedural consequences which, in terms of the Rules of the Court of Session, must follow. In other words, the petition was lodged and the application made on 21 August 2006.

[63] That is not to say that the date-stamp and computer entry are necessarily conclusive evidence of the correct date of the lodging of the petition. I accept that a party may be able to lead evidence which rebuts the presumption *omnia rite acta esse*. For example, a party may be able to prove that the Petition Department staff were for some reason, on a particular day, working under a misapprehension as to the correct date, and that the date-stamp and computer entry reflected their error, and did not correctly record the day on which the court staff accepted and processed the petition. However in this case, the evidence produced by the petitioners, far from overcoming the presumption raised by the date-stamp and computer entry, in my view tends to support a sequence of events consistent with the date of lodging the petition being 21 August 2006, for the following reasons:

[64] Mr McLeod of the Petition Department put forward three possible explanations about what may have occurred in August 2006. Counsel for the petitioners did not suggest any other possible explanation. Accordingly I consider each of the three in turn.

[65] The first possible explanation is that Petition Department staff saw the petition on 15 August 2006, but returned it to Mrs Dickson while she arranged a date for the hearing of the motion for a first order. However that explanation is inconsistent with Mrs Dickson's carefully-kept diary and the time-recording sheets, and also with the explanations in her affidavit. The explanation is also inconsistent with Mr Simpson's recollection of events as outlined in his affidavit. I see no reason to doubt the credibility or reliability of either Mrs Dickson or Mr Simpson. Accordingly I am not satisfied that the first suggested possibility in fact occurred.

[66] Turning to the third possible explanation, namely that Petition Department staff did not see the petition until 21 August 2006: again that explanation is inconsistent with Mrs Dickson's diary, time-recording sheets, and the explanations in her affidavit. Nor does it match Mr Simpson's recollection of events and the fact that he dictated a letter of instruction to counsel dated 18 August 2006, identifying 24 August 2006 as the date of the hearing. I am satisfied by that evidence that Petition Department staff and possibly other Court of Session staff must have been involved with the petition prior to 21 August 2006.

[67] The remaining possible explanation (the second explanation) appears to me to be the only one which is consistent with the sequence of events outlined in the affidavits and productions. That sequence of events appears to me to be as follows:

[68] On 15 August 2006, during the court's summer vacation, the petitioners' agents' court runner Mrs Dickson took the petition and a completed Motion Sheet dated 15 August 2006 to the Petition Department for lodging and for enrolling the motion for a first order: see paragraphs 5 and 6 of Mr Simpson's affidavit, and paragraph 5 of Mrs Dickson's affidavit. Mr McLeod, a member of court staff in the Petition Department, spoke to Mrs Dickson at the counter. It became apparent that the Petition Department required to be advised of the date (or dates) on which the agents' selected counsel could appear at the chambers hearing to make the motion for a first order: see paragraph 6 of Mr Simpson's affidavit, and paragraph 5 of Mrs Dickson's affidavit. Mrs Dickson then had to check the availability of that counsel before being able to confirm with Mr McLeod a suitable date when the petition could "forthwith" be placed before a Lord Ordinary in chambers. Mrs Dickson telephoned Mr Simpson to explain this requirement: see paragraph 6 of Mr Simpson's affidavit, and paragraph 5 of Mrs Dickson's affidavit. Mrs Dickson was then instructed to arrange for the selected counsel to move the motion. She accordingly checked the availability of counsel (probably noting a range of suitable dates: see paragraph 5 of Mrs Dickson's affidavit). She carried out that checking procedure some two days after 15 August 2006, for her time-recording for 17 August 2006 notes: *"Spoke to Christine at [Advocates'] Clerks, put entry in [counsel's] diary and spoke to [Petition] Dept. about the date."*

[69] Thus it appears that negotiations with the Petition Department did indeed begin on 15 August 2006, but counsel's availability was unknown at that stage. Mrs Dickson's evidence was that the petition was not physically returned to her on 15 August 2006: see paragraph 6 of her affidavit. If it had been, she would have marked her diary entry with a cross, and made an entry for another date: see paragraph 3 of her affidavit. Also she would have made an entry in her time-recording sheet that she had *tried* to lodge the petition: see paragraph 4 of her affidavit. So far as she was concerned, she had physically left the petition with the Petition Department on 15 August 2006, and had never again had it in her possession. Thus she reported to the solicitors' office that the petition had been "lodged": see paragraph 8 of her affidavit, and paragraph 6 of Mr Simpson's affidavit. However as Mr McLeod had raised the question of a date for the chambers' hearing (dependent upon the availability of the preferred counsel), I have concluded on a balance of probabilities that Mr McLeod on that particular occasion adopted the method of approach outlined in his second option, namely: *' ... held [the petition] in [his] pending tray with a note stating that [he] was awaiting a date for the hearing on the motion for first orders ..."*

[70] I have also concluded, on a balance of probabilities, that Mr McLeod thereafter waited for information from Mrs Dickson about dates which would suit counsel. He may then have had to make arrangements for a suitable judge to be available in the Court of Session on the appropriate date, as the interlocutor relating to the first order was ultimately granted, not by the Vacation Judge on general duty, but by a commercial judge, Lord Drummond Young. On 17 August 2006, Mr McLeod and Mrs Dickson agreed that 24 August 2006 would be an appropriate date for the hearing in chambers. It seems to me, on a balance of probabilities, that it was only after that date (24 August 2006) had been arranged that Mr McLeod took the necessary administrative steps (at a time convenient to him, as no-one had mentioned any particular urgency) whereby the petition was "lodged" in the Court of Session and put into the Court of Session machinery with all the automatic consequences such as the date-stamp, the debit of fee fund dues, the registration of the petition in the Petition Register, the enrolling of the motion for a hearing for a first order, and the placing of the petition before a Lord Ordinary. It appears from the date stamp and the computerised Petition Register that Mr McLeod so dealt with the petition on 21 August 2006. Thus the petition was in my opinion lodged in the Court of Session on 21 August 2006. All that went before comprised preliminary discussions, negotiations and preparations for the ultimate lodging which occurred on 21 August 2006. Unlike the circumstances in ***Burgh of Millport, petitioners****, cit. sup.,* the petition was waiting on the threshold of the court system: it had not been introduced into that system.

[71] I would add that the date of 15 August 2006 which appears on the relevant Motion Sheet prepared by the petitioners' solicitors is consistent with the sequence of events outlined above, despite appearances to the contrary. The Motion Sheet was prepared by the petitioners' solicitors at their office. It was no doubt prepared in the expectation that the petition would be accepted for processing (i.e. lodged) on 15 August 2006 and the motion enrolled on that date. If the events outlined in paragraphs [68] to [70] above then occurred, the date on the Motion Sheet became out-of-date, and should strictly speaking have been altered to reflect the date when the petition and the motion were in fact formally lodged and enrolled respectively. However on the information placed before me, Mr McLeod, the manager in the Petition Department, would have been unlikely to trouble with the date on the Motion Sheet: see, for example, paragraph 7 of Mr McLeod's affidavit. Mrs Dickson may have handed over the Motion Sheet with the petition on 15 August 2006, and thus did not have an opportunity to alter the date at a later stage. Alternatively, although she may have had an opportunity to alter the date, she understandably did not in the circumstances either think about doing so, or think it was necessary. Accordingly I am satisfied on the evidence that the Motion Sheet could still bear the date of 15 August 2006, despite the petition and motion being lodged and enrolled respectively on 21 August 2006.

[72] In the result, I have not been persuaded by the evidence that the Court of Session's date-stamp and the first entry in Petition Department register do not properly reflect the date on which the petition was lodged. On the contrary, I am satisfied on a balance of probabilities that the petition was lodged on 21 August 2006. That being so, it is unnecessary for me to decide whether the arbiters' award was received by the petitioners on 15 or on 18 May 2006. In that connection, it has occurred to me that I was not addressed in any detail on the terms of the PDF file attached to the e-mail, nor was I addressed on the nature and relevance of electronic signatures. I accordingly reserve my opinion on the question whether the e-mail of 15 August 2006 could be said to satisfy the terms of Article 31 of the UNCITRAL rules, quoted in paragraph [1] above.

[73] I have therefore concluded that the petitioners' application for setting aside the arbiters' award was made "after three months [had] elapsed from the date on which [the petitioners] had received the award". In terms of Article 34(3), the petition is time-barred and should be dismissed.

Decision

[74] For the reasons given above, I shall dismiss the petition. I reserve meantime the question of expenses.

Petitioners: D.E.L. Johnston QC; A.M. Clark, Advocate; Tods Murray LLP
First Respondents: R. S. Keen, Q.C.; McBrearty, Advocate; Simpson & Marwick
Second, Third and Fourth Respondents (Arbiters): No appearance