JUDGMENT : Mr Justice Aikens: Commercial Court : 4th November 2002

A. Synopsis of the case

1. These proceedings have taken place against the background of a long – standing quarrel between two branches of a Greek family and the tumultuous events in the Balkans over the last decade. There are two actions which have been tried together. The actions concern contracts relating to the supply and *"manipulation*" (ie. handling) of crude oil. The defendants ("Okta") are the owners of a refinery at Skopje, now the capital of the Former Yugoslav Republic of Macedonia ("FYROM"). The first named Claimant ("Jetoil"), is a Greek company. It entered into a contract with Okta in 1993, ("the 1993 contract"), which gave Jetoil the exclusive right of manipulation, at its terminal in Thessaloniki, Greece, of non – heated crude oil bought by Okta for its own account. That contract also gave Jetoil a right of "first refusal" to supply crude oil to Okta. It contained an English law and arbitration clause.

2. In the first action (1999 Folio No 1513) Jetoil claims damages for breach of the 1993 contract, which was concluded on 5 March 1993 and states that it is valid for 10 years, ie. until March 2003. Jetoil's claim is made under two heads. First Jetoil alleges that, from July 1999, Okta failed to permit Jetoil to manipulate, at its terminal in Thessaloniki, all the non - heated crude oil that Okta had bought on its own account (as opposed to a purchase for any other party). Jetoil asserts that this failure continued until the time of the trial. The second head of claim is for alleged breach by Okta of Jetoil's right of first refusal to supply crude oil to Okta.

3. Okta accepts that, since July 1999, it has failed to permit Jetoil to manipulate the non – heated crude oil that Okta has bought for its own account. Okta also accepts that since July 1999 it has not afforded Jetoil the right to exercise a first refusal to supply Okta with crude oil that Okta wishes to buy for its own account. Okta says that the FYROM government sent letters to Okta dated 16 and 26 November 1999 and then again on 30 May 2001. Okta says that effectively the letters were an order that Okta should not perform the 1993 contract. Okta relies on a "*force majeure*" clause in an annex to the 1993 contract which states that neither party will be responsible for damage caused by failure to perform the contract if that failure is attributable to "*acts or compliance with requests of any governmental authority"*. Although Okta accepts that it did not give Jetoil prompt notice of this alleged force majeure event, as is required by the terms of the 1993 contract, Okta submits that it can still rely on the *"force majeure"* provision of the 1993 contract to avoid any responsibility for its admitted failure to perform that contract since July 1999.

4. Jetoil denies that Okta's failure to perform the 1993 contract is attributable to a request by the government of FYROM to Okta not to perform that contract with Jetoil. Jetoil says that, from July 1999 at the latest, Okta had decided to deal instead with another Greek oil company, Hellenic Petroleum SA ("Hellenic"). This was because, by July 1999 Hellenic, through a joint venture company called EL.P.ET ("Elpet"), had obtained a significant shareholding interest in Okta.

5. Jetoil's case is that once Okta had come under the control of Hellenic in July 1999, Okta had no choice but to deal with Hellenic. Hellenic wished both to supply and handle non – heated crude oil that Okta needed to purchase. Thus Okta decided that it would deal only with Hellenic, rather than Jetoil or Moil – Coal and it started to do so.

6. In November 1999 Jetoil obtained an injunction in the English Court ordering Okta to perform the 1993 contract so as to permit Jetoil to manipulate crude oil bought by Okta. Jetoil's case is that Okta then persuaded the FYROM government to "request" that Okta did not perform the 1993 contract. Jetoil submits that as a result of this request from Okta the FYROM Minister of Trade signed and sent the letters of 16 and 26 November 1999 to Okta. Therefore this is not truly a case of a request by a governmental authority not to perform the 1993 contract. Moreover, Jetoil asserts, the letters do not say in clear terms that it is requesting Okta not to perform the 1993 contract.

7. These points are all challenged by Okta. There are also points on the quantum of the claim under the 1993 contract.

8. The second named Claimant ("*Moil – Coal*"), is a Cypriot company. It says that it entered into an oil supply contract with Okta in 1998 for the supply of 500,000 MT of crude oil over a period of one year from September 1998 to 1999 ("*the oil supply contract*"). In the second action (2001 Folio 528), Moil – Coal claim damages for breach of the oil supply contract. Okta argues that the oil supply contract was intended only to be a *"framework agreement"*, to be superseded by contracts for individual cargoes. Okta also says that the contract terms are too vague to be enforceable. There are further points on quantum.

9. At a late stage in the trial before me Jetoil sought leave to amend its pleadings in both actions to claim a declaration that the 1993 contract was binding and that Okta and its privies, which are said to include Elpet, are estopped from denying the binding nature of the 1993 contract. Jetoil further claimed an injunction against Okta and its directors and officers from pursuing proceedings in the courts of the FYROM. A mandatory injunction ordering Okta to discontinue those Macedonian proceedings was also sought.

10. It was the case that in July 2001 Elpet (not Okta) had commenced proceedings against Jetoil in the courts of the FYROM. Elpet sought a declaration that the 1993 contract is not valid and binding. It also sought temporary measures to prevent any payment, by Okta, of damages awarded in the English Courts in the current proceedings. On 2 July 2002 the Macedonian Court gave judgment in favour of Elpet and granted an interlocutory injunction as requested.

11. Leave to amend Jetoil's pleadings was not seriously opposed. I granted leave and heard argument on this additional issue some time after most (but not all) of the other aspects of the case had been dealt with.

B. The parties in the case

12. Jetoil is a company incorporated in Greece. By 1993 and thereafter Mr Kyriakos Mamidakis was the Chairman of Jetoil. He gave evidence before me. He stated that in 1968 his branch of the Mamidakis family fell out with his uncle, Mr George Mamidakis. Following this family quarrel Jetoil was founded in 1969. It has operated as a Greek oil and trading company which has supplied the Greek domestic market with all grades of petroleum products. It also supplies companies internationally. In 1972 Jetoil constructed a crude oil storage facility at Thessaloniki. The facility has a storage capacity of some 190,000 cubic metres. In 1956 Mr George Mamidakis had constructed a similar installation at Thessaloniki. It was owned by his company, George Mamidakis & Co. In 1999 George Mamidakis & Co was sold to Hellenic, which is a company owned by the Greek state and is a commercial rival to Jetoil. Therefore from 1999 Hellenic owned and operated the George Mamidakis & Co oil installations at Thessaloniki.

13. Moil – Coal is a Cypriot registered company that was founded in 1986. Mr Kyriakos Mamidakis was the Chairman and Managing Director of that company, although he no longer holds that position following changes in the law in Greece. Moil – Coal is an oil and coal trading company. For many years it has delivered crude oil to Jetoil's installations at Thessaloniki.

14. The background to the creation of Okta and its interest in the refinery at Skopje is a little complex. Before the break up of Yugoslavia, two entities dealt with the supply and storage of crude oil in the territory of the Macedonian Republic of Yugoslavia. They were Jugopetrol – Skopje ("*Jugopetrol*"), which was later replaced by Makpetrol Export – Import Skopje ("*Makpetro*l"), and Organsko Hemiska Industria Naum Naumovksi – Borce ("OHIS"). Jugopetrol and OHIS decided, in the 1970s, to construct an oil refinery in Skopje. It was built with the aid of Russian finance. The refinery was able to operate by 1982 and had a capacity of some 2.5 million metric tonnes. In 1979 both Jetoil and George Mamidakis & Co entered into contracts with Yugoslav entities for the receipt, storage and delivery of crude oil to the refinery at Skopje. Delivery of the oil was by railway tankers.

15. The refinery at Skopje was owned by a company that was itself owned by the Yugoslav state. In December 1990 the company owning the refinery became known as OKTA Crude Oil Refinery AD, (ie. Okta), but this was merely a change of name. Okta remained a wholly state owned company.

16. In November 1992 the FYROM declared itself independent of Yugoslavia. Okta continued to own and operate the refinery. At the time that the 1993 contract and the 1998 oil supply contract were concluded with Jetoil and Moil – Coal respectively, Okta was still a state owned company. Okta was *"privatised"* in 1999, when 54.19% of the shares in the company were sold and transferred to Elpet. The remainder of the shares in Okta are owned by the FYROM government. After the privatisation of Okta the President of the Board of Directors was Mr Giorgi Kotev. He has also been the Secretary General of the present FYROM government from its election in December 1998. Mr Kotev gave evidence at the trial.

17. Elpet is a company which is owned by Hellenic and Meton SA and Etap SA ("*Meton*" and "*Etap*"), which are also Greek companies. Pursuant to a Share Sale and Purchase Agreement between Elpet and Okta signed on 8 May 1999, Elpet became the owner of 54.19% of the shares in Okta. Mr Athanasios Karachalios was the Managing Director of Okta during the period July 1999 to October 2000. From January 2002, Mr Karachalios has been the Managing Director of Hellenic. From September 2000, Mr Petros Karalis has been the Managing Director of Okta. Both Mr Karachalios and Mr Karalis gave evidence at the trial.

C. The Background to the 1993 contract

18. On 2 February 1979 Jetoil signed a contract for the receipt and storage (at the Jetoil installation in Thessaloniki) and then the delivery of crude oil sold to OHIS. This contract was between Jetoil, Jugopetrol and a Yugoslav railway organisation called ZTO – Skopje. The contract was initially for 5 years, during which a minimum quantity of 4 million tons of crude oil would be handled by Jetoil. The operation of the contract began in September 1982, when the Okta refinery started to function. At about the same time Makpetrol replaced Jugopetrol as one of the parties to the 1979 contract with Jetoil. Also in 1979 George Mamidakis & Co entered into a contract with the same Yugoslav parties. So the manipulation of crude oil imported to the Skopje refinery was split two ways between Jetoil and George Mamidakis & Co.

19. At the time of the creation of the FYROM, Makpetrol was responsible for supplying all the crude oil requirements of the Skopje refinery. The Okta refinery processed the crude for a fee and Makpetrol marketed the refined product. In 1992 the management of the Okta refinery decided to enter into competition with Makpetrol for the importation of crude oil and the distribution of refined petroleum products. The Okta refinery reached an agreement with Makpetrol which enabled the refinery to import crude oil for its own account. Mr Kyriakos Mamidakis agreed with Okta that the crude oil that the refinery was to import for its own account would be manipulated (ie. handled) at Thessaloniki by Jetoil. However the crude oil imported by Makpetrol continuted to be manipulated by George Mamidakis & Co.

20. The 1993 contract, which was signed on 5 March 1993 by Mr Kyriakos Mamidakis on behalf of Jetoil, was concluded to reflect this agreement that had been made between Jetoil and Okta. An Annex to the contract was signed on 6 March 1993. It contains the all – important force majeure clause. Under the contract Jetoil would manipulate, at its installations at Thessaloniki, the quantities of crude oil that Okta would buy and process for its

own account. The "*manipulation*" consisted of receiving the crude oil from the vessels, storing it in tanks and then loading it onto rail tankers that were supplied by the refinery.[1]

21. In 1993 it was contemplated by both sides that a pipeline would at some stage be built between Thessaloniki and Skopje. Clause 1 of the Annex to the 1993 contract provided that if a pipeline was built then both parties would use their influence to persuade the authorities to start the pipeline at the Jetoil facilities at Thessaloniki. In that case the terms of the 1993 contract "*duly modified/supplemented if needed*" would apply.[2]

D. Events after the 1993 contract had been concluded: general

22. After the FYROM had declared independence there was a period of political and economic instability both within the FYROM and in the Balkans generally. This meant that the FYROM was in a precarious financial position. During the period from April 1994 to October 1995 the Greek government imposed a ban on the export of oil to the FYROM. During that time Jetoil could not manipulate the crude oil bought by Okta for its own acccount. Nor could Jetoil utilise the right of first refusal. The annual consumption of crude oil in the FYROM fell to about 800,000 to 900,000 MT of crude oil per year. This was very much less than the capacity of the Okta refinery, which was 2.5 million metric tonnes per year.

23. In November 1998 a new government was elected in the FYROM. That led to the *"privatisation"* of Okta and the transfer of shares in Okta to Elpet that I have already mentioned. On 11 March 1999 a Memorandum of Understanding between Hellenic, Meton, Elpet and the Prime Minister of the FYROM was signed. It proposed the *"privatisation"* of Okta and the creation of a new company to which all the assets of the old Okta company would be transferred, but free of existing liabilities. Amongst those liabilities were the obligations under the 1993 contract and the oil supply contract. This proposal led to concerns by Jetoil and Moil – Coal that the 1993 contract and the oil supply contract may not be honoured by any new refinery company that took over from the state owned Okta. Those concerns were not met to the satisfaction of Jetoil and so led to Jetoil's application for an injunction against Okta in the English Commercial Court on 27 May 1999.

24. The Claimants sought an injunction to restrain Okta from divesting itself of any assets save on terms that *"the transferee"* of Okta's rights and liabilities undertook to Jetoil and Moil – Coal that it would honour the 1993 contract and the oil supply contracts. Thomas J granted the injunction, which was continued by Timothy Walker J on 9 June 1999, when Okta was also represented. Both Orders made by Thomas and Timothy Walker JJ contemplated that a Claim Form would be issued and served by the Claimants. This was despite the fact that the 1993 contract contained a London arbitration clause. In fact no claim form in that action was ever issued.

25. Meanwhile on 8 May 1999 the Share Purchase and Concession Agreement (ie. the SPA) had been signed by the FYROM Government and Elpet. Clause 33.1(c) of the SPA provided that it was a condition precedent of the contract that Okta would terminate specified agreements with Jetoil and Moil – Coal and any other agreements that were to be specified by Hellenic within 30 days of the closing of the agreement.

26. Subsequently, after the further hearings before Thomas and Timothy Walker JJ, there was an amendment to the SPA which stated that Clause 33.1(c) was to be deleted and that the FYROM Government would assume the existing liabilities of Okta.

27. Between the 4 July 1999 and 17 October 1999 Okta purchased for its own account five cargoes of non - heated crude oil. The total oil purchased was over 210,000 MT. Under the terms of the 1993 contract Okta should have permitted Jetoil to manipulate these cargoes at the Jetoil installation in Thessaloniki. However all the cargoes were manipulated by Hellenic at its facilities at Thessaloniki. Jetoil became aware of these shipments. On 14 October 1999 Mr Kyriakos Mamidakis sought undertakings from Okta that Okta would honour the 1993 contract, which, as he interpreted it, meant that Okta had to give Jetoil the exclusive right to manipulate all the non – heated crude oil bought by Okta for its own account.

28. Jetoil was not satisfied with the situation and so on 11 November 1999 it applied, without notice, to Longmore J for a second injunction against Okta. This was the start of the first action, 1999 Folio No 1513. I deal with the procedural history of the action in further detail below.

29. On 16 November the Government of the FYROM sent to Okta the first *"force majeure letter*". The exact terms of the letter are important. For convenience I have set out the full text of this and the other two "force majeure" letters (of 26 November 1999 and 30 May 2001) in an Annex to this judgment. Effectively the letter of 16 November instructed Okta "*to continue to supply the refinery with crude oil from a partner which you consider most favourable for you"*. The letter also stated that Okta should comply with the instructions in the letter, "*which are considered to be force majeure"*. The letter referred to the "*force majeure*" clause in the 1993 contract. The circumstances in which this letter was produced are much in issue between the parties and I will have to make further detailed findings on the facts later in this judgment.

30. A second *"force majeure"* letter, signed by the Minister of Trade on 26 November 1999, was sent by the FYROM government to Okta on the same day. This letter was in similar terms to the first one, but it further emphasised the importance that the supply of crude oil had for the FYROM. The bulk of the evidence in the trial before me was

[1] As already mentioned clause 6 of the 1993 contract also gave Jetoil the right of first refusal for the purchase of any crude oil to be procured by the Okta refinery for its own account.

[2] Clause 1 of the Annex to the 1993 Contract: Bundle A/page 3.

concerned with the precise circumstances leading to the generation and production of these two *"force majeure"* letters.

31. As I have already mentioned, the alleged breaches of the 1993 contract by Okta in July – November 1999 led to Jetoil taking the current proceedings against Okta in the Commercial Court. On 1 December 1999 Thomas J ordered that four preliminary issues concerning the construction and effect of the 1993 contract should be determined urgently. Thomas J gave his judgment on those preliminary issues on 26 January 2000. He held (amongst other things) that Okta was obliged to permit Jetoil to manipulate all the non – heated crude oil that Okta bought for its own account. However this obligation only extended so long as the parties reached agreement on a price for this manipulation. As no price had been agreed for the period from 1 January 2000, then unless the parties agreed a price, the obligation would cease and would not carry on until the end of the 10 year period originally envisaged when the contract was concluded in 1993.

32. Jetoil appealed the issue of the duration of the 1993 contract. The Court of Appeal delivered its judgment on 22 March 2001. It upheld Thomas J's ruling on the existence of the binding obligation to permit Jetoil to manipulate all the non – heated crude oil bought by Okta for its own account. But it overturned Thomas J's conclusion that this obligation only subsisted so long as a price had been actually agreed. The Court of Appeal held that, in the absence of an agreement on price, for the period after 31 December 1999, Jetoil was entitled to a reasonable price for the manipulation that it performed after that date.

33. Following the Court of Appeal's judgment, on 30 May 2001 the Minister of Economic Affairs sent another "force majeure" letter to Okta. It referred to the letter of 16 November 1999. The new letter stated that the FYROM government "*request[s]/require[s] you not to implement any part of the document that seems to have been concluded between the refinery [ie. Okta] and [Jetoil] of 5 March 1993*". The letter also stated that "*in accordance with this document you [ie. Okta] should concur with our instructions which, if the Annex to the basic document of 5.3.1993 is valid, point 4 is considered to be a force majeure*".

34. Once again the circumstances in which this letter was produced and sent are much in issue between the parties and I will have to make more detailed findings of fact about them.

E. Background to the 1998 oil supply contract

35. Moil – Coal had entered into various contracts with Okta for the supply of crude oil from about 1993. On 11 June 1997 the parties concluded a contract for the sale of 800,000 MT of crude oil over a period of 12 months. Then on 27 August 1998 a document headed "*Contract For the Sale/Purchase of Crude Oil*" was signed by the parties.

36. After the production of the Memorandum of Understanding in March 1999, Jetoil was also concerned about whether Okta, if privatised, would fulfil what Jetoil regarded as Okta's contractual obligations under the oil supply contract. The injunction proceedings in May 1999 and those in November 1999 referred to the oil supply contract as well as the 1993 contract.

F. The terms of the relevant agreements and the "force majeure" letters

37. The relevant terms of the 1993 contract and the Oil Supply Contract are set out in an Annex to this judgment.

G. The Procedural Background to the present trial

38. The first of the present two actions was not started by the injunction proceedings in May 1999.[3] This action began (albeit as an application under the Arbitration Act 1996) in November 1999 when Jetoil was dissatisfied with Okta's responses to requests for assurances that the 1993 contract would be honoured by Okta.

39. On 11 November Jetoil applied, without notice, to Longmore J, for a second injunction against Okta.[4] This was to restrain Okta from using the services of any person other than Jetoil for the manipulation of crude oil destined for the refinery at Skopje, until the return date of 18 November, or further order. At that stage Jetoil intended to start an arbitration against Okta under the terms of the arbitration clause in the 1993 contract. So Longmore J's order was made under ***section 44*** of the Arbitration Act 1996. On 12 November 1999 Jetoil called on Okta to appoint an arbitrator. On the return date Thomas J continued the injunction in a modified form.

40. At a hearing before Thomas J on 30 November and 1 December 1999, he heard an application by Okta that this second injunction should be discharged. He concluded that, on the balance of convenience, it should be so. At that hearing he ordered the expedited hearing of the four preliminary issues on the construction of the 1993 contract.

41. The four preliminary issues and the answers given by Thomas J were as follows:

(1) First: whether Clause 1 of the 1993 contract obliges the Okta refinery to make exclusive use of Jetoil for the manipulation of non – heated crude oil purchased and processed by the Okta refinery for its own account; and whether the Okta refinery is free to use manipulating services other than those provided by Jetoil for such purposes. The answer Thomas J gave was: Okta is obliged to make exclusive use of Jetoil for the manipulation of non – heated crude oil purchased and processed by Okta for its own account.

(2) Secondly: whether Clause 3 of the 1993 contract obliges the Okta refinery to submit at least 500,000 tonnes of non – heated crude oil per annum to Jetoil for manipulation pursuant to the contract. Thomas J held that it does not.[5]

[3] That was the action 1999 Folio 725.

[4] The first having been obtained in May 1999.

[5] See *[2000] 1 Lloyd's Rep 554 at 560 second column.*

(3) Thirdly: what rights (if any) are given to Jetoil by Clause 6 of the 1993 contract. The parties agreed that this question should be answered: Jetoil obtained the right to receive an offer to supply not – heated (*sic*) crude oil to the refinery for its own account on the same terms including price on which the refinery was, in fact, prepared to purchase.

(4) Fourthly: whether, upon the failure of the parties to agree a price for manipulation services from and after 1 January 2000 pursuant to the 1993 contract: (i) the 1993 contract is to be treated as discharged; (ii) whether any (and if so what) mechanism is available to fix such price. Thomas J held that if the parties fail to reach agreement on the price payable for manipulation after 1 January 2000 and the period for which that price is to subsist, then the 1993 contract ceased to have effect.

42. As I have mentioned already, Jetoil appealed the ruling on the fourth preliminary issue. Okta cross – appealed the ruling on the first preliminary issue. On 22 March 2001 the Court of Appeal allowed Jetoil's appeal and dismissed Okta's cross – appeal.

43. Accordingly, at the start of the trial before me, the position on the legal effect of the 1993 contract was as follows:

(1) Clause 1 of the 1993 contract obliged Okta to make exclusive use of Jetoil for the manipulation of non – heated crude oil purchased and processed by Okta for its own account. Okta was not free to use manipulating services other than those provided by Jetoil for such purposes;[6]

(2) Clause 3 of the 1993 contract did not oblige Okta to submit at least 500,000 MT of non – heated crude oil per annum to Jetoil for manipulation pursuant to the contract;[7]

(3) Under Clause 6 of the 1993 contract Jetoil obtained the right to receive an offer to supply non – heated crude oil to Okta for its own account on the same terms including price on which Okta was in fact prepared to purchase;[8]

(4) Upon the failure of the parties to agree a price for the manipulation services from and after 1 January 2000, (a) the contract was not to be treated as discharged; (b) a term was to be implied that a reasonable fee, including a reasonable discount of throughput of more than 500,000 MT per year is to be fixed for a reasonable period from and after 1 Jaunary 2001.[9]

44. The trial before me was heard on various days between Tuesday 2 July and Tuesday 30 July 2002 and on 2 October 2002. I heard evidence from the following witnesses:

(1) For the Claimants: Kyriakos Mamidakis, the Chairman of Jetoil; George Xintariou, the chief accountant of Jetoil; John Kardamakis, who was a "*personal consultant*" to Mr Mamidakis on a number of issues, including the negotiation of the 1993 contract and other matters; George Tsiropoulos, an expert called to deal with the "Tank 10 mitigation" issue.

(2) For the Defendants: Professor Galev, professor at the Law Faculty of the University of Saints Cyril and Methodius at Skopje, who acted as a consultant to the FYROM government in 1999 in connection with the 1993 contract; Athanasios Karachalios, the Managing Director of Okta between July 1999 and October 2000; Petros Karalis, the Managing Director of Okta from October 2000; Stathis Potamitis, a lawyer and partner in the Greek firm Potamitis Iliadou, who acted for both Okta and Elpet during the period 1999 to 2001; Besmik Fetai, the FYROM Minister of Economy in 2001, who had been the Director of the Bank Clearing Agency in 1999; Giorgi Kotev, who was the Secretary General of the FYROM government from December 1998 and was also the President of the Board of Directors of Okta; Michael Trowsdale, called to deal with the "*Tank 10 mitigation*" issue. In addition to the evidence of these witnesses, Okta also relied on the witness statements of Nikola Gruevski, who was the Minister of Trade in the FYROM government in November 1999; Pando Dzigerovski, who at the relevant time was a Manager and then Director of Okta; and that of Julijana Maslarkova, Okta's in – house counsel.

45. Both parties instructed oil trading experts. Mr Michael Church was appointed for Jetoil and Miss Meg Annesley for Okta. They were not called but produced an agreed statement of points they had agreed. The parties also engaged accounting experts: Mr Efstathios Poulitsis for Jetoil and Mr Paris Efthymiades for Okta. Once again they were able to agree all relevant matters and produced Joint Memoranda on the figures in the case.

H. The final claims of Jetoil and Moil – Coal and the Issues between the parties by the end of the trial.

46. By the end of the trial the claims of Jetoil and Moil - Coal, for which the figures were largely agreed, were as follows:

(1) **Failure to permit Manipulation under the 1993 Contract:** Jetoil claimed damages for breach of the obligation to permit Jetoil to manipulate non – heated crude oil bought by Okta for its own account.

(a) The parties were agreed that the relevant period for the claim was April 1999 to 5 March 2003. The parties agreed that issues on the quantum of claims under the 1993 contract for the period from 5 March 2002 to 5 March 2003 should be adjourned, save for one point identified below. The parties' experts agreed a figure for Jetoil's gross "*manipulation claim*" for the period April 1999 to 5 March 2002, as US$

[6] See the judgment of Thomas J: *[2000] 1 Lloyd's Rep 554 at 562*. This conclusion was unsuccessfully appealed.

[7] See the judgment of Thomas J: *ibid: at 560 right hand column*.

[8] This answer to the third preliminary issue had been agreed between the parties before the start of the hearing before Thomas J. It is recorded at *[2000] 1 Lloyd's Rep 554 at 559, left hand side*.

[9] See the judgment of the CA: *[2001] 2 Lloyd's Rep 76 at 92, right hand side*. This was the only part of Thomas J's judgment that was successfully appealed – by Jetoil.

6,264,064. From this sum a figure of at least US$234,835 has to be deducted to take account of profits made by Jetoil from mitigating its loss[10] caused by Okta's breach.

(b) The principal quantum issues on the manipulation claim that remained for determination by me were therefore:

(i) in the absence of an agreed price for manipulation of non – heated crude oil once the Thessaloniki – Skopje pipeline had been opened, what is the sum that Jetoil could reasonably have charged after the pipeline had opened and until 5 March 2003; and

(ii) does Jetoil have to give Okta credit for any profits obtained from the use of Tank 10 at the Jetoil installation at Thessaloniki. That Tank would have been used for manipulating Okta crude oil had the 1993 contract been fufilled. The issue was whether Okta had proved that Jetoil could not have used that tank (and made profits from it) ***but for*** the breach of contract by Okta – assuming that breach is established.

(2) **The failure to give first refusal claim (under the 1993 Contract):** Jetoil claimed damages for alleged breach of the obligation (under Clause 6 of the 1993 contract) to give Jetoil first refusal to supply non – heated crude oil to Okta when requiring it for its own account. The parties agreed that the total claim under this head is US$ 2,636,519.

(3) Therefore the total agreed claim under the 1993 contract, (subject to the two points identified above) is: US$ 8,665,748.

(4) **The claim of Moil – Coal under the oil supply contract.** Moil-Coal submits that it is entitled to claim that Okta had failed to take a total of 209,646 MT of crude oil under the contract. That total figure was agreed, although Okta said that it was not the relevant figure for the purposes of calculating damages. On the assumption that Moil-Coal was entitled to claim damages for a failure to take the whole of this amount, it was agreed by the experts that the total quantum of Moil-Coal's claim under that contract amounted to US$ 918,249. However it was also accepted by both parties that Jetoil and Moil – Coal could not recover in full for the claims under Clause 6 of the 1993 contract and also the oil supply contract. It was agreed between the parties that if Jetoil recovers in full under the 1993 contract, then a credit of US$280,925 had to be deducted from Jetoil's claim for breach of the right of first refusal to avoid any element of double recovery. Therefore the net total of Jetoil's right of first refusal claim would be: US$ 8,384,823.

47. **The remaining issues between the parties.** By the end of the trial the issues between the parties had therefore been much narrowed. They were as follows:

(1) **In relation to the 1993 contract**:

(a) the principal issue on liability is whether Okta could rely on the force majeure clause in the 1993 contract to avoid responsibility for its failure to perform its obligations under the 1993 contract. This argument affects the claim for damages for Okta's failure to permit Jetoil to manipulate non – heated crude oil bought by Okta for its own account and also Jetoil's claim for damages for Okta's refusal to permit Jetoil to exercise the right of first refusal pursuant to Clause 6 of the 1993 contract.

(b) On quantum: the principal remaining issues concerned the "*manipulation*" claim. They were:

(i) what manipulation fee would have been charged by Jetoil after the pipeline between Thessaloniki and Skopje had started to operate;

(ii) what credit (if any) should be given for use of Tank 10 at the Jetoil installations.

(2) **The Oil Supply Contract claim.** The principal issues remaining were:

(a) whether the oil supply contract was a "*framework*" agreement on the basis of which the parties intended that they would agree specific contracts that regulated the delivery of individual cargoes of crude oil;

(b) whether the oil supply contract, assuming it was intended to be a valid contract, is unenforceable for uncertainty. Okta submit that there is uncertainty as to (i) how the price of oil was to be fixed; and (ii) the quantity of oil to be sold under the contract.

(c) On quantum, it is Okta's case that even if Moil-Coal is entitled to damages for Okta's failure to take the balance of "***about***" 500,000 MT of crude oil, nonetheless, because the contract contemplated the sale of a quantity of "***about***" 500,000 MT, this means that Okta would have been entitled to take only 90% of that figure. That would be a further 159,646 MT, as opposed to the figure of 209,646 MT on which Moil-Coal based its claim.

(3) **Jetoil's claim for a declaration on the validity of the 1993 contract and injunctions against Okta to prevent continuation of proceedings in the FYROM courts by Elpet or reliance by Okta on the FYROM court's judgment.** These claims are keenly resisted by Okta.

48. These issues must be considered, of course, against the background of the conclusions of Thomas J and the Court of Appeal on the four preliminary issues that I have set out above.

I. Can Okta invoke the force majeure clause to avoid responsibility for its failure to perform its obligations set out in Clauses 1 and 6 of the 1993 contract?

49. The principal arguments of Okta run as follows: (i) Okta is entitled to invoke the force majeure clause in the 1993 contract provided that it can demonstrate that (a) "*acts or compliance with requests of any governmental or EC*

[10] It was agreed that because of Okta's breach, Jetoil was able to use Tanks 15 and 16. The figure of US$234,835 constitutes the migitation profit from the use of those tanks. There was a dispute about the use of Tank 10.

authority" had occurred and (b) Okta's failure to perform its obligations under the 1993 contract were "*attributable"* to such acts or compliance. There was no need for Okta to demonstrate that performance of the 1993 contract was rendered either illegal or physically impossible as a result of matters outside the control of Okta and which Okta could not have avoided by taking reasonable steps; (ii) as a matter of interpretation, the letters of 16 and 26 November 1999 should be read as stating, unequivocally, that the FYROM government required or requested Okta to cease performing the 1993 contract; (iii) that interpretation is bound to be given to the letters if the texts are read in their contextual setting, ie. the situation in which they were written by the FYROM Minister of Trade in November 1999; (iv) as a matter of construction of the force majeure clause, what motivated the FYROM government to make the request to Okta to cease performing the 1993 contract is irrelevant; (v) however, if motivation is relevant, then as a matter of fact the decision to request Okta not to continue performance of the 1993 contract was made by the government and was not induced by Okta; (vi) the failure of Okta to perform the 1993 contract is ***attributable*** to the requirement or request of the FYROM government to do so either in the November 1999 letters or that of 30 May 2001; (vii) it is conceded that Okta did not give notice to Jetoil that the FYROM government had required or requested it not to perform the 1993 contracts until the letter of 5 June 2001 was sent from Bird & Bird to Stephenson Harwood. However, although that letter does not constitute "*prompt notice"* within the terms of the force majeure clause, Okta is still entitled to rely on the clause. Okta may have been in breach of the requirement to give prompt notice of invoking the force majeure clause, but the consequence of the failure to give prompt notice is that Jetoil has a right to claim damages. But in this case none have been suffered by Jetoil.

50. Jetoil's response to these arguments is as follows: (i) as a matter of construction of the force majeure clause the phrase "*requests of a governmental or EC authority"* means a request by a government acting in a governmental capacity (rather than as a shareholder or for purely commercial reasons) and pursuant to a statutory authority that renders performance of the contract illegal or physically impossible; (ii) the letters of 16 and 26 November 1999 were based on a series of incorrect facts as stated in the letters and do not, on their face state that the force majeure event relied on by Okta has occurred; (iii) in fact the letters of 16 and 26 November 1999 were instigated by Okta and sent by the Minister of Trade to Okta at the request of Okta; (iv) on the face of the terms of the letters of 16 and 26 November 1999, Okta was not prevented from performing the 1993 contract by virtue of any circumstances beyond its control; (v) therefore, the failure of Okta to perform the 1993 contract after July 1999 was not "*attributable"* to the request of the FYROM government in November 1999 or the letter of 30 May 2001; (vi) the prompt notice provision in the force majeure clause is a condition precedent to Okta's ability to rely on the clause. Giving notice in June 2001 of an alleged force majeure event in November 1999 is not prompt notice and so Okta cannot rely on the clause; (vii) the letter of 30 May 2001 was also instigated by Okta, in an attempt to avoid liability after the Court of Appeal had concluded that the obligation to permit Jetoil to manipulate non – heated crude oil cargoes for Okta's account was one that carried on until 5 March 2003.

51. **Issues for decision on the "force majeure" point.** In my view the following matters have to be decided in relation to the defence of "force majeure":

(1) what is the proper construction of the force majeure clause in the Annex to the 1993 contract: (leaving aside the notice provision for the present)?

(2) What were the precise circumstances in which the letters of 16 and 26 November 1999 came to be sent by the Minister of Trade to Okta?

(3) How should those letters be interpreted against that background?

(4) In the light of the findings on (1) to (3), was Okta's admitted failure to perform the 1993 contract (in relation to both its clause 1 and clause 6 obligations) a failure that is "*attributable"* to a request of the FYROM government and so within the meaning of the force majeure clause?

(5) What were the circumstances in which the letter of 30 May 2001 was sent?

(6) If no force majeure event (within the meaning of the clause) was operative before 30 May 2001, was it operative thereafter?

(7) If the force majeure clause is operative at all, then what is the effect of Okta's failure to give prompt notice of the force majeure event on which it relies?

52. **The proper construction of the force majeure clause in the Annex to the 1993 Contract.**
I accept the submission of Okta that the ambit of the force majeure clause depends on the precise meaning of the words themselves, read in their contextual setting. When the 1993 contract was concluded, the FYROM had become a sovereign state, separate from Yugoslavia. But at that stage Okta remained a state – owned entity. Greece, the country of incorporation of Jetoil, was a member state of the European Community, as it was then called. There is the further background fact, which was not in dispute, that the force majeure clause was part of an "annex" to the contract that was added on 6 March 1993. From Jetoil's side this provision was required because of the danger of an embargo by the Greek government on trade with the nascent FYROM.[11]

53. I accept the submission of Jetoil that, generally, force majeure clauses are concerned to excuse performance of contractual obligations in circumstances where the events giving rise to the failure to perform are outside the control of the contractual party wishing to rely on the clause and their effect could not have been avoided or mitigated by reasonable steps by the contracting party concerned. A particular clause could be broader than those general confines. However in the present clause I note that after the particular events are set out there is a

[11] And an embargo was in fact subsequently imposed by the Greek government in 1994-5.

general phrase: "…*or other causes beyond the control of the party affected, whether or not similar to those enumerated"*. That suggests that in this case the parties contemplated that the events enumerated in the clause on which a party might wish to rely should be ones that were beyond the control of the party concerned.

54. I also accept the submission of Jetoil that it is for the party relying on the force majeure clause to bring itself within the terms of the clause as construed. Therefore here the burden is on Okta to do so.

55. In the case of the present clause I think that, read in its context, the particular part of the force majeure clause on which Okta relies has to be construed as follows:

(1) there must be a *"request of a governmental authority*". The word "*governmental"* is used as an adjective. In the context of this clause the word describes the nature of the request as well as its source. In my view a request is governmental if it is for the general good or a public, as opposed to private, purpose. A request will not be governmental in nature nor within this clause if it is proved that it was made solely or predominantly to enable the party relying on the clause to avoid its contractual liabilities.[12]

(2) The *"request of a governmental authority"* has to be made to the party relying on the force majeure clause. A party can rely on the force majeure clause if it can prove that it failed to perform the contract as a result of "*acts or compliance"* with "*requests of a governmental authority"*. To my mind that implies that the request is one that is directed to the party which, as a result, is unable to perform the contract.

(3) the *"request of the governmental authority"* must be one that is made independently of the party that is requested. I think that this construction follows from my conclusion that the request must be governmental in nature. It is also consistent with the nature of the other particular events set out in the clause and the general wording at the end of the particular events, enabling a party to rely on "*other causes beyond the control of the party affected*". In my view the wording of the clause taken together contemplates that each of the potential force majeure events will be something which is beyond the control of the party affected.

(4) The failure to perform the contract by the party which is the subject of the *"request of the governmental authority"* must be *"attributable"* to that request. In my view this means that the party relying on the force majeure clause must show that the effective cause of the non – performance of the contract is a request of a governmental authority which that party has acted upon or complied with. That is a question of fact to be determined by looking at all the circumstances in which the non – performance occurred and the governmental request was made. Only if it is shown that there is that causal connection between the request of the governmental authority and the non – performance can it be said that the non – performance is "*attributable*" to the "*acts or compliance*" with the "*request of the governmental authority"*.

56. **What were the circumstances in which the letters of 16 and 26 November 1999 came to be written by the FYROM Minister of Trade to Okta?**

Both sides attached great importance to this issue and it was to this aspect that most of the evidence at the trial was directed. The sequence of events begins with the "privatisation" of Okta. As I have already stated, the Memorandum of Understanding between the FYROM government and Hellenic, and two other Greek entities (together called the "Strategic Investor") was signed on 11 March 1999. It records that the Strategic Investor will invest about US$ 150 million in a number of schemes constituting the "Investment Plan". These schemes include "*the acquisition of the majority (**sic**) and the immediate management of"* the Okta refinery and the construction of a crude oil pipeline from Thessaloniki to Skopje. The Board of Okta made a decision to transform itself from a state owned company by a Decision on 6 May 1999.[13] The Share Purchase and Concession Agreeement was concluded between the FYROM government and Elpet on 8 May 1999. By this Elpet agreed to acquire 54.19% of the shares in Okta at the "Closing" date, in return for undertaking to apply its best efforts to secure the Investment Plan and also paying a sum of $32 million in instalments.[14] The SPA also provided that the Closing of the SPA would be conditional upon a number of events. These included, first, the assumption by the FYROM government of all "Liabilities", which was widely defined and included all existing obligations of Okta (including contractual ones).[15] Secondly, it was a condition that Okta terminated the oil supply contract with Moil – Coal and any other agreements to be specified by the Strategic Investor.[16] By an Amendment to the SPA dated 22 June 1999 the obligation of the FYROM government to assume the "Liabilities" of the old Okta was narrowed so as to embrace only the liabilities relating to the period up to the Closing.[17] Further, the clause that included the obligation on Okta to terminate the oil supply agreement with Moil – Coal, and any other agreements designated by the Strategic Investor, was deleted.[18]

57. On 8 July 1999 the FYROM government and Elpet signed an "Assumption of Liabilities and Escrow Agreement". By this the FYROM government re-affirmed its obligation to assume Okta's liabilities (as defined in the amended SPA). To do so an Escrow Account was to be set up. The new Okta would be the Escrow Agent and hold the account. Sums paid by Elpet under the SPA were to be deposited in the Escrow Account. That was stated to to be

[12] Cf the analysis of their lordships in *Czarnikow Ltd v Centrala Handlu Zagranicznego Rolimpex [1979] AC 351*, particularly per Lord Wilberforce at *pages 363 – 4;* Viscount Dilhorne at *page 366;* Lord Salmon at *page 370*.

[13] See: Bundle E1/page 532.

[14] Articles 2 and 3 of the SPA.

[15] Article 1.

[16] Articles 33.1 (b) and (c) respectively.

[17] Amended Article 6.2.

[18] Article 16 of the Amendment to the SPA.

intended "*expressly and exclusively for the satisfaction of Liabilities as have been assumed by*" the FYROM government.[19] The Closing Agreement was signed on 9 July 1999.

58. At the same time as these agreements were being made, proceedings against Okta were started in the Commercial Court, as I have set out above.

59. In July 1999 Mr Karachalios took over as Managing Director of Okta. Prior to his appointment Mr Karachalios had been employed by Meton, one of the joint venturers that created Elpet.[20] In his witness statement Mr Karachalios states that his greatest concern when he took over was to have a constant and reliable source of oil. Paragraph 26 of his statement continues: "*I decided in July 1999 for various reasons that an alternative supplier of oil, rather than [Jetoil] should be used. Including in my reasoning was my belief and the view that I had formed following conversations with Okta's legal advisers and staff at Okta, that the 1993 Agreement was not a binding agreement*".

60. This statement formed part of Mr Karachalios' evidence at the trial. He insisted in cross examination that he believed that the 1993 contract was not binding.[21] This was despite the fact that during the whole of the proceedings in the Commercial Court Okta never argued that the 1993 contract was not binding at the outset or as at July 1999.[22]

61. Mr Karachalios' statement goes on to say that in July 1999 he recommended that Okta should obtain its oil from Hellenic, for various commercial reasons that are there set out.[23] Paragraph 29 of his statement[24] continues: "*As I did not consider that the 1993 Agreement was binding on Okta and because Hellenic was offering more advantageous supply terms, I decided that Okta should obtain its oil from Hellenic Petroleum rather than Moil – Coal. It therefore naturally followed that Okta would also use Hellenic for the manipulation of this oil. It would have been very impractical to use a third party to manipulate oil that had been supplied from another source*".

It is therefore clear that Okta had decided by July 1999 not to fulfil the 1993 contract.

62. I reject the suggestion or submission that the prime reason for deciding not to continue to perform the 1993 contract with Jetoil was Mr Karachalios' opinion that it was not binding on Okta. This is for several reasons. First, as I have stated, there has never been any suggestion, throughout these proceedings that the 1993 contract is not binding, as a matter of the proper law of the contract, ie. English law. Indeed during the hearing of the preliminary issues, in the Court of Appeal and throughout this trial it has been expressly accepted that the contract is binding.[25] Secondly, if Mr Karachalios or others (such as Professor Galev or Mr Potamitis) had taken the view at the time that the contract was not binding according to its proper law, I would have expected to see something in writing to that effect at the time, from either Professor Galev or Mr Karachalios or Bird & Bird, who were instructed on behalf of Okta from at least 28 May 1999.[26] There is nothing, except for one draft letter, apparently intended to be signed by Professor Galev, which was prepared by Mr Potamitis on 15 November 1999 and sent to Mr Karachalios.[27] This draft letter expresses the view that, according to Macedonian law, the 1993 contract is not binding on Okta because it does not bear the seal of Okta and is not signed by Okta's legal representative. However the draft makes it clear that the opinion is limited to the laws of the FYROM. The 1993 contract is, of course, governed by English law. The large bundle of privileged documents relating to "force majeure" for the period from June 1999 to April 2002 was disclosed by Okta pursuant to an order of Tomlinson J dated 19 April 2002. In it there are no other documents suggesting that Okta had been advised, at any time between July and November 1999, that the 1993 contract was not binding on Okta. Thirdly, a view that the contract was not binding is quite inconsistent with any attempt to rely on the force majeure clause. If, as the Okta witnesses stated, there were discussions about invoking the force majeure clause, then those must have been on the premiss that the contract was valid and binding and Okta could rely on one of its clauses to avoid responsibility for failing to perform it. It is noteworthy that Professor Galev himself was the principal draftsman of the letter of 16 November 1999 that was signed by the FYROM Minister of Trade. That letter proceeds on the basis that the 1993 contract was binding and it even asserts (incorrectly as is now accepted by Okta) that Jetoil was in breach of it.

63. I have concluded that Mr Karachalios decided, for purely commercial reasons, not to continue with performance of the 1993 contract. I also conclude, on the basis of the passages from Mr Karachalios' statement quoted above, that for commercial reasons only, Okta decided not to fulfil the oil supply contract with Moil – Coal. Further, there

[19] Clause 3.5 of the Escrow Agreement.

[20] Karachalios statement para 5: D/tab 10/page 404

[21] Transcript: Day 4 at pages 376 to 381

[22] The issue of validity *according to Macedonian law* was raised in Greek proceedings between Jetoil, Hellenic, Elpet and Mr Karachalios, but only in November 2000. The same *Macedonian law* issue was raised by Elpet in the Macedonian proceedings in July 2001. The parties agreed, however, that the contract is governed by English law.

[23] Para 27: D/page 408.

[24] D/page 409

[25] It is true that Okta pleaded in para 3 of its Points of Defence, served on 31 July 2001, that it reserved the right to amend its pleading on this issue in the light of findings by the FYROM court. But it never did so, even though the FYROM Court handed down its judgment during the trial before me and declared that the 1993 contract was not valid or binding.

[26] On 28 May 1999 Stephenson Harwood, solicitors for Jetoil, sent a fax to Bird & Bird with copies of the Order of Thomas J and supporting documents: E4(II)/pages 1453 – 4.

[27] See H/page 22. Bundle H consisted of privileged documents disclosed by Okta as a result of the order of Tomlinson J dated 19 April 2002. The letter is not referred to in the witness statements of Mr Potamitis, Mr Karachalios and Professor Galev. Nor were they questioned particularly about this draft, although Mr Potamitis made a passing reference at Transcript Day 6/page 685 lines 13 – 18.

is nothing in Mr Karachalios' evidence or elsewhere to suggest that, as at July 1999, the FYROM government had made any request to Okta not to carry on with the 1993 contract.

64. Between 4 July 1999 and 5 November 1999, six cargoes of crude oil were received by Okta from Hellenic. During the remainder of 1999 a further three cargoes were received. The total crude oil received by Okta from Hellenic in the period July to December 1999 was 345,200.53 MT.[28]

65. There was some evidence from Okta witnesses to the effect that the possibility of invoking the force majeure clause was discussed during the period from May to November 1999. In his first witness statement Professor Galev states that he was employed by the FYROM government to consider the agreements connected with the privatisation of Okta. He also looked at the 1993 contract on behalf of the government. The wording of his first and second witness statements imply that he considered the 1993 contract at an early stage of his work on the other documents.[29] He also states that, having considered the force majeure clause, he suggested that the FYROM government "*should invoke the existence of the force majeure clause in its letter*".[30] This is a curious statement, because only the parties to the 1993 contract could "*invoke*" that clause. It suggests that Professor Galev was under the impression that, for the purposes of the force majeure clause, the government of the FYROM and Okta could be regarded as one and the same.

66. In cross – examination Professor Galev made the same point.[31] He was vague on when this suggestion was made.[32] However Professor Galev did not suggest in evidence that any decision had been made before 16 November 1999 by the FYROM government to send any letter similar to the one that was sent.

67. In 1999 Mr Potamitis originally acted for Hellenic. He was then instructed by Elpet. He was only instructed to act for Okta on 12 November 1999. That was after the second injunction had been obtained against it the previous day.[33] In cross – examination Mr Potamitis stated that, as the lawyer for Elpet, he had discussions with Professor Galev about the 1993 contract and, in particular, the effect of the force majeure clause. Mr Potamitis stated that Professor Galev identified a number of points about the contract. Mr Potamitis said: "*The third one [was] that they had a unilateral right as Government to cause Okta to opt out of that agreement and that is what they were going to do*".[34] Mr Potamitis' evidence was that this discussion took place in June or July 1993. If Mr Potamitis' evidence concerning Professor Galev's analysis is correct, then the analysis concerning the force majeure clause was inaccurate. The contract gave neither Okta nor the FYROM government the "*unilateral*" right to cause Okta to opt out of the 1993 contract.

68. Mr Eder QC, acting for Jetoil, put it to Mr Potamitis that it was a lie to state that there was such a discussion and an indication that the government were going to act on this, but Mr Potamitis maintained his evidence.[35] However Mr Potamitis was forced to accept that nothing was in fact done by the government or Okta in relation to the force majeure clause before the letter of 16 November 1999.[36]

69. I have come to the conclusion that there probably was some discussion between Mr Potamitis and Professor Galev about the possible effect of the force majeure clause.[37] But it is probable that both misunderstood the proper nature of the clause (in the manner I have already outlined) and that the discussion was inconclusive. I reach this second conclusion because nothing was in fact done during the period from July to November 1999.

70. On 20 October 1999 Bird & Bird, solicitors acting for Okta, sent a letter to Stephenson Harwood, the solicitors for Jetoil.[38] The letter stated that the factual basis on which Jetoil had obtained injunctions in May and June 1999 were inaccurate. The details of the letter are not important, but I note two points. First, the letter states that Okta has not taken any step which was likely to put it out of its power to comply with its contractual obligations under the 1993 contract.[39] Secondly, at no point was it suggested that Okta could not perform the 1993 contract because of a governmental request.

71. Stephenson Harwood responded to this in a letter dated 25 October 1999.[40] This letter again accused Okta of being in breach of both the 1993 contract and the oil supply contract. It reserved Jetoil's right to make a further application to the English High Court "*as a matter of urgency*" to restrain Okta from acting in breach of the 1993 contract.

28 See the agreed table: A/page 28

29 Statement: D/page 392; second statement: paras 7 and 8: D/page 436G. In cross – examination Professor Galev confirmed paras 8 and 9 were correct: Transcript: Day 5/page 494. This is in contrast to the evidence of Mr Potamitis in cross – examination, who suggested that the 1993 contract only came to light in late June or early July, after Elpet had done its "due diligence" in preparation of signing the SPA: Potamitis XX: Transcript Day 6/page 672 lines 24 – 5.

30 D/page 393; to similar effect: second witness statement: para 8: D/page 436G.

31 Transcript: Day 3 page 341, lines 11 to 13: *"My job was to indicate that there is the possibility for the government to invoke paragraph 4 of the annex to the contract".*

32 Compare: Transcript Day 3/pages 339 lines 7 – 12 and pages 341 – 2.

33 Second Witness statement paras 4 to 7: D/pages 436 o – p.

34 Transcript: Day 6 page 673 lines 10 to 12.

35 Transcript: Day 6/page 677 – 678.

36 Transcript: Day 6/pages 680 – 1.

37 It is also clear from an attendance note of Bird & Bird dated 1 June 1999 that Mr Potamitis was discussing force majeure with Okta's London solicitors. H/pages 1 and 7

38 E4(II)/page 1581

39 E4(II)/page 1582; para B

40 E4(II)/page 1592.

72. On the same day there was a telephone conversation between Mr Potamitis and Mr Trevor Asserson, the partner at Bird & Bird who was handling the case for Okta. Part of this discussion was recorded by Mr Asserson in a manuscript attendance note.[41] This reads: *"Force majeure – request by State to stop – Can we request the State to request a cessation – intended for Greek embargo".*

73. Mr Potamitis accepted in cross – examination that there was a discussion on the issue of force majeure between himself and Mr Asserson. But he was vague about the precise points discussed.[42] Mr Asserson did not give evidence. Mr Karachalios said in cross – examination that he could not remember whether he had any conversation with Mr Asserson on that day.[43]

74. On the evidence before me it appears that by 25 October 1999 there had been no suggestion from the FYROM government that it would be requesting Okta not to perform the 1993 contract. I conclude, on a balance of probabilities, that on 25 October 1999 there was a conversation between Mr Potamitis and Mr Asserson in which they discussed the possibility of Okta requesting the FYROM government to request that Okta cease performance of the 1993 contract, thereby enabling Okta to invoke the force majeure clause.

75. On 11 November 1999 Jetoil obtained the second injunction against Okta. This was obtained from Longmore J without notice to Okta. The precise terms of the substantive part of the order are significant:

"As a result of the application IT IS ORDERED that:

(1) Until after the hearing on 18 November 1999 (the return date), or as otherwise agreed between the parties, the Respondent [ie. Okta], by itself, its servants and agents does not use the services of any person other than the Applicant for the "manipulation" of crude oil destined for its refinery at Skopje, Macedonia, namely for the receipt of crude oil from carrying vessels, the storage and/or the arranging of on transportation of crude oil to the Respondent's installations at Skopje, Macedonia".

In their final submissions for Okta, Mr Jarvis QC and Mr Lightman made the point that the wording of this order was wider than Jetoil were entitled to obtain at best. This was because the order enjoined Okta to use Jetoil for the manipulation of ***all crude oil*** destined for the refinery, whereas under the terms of Clause 1 of the 1993 contract Jetoil were only entitled to manipulate non – heated crude oil that Okta would "*buy and process for its own account".*

76. Mr Lightman, when going through the chronology leading up to the injunction on 11 November, also submitted that at the time that the order was obtained, there were only two days supply of crude oil left in Macedonia. This submission was based on an attendance note by Mr Asserson of a telephone conversation that he had with Mr Karachalios on 19 November 1999.[44] The Attendance Note is in the form of a statement from Mr Karachalios. That statement was used as part of the evidence put before Thomas J at the hearing on 30 November/1 December 1999 when he discharged the injunction and ordered preliminary issues to be tried.[45]

77. In the attendance note Mr Asserson records the gist of a telephone conversation that Mr Karachalios had with Mr Kotev[46] on 12 November, after Mr Karachalios had received notice of the injunction. Mr Asserson records that Mr Karachalios stated that the FYROM had only two days supply of oil left in its reserves; that the oil was being supplied on a hand to mouth basis and that Okta was the only crude oil refinery in the FYROM. The note continues: "*If Okta is not able to process the oil which it receives, the country will have no oil supplies within a matter of days".* The attendance note also reported that, as at 12 November, Mr Karachalios knew that Okta had two contracts with Hellenic for the purchase of a total of 70,000 MT of crude oil,[47] which was not destined to be manipulated at the Jetoil installation at Thessaloniki. However, it appears, and I find, that the two cargoes of crude oil were for Okta's own account and destined for the Okta refinery via the Hellenic installation at Thessaloniki.[48]

78. Mr Karachalios refers to this conversation of 12 November 1999 in his witness statement.[49] He was asked a number of questions on that in cross – examination. But there is no reference to the Attendance note of Mr Asserson in his witness statement, nor was Mr Karachalios cross – examined about it.

79. I accept that a conversation took place between Mr Karachalios and Mr Kotev on 12 November 1999. I also accept that in that conversation Mr Karachalios told Mr Kotev that the injunction presented Okta with two problems. First there was the problem of the existing two contracts between Okta and Hellenic. Mr Karachalios explained that the terms of the injunction ordered Okta not to allow any party other than Jetoil to manipulate those cargoes. The second problem presented was, in the words of Mr Karachalios' statement:[50] " *…a more long term problem… in that, by the terms of the injunction, Okta should use [Jetoil] for the supply and manipulation of all oil for Okta's own account".*

41 H/page 16.
42 Transcript: Day 6/pages 681 – 3.
43 Transcript: Day 4/page 393 lines 6 – 10.
44 E4(II)/page 1613C.
45 This statement was in Bundle D at page 490, but was not, strictly speaking, put in evidence before the court. However nothing turns on that.
46 Secretary General of the FYROM government and the President of the Okta Board of Directors.
47 One cargo of 50,000 MT and the other of 20,000 MT: see Attendance Note: para 4: E4(II)/page 1613C.
48 This is based on para 4 of the Attendance Note of 19 November 1999: E$(II)/page 1613C.
49 Para 35; D/page 410-411.
50 Para 35: D/page 411

The statement goes on to say that in the conversation, Mr Karachalios told Mr Kotev that the injunction was based on the assumption that the 1993 contract was binding, whereas Okta had concluded, "*for a variety of reasons*" that it was not. There is no reference to such a statement in the more contemporaneous Attendance Note. Nor is there reference to a belief by Okta that the 1993 contract was not binding in any of the three statements that Mr Karachalios made for the purposes of the Commercial Court hearings in November 1999. Indeed, in those statements he accepts that the contract was binding. (For good measure I note that there is also no suggestion in any of those statements that the FYROM government had requested Okta not to continue performance of the 1993 contract).

80. I conclude that Mr Karachalios did not state to Mr Kotev on 12 November that Okta believed that the 1993 contract was not binding. I also find that, in the same conversation, Mr Kotev told Mr Karachalios that, in relation to the two existing contracts between Okta and Hellenic for the delivery of 70,000 MT of crude oil to the Okta refinery, the contracts should be novated so that Hellenic would sell the oil to the State Reserves, (a FYROM governmental organisation), thereby avoiding the effect of the injunction on Okta. That is what was done,[51] although the order to use the State Reserves needed the ratification of the FYROM Prime Minister, Mr Georgevski.[52]

81. The next event occurred on 15 November 1999. Mr Potamitis sent two draft letters to both Mr Karachalios[53] and Mr Asserson.[54] The first draft was of a letter to be sent by the FYROM Minister of Trade to Okta, in the following terms:

"We are a competent Governmental authority of the Republic of Macedonia for matters relating to the supply of energy and a supervisory authority of the refinery operated by your company.

We have been advised in writing by a Greek company named Mamidoil – Jetoil Greek Petroleum Company SA that there is a written contract between that company and OKTA (dated 5 March 1993 with subsequent amendments) that purports to limit your ability to obtain handling services for the crude oil you require.

Regardless of the binding nature of the contract to which reference is made, in view of the significance of the supply of crude oil for the Republic of Macedonia and of the extremely serious adverse interference with such supply we hereby instruct you to give no effect, as of today, to any of the provisions of that document. We understand that under the terms of that document you are expected to comply with our instructions which are deemed to be force majeure.

The Minister."

The second draft letter was to be sent by Professor Galev to Okta, giving his opinion why, as a matter of Macedonian law, that 1993 contract was not binding on Okta. (I have already referred to this document).[55]

82. The evidence of Mr Potamitis was that he could not recall the precise circumstances in which the drafts were produced. But he surmised that this was as a result of conversations, probably with Mr Karachalios (or another Okta employee) after the second injunction had been granted.[56]

83. Mr Karachalios stated in his second withness statement that during the summer of 1999, after the first injunction, he had meetings with Professor Galev on the subject of the 1993 contract. He stated that during these meetings Professor Galev explained the force majeure clause in the contract and "*told me that the Macedonian government would invoke this clause*". Mr Karachalios goes on to say that it was at one of these meetings that Professor Galev asked for a draft, in English, of a letter from the Macedonian government to Okta "*invoking the force majeure clause*". He supposed that someone in Okta instructed Mr Potamitis to prepare a draft.[57] In cross – examination Mr Karachalios stated that Mr Potamitis was asked to produce a draft of a letter to be sent to Okta. But he was very imprecise as to when this request was made or by whom.[58] Professor Galev was equally vague in his answers in cross - examination about the part that Mr Potamitis had in preparing the letter of 16 November 1999.

84. I find that at some stage after the conversation between Mr Karachalios and Mr Kotev on 12 November, there were conversations between Mr Karachalios, Professor Galev, Mr Potamitis and Mr Asserson which resulted in Mr Potamitis producing the draft letters. I am not convinced that any request was made earlier than this. It would be too much of a coincidence that the drafts were produced by Mr Potamitis within a short time of notice of the second injunction having been received by Mr Karachalios and his conversation with Mr Kotev on 12 November, followed by the decision to novate the contracts for the two cargoes totalling 70,000 MT of crude oil.

85. On the morning of 16 November 1999 there was a meeting at the offices of the Prime Minister of the FYROM, Mr Luebjo Georgevski. That was attended by the Prime Minister, Mr Kotev, Mr Karachalios and the General Manager of the State Reserves.[59] At the meeting Mr Karachalios told the Prime Minister of the Jetoil second injunction and his view of its effect. That view appears to have been that the injunction would prevent Okta

51 See the Attendance Note: E4(II)/page 1613E at paras 10 to 12.
52 Karachalios statement: para 36: D/page 411.
53 H/pages 20 – 22.
54 H/pages 17 – 19.
55 See para 62 above.
56 Second statement para 11: D/page 436 Q. This statement was inconsistent with his first in which he had said emphatically that he had no involvement with the decision to send the letter of 16 November 1999.
57 Karachalios second statement para 6: D/page 436GGG.
58 Karachalios XX: Day 4 pages 388 to 390.
59 This is the list set out in the Attendance Note of 19 November: E4(II)/page 1613E para 14. (The dates were wrongly typed, but later corrected: see Supplemental Witness statement of Mr Karachalios dated 29 November 1999: D/page 490).

receiving the two cargoes of 70,000 MT that were already contracted for with Hellenic.[60] Mr Karachalios says in his statement[61] that he also explained that the long – term effect of the injunction was that Okta would have to use Jetoil for the "*supply and manipulation of all oil destined for Okta's own account*". At the same meeting Mr Kotev explained to the Prime Minister about the FYROM's oil supply requirements and the involvement of the State Reserves. I am satisfied that at that meeting there was discussion about the force majeure clause in the 1993 contract and that the Prime Minister referred to advice that he had already received from Professor Galev.[62] The manuscript note of Mr Asserson recording the telephone conversation that he had with Mr Karachalios on 19 November states that at that meeting the Prime Minister gave instructions that: "*in order to protect the interests of the country the Minister of Trade [is] to issue a letter to Okta to (sic) based on [the] letter presented to the PM from Jetoil. The PM confirmed that the Force Majeure letter be sent. He said we have the r[igh]t to issue instructions to Okta to make use of the article and no obligation of Okta to stop using…*"[63]

86. At the same meeting the Prime Minister ratified the use of the State Reserves to purchase oil from Hellenic.

87. After that meeting Mr Karachalios and Professor Galev went to Okta's offices to discuss the proposed force majeure letter. Professor Galev had Mr Potamitis' draft, sent the previous day.[64] Professor Galev used that in drafting the final version of the force majeure letter. In cross – examination Professor Galev insisted that he had already prepared a first draft before his meeting with Mr Karachalios.[65] No draft has been produced. I am not satisfied that there ever was such a draft. This is principally because I have concluded that no one had thought there was any need for a letter prior to Jetoil obtaining an injunction on 11 November 1999. There was (as I have found) discussion before then about the scope of the force majeure clause in the 1993 contract. But neither the FYROM government nor Okta had suggested that it needed to be utilised.

88. Professor Galev also insisted in cross – examination that he was the only draftsman of the wording of the final version of the letter that was sent to the Minister of Trade, Mr Gruevski, to sign.[66] He stated that the "information"[67] in the second paragraph of the letter had come from Okta and that it was probably given by Mr Karachalios. I accept that evidence.[68]

89. The final version of the letter was taken by Professor Galev to the Prime Minister in the evening of 16 November and later the same evening it was signed by the Minister of Trade, Mr Gruevski.[69] Mr Gruevski says in his second witness statement[70] that the reason he signed the letter was "*I believed that this*[71] *would endanger relations with Hellenic Petroleum and the Greek government, which provides crude oil delivery at a price that is much more favorable (sic) for Macedonia*". It is common ground that Hellenic did not provide crude oil at a lower price than Jetoil.

90. At the start of the trial and during cross – examination of Okta witnesses, Mr Eder QC suggested that the letter of 16 November 1999 was "curious". He did not go so far as to submit that it had been manufactured at a later date, but there was a hint that it was not quite proper. I reject any such idea. It was unfortunate that the original was never produced in court and all work had to be done with photo – copies or fax versions. But, having heard all the evidence,[72] I am quite satisfied that a letter, in the terms as seen in the court bundles, was produced on 16 November and that several "originals" were signed by Mr Gruevski on that day.

91. I will complete the history of the two letters of November 1999. The hearing on the return date for the without notice injunction took place on 18 November 1999. Both sides attended. Thomas J asked for information about the two cargoes due to arrive. That was given to him the following day by Bird & Bird.[73] Thomas J adjourned the hearing until 30 November to enable further evidence to be filed by each side. There is some mystery about the circumstances in which the letter of 26 November was signed by Mr Gruevski and sent to Okta. Mr Gruevski states that it was sent on legal advice and in order to emphasise the importance of crude oil supply to Macedonia.[74] Professor Galev said that he could not now recall why that second letter had been produced.

92. A copy of the 26 November letter was sent to Mr Asserson, apparently for use in the hearing to take place before Thomas J. However it was not used, following some advice given by Mr Asserson.[75] That is set out in a letter dated

60 It is not clear whether either of the two cargoes had arrived at Thessaloniki by 16 November. Mr Asserson's Attendance Note states that by 19 November the first cargo of 20,000 MT had arrived there, and was being transported by rail to Skopje at the rate of about 4/5,000 MT per day. The second cargo had yet to arrive so, theoretically, could have been manipulated by Jetoil.

61 Para 37: D/page 411.

62 Karachalios statement: para 38: D/page 411: this was not challenged in cross – examination. The same point is made in the Attendance Note: para 17: E4(II)/page 1613F.

63 H/135 to 136. I assume that the word missing at the end of the last sentence is "*Hellenic*".

64 Galev second statement: D/page 436G: cross – examination: Day 5/page

65 Transcript: Day 5/page 492 lines 5 – 10.

66 Transcript: Day 5/page 496 lines 24 – 25.

67 That is the sentence: "*However, based on the fact that, in respect of your agreement with [Jetoil] you requested their assistance for the shipping and the expedition of crude oil at a price, which was offered to you by another Greek company, and which for you was more favourable, the above mentioned company did not accept this price*". It was common ground that this sentence was totally inaccurate.

68 Transcript: Day 5/page 497 lines 14 to 25.

69 Galev second statement: para 9: D/page 436G.

70 Para 3: D/page 430. Mr Gruevski did not give oral evidence. His statements say that he wrote the letter of 16 November; Okta accepts that this was not so.

71 That is Okta's performance of the 1993 contract with Jetoil.

72 In particular that of Mr Fetai: Transcript Day 6 pages 628 – 9.

73 See letter of 19 November 1999 to the Judge's clerk: E4(II)/page 1613A. The Attendance Note or 19 November was enclosed with the letter.

74 Second witness statement: para 5: D/page 430.

75 A witness statement from Mr Asserson was in Bundle D: page 434. He was not called but it was agreed that this could be put before the court: see paras 8 and 9.

29 November 1999 to Mr Karachalios. Mr Asserson's view was that the 26 November letter appeared to give Okta some choice as to which company to use to supply crude oil. Therefore, he concluded: *"it is not entirely clear that [the letter] properly activates the force majeure, which specifically refers to "causes beyond the control of the party affected". It is clear that the letter from FYROM does give you a measure of control".* [76]

93. **How should the letters of 16 and 26 November 1999 be interpreted?**
The submissions of Jetoil were that the management of Okta had, for Okta's own purely commercial reasons, decided to purchase crude oil from Hellenic in July 1999. Jetoil submitted that at that stage there was no question of the FYROM government ordering Okta to stop performing the 1993 contract. However, as a result of Jetoil's action in obtaining the injunction on 11 November, Okta believed that it would not be able to continue the new arrangements with Hellenic and would be forced to carry on with the 1993 contract. Therefore Okta persuaded the FYROM government to issue the two letters. Accordingly, Jetoil submitted, even if the two letters amounted to a governmental request to Okta not to perform the 1993 contract, the reason for that request was Okta's own previous actions in entering into the arrangements with Hellenic and fear of the consequences of having to comply with the injunction of 11 November. In addition Jetoil submitted that the two letters do not, on their true interpretation, amount to a request to Okta not to perform the 1993 contract; they are more equivocal and leave the ultimate decision to Okta itself.

94. Okta's submissions were that whatever the background to the production of the two letters, it is clear that by 16 November 1999 the FYROM government decided that it was in the best interests of the state that Okta should continue with the arrangements it had developed (since July) with Hellenic for the supply of crude oil for the refinery. The position was that the fledgling state of the FYROM then had only two days of crude oil supply left and it had to ensure that the two cargoes which were expected imminently could be imported without delay. Therefore it decided, in state interests, to issue the letters. Okta submitted that the letters were and were understood by both the government and Okta to be orders to Okta to terminate performance of the 1993 contract. Okta submitted that, in considering the proper interpretation of the letters, the Court must look at the background to their production and the common understanding of their effect by both the government and Okta at the time.

95. In relation to the submission as to the common understanding of Okta and the FYROM government as to the meaning of the two letters, Okta argued that I was entitled to look at the evidence of various witnesses as to the intention of the government in November 1999. But I can only do so to a very limited extent. Expressions by witnesses at a later date as to what the government intended by the letters cannot be used as an aid to their interpretation. Thus the evidence of Mr Karalis about statements made in meetings in 2001 by Professor Galev and Mr Kotev on the intent of the 1999 letters cannot assist me in their interpretation. This also applies to the evidence of Mr Kotev about his state of mind at the time of meetings in early 2001.[77]

96. Okta also relied on other witnesses' evidence in support of its case on interpretation. First there was the evidence of Mr Karachalios about his attitude to the two letters after Okta had received them.[78] Mr Karachalios gave persuasive reasons why it would have been unfortunate for Okta if it were to ignore the letters. But that post - receipt reasoning cannot, by itself, assist me in their proper interpretation. Secondly, Okta relies on Mr Karachalios' description, which he gave in cross – examination,[79] of the process leading to the letter of 16 November. I have rejected the suggestion that there was any decision by the government to send a letter to Okta prior to the injunction of 11 November. Nonetheless the effect of Mr Karachalios' evidence is that the government did decide, thereafter, that Okta should "*proceed with your works without any involvement of this agreement [ie. the 1993 contract]".*[80] Thirdly Okta relies on Mr Karachalios' evidence that Professor Galev had told him (at a meeting prior to 16 November) that the government had told Professor Galev[81] that it "*would invoke the [force majeure] clause".*[82] Apart from being double – hearsay, this simply indicates the government's possible intention at some time before the letters were actually drafted. The final version of the letter of 16 November was painstakingly drafted by Professor Galev only ***after*** he had been told of the meeting that Mr Karachalios and Mr Kotev had had with the Prime Minister on 16 November.

97. Okta also relies on direct evidence of Professor Galev, in cross – examination, that his job in drafting the letter of 16 November was *"..to indicate that there was the possibility for the Government to invoke paragraph 4 of the annex to the contract, in the part which says that Governmental decisions also have the force majeure, and in that way terminate the contracts, liberating both the parties from any sort of commitments".* This gives a flavour of government thinking, but I think it is hard to interpret it further.

98. I have concluded that I do not receive much help from these selected snippets of evidence in which witnesses suggest what the government's intention was or what Okta's understanding of it was at or just before the time when the letters were sent by the government. Ultimately my best guide to the interpretation of the two letters is

[76] H/page 50.
[77] Transcript: Day 6/pages 653 – 4.
[78] First witness statement: para 41: D/page 412.
[79] Transcript: Day 4/pages 387 – 9.
[80] Transcript: Day 4/page 389 lines 6 to 8.
[81] Who was an independent adviser to the government.
[82] Third witness statement: para 6: D/page 436 GGG.

the statement of Lord Steyn in ***Society of Lloyd's v Robinson***[83] that "*loyalty to the text of a commercial contract, instrument or document read in its contextual setting is the paramount principle of interpretation*".

99. So how should the letters be interpreted? First it is common ground that the factual assertions made in the second paragraph of the letter of 16 November are incorrect. Thus: (i) at no time did "*another Greek company*" offer Okta a price for the "*shipping and expedition*" of crude oil at a price below the price for supply and manipulation offered by Jetoil. In fact, Hellenic were to do the manipulation at the same price as Jetoil, ie. $4 per tonne, and Jetoil could only exercise the right of first refusal if it matched the price offered by another. (ii) At no stage did Okta inform Jetoil that another company was offering better prices for the supply or manipulation of non – heated crude oil. (iii) At no stage did Jetoil refuse to match or better such prices as they were never asked to do so. (iv) There is a reference to an ***offer to supply*** from another company, whereas Hellenic had already contracted with Okta to supply several cargoes of crude oil. Okta accepted in argument that the assertion in the letter that Jetoil was in breach of the 1993 contract was wrong in fact and law.

100. Therefore the factual premiss for the third paragraph of the letter is false. But the third paragraph does refer to other factors, in particular the importance of crude oil to the FYROM and the "*extremely negative influence*" of a contract that restricts the rights of Okta to obtain supplies from elsewhere.

101. I will set out for convenience the central sentences in the letter of 16 November. They are: *"…we hereby instruct you to continue to supply the refinery with crude oil from a partner which you consider most favourable for you. Given this situation, the clauses of the agreement should not be considered as obligatory for you. We consider that according to the conditions of this document you should agree with our instructions, which are considered to be force majeure (Annex to the primary agreement 060393 para 4)."*

102. In considering the letter of 16 November I am conscious that I am looking at the English translation of a document that was drafted in Macedonian for a Macedonian reader. So I must be careful not to place too much emphasis on the particular English words, or the grammar and syntax of the letter. I interpret this part of the letter as follows:
    (1) The government was giving Okta an instruction. The nature of the instruction was to continue to supply the refinery with crude oil from a partner which Okta considered most favourable to it. The government knew, because Mr Karachalios had told Mr Kotev and the Prime Minister, that Okta was receiving supplies from Hellenic. The government knew also that Okta wished to continue that arrangement and it was happy with it. Therefore, against the contextual background to the letter of 16 November, I interpret this and I hold that both parties would have understood this to be an instruction to Okta to carry on with the supplies from its *"partner",* Hellenic.
    (2) I regard the next sentence as the obverse of the first instruction. It is an instruction to Okta not to be bound by (and so not to perform) the terms of the 1993 contract.
    (3) The next sentence is an order to Okta to carry out these instructions. The sentence goes on to give an opinion that the instructions constitute a force majeure event according to the terms of the 1993 contract. That comment assists in demonstrating that it was the government's intention, in sending this letter, to make to Okta a "*governmental request*" within the terms of the force majeure clause. It cannot, of course, help in answering the question of whether the letter does constitute a force majeure event within the meaning of that clause.

103. Therefore, overall, I conclude that the letter of 16 November does constitute a request, by the Minister of Trade to Okta, not to continue to perform the 1993 contract. Neither side made any submissions that the letter of 26 November should be interpreted differently to that of 16 November. So, although the wording is different, I reach the same conclusion as to its effect.

104. **In the light of the findings so far, was Okta's admitted failure to perform the 1993 contract (in relation to both its clause 1 and 6 obligations) a failure that is attributable to an act or compliance with a request of a governmental authority (ie. the FYROM government) and so within the meaning of the force majeure clause?** Mr Jarvis QC accepted, of course, that the failure of Okta to perform its obligations under the 1993 contract between July and 16 November 1999 could not be excused by relying on the force majeure clause. But he submitted that (subject to argument on the notice clause) the government instruction to Okta in the letter of 16 November 1999 was the effective cause of Okta's failure to perform the contract thereafter. Therefore, even if there had been a pre – existing breach, the non – performance by Okta after the force – majeure letters was at least partly caused by Okta's compliance with the FYROM government's request in the letters.

105. Mr Eder QC's argument was that: (i) the ***request*** was not truly a governmental one, but founded on an Okta request to the FYROM government; (ii) the request was not ***governmental*** because its sole aim was to enable Okta to avoid the consequences of its own existing breach of the 1993 contract and to protect the commercial interests of a major investor in Okta, ie. Hellenic. Therefore the failure to perform by Okta was not "*attributable*" to a "*request of any governmental authority*".

106. Based on the facts that I have found as set out above, I find further that: (i) in about July 1999 Okta did decide, for purely commercial reasons, to enter into arrangements with Hellenic for the supply and manipulation of non – heated crude oil for Okta's own account; (ii) at the same time Okta did decide, for purely commercial reasons, not to perform the 1993 contract; (iii) at that time and thereafter until after the second injunction was granted on 11 November 1993, there was no request by the FYROM government to Okta that it should stop performance of the 1993 contract with Jetoil; (iv) after the injunction had been granted to Jetoil on 11 November, Mr Karachalios

[83] *[1999] 1 WLR 756 at 763*

of Okta initiated discussions with Mr Kotev, the Secretary General of the FYROM government as well as the President of the Board of Okta. In the view of Mr Karachalios the injunction presented Okta with severe short and long term difficulties over the performance of the arrangements with Hellenic. Further, at that time the FYROM had about 2 days of crude oil supply left; (v) at the same time Mr Asserson and Mr Potamitis had the conversation noted by Mr Asserson in which the idea was mooted of asking the FYROM government to request Okta to cease performing the 1993 contract;[84] (vi) it is uncertain whether Professor Galev or Mr Potamitis produced the first draft of a "force majeure letter" after 12 November, but it is certain that Mr Potamitis produced a draft to Mr Karachalios on 15 November and Professor Galev used it when formulating the final version of the letter during 16 November for approval by the Prime Minister and signature by Mr Gruevski that evening; (vii) when the Prime Minister took the decision to order that a letter be sent to Okta instructing it not to continue to carry on performance of the Jetoil contract, his immediate concerns were to counter the effects of the injunction. This was because, in the short term, obedience to it might mean the FYROM ran short of crude oil. In the longer term he was concerned that an inability to continue the existing arrangements with Hellenic as the supplier of crude oil to Okta would jeopardise good relations between his government, Elpet, Hellenic and the Greek government.

107. If those are the facts then was the failure of Okta to perform the 1993 contract after 16 November 1999 ***attributable*** to a request of a ***governmental*** authority? I have concluded that it was not. First, I have concluded that the request cannot be characterised as ***governmental*** in the sense I have described in paragraph 55 above. Although the FYROM government was concerned about the possible short and long term effects of the injunction, which were concerns for the public good, nonetheless the very object of the "instruction" to Okta was to ensure it did not have to perform its contractual obligations under the 1993 contract. It is also important to note two further points. First, that this was an instruction specifically given to Okta, in relation to its contractual obligations to only one other contracting party, ie. Jetoil. Secondly, the request to Okta were apparently based on incorrect facts, as given to the FYROM government by Okta's Managing Director, Mr Karachalios. Those facts related to Okta, Jetoil and Hellenic.

108. Secondly I have concluded that Okta's failure to perform was not ***attributable*** to the FYROM government's request, even in part. The reason Okta was in such an invidious position after the second injunction was granted on 11 November 1999 was its own decision in July 1999 not to perform the 1993 contract but to contract with Hellenic instead. The failure of Okta to fulfil its contractual obligations under the 1993 contract led to the second injunction and that led to Okta telling the FYROM government of its predicament (and that of the FYROM). That in turn led to the FYROM government's letters of 16 and 26 November. In my view, therefore, the only ***effective cause*** of the non – performance of the 1993 contract was not the "*governmental request*". It was the pre – existing decision of Okta to break the 1993 contract and its desire to continue doing so after Jetoil had obtained the 11 November injunction.

109. In his closing submissions, Mr Jarvis argued that the reason that the FYROM government was compelled to send Okta the letter of 16 November was that Jetoil had wrongly obtained a "without notice" injunction whose scope was unjustifiably wide. I reject both parts of that submission. As to the first, in correspondence Jetoil's solicitors had sought assurances that Okta would honour its obligations under the 1993 contract. They had set out the position in letters dated 18 October and 25 October 1999.[85] In the latter letter Stephenson Harwood made it clear that they were concerned that Okta would be concluding further agreements for the supply and manipulation of crude oil with Hellenic. Therefore they specifically warned Okta that Jetoil might apply to the Court urgently to restrain Okta from acting in breach of the 1993 contract. Okta did not respond. In my view Jetoil's decision to go "without notice" was, in these circumstances, both understandable and warranted.

110. As to the second part of the submission, the terms of the injunction did not stop crude oil from being imported into the FYROM. It only provided that oil destined for the Okta refinery was not to be manipulated by anyone other than Jetoil. It is correct that the injunction was not confined to crude oil that Okta had bought for "*its own account*". However there is no evidence that any crude oil had been bought by Okta for the account of any other company. Okta was put in its difficult position precisely because it had made arrangements for all the oil it bought for its own account to be supplied and manipulated by Hellenic.

111. **What were the circumstances in which the letter of 30 May 2001 was sent to Okta?**
It will be recalled that on the last of the preliminary issues Thomas J held that the manipulation obligation did not extend beyond 31 December 1999 if the parties failed to reach an agreement as to the price to be paid for manipulation performed after that date. There was no agreement. It was Okta's contention that the effect of this judgment was that Jetoil also could not exercise any rights under Clause 6 of the 1993 contract as a result of the failure to agree a manipulation fee. That point was disputed by Jetoil, but Thomas J held that Okta's contention was correct.[86] Therefore, in practical terms, Thomas J's judgment meant that Okta could carry on with its arrangements with Hellenic throughout 2000 and need not be concerned with the 1993 contract.

112. However, as I have noted, Jetoil decided to appeal the decisions of Thomas J on the fourth preliminary issue. The appeal hearing was set for 5 February 2001. As I have already noted, Mr Asserson of Bird & Bird had advised Mr Karachalios that in his view the letters of 16 and 26 November may not have constituted a force majeure

[84] H/16
[85] See, respectively: E4(II)/pages 1578 to 1580, particularly point 4; E4(II)/pages 1592 – 6, particularly points 4 and the last paragraph.
[86] The hearing took place on 12 October 2000. See Order at A/page 40.

event within the meaning of the clause of the 1993 contract.[87] It is agreed that between the letter of 26 November 1999 and January 2001, the FYROM government did not consider sending Okta any further governmental request letters.

113. Then on 22 January 2001 there was a meeting in Skopje between Mr Karalis,[88] Professor Galev, Mr Kotev, Mr Potamitis, Miss Maslarkova and Mr Asserson. Mr Asserson took notes at the meeting[89] and the meeting is referred to in a letter of 4 April 2001[90] from Mr Asserson to Mr Karalis, the Managing Director of Okta. The letter is important, as it sets out the position of the FYROM government as explained at the meeting. The letter reads:

"*When we met with representatives of the Macedonian Government on Monday 22 January 200, we were given clear instructions from the Government that it did not wish Okta to trade with Mamidakis. The Government's reasoning behind this instruction was that it did not want to jeopardise the relationship that Okta had formed with Hellenic Petroleum because this had brought much financial and structural stability to Macedonia. The Government apparently feared that if Okta's relationship with Hellenic is to be replaced with one with Mamidakis, then the restructuring that has taken place in Macedonia could be endangered.*

I understand that the Government wrote a letter on 16 November 1999 ordering Okta to treat its contract with Mamidakis as discharged for these reasons. I have seen a copy of this letter but believe that the translated version does not make the Government's reasons behind such an order clear. I explained this to the Government representatives when we met. They asked me to provide an English draft letter clarifying the intention behind the letter of 16 November 1999, as described to me.

I enclose a copy of this draft. Please would you pass this onto the appropriate person within the Macedonian Government for their comments. If they are happy that the letter reflects the reasoning that they intended to portray in their letter of 16 November 2001 [sic], then I advise that they send this letter to Okta. I am concerned that the Government should instruct independent lawyers on this point, to make the production of the letter more credible. I can recommend lawyers, if required."

114. It is clear from that letter that it remained the FYROM government's position that it did not wish Okta to trade with Jetoil and that it did wish Okta to trade with Hellenic. Mr Asserson produced a new draft "force majeure letter"[91] as requested by government representatives. That letter was to be sent from the FYROM government to Okta. By that time the Court of Appeal had given its decision, reversing Thomas J's judgment on preliminary issue four and holding that the 1993 contract remained in force after 1 January 2000 until 5 March 2003.

115. Following the Court of Appeal's decision a meeting was held on 18 April 2001. This was an Elpet gathering which was convened by Mr Karalis to discuss the Court of Appeal's decision. It was attended by Mr Kotev, Professor Galev, Mr Potamitis, Mr Asserson, a Greek representative in the FYROM[92] and Miss Maslarkova. Mr Asserson took a fairly comprehensive manuscript note of the meeting. Mr Potamitis explained that the meeting was of the main shareholders of Okta and its purpose was to try "*to establish what we will do to sort out a problem for Okta*".[93] The "problem" was that the Court of Appeal had held that the 1993 contract remained effective and therefore, unless Okta could invoke the force majeure clause, it faced a large claim from Jetoil for damages for breach of contract.

116. Mr Asserson's note goes on to record that "*in order to face up to M*[94] *we must (1) send the letter – it will help face any claim for damages….*" It was agreed at the meeting that a further "force majeure letter" would be produced. In the note Mr Asserson records himself as saying that he had produced a new draft and that the original "force majeure letter" would be sent with the second letter.[95]

117. On 27 April 2001 Stephenson Harwood wrote to Bird & Bird asking them to confirm, by the close of business on 1 May, that Okta would honour and perform their obligations under the 1993 contract.[96] The letter also asked for confirmation that Okta would pay substantial damages to Jetoil for Okta's failure to permit Jetoil to manipulate crude oil or to let it exercise the right of first refusal.

118. Thereafter, following a short delay whilst a new Prime Minister was elected, [97] it appears that it was agreed that Okta should "*go for force majeure*". That was stated in a telephone conversation between Mr Potamitis and Mr Asserson, on 8 May 2001.[98] On the same day Mr Potamitis sent Mr Asserson an e-mail in which he reported that he had spoken to Mr Karalis and asked him "*that he push the government as much as possible*".[99] There was some

87 See the letter of 29 November 1999: H/page 50.
88 He had taken over as the Managing Director of Okta; he was also the Managing Director of Elpet: witness statement paras 1 and 6: D/pages 396 – 7.
89 H/page 53.
90 H/page 55
91 H/page 56
92 Referred to but not identified in Mr Asserson's manuscript note: H/page 58; see also Karalis statement: para 20: D/page 400.
93 H/page 60A.
94 There is no dispute that this is a reference to Mr Mamadikis.
95 H/page 60. Professor Galev was exercised by the fact that Okta had not notified Jetoil of the 16 and 26 November letters as required under the 1993 contract.
96 E4(II)?page 1656.
97 Mr Asserson's undated note: H/page 69
98 H/page 73.
99 H/page 75. Mr Potamitis confirmed in cross - examination that what he had stated there was true: Day 6/page 712 line 3.

discussion as to the precise form of the letter, as Mr Potamitis wished to keep open an issue as to whether the 1993 contract was valid under Macedonian law.[100]

119. Bird & Bird produced another draft letter to be sent by the FYROM government to Okta. This was sent to Mr Karalis on 10 May 2001.[101] In his covering letter to Mr Karalis, Mr Asserson stated that he had redrafted the force - majeure letter so as to reserve the point on the validity of the 1993 contract. He advised Mr Karalis to send the letter to the appropriate person on the FYROM government for their comments. The letter continued: *"If [the FYROM government] are happy that the letter reflects the reasoning that they intended to portray in their letter of 16 November 2001 [**sic**], then I advise that they send this letter to OKTA as soon as possible".*[102]

120. The draft force – majeure letter that was produced by Mr Asserson[103] contemplates it being sent by the Minister for Trade to Okta. It states the Minister's "*understanding"* that Okta questions the validity of the 1993 contract and that Okta has commenced proceedings in Macedonia to obtain a ruling that the contract is not binding.[104] The letter goes on to state that (i) the supply of raw fuel to the FYROM has become even more important since the November 1999 letter; (ii) in these circumstances the relationship between the FYROM and Hellenic "*has assumed great importance"* because it is a major investor in the country and the builder of a pipeline between Thessaloniki and the Okta refinery at Skopje, thus forming "*a high level relationship for [the FYROM] with an independent, democratic EU State";* (iii) the state considers that Okta trading with Jetoil "*could endanger the relationship with Hellenic"* that the FYROM has built up; (iv) that is why in the letter of 16 November 1999 the FYROM ordered Okta to treat the 1993 contract as ineffective; and (v) those instructions are confirmed.

121. On 14 May 2001 a fax letter was sent from Bird & Bird to Mr Karalis enclosing a further draft force – majeure letter. This letter[105] was sent following a telephone conversation between Miss Thompson of Bird & Bird and Miss Vicky Psaltis, an assistant to Mr Potamitis. The draft letter removes the reference to Okta starting proceedings in the FYROM courts in case Elpet and/or Okta did so. There was no evidence before me to suggest that the FYROM government was involved in the drafting of either of these two versions of this letter.

122. On 18 May 2001, Stephenson Harwood sent a chaser to Bird & Bird, as no reply had been sent to Stephenson Harwood's letter of 27 April. Mr Asserson sent a copy of this letter on to Mr Karalis the same day.[106] Mr Asserson explained that without a signed letter from the FYROM government explaining its intention behind the 16 November 1999 letter, he would be unable to state that Okta believed it had no obligations under the 1993 contract. The letter continued: *"It is therefore imperative that the letter that we drafted for the Macedonian government is signed as soon as possible so that we can use it in a reply to Stephenson Harwood……I suggest that you stress to the Macedonian Government the urgency of them signing and sending a letter clarifying their intention behind their letter of 16 November 1999".*[107]

    In my judgment it is implicit in Mr Asserson's letter that Okta must persuade the FYROM government to send a force majeure letter or else Okta will be unable to resist a claim for substantial damages by Jetoil for breach of the 1993 contract.

123. On 28 May 2001 Mr Potamitis went to Skopje to discuss with Mr Karalis and Miss Maslarkova, Okta's in – house lawyer,[108] various legal issues concerning Okta. The question of a force – majeure letter was considered. Mr Potamitis' assistant, Miss Psaltis was instructed to prepare yet another draft. She did so and sent it by fax to Mr Karalis the same day.[109] Sometime between 28 and 30 May there was a meeting at Okta's offices between Miss Maslarkova, Professor Galev, Mr Kotev and Mr Potamitis. Mr Karalis was present for some of the meeting. The latest draft force – majeure letter was further refined and Professor Galev and Mr Kotev took a copy of the final typed out version when they left the meeting.[110] The letter was signed by Mr Fetai, the Minister for Trade, on 30 May 2001. It is perhaps instructive to note that a copy of the signed letter was sent the same day by Mr Karalis, on Okta headed fax paper, to Mr Potamitis and Miss Psaltis, but the cover note is singed by Astrid Orovcanec, who is described as the "*Chief of the Cabinet*".[111] The same day Mr Potamitis faxed a copy of the final letter (in Macedonian) to Mr Asserson.

124. On 5 June 2001 Bird & Bird wrote to Stephenson Harwood enclosing the originals and translations of the force – majeure letters of 16 November 1999 and 30 May 2001. The covering letter explained that the letter of 16 November 1999 had not been sent at the time because Bird & Bird considered the letter to be unclear, at least in the English translation. It explained that efforts to obtain clarification were diverted by the hearings in the Commercial Court in December 1999 and January 2000. Then, it explained, as a result of Thomas J's decision, clarification became "*academic"*. Bird & Bird's letter said that the issue only arose again as a result of the Court of Appeal's decision reversing Thomas J's conclusion that the 1993 contract had been terminated. That decision

[100] Potamitis cross – examination: Day 6/page 712 lines15 – 25.
[101] H/page 85 – 87. The letter was addressed to Mr Karalis at Elpet rather than Okta.
[102] H/page 85.
[103] H/page 86.
[104] That was not the case. Ultimately the proceedings in the FYROM courts were not started by Okta but by Elpet; Okta and Jetoil were named as defendants.
[105] H/page 90.
[106] H/pages 94 – 95.
[107] H/page 94.
[108] Maslarkova statement: para 5:D/page 436M.
[109] H/pages 96 - 97
[110] Maslarkova statement: paras 8 – 12: D/page 436M.
[111] H/page 105.

triggered production of the letter of 30 May 2001. Bird & Bird's letter also asserted that it constituted the notice required by the force – majeure provision, ie. clause 4 of the Annex to the 1993 contract.[112]

125. **If no force majeure event (within the meaning of the clause) was operative before 30 May 2001, was it operative thereafter?**
Okta's submission is that even if the 1999 letters did not constitute a *"request of a governmental authority",* the letter of 30 May 2001 did so and Okta complied with it. Therefore the failure of Okta to perform the 1993 contract after the 30 May 2001 is attributable to its compliance with this request. Jetoil submits that the arguments advanced in relation to the 1999 letters apply equally to the 30 May 2001 letter.

126. I am prepared to accept that the 30 May 2001 letter does constitute an instruction to Okta not to carry on performing the 1993 contract with Jetoil. The sentence: "*we request/require you not to implement any part of the document that seems to have been concluded between the refinery and the Greek company [ie. the 1993 contract]"* is plain. However I reject the Okta submissions that the letter amounts to a "*request by a governmental authority*" within the meaning of the force majeure clause or that Okta's failure to perform the 1993 contract thereafter is "*attributable*" to that request.

127. In my view the evidence establishes that it was Okta and Elpet, as advised by their lawyers, who decided that a new force majeure letter must be produced by the government. All the early drafts were produced by Okta's lawyers. Okta needed a letter because, as its English lawyers recognised after the Court of Appeal's decision in March 2001, without it Jetoil had a cast – iron case against Okta for breach of contract and damages. So the FYROM government had to be persuaded to produce a letter that would apparently avoid that result.

128. The evidence from the FYROM government ministers does not satisfy me that the letter was initiated by the government or produced for genuine governmental reasons. In his witness statement, [113] Mr Fetai states that in May 2001 he was concerned to ensure that Okta did nothing to damage or weaken the relationships with Hellenic Petroleum or the Greek government, both of which remained very important to the FYROM. His statement continues: *"In particular, I was concerned that if Okta were to obtain supply or transport of oil from Mamidoil –Jetoil, this would seriously undermine those relationships. To avoid this I wrote the letter of [30] May 2001"*

However there is no evidence that Okta had any intention of reverting to performance of the 1993 contract with Jetoil or of doing anything else to undermine relations with Hellenic or the Greek government. The evidence shows that Okta intended to do precisely the opposite, that is to ignore the 1993 contract and to carry on its arrangements made with Hellenic in 1999. Therefore the reasons Mr Fetai gives for signing the 30 May letter must be incorrect. He did not expand at all upon this point in his oral evidence.

129. The statements of Mr Kotev[114] do not explain this reasoning further. His oral evidence was not very satisfactory as he either did not appear to understand questions put to him by Mr Eder or else he seemed unwilling to address them. In any event his evidence was that he did not have specific recollections of the events in April and May 2001 leading up to the final draft of the letter of 30 May that was signed by Mr Fetai.[115] So his evidence does not help on the question of why the FYROM government signed the letter.

130. Accordingly I conclude on the evidence, that Okta has not demonstrated that the 30 May 2001 letter constituted a request from the FYROM government that was for the general good or for a public, as opposed to a private purpose. On the contrary, I am satisfied that the principal motivation of the letter was to try and extract Okta from its unfortunate position of being in breach of contact under the 1993 contract. Further I am not satisfied that this letter was made independently of Okta. All the evidence I have seen leads to the conclusion that the letter was instigated by Okta and its lawyers, was drafted by them and was then presented to the government to sign. There was no evidence before me that the government gave any independent consideration to the issue at all.

131. Lastly I have concluded that the failure of Okta to perform the 1993 contract is not "*attributable"* to the FYROM government's order in the letter of 30 May 2001. The effective cause of the continued non – performance of the contract was not Okta's "*acts or compliance*" with the FYROM government's request. The effective cause was the sequence of events that started in April to July 1999, when Okta decided that it would no longer perform the 1993 contract but would buy crude oil from Hellenic instead. Okta decided to continue to do this throughout 2000 and into 2001. As Mr Asserson's letter of 4 April 2001[116] makes clear, this suited the FYROM government. The 30 May 2001 letter was, in my view, an attempt at justification of an existing breach of contract by Okta rather than the effective cause of Okta's failure thereafter not to perform the 1993 contract.

132. Therefore I conclude that Okta cannot rely on the force majeure clause to excuse its non – performance of the 1993 contract. This means that, strictly speaking, I do not need to consider the proper construction of the notice provision in the force majeure clause or the effect of Okta's failure to give give prompt notice of the 1999 letters on which it relies as constituting a force majeure event.[117] However I will give my views on this issue very briefly.

133. **What is the effect of Okta's failure to give "*prompt notice*" of the force majeure event on which it relies?**

[112] E4(II)/pages 1662 – 4.
[113] D/page 381
[114] D/pages 389 and 436a – b.
[115] Transcript: Day 6/page 663 line 24 to page 664 line 3.
[116] H/page 55.
[117] Jetoil did not argue that if the 30 May 2001 letter was effective then notice on 5 June 2001 was not "prompt notice" of that letter.

Jetoil argues that the "*prompt notice*" provision in the force majeure clause is a condition precedent which must be fulfilled before a party can rely on the clause. Okta argues that it is simply an innominate contractual term which, if broken, does not prevent Okta from relying on the force majeure clause. Okta argued that the only effect of breach of this notice provision was that Jetoil could claim damages, if it can prove any have been suffered. Both sides argued the point as a matter of construction of the wording. Okta referred me to the speech of Lord Wilberforce in ***Bremer Handelsgessellschaft mbH v Vanden Avenne – Izagem PVBA.***[118] Okta submitted that Lord Wilberforce's speech establishes that there are three factors that determine whether the notice provision is a condition precedent: (i) the form of the clause itself; (ii) the relation of the clause to the contract as a whole; and (iii) general considerations of the law.

134. I would have been inclined to hold that notice provision in the 1993 contract is a condition precedent. The form of the notice provision is imperative; a party "*invoking force majeure* ***shall*** *give prompt notice to the other party*". The implication behind that imperative is that if the party does not then it cannot rely on force majeure. The reason for requiring notice to be given must be that the "*other party*" can then investigate the alleged force majeure at the time. It can challenge whether it does prevent performance or delay in performance by the party invoking force majeure. Alternatively it can see if there are other means of enabling performance to be continued. Lastly, if the notice provision is only an innominate term, then I find it difficult to see when the innocent party could allege it had suffered additional damage as a result of not being told promptly of the force majeure event other than the very damages that it would wish to recover for the first party's failure to perform the contract at all. These factors would all lead me to conclude that the parties intended the notice provision to be a condition precedent.

135. There could have been a further issue of what precisely is meant by "prompt". Its interpretation would depend on the circumstances of each case. But here Okta did not suggest that the letter of 5 June 2001 constituted "prompt" notice of the force majeure letters of 16 and 26 November 1999. Nor did Jetoil argue that the letter of 5 June 2001 did not constitute "prompt" notice of the 30 May 2001 letter.

J. Quantum of the Manipulation claim: what is the proper manipulation fee that Jetoil could have charged after the pipeline had started to operate?

136. Clause 3 of the 1993 contract provided that the manipulation fee would be fixed at US$ 4 per metric tonne for the period from 1 November 1992 until 12 December 1994. The same sum was fixed for successive periods until 31 December 1999.[119] No fee was fixed for the period after 31 December 1999. This led Thomas J to conclude that, in the absence of agreement on a fee, the 1993 contract terminated on 31 December 1999. But this conclusion was reversed by the Court of Appeal.

137. The effect of the judgment of the Court of Appeal is that the 1993 contract is effective for 10 years from 1993 and that it contained an implied term to the effect that, in the absence of agreement between the parties, a reasonable fee should be determined.[120] By the time of the hearing before me the parties had agreed that a reasonable fee for the manipulation is US$4 per metric tonne during the period before the opening of the pipeline between the Hellenic installations at Thessaloniki and the Okta refinery in Skopje. There was some controversy on when this pipeline would start to operate, but I was not asked to resolve that issue. The only question under this heading is: what is a reasonable fee for manipulation when the new pipeline is operative? Jetoil submits that it should remain at $4 per metric tonne. Okta asserts that it should be only Euro 2.5 per metric tonne.

138. The evidence of Mr Karalis was[121] that ***Hellenic*** and Okta had agreed that Okta would pay a total of US$25 per metric tonne for the manipulation and transport of crude oil from the Hellenic installation to the Skopje refinery for five years after the pipeline had opened. He said that of this sum, 2.5 Euros would constitute the manipulation fee.[122] Okta submits that: (i) Clause 1 of the original Annex to the 1993 contract expressly provided that if a pipeline was opened between the Jetoil installation at Thessaloniki and Skopje then "*in this case the terms of this agreement duly modified/supplemented, if needed, will apply";* (ii) therefore the parties could and would have renegotiated the manipulation fee payable after the pipeline opened; (iii) it is reasonable to conclude that the same figure would have been agreed between Jetoil and Okta as has, in fact, been agreed between Hellenic and Okta.

139. Mr Karalis was cross – examined on this point. He agreed that the figure of 2.5 Euros constituted the charge that Hellenic will charge ***Elpet*** for the manipulation of crude oil from the port to the tanks.[123] Mr Eder submitted that Mr Karalis accepted that the figure of $4 per metric tonne would be the appropriate manipulation fee under the terms of the 1993 contract after the pipeline was opened.[124] That is not my understanding of Mr Karalis's evidence at that point. Nor was it clear that Mr Karalis accepted that the manipulation of crude oil from ship to pipeline (via a tank if necessary) was an easier business than the exercise of manipulating it from the ship to railway tankers (via a tank if necessary).

[118] *[1978] 2 Lloyd's Rep 108 at 128; 130 and 131.*
[119] The last addendum was dated about 20 May 1999: A/page 9.
[120] *[2000] 2 Lloyd's Rep 91 at para 73 of the judgment of Rix LJ.*
[121] Fourth statement paras 16 – 19: D/pages 436dd – ee: Fifth statement paras 6 –10; D/pages 528 – 9.
[122] This was stated in a fax from Hellenic to Okta dated 27 June 2002: D/page 436ll.
[123] Transcript: Day 5/page 577 lines 13 – 15; page 587 lines 15 – 16.
[124] Mr Eder relied on answers given at Transcript Day 5/page 586 lines 1 – 8.

140. There was a hint in Mr Eder's cross – examination and submissions that the figure of 2.5 Euros was not an "arms – length" calculation of the cost of manipulation as between Elpet and Okta. On the evidence I have seen, including the Inter – Office Note of Industrial Installations at Thessaloniki[125] the figure of 2.5 Euros seems a reasonable figure.

141. I have concluded that if the 1993 contract had still been operating between Jetoil and Okta when a pipeline between Thessaloniki and Skopje was opened, then: (i) they would have negotiated a modification in the manipulation fee, as permitted by clause 1 of the first Annex to the contract; (ii) it is probable that they would have agreed a manipulation fee of 2.5 Euros per metric tonne, as Elpet and Okta have apparently done.

K. Does Jetoil have to give credit for profit obtained from the use of Tank 10 for manipulating oil products from July 1999 to March 2002?

142. The evidence and submissions on this issue were deferred until 2 October 2002 for the reasons that I set out below. The issue arises in the following way. It was agreed that Tank 10 is by far the largest tank in the Jetoil installation, having a total capacity of over 62 million cubic metres. It is also agreed that up to April 1999 this tank was used exclusively for the storage of crude oil and was used for the reception and manipulation of non – heated crude oil destined for Okta. The evidence of Mr Mamidakis, which I accept, is that between April and July 1999 Jetoil did repairs and refurbishment to Tank 10 so that it could store clean oil products.[126] It is also agreed that, after these repairs, Tank 10 was used for the storage of clean oil products received from ships into the Jetoil installation.

143. The argument of Okta is that as a result of Okta's failure to perform the 1993 contract, Tank 10 was released for other uses by Jetoil; Jetoil did in fact make use of Tank 10 considerably during the period July 1999 to March 2002; therefore the net profit that Jetoil made from this use must be credited, (as a "mitigation profit"), against any damages that Okta might otherwise have to pay Jetoil for breach of the 1993 contract.

144. Jetoil submits that it does not have to give any credit for the profit obtained from using Tank 10 to store and manipulate clean oil products during the period July 1999 to March 2002. Its argument is that although Tank 10 was used in fact, all the clean oil products that were manipulated during this period could have been accommodated within the Jetoil installation, even if Okta had performed the 1993 contract and Tank 10 had been used for manipulating Okta crude oil.

145. The legal principles are as follows: if one party is in breach of contract, the innocent party is under a duty to mitigate the loss suffered as a consequence of the breach. If the innocent party makes a profit from the mitigating action, then it has to give the contract breaker credit for this if the court finds, as a fact, that those profits arose out of the attempt to mitigate the loss suffered from the breach. If, however, the profits were the result of *"independent*" actions and not the mitigating steps, then the profit does not have to be taken into account.[127] Where the effect of the breach of contract is to release resources of the innocent party for other uses, then the innocent party must give credit for the net profit from the alternative use of those resources if it is demonstrated (the burden being on the contract breaker) that (i) the innocent party could not have undertaken the alternative use ***but for*** the breach of contract by the defendant; and (ii) the innocent party employed substantially the same resources as it would have done if the contract had been performed.[128]

146. The position was that, as at April 1999, Jetoil had two contracts for the manipulation of clean oil. One was a contract with Motor Oil (Hellas) Corinth Refineries SA dated 13 November 1996.[129] That provided for the transfer of up to 60,000 cubic metres of heating oil to the Jetoil facility. Each shipment was to be up to 20,000 cubic metres, unless otherwise agreed by the parties. The shipments were to be by a mutually agreed schedule.[130] The contract was initially for one year but was renewed for an indefinite period by Addendum No. 3 dated 27 January 1999.[131]

147. The second contract was with Petrola Hellas SA and dated 6 September 1998. That was a three year contract to run from 1 January 1999 until 31 December 2001. The contract provided that Petrola would deliver a stated minimum quantity of various clean oil products to Jetoil in each of the three years of the contract and Petrola could deliver up to stated maximum figures.[132] Petrola had the right to deliver individual cargoes of up to 30,000 MT each for autogas or heating oil. It could deliver cargoes of up to 5,000 MT each of super or unleaded gasoline.[133] Petrola had to provide Jetoil with a tentative schedule of quantities of each product and had to inform Jetoil promptly of any shipments of over 5,000 MT. Petrola had to give Jetoil at least five days notice of the arrival of each tanker if the cargo was over 5,000 MT. Tankers had to give at least two days notice to Jetoil of their ETA.[134]

148. Jetoil instructed an expert, Mr George Tsiropoulos, to consider the quantities and manner of manipulation of oil by the Jetoil facility in the period from 1999 to the first quarter of 2002. He produced figures for the total

[125] D/pages 537 – 8: attached to Mr Karalis' fifth statement.
[126] Mamidakis Fourth witness statement: para 58: D/pqge 346.
[127] See: Chitty on Contracts: para 27 – 093.
[128] See: Chitty on Contracts: para 27 – 096.
[129] Bundle I(2)/Tab 12 page 385.
[130] Article 3 of the contract: Bundle I(2)/page 386.
[131] Bundle I(2)/page 392.
[132] Article 3 of the contract: Bundle I(2)/page 400.
[133] Article 4 of the contract: Bundle I(2)/page 401
[134] Article 10 of the contract: Bundle I(2)/page 406.

quantities that passed through the Jetoil installation under the Motor Oil and Petrola contracts.[135] These were within the figures contemplated by the contracts and were not challenged by Okta. Okta accepted that the quantities of clean oil that would have been manipulated by Jetoil under those contracts would have been the same even if Okta had not been in breach of the 1993 contract and Tank 10 had continued to be used to manipulate crude oil for Okta's account.

149. After Okta was in breach of the 1993 contract, Jetoil entered into a new contract with Shell for the rent of Tanks 15 and 16. This contract was concluded in 2001. It is not relevant to the present issue because Jetoil accepts that it must give credit for the profit received from this contract. It has already been included in the net figures for the damages receivable if Okta is found to be in breach of contract.

150. Jetoil accepts that quite apart from these contracts, other clean oil products were received at the Jetoil installation for Jetoil's own account in the period following July 1999. Mr Paris Efthymiades, Okta's forensic accountant, produced a table showing the quantities of oil manipulated through the Jetoil facility in the years 1998 – 2001.[136] The figures of oil received for Jetoil's own account increased considerably from 122,501 cubic metres in 1999 to 232,775 cubic metres in 2000 and to 425,342 cubic metres in 2001. These figures were not challenged by Jetoil. Indeed Mr Mamidakis accepted in cross – examination that the throughput of clean oil products for Jetoil's own account had been increased from 1999 to 2001. He also accepted that from September 2001 Tank 10 was used to store clean oil products.

151. The question then is whether Okta has demonstrated that Jetoil would not have been able to manipulate these additional quantities of clean oil products but for the breach of contract by Okta, because without that breach of contract Jetoil would not have been able to use Tank 10. In his report prepared for the trial before me,[137] Okta's forensic accountant, Mr Efthymiades, accepted that he was not in a position to quantify the mitigation profits that related to the quantities of oil manipulated through Tank 10.[138] Consideration of this issue was deferred to enable Okta to instruct another expert. The cross – examination of Mr Mamidakis on this issue was also deferred.

152. When this aspect of the case was heard on 2 October 2002, Okta had served two further reports prepared by Mr Michael Trowsdale, who is a chemist and surveyor. The exercise that he carried out was to examine the oil product handling that took place in fact at the Jetoil installation during the period January 1999 to March 2002 inclusive. He produced an Appendix 12 to his first report which demonstrated that, given the deliveries that were actually made to Jetoil on the particular dates that they occurred, a total of 709,788,432 cubic metres of cargo ***had*** to be stored in Tank 10.[139]

153. Jetoil accepts these figures, but argues that they do not make out Okta's case. Jetoil argues that Okta must prove that the additional clean oil products could not have been manipulated by Jetoil at its facility ***but for*** the availability of Tank 10 as a result of Okta's breach of contract. Jetoil submits that the question is not what happened in fact, but what would Jetoil have been able to do if Okta had not been in breach of the 1993 contract. In those circumstances would Jetoil have been able to manipulate the additional quantity of clean oil products that it did take in fact, but without using Tank 10?

154. In my judgment the question, as posed by Jetoil, is the correct one. Its expert, Mr Tsiropoulos, prepared a report in which he concluded that Jetoil would have been able to handle the extra quantities of clean oil products without using Tank 10.[140] He accepted that the "turnover", ie. the use to which the tanks was put, would have been higher if Tank 10 had not been available to take clean products. But his opinion was that the quantities could have been accommodated. He thought this was so even though the clean products that were manipulated by Jetoil were concentrated in the two winter quarters.

155. Mr Trowsdale responded to these views in his Supplementary Report.[141] In his opinion neither rescheduling of vessels nor using smaller vessels, nor even a combination of the two would have enabled Jetoil to accommodate the additional clean oil products if Tank 10 was not available to store it. However he fairly stated that he doubted whether a "definitive" maximum turnover rate could be identified. He also accepted that it was not possible to state categorically whether rescheduling of vessels could have affected the situation decisively.[142] Mr Trowsdale pointed out that rescheduling does have difficulties, as would the use of smaller vessels.

156. Jetoil only has to give Okta credit for the net profit obtained from using Tank 10 if Okta satisfies me that, on a balance of probabilities, that profit would not have been obtained by Jetoil ***but for*** Okta's breach of contract. Neither of Mr Trowsdale's reports sets out to prove that point. They address a different issue, ie. whether on the facts as they actually occurred between January 1999 and March 2002, the quantities of oil manipulated by Jetoil could have been accommodated without using Tank 10. That is not the right test. Nor did Mr Trowsdale make good the point in his oral evidence, because he had not addressed this question at all. Indeed in cross – examination he accepted that he had not considered this specific issue. I therefore must conclude that Okta have not discharged the burden of proof on this issue.

[135] Tsiropoulos Report: Bundle I/page 104.
[136] Bundle I/page 304.
[137] Dated 10 June 2002. I/page 256 and following.
[138] Para 120: I/page 290.
[139] Bundle I/page 61: Terminal Summary.
[140] Tsiropoulos Report: paras 3.14 to 3.18: Bundle I/pages 95 – 96.
[141] Trowsdale Supplementary Report: Bundle I/page 317.
[142] Trowsdale Supplementary Report: paras 10 and 11; Bundle I/page 319.

L. Moil-Coal's claim under the 1998 Oil Supply Contract: did that agreement have contractual force?

157. Okta makes two submissions under this heading. First it submits that the oil supply contract was a "framework" agreement on the basis of which the parties intended that they would agree specific contracts that regulated the delivery of individual cargoes of crude oil. Secondly Okta submits that, even if the parties intended that the 1998 agreement should have contractual force, it did not do so because it was uncertain in two respects: (a) on how the price for the oil should be fixed; and (b) the quantity of oil to be sold under the contract.

158. I reject the first submission. First the document has every appearance of being a commercial contract between two business parties. It is headed "contract". The document records that "*This Contract is made and signed in Athens today 27 – 8 – 98*". The parties are identified as "*Buyer*" and "*Seller*" respectively. It states that there is agreement as to a large number of detailed terms on quantities; quality; delivery; price and pricing; payment and other terms. There is a "*Law and Arbitration*" clause which states that "*This contract is constructed (sic) and governed in accordance with the laws of England*". Secondly, I note that when Okta was inviting tenders from potential suppliers[143] of crude oil in August 1998, there was no hint that the parties would conclude a "framework" agreement and supplement it with individual contracts for each cargo supplied.

159. When commercial parties apparently enter into an ordinary commercial transaction which is evidenced by express and detailed provisions, the burden of proving that the parties intended that the document concluded should have no legal effect is on the party making that assertion.[144] Okta did not begin to discharge that burden.

160. Okta's second submission is more substantial. On the issue of uncertainty as to price, Okta notes that Annex 2 to the Oil Supply Contract sets out the prices for cargoes to be delivered during the last quarter of 1998. But there was no further Annex to deal with prices after that time. Okta submits that the wording of Clauses 4 and 5 of the Oil Supply Contract is uncertain because:

(1) there is no "*common practice*"[145] for the pricing of each type of crude which could be supplied under the contract;

(2) There is uncertainty as to whether "*three or five quotations after B/L date*" should be used to price the crude oil supplied.[146] There is additional uncertainty because the same clause mentions "*a certain number of quotations before/after or around NOR at discharge port etc*".

(3) there was further uncertainty as to the publications from which to take the "*D[a]T[e]D Brent*" price.

(4) Unlike the 1993 contract, there is no mechanism such as arbitration to determine what a reasonable price would be in default of agreement between the parties.

(5) the courts have been reluctant to enforce executory contracts for the sale of goods when there is uncertainty as to such a basic element as the price of the goods to be sold.

161. It is clear that no fixed prices were agreed for crude that was to be delivered after 1 January 1999. Therefore the question is whether the parties had agreed some mechanism whereby the prices might be determined. There are two elements to Okta's arguments on uncertainty. First there is the alleged uncertainty as to the period during which the pricing should be calculated. Secondly there is uncertainty as to the publication from which to take the Dated Brent price.

162. The contract contemplated delivery to Okta on board railway tankers. Moil-Coal would obtain the crude oil from suppliers who would deliver cargoes at Thessaloniki once Moil-Coal knew of Okta's requirements. The suppliers would nominate a vessel. The evidence of Mr Kardamakis was that in practice Moil-Coal would take the average of the mean price for Dated Brent crude for three or five quotations as set out in the publication Platt's Crude Oil Marketwire, after the Bill of Lading date or nomination, depending on which range of quotations Moil-Coal's supplier had chosen. Moil-Coal would then add a premium or subtract a discount in accordance with Clause 4 of the oil supply contract, using the publication Nefte Compass to provide the price formula. That figure would be given to Okta. It was never challenged by Okta although it had the right to do so.[147] Platts Marketwire was in fact used for each of the eight shipments made under the 1998 contract.

163. The two parties managed to agree prices for eight shipments of crude oil totalling 290,353 metric tonnes between August 1998 and July 1999. So this is not a case of one party asserting that the reason an executory contract has never been performed at all is that it was always too uncertain. This contract was performed for over half the amount agreed to be sold to Okta. In fact the first time that a plea of uncertainty was raised by Okta was when the Points of Defence were amended in May 2002, shortly before the trial.

164. I find that there was a course of dealing between the parties in executing the Oil Supply Contract. The parties agreed, by their conduct, to terms in the Oil Supply Contract that: (i) Moil-Coal would fix the price by reference to Dated Brent prices as set out in Platt's Marketwire for either three or five quotations after Bill of Lading date or nomination, depending on what had been used by Moil-Coal's supplier of the crude to be sold to Okta; (ii) the premium or discount would then be added in accordance with Clause 4 of the oil supply contract; (iii) Okta had the right to challenge the price fixed in this way, in which case the parties had to agree a reasonable price for the oil sold in that shipment.

[143] Including Moil – Coal: Tender letter at E4(I)/page 1250 – 1.
[144] Chitty on Contracts (28 Ed): para 2 – 147.
[145] The phrase used in Clause 5.
[146] See Clause 5.
[147] Kardamakis: third witness statement: paras 10 to 13; D/page 424k; Transcript Day 3/page 271 lines 20 – 25; page 275 at line 9 – page 276 line 4.

165. Accordingly I reject Okta's second submission on uncertainty. It follows that the oil supply agreement was a valid contract. Okta has not advanced any other arguments against the allegation that it was in breach. Therefore the only remaining question is one of quantum. The issue is how does the word "about" which qualifies the amount to be purchased under clause one of the contract affect the quantity on which damages are to be assessed.

M. What is the effect of the word "about" in Clause One of the oil supply contract?

166. By Clause 1 of the oil supply contract Moil – Coal agrees to sell and Okta agrees to buy a quantity of: "*About 500,000 MT in shipments of 25,000 to 80,000 MT to be delivered during twelve months period staring from September 1998 until August/September 1999*".

Clause 3 states that the crude oil is to be delivered "*ex ship shore outturn Mamidoil – Jetoil SA installation in Thessaloniki*". The price is stated in Clause 4 to be: "*CIF shore outturn Mamidoil – Jetoil SA installation in Salonika (sic)*". Okta argues that the effect of the word "about" in this clause is to give it, as buyer, the option only to buy 90% of 500,000 MT of crude oil, that is 450,000 MT. It submits that if Okta is liable for damages of breach of the oil supply contract then it follows that Moil-Coal's damages should be based on the loss of profit on the difference between the amount of crude oil that Okta did accept from Moil – Coal (ie. 290,353 MT) and the minimum amount that Okta was obliged to accept, ie. 450,000 MT. Okta argues that this would be to apply the general rule that damages are to be assessed on the basis that the contract breaker would have performed the contract in the way that would have benefited it most.[148]

167. Moil-Coal accepts that the word "about" in Clause 1 implies that there is a tolerance in the amount to be sold under the contract. But it submits that the margin is not in the buyers' option, but the sellers', because the contract is a CIF outturn contract. Moil-Coal submits that factors such as shipping dates, co-ordination with the terminal at the discharge port and general operational considerations all affect the seller rather than the buyer under this contract; therefore the margin given by "about" is one that the seller can exercise, but not the buyer.

168. Moil-Coal also argues that, in any event, the amount of the margin in the case of this contract is 5% and not 10%. It submits that 10% would amount to a large shipment under the contract terms;[149] and that this could not have been what the parties would have contemplated.

169. The parties agree that there has to be a tolerance in the amount to be sold under this contract and that is why the word "about" appears in Clause 1. But that still leaves two issues to be decided. First, which party has the right to exercise the tolerance? Secondly, if this is an option that Okta, as the buyer could exercise, how large could that tolerance be?

170. The oil supply contract was, as I have held, an effective agreement for the sale and purchase of a large quantity of crude oil over a period. It is clear from the agreed statement of the parties' oil experts that there is no settled market meaning or effect of the word "about" in such a contract. All that Mr Church and Mrs Annesley could agree was that crude oil contracts (whether for one shipment or for delivery over a term) had to have a tolerance.

171. Clause 3 of the contract provided that deliveries during the first quarter of the contract, from September to November (inclusive) of 1998 would be as set out in Annex 2.[150] The parties actually signed that Annex on 1 October 1998. The parties agreed that Okta would buy a total of 154,000 MT during that period. I have not seen any similar annex for the next quarter, although I assume that there was agreement because a further 140,353 MT of oil was delivered to Okta. Annex 2 makes it clear that the parties agreed the amounts to be delivered in any particular quarter. It does not indicate that Moil – Coal had stipulated unilaterally the amounts to be delivered and when. So although this was a "CIF ex – ship outturn" contract, I find that the parties contemplated that, provided that the tolerance was within that contemplated by "about", the actual amounts to be delivered under it during each quarter, were to be agreed between the parties. Therefore Okta would have been contractually entitled to say that it wished only to take the minimum contemplated by the word "about" and it would have been within its contractual rights to do so.

172. So I must move onto the second question: what tolerance is contemplated by the word "about" in this contract? I accept the submission of Moil-Coal that a figure of 10% is too high for such a large contractual quantity. That does not seem a commercially sensible figure for the parties to have contemplated. But 5%, ie. 25,000 MT, does appear reasonable.

173. Therefore I conclude that Okta would have been entitled to buy a total of only 475,000 MT under the oil supply contract. Moil – Coal did not dispute the general rule that if a contract breaker had an option as to how the contract was performed, then damages should be based on the method of performance that was most favourable to the contract – breaker.

174. Thus I hold that Moil – Coal's damages for breach of the oil supply contract should be calculated on the basis that Okta was obliged to buy (and failed to do so) a further total of 184,654 MT of crude oil.

N. Jetoil's Application for Declarations and in Injunction against Okta concerning the Macedonian proceedings

175. I have already mentioned that at a late stage in the trial Jetoil obtained permission to amend its pleadings so as to claim further relief against Okta. The relief claimed was:

[148] Okta relied on *Chitty on Contracts: para 27 – 036*.
[149] The shipments could be from 25,000 up to 80,000 MT under Clause 1.
[150] Bundle A/page 18.

(1) A Declaration that the 1993 contract is valid and binding on Okta;

(2) a Declaration that Okta and its privies, (which, Jetoil submits, includes Elpet), are estopped from denying the validity and binding nature of the 1993 contract;

(3) an Injunction restraining Okta by its directors, officers, servants or agents or otherwise howsoever from prosecuting proceedings in the FYROM or from relying on any judgment or order given in the FYROM Courts, which purports to prevent Okta from paying to Jetoil any sums by way of damages, interest or costs adjudged due by this Court or which purports to deny the validity and binding nature of the 1993 contract;

(4) an Order that Okta, by its directors, servants and agents do forthwith discontinue the FYROM court proceedings and set aside any judgment, decision or order obtained in those proceedings.

176. For this part of the case the parties relied on evidence from the witnesses who had been cross – examined and also two witness statements each from Mr Angus Johnson (for Jetoil) and Catherine Milton (for Okta).[151] After that part of the hearing was concluded, Okta also submitted a third witness statement of Mr Potamitis. That dealt with aspects of the proceedings brought by Jetoil against Okta and Elpet in the Greek courts.

177. **The application for declarations as to the validity and binding nature of the 1993 contract.**
Mr Jarvis QC[152] stated that Okta did not assent to or oppose the applications for the declarations as against Okta. I am prepared to grant them. However, in doing so I am not pre – empting any conclusion on whether Elpet is to be regarded as Okta's "privy" for the purpose of the Declarations sought by Jetoil against Okta. Very briefly my reasons for granting the declaration are: (i) the preliminary hearing before Thomas J and the Court of Appeal all proceeded on the basis that the 1993 contract, which is governed by English law, is valid and binding. At no time did Okta argue otherwise; (ii) in the hearing before me Okta did not assert otherwise; (iii) there is no possible argument that I can discern which might impugn the validity of the 1993 contract; (iv) Okta have not raised any argument against me exercising the court's powers to grant the equitable remedy of a Declaration. Accordingly I grant the Declarations sought by Jetoil.

178. **Declaration that Okta and its privies (including Elpet) are estopped from denying the validity and binding nature of the 1993 contract.**
So far as Okta is concerned, I think that this declaration adds nothing to the first one sought. However it does raise the question of whether Elpet is to be regarded as the "privy" of Okta for the purpose of deciding whether, so far as the English Courts are concerned, Elpet is bound by any decision as to the validity of the 1993 contract. I will deal with this issue after I have set out the history of the FYROM Court proceedings and the arguments of the parties.

O. The application for Injunctions: (i) restraining Okta from prosecuting proceedings against Jetoil in the FYROM Court or (ii) restraining Okta from relying on any judgment given by the FYROM Court which would prevent Okta from paying damages etc awarded by this Court against Okta and in favour of Jetoil; (iii) ordering Okta to discontinue the proceedings in the FYROM Courts and to set aside any judgment, decision or order granted in those proceedings.

179. **The History of the proceedings in the FYROM Courts.** Clause 5 of the Annex to the 1993 contract contains an English law and London arbitration provision. At the hearing before Thomas J on 30 November and 1 December 1999 both Jetoil and Okta, through their counsel, confirmed that they waived their rights to have referred to arbitration "*any dispute arising under or in connection with the 1993 contract*". This is recorded in the Order that was made following that hearing.[153] At the time neither side suggested that this constituted an agreement to give the English Court ***exclusive*** jurisdiction over all matters that might arise under or in connection with the 1993 contract. There was a subsequent exchange of letters between solicitors after the Court of Appeal's judgment in which both confirmed that the parties had submitted to the jurisdiction of the English Court.[154] But those letters do not confirm an ***exclusive jurisdiction*** had been given to the English Court.

180. The Court of Appeal handed down its judgment on 22 March 2001. The judgment held that the 1993 contract was valid and binding until March 2003. As I have already found, there were meetings of Okta and Elpet personnel following that judgment. The purpose of those meetings was to consider its consequences. The meetings led to the production of the force majeure letter of 30 May 2001. The meetings also discussed the issue of the validity of the 1993 contract and the possibility of starting proceedings in the FYROM courts to challenge the validity of the 1993 contract. That is referred to in one of the draft force majeure letters (to be sent by a FYROM government minister to Okta) produced by Bird & Bird on 10 May 2001.[155]

181. This idea had partly originated with Mr Karalis,[156] who was, of course, both Managing Director of Okta and Elpet. But it was also the result of advice obtained from Elpet's lawyer in Greece, Professor Pamboukis. He was instructed by both Elpet and Okta as a result of proceedings that were brought in the Athens Courts against both those companies by Jetoil. Those proceedings had been started on 12 April 2000. Jetoil claimed damages against Elpet (and Mr Karachalios, the former General Manager of Okta) for breach of the 1993 contract and against Elpet for inducing breach of contract. That claim was rejected by the Greek court at first instance in May

[151] A separate bundle for the Declaration/Injunction part of the case was produced. I will refer to it as *Bundle J*.
[152] Transcript: Day 7/page 828 lines 9 – 14.
[153] Bundle J/page 154; fourth recital. The wording is as quoted, although the Order mistakenly refers to Clause 4 of the Annex, rather than Clause 5.
[154] letters of 14 May and 15 August 2001: Bundle G/pages 159 and 160.
[155] Bundle H/page 86: "*I understand that Okta questions the validity of the Contract and has commenced proceedings in Macedonia to obtain a ruling that the Contract is not binding*".
[156] He so stated in cross – examination: Day 5/page 549 lines 21 – 24.

2001. But it was contemplated that Jetoil might appeal.[157] Professor Pamboukis was informed that there was an argument that, according to Macedonian law, the 1993 contract was not valid. Professor Pamboukis advised Elpet to consider bringing proceedings in the FYROM Courts to challenge the 1993 contract. In his view, as a professor of Private International Law, that was the appropriate jurisdiction in which to make such a challenge.[158]

182. I find that, by 10 May, Okta had decided that it would start proceedings in the FYROM Courts to challenge the validity of the 1993 contract and that those would be started by the time that the FYROM government had sent the force majeure letter that Bird & Bird were drafting. Then the strategy changed. By the time the next draft force majeure letter was sent by Bird & Bird on 14 May, it was envisaged that either Okta or Elpet or both would start proceedings in the FYROM Court.[159]

183. A formal resolution to start proceedings in the competent Court at Skopje was passed by the Elpet board on 5 June 2001.[160] It was proposed that the action should be against both Jetoil and Okta in order that, "*among other things, the voidness of the contract dated 5.3.99 be recognised*".

184. The proceedings were begun by Elpet on 12 July 2001, naming itself as the claimant and both Okta and Jetoil as defendants.[161] In cross – examination Mr Potamitis accepted that when the identity of the claimant in the FYROM court proceedings was being considered, one factor was that if Okta brought them as claimant it might be in breach of the English jurisdiction clause in the 1993 contract.[162]

185. The claim document in the FYROM proceedings sought two forms of relief. First, effectively, a permanent declaration that the 1993 contract is non – existent and of no legal effect. The basis for that claim was, in summary, that the 1993 contract with its subsequent annexes: "*are untrue documents due to which this agreement does not exist and the same does not produce any legal effect from the date of their signing*".

    Secondly Elpet sought a "*Temporary Measure*". The claim document noted the proceedings in the Commercial Court and the fact that Jetoil was claiming damages against Okta in those proceedings. The Temporary Measure sought was a prohibition on Okta complying with any kind of "*obligation at the request of [Jetoil] including a request for damages resulting from the allegedly concluded [1993 contract] until the final and irrevocable closing of this dispute*". Elpet pleaded that if Okta was obliged to pay damages to Jetoil then this would cause irreparable damage to Okta and Elpet, "*who is a majority shareholder [in] the first defendant [ie. Okta].*"[163]

186. Jetoil was formally served with these proceedings in November 2001. It filed submissions to the Primary Court in Skopje on 7 December 2001, challenging the jurisdiction of the FYROM Courts. Jetoil asserted that the proper forum was England, pursuant to the original jurisdiction clause in the contract and the subsequent agreement of Okta and Jetoil. On 8 February 2002 the Skopje Court rejected that challenge. That was confirmed in a judgment dated 26 June 2002.[164] The Macedonian Court concluded: (i) that Elpet was not bound by any jurisdiction agreement in the 1993 contract; (ii) the Court had jurisdiction because Okta, a defendant, was resident in the FYROM; (iii) the issue before the court concerned the validity of the 1993 contract. That was not in issue before the English Courts, nor was Elpet a party to the English proceedings, therefore that issue was not "*res judicata*" so far as the Macedonian court was concerned. It is accepted that Jetoil had no right of appeal on the issue of jurisdiction alone. Any appeal on jurisdiction has to await the outcome of the case on the merits.

187. Elpet's claim on the merits was heard on 16 April 2002. Jetoil participated in that hearing and opposed Elpet's claim. By the judgment dated 26 June 2002, the Basic Court in Skopje held: (i) that the 1993 contract and the various subsequent annexes are "*non – existent*" and produce "*no legal effect whatsoever*"; (ii) that Elpet was entitled to interim relief in the form of an injunction preventing Okta from paying any damages that might be found due and owing to Jetoil in connection with the 1993 contract.

188. It is accepted, for the purposes of the current English proceedings, that the Macedonian proceedings are not yet final (even if there is no appeal). The interim relief will remain in force until the completion of the Macedonian proceedings. At that stage if Elpet remains successful, then it will be able to obtain a final injunction preventing Okta from paying Jetoil any damages found due to it by the English or other proceedings.[165]

189. **The arguments of the parties: Jetoil.**
    The arguments on this part of the case were advanced (most persuasively) by Mr Parsons. He submitted:
    (1) Elpet is to be regarded as a "privy" of Okta. This is because Elpet has a "*privity of interest*" with Okta.[166] Therefore any declaration of the English Court that the 1993 contract is valid and binding and that Okta is estopped from denying that is so must also bind Elpet.

[157] Jetoil did so and the appeal was heard in February 2002. The judgment is awaited.
[158] See: first witness statement of Catherine Milton: paras 14 – 18: G/page 138.
[159] See letter from Bird &Bird to Mr Karalis at Bundle H/page 90.
[160] Bundle J/page 152. Mr Karalis was not present at the meeting and the resolution was proposed by the President of the Board, Mr Prodromidis.
[161] Bundle G/pages 1 – 6.
[162] Transcript: Day 6/page 716 lines 21 – 24.
[163] Bundle G/page 5.
[164] Bundle J/pages 110 – 111 for the relevant extract.
[165] Second statement of Miss Milton: paras 4 – 6: Bundle J/page 187.
[166] Mr Parsons relied on the speech of Lord Bingham of Cornhill in *Johnson v Gore Wood [2001] 2 WLR 72 at 91,* where he approved the statement of what constitutes a "*privity of interest*" set out by Megarry V-C in ***Gleeson v Whippell & Co Ltd*** *[1977] 1 WLR 510 at 515.*

(2) Okta agreed to litigate disputes arising out of or in connection with the 1993 contract in the English Court. In the English Court Okta has not challenged the validity of the 1993 contract. Now Okta is, effectively, using Elpet to engage in proceedings in the FYROM Court precisely to challenge the validity of the 1993 contract.

(3) The actions of Okta are in breach of its contract and unconscionable. The English Court has the power to grant an injunction against an entity that is amenable to the English jurisdiction from engaging in unconscionable conduct consisting of bringing or acquiescing in foreign proceedings contrary to an agreement to litigate disputes in the English courts.[167]

(4) The English Court should not permit Okta to use Elpet to bring the claim in the FYROM court to avoid an injunction being made against Okta.

(5) In this case the conduct of Okta is so egregious that an injunction should be granted to prevent Okta from relying on any judgment given by the FYROM Court.[168]

(6) Even if Jetoil has delayed in bringing this claim for an injunction, no blame attaches to it, so this is not a bar to the injunction sought.

190. The arguments of Okta are:

(1) The agreement made between the parties that disputes arising out of or in connection with the 1993 contract should be litigated in the English Courts did not constitute an agreement to submit ***exclusively*** to the English Court's jurisdiction. Indeed Jetoil subsequently attempted to litigate matters in Greece.

(2) Elpet is not bound by any agreement made by Okta with Jetoil. Elpet is a separate legal entity from Okta and it is not controlled by Okta. Elpet made its own decision on whether to bring the FYROM Court proceedings. So Elpet is not a "privy" of Okta. Moreover Elpet is not a party to the current proceedings nor is it amenable to the jurisdiction of the English Courts. Elpet should not be bound by any declaration made by the English Court against Okta as to the validity of the 1993 contract.

(3) Even if the actions of Okta (in acquiescing in the claim by Elpet in the FYROM Court for a declaration of invalidity of the 1993 contract) constitute "unconscionable action", no injunction should be granted against Okta in this case. This is because Okta is now in the position of being enjoined by the FYROM courts from satisfying any claim for damages made in the English Courts. As a matter of comity, or judicial restraint, the English Court should not make any order against Okta that would or might force it (in the FYROM) to disobey the existing order of the FYROM Court.[169]

(4) In any event Jetoil should not be granted any injunction against Okta when (a) Jetoil took a full part in the FYROM Court proceedings on the merits; and (b) Jetoil has delayed in making its claim for an injunction for so long.

191. **The Issues to be decided.**

The following issues have to be decided:

(1) Is Elpet a "privy" of Okta by virtue of an "identity of interest" with Okta in relation to issue of the validity of the 1993 contract? If it is a "privy" of Okta, then it must follow that, so far as the English Courts are concerned, Elpet would be estopped from denying that the 1993 contract is valid and binding on Okta.

(2) Should an injunction be made restraining Okta from prosecuting proceedings in the FYROM Courts which purport to prevent Okta from paying to Jetoil any sums by way of damages, interest or costs adjudged due by the English Court in relation to the 1993 contract.

(3) Should an injunction be made restraining Okta from relying on any FYROM Court's judgment or order that purports to prevent Okta from paying to Jetoil any sums by way of damages, interest or costs adjudged due by the English Courts in relation to the 1993 contract.

(4) Should Okta be ordered (i) to discontinue the current FYROM proceedings; and/or (ii) to set aside any judgment or order granted in the current FYROM proceedings.

192. **Is Elpet the "privy" of Okta?**

The concept of one legal entity being the "privy" of another is encountered usually in the context of "***res judicata***". A claim that a cause of action or a particular issue cannot be re-litigated will only succeed if there is an identity of parties between the two sets of proceedings. If a judgment has been made for or against party A in the first proceedings, then any "privy" of A is also bound by that judgment. So the usual question is whether entity B, which is involved in the second action, is a "privy" of entity A and so bound by the first judgment that has been made for or against entity A. In this case the position is slightly different, because Okta is a party to both the English action and the FYROM action, but Elpet is only a party to the latter. But Jetoil submits that if the English Court declares that the 1993 contract is valid, then, so far as the English Courts are concerned, Elpet must be estopped from denying that validity, because Elpet is Okta's "privy".

193. One person or legal entity can be the "privy" of another if there is (i) privity of blood; (ii) privity of interest; or (iii) privity of estate.[170] In this case it is said that there is a privity of interest as between Elpet and Okta in relation to the issue of the validity of the 1993 contract. The validity of the 1993 contract is now part of the subject matter of the English action and also the FYROM Court proceedings.

[167] Jetoil relied on *Donohue v Armco Inc and others [2002] 1 Lloyd's Rep 425;* ***Turner v Grovit*** *[2002] 1 WLR 107.*

[168] Relying on ***Ellerman Lines v Read*** *[1928] 2 KB 145.*

[169] Okta relies on ***ED & F Man (Sugar) Ltd v Yani Haryanto (No 2)*** *[1991] 1 Lloyd's Rep 429.*

[170] ***Carl Zeiss Stiftung v Rayner & Keeler (No 2)*** *[1967] 1 AC 853 at 910 F and 945F, per Lords Reid and Upjohn.*

194. The English Courts have found a definition of *"identity of interest"* to be elusive. In the context of ***"res judicata"***, Megarry V – C characterised "*identity of interest*" as follows: "*I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two [parties] to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party".*[171]

That statement was approved by the House of Lords in ***Johnson v Gore Wood.*** [172]

195. How should that characterisation be applied in this case where the issue is whether Elpet should (so far as the English Courts are concerned) be regarded as Okta's "privy" and so estopped from denying the validity of the 1993 contract? The test must be: is there a sufficient identity of interest between Okta, which is party to the 1993 contract with Jetoil, and Elpet, which is now the majority shareholder in Okta, to make it just that (so far as the English Courts are concerned) Elpet should be estopped from denying the validity of the 1993 contract?

196. Elpet did not exist when the 1993 contract was concluded. It was only incorporated in 1999, when Okta was privatised. Elpet is a Greek company. It has a separate board of directors from Okta, although two directors are common to both boards.[173] Elpet now owns 69.46% of the share capital of Okta.[174]

197. The first question that has to be answered is: at what date has there to be identity of interest so far as the validity of the 1993 contract is concerned? Is it when the contract was concluded, or when the issue of validity arises? I think that it must be when the issue arises. That is the point when the court considers who is to be bound by the issue it decides.

198. The next question is: does the fact that Elpet has become a majority shareholder in Okta mean that it now has an identity of interest with Okta on the issue of the validity of the 1993 contract? Of course the issue of validity affects Elpet. That is because if the 1993 contract is valid and Okta is liable to Jetoil for its breach, then the value of Okta to Elpet will decrease. But that must be true of all cases where a subsidiary company is successfully sued for breach of contract by a third party. Does the fact that the value of the subsidiary to the parent is thereby drastically reduced mean that those facts are sufficient to make it just to hold that Elpet has an identity of interest so far as the issue of the validity of the 1993 contract is concerned?

199. I find this a difficult point where the cases do not help. I think a useful way of testing the issue is to assume the facts as in this case and ask: if, in the English Courts, Jetoil had originally obtained a declaration against Okta that the 1993 contract is valid and then Elpet had attempted, in another jurisdiction, to obtain a declaration that it was not, could Jetoil then obtain a declaration (in England) against Elpet that it was bound by the earlier decision because it had an identity of interest with Okta?[175] In my view Jetoil could, because there is a sufficient degree of identification between the two entities to make it just to hold that the decision to which Okta had been a party should bind Elpet. If that conclusion is correct, then I think that it follows that in the present case Elpet should be regarded as the privy of Okta. Therefore I have concluded that, so far as the English Courts are concerned, Elpet is bound by the declaration that the 1993 contract is binding and is estopped from denying the validity and binding nature of that contract. In reaching this conclusion, I wish to emphasise two things. First, that this conclusion is based solely on an English law view of who or what is a "privy" of a person or entity. Secondly, as I have been at pains to point out in the wording of preceding paragraphs, this conclusion only concerns the English Courts and Elpet is not a party to either of the current actions.

200. **Should an injunction be made restraining Okta from prosecuting proceedings in the FYROM Courts which purport to prevent Okta from paying to Jetoil damages etc in relation to the 1993 contract?**
The issue is whether this is a proper case to grant an injunction against Okta restraining it from "*prosecuting proceedings"* in the FYROM Court. Okta did not initiate the proceedings; Elpet did. Okta could (and probably did) suggest to Elpet that such proceedings should be started. But Okta does not have control of Elpet, nor does Okta have control of the FYROM proceedings. Okta has not "*prosecuted"* the FYROM proceedings. It has had no need to do so, because Elpet has done so. Okta has simply not opposed them actively. In my view it would be wrong to grant an injunction purporting to restrain Okta from doing something it is not, in fact, doing.

201. **Should an injunction be granted to restrain Okta from relying on any judgment or order given in Macedonia which prevents Okta from paying to Jetoil any sums by way of damages etc. adjudged due by the English Court?**
I have concluded that such an injunction should not be granted. This injunction would be aimed at preventing Okta from relying on the interlocutory injunction that has been obtained by Elpet in the FYROM Court proceedings. Okta would rely on that interlocutory injunction if and when Jetoil attempted to enforce the English Court's judgment for damages for Okta's breach of the 1993 contract. Those enforcement proceedings could take place in a number of jurisdictions. The three most relevant ones are England; Greece and the FYROM.

202. If the enforcement proceedings take place in England then an injunction in those terms is not needed by Jetoil because the English Court would decide whether to enforce its own judgment. It would consider the FYROM Court's

[171] ***Gleeson v J Wippell & Co*** *[1977] 1 WLR 510 at 515 G.*
[172] *[2001]2 WLR 72 at 91C-H per Lord Bingham of Cornhill.*
[173] These are Tergios Tzermias and Petrols Karalis, who is the excutive director of Okta.
[174] First statement of Catherine Milton: para 3: J/page 135.
[175] This assumes no jurisdictional problems arose. I have deliberately avoided the further complications concerning an injunction.

conclusion on the 1993 contract, of course. But ultimately the present judgment is the relevant one. So a further injunction against Okta is not needed so far as the English court is concerned.

203. If the enforcement proceedings took place in Greece, then the Brussels/Lugano Convention regime on the recognition and enforcement of the English Court's judgment would be applied. That regime will decide whether this judgment is to be enforced. No injunction by the English Court would be needed to deal with the FYROM Court's interlocutory injunction. It could not add to Jetoil's case that the present English Court's judgment determined the validity of the 1993 contract. Whether it did or not would, of course, be a matter for the Greek Courts.

204. So the only likely jurisdiction in which such an injunction might be useful is in the FYROM, although I accept that enforcement of the present judgment in other jurisdictions is a possibility. Effectively, Jetoil is inviting this court to grant an injunction that will interfere, albeit indirectly, with the process of the FYROM Courts or those of other countries to decide, in accordance with their own laws and procedure, whether to recognise and enforce a judgment of a foreign court, ie. the English Court.

205. Although the English Court has jurisdiction to grant an injunction with such potent extra – territorial effect,[176] it is well recognised that this jurisdiction must be used with great caution. That is because it does involve an indirect interference with existing or potential proceedings in a foreign court. This point was made particularly in ***ED&F Man (Sugar) Ltd v Yani Haryanto (No 2)*** [177] where the Court had to deal with a similar problem. Man and Mr Haryanto reached a settlement, in England, concerning disputes on sugar contracts. But Mr Haryanto failed to pay sums due under the settlement. Mr Haryanto then began proceedings in Indonesia claiming annulment of the disputed contracts. Man then began proceedings in Indonesia to enforce the settlement. The Indonesian courts upheld Mr Haryanto's claim and rejected Man's claim. Then Man began further proceedings in England for a declaration that the settlement agreement was valid and binding on Mr Haryanto. Man also sought an injunction to restrain Mr Haryanto from repeating anywhere in the world the assertions that he had put forward successfully in the Indonesian proceedings. Steyn J and the Court of Appeal refused to grant the injunction.

206. The principal ground for refusing the injunction was that even if Mr Haryanto's act in bringing the Indonesian proceedings was "*unconscionable",* an English Court should not, as a matter of comity and discretion, grant an injunction against him which prevented him from attempting to rely on the Indonesian judgment to resist enforcement of the English settlement or to obtain recognition of the Indonesian judgment. Mann LJ emphasised[178] that an injunction that restrained Mr Haryanto from relying on the Indonesian judgment was contrary to notions of comity. He approved the judgment of Steyn J who said that it must be up to foreign courts to decide whether to recognise the English or Indonesian judgment.

207. I think that I must adopt the same approach here. Furthermore if an injunction were granted it might place Okta and its officers in an impossible position if Jetoil attempted to enforce this judgment in the FYROM courts. Those Courts have granted an interlocutory injunction preventing Okta from paying damages to Jetoil. To disobey that in the FYROM may well be the equivalent of a contempt and could expose officers of Okta to criminal sanctions.[179]

208. Therefore, as a matter of discretion, I would refuse this injunction.

209. **Should the Court grant an injunction that orders Okta and its officers to discontinue the FYROM Court proceedings and to set aside any judgment, decision or order granted in those proceedings?**
This head of relief would amount to a mandatory injunction against Okta, forcing it to take positive steps in proceedings where it is a defendant and not the claimant. I accept that the English Court has jurisdiction to grant an injunction in such terms in an appropriate case. The Court of Appeal did so in ***Turner v Grovit*** [180] But that was an extreme case where Mr Grovit, who controlled several companies, deliberately used one company to bring proceedings in Spain against an employee in order to circumvent the English proceedings brought by the employee against another of Mr Grovit's companies. It is in marked contrast to the present case where Elpet has not used Okta to bring proceedings in the FYROM Courts and Okta is not in a position to force Elpet to start such proceedings.

210. In my view such an injunction should not be granted in this case for two principal reasons. First, Okta is not in a position to "discontinue" the FYROM proceedings. It is a defendant. Okta cannot, either legally or practically, stop Elpet from continuing those proceedings against Okta if Elpet wishes to do so. Therefore the injunction would be of no practical utility. Secondly, in my view such an injunction would be a direct interference with the procedure of a foreign court. Particularly where the injunction has no practical utility, comity requires that it should not be granted. Such an injunction would be a gratuitous affront to the existing orders of the foreign court.

211. Accordingly, as a matter of discretion, I refuse to grant the last injunction sought.

[176] See: ***Ellerman Lines Ltd v Read and others*** *[1928] 2KB 144,* although Scrutton LJ was at pains to emphasise that the defendant Lundi in that case was a naturalized British subject.
[177] *[1991] 1 Lloyd's Rep 429.*
[178] See page 440 of the report.
[179] First statement of Catherine Milton at para 36: J/page 144. This was disputed in the second statement of Angus Johnson: para 15: J'page 165. That point is not resolvable on the statement evidence.
[180] *[2002] 1 WLR 107 at 114,* where the order made by the CA is set out in the speech of Lord Hobhouse of Woodborough. The House of Lords approved the injunction as a matter of English law. The issue of whether that was compatible with the Brussels Convention was referred to the European Court.

212. Having reached these conclusions, I have not had to deal with the submissions of Okta that (i) Jetoil's participation in the FYROM Court proceedings and/or (ii) Jetoil's delay in seeking the injunctive relief would, in any event, have prevented Jetoil obtaining the injunctions. My provisional view is that, on the facts of this case, (i) would not prevent Jetoil obtaining the injunctions sought, but (ii) delay may well have done so.

P. Conclusions

213. My conclusions are as follows:

(1) Okta is not entitled to rely on the force – majeure clause in the 1993 contract. Therefore it is liable to Jetoil for damages for its failure, since July 1999, to permit Jetoil to manipulate non – heated crude oil bought by Okta for its own account and for its failure to permit Jetoil to exercise its right of first refusal to supply crude oil to Okta.

(2) The proper charge for manipulation after the opening of the pipeline is Euro 2.5 per metric tonne.

(3) Jetoil does not have to give credit for the additional use of Tank 10 after Okta's breaches of the 1993 contract.

(4) The oil supply contract is a valid contract which the parties intended to be legally binding. It is not void for uncertainty.

(5) The effect of the words "***about 500,000 MT"*** in that contract is that Okta had the right to purchase a minimum of 475,000 metric tonnes. Accordingly Moil-Coal's damages must be based on Okta's failure to purchase a balance of 184,646 metric tonnes.

(6) Jetoil is entitled to a declaration that the 1993 contract is valid and binding on Okta.

(7) Jetoil is entitled to a declaration, against Okta, that Okta and its privies are estopped from denying the validity and binding nature of the 1993 contract.

(8) I hold that, so far as the English Courts are concerned, Elpet is to be regarded as a "privy" of Okta with regard to the issue of the validity of the 1993 contract.

(9) Jetoil is not entitled to any of the injunctions claimed against Okta in relation to the proceedings brought by Elpet in the FYROM Courts.

214. In the light of these conclusions, the parties will have to work out the precise figures for damages that are due from Okta to Jetoil and Moil-Coal. I will hear further submissions on interest and costs if these are in dispute.

215. I am very grateful to all counsel for their assistance in this case.

Mr Bernard Eder QC and Mr Luke Parsons (instructed by Stephenson Harwood) for the Claimants
Mr John Jarvis QC and Mr Daniel Lightman (instructed by Bird & Bird, subsequently by Morgan, Lewis & Bockius) for the Defendants

ANNEX

The 1993 Contract

A G R E E M E N T

Today 5:03.1993 in Athens Skopje Refinery represented by Mr ZANTEVSKI BOJAN hereinafter referred to as "Refinery" and Mamidoil-Jetoil represented by Mr MAMIDAKIS KYRIAKOS hereinafter referred to as Jetoil have agreed the following:

1. *The Refinery wants and Jetoil accepts to manipulate via its Salonica Installations the quantities of not heated crude oil that the Refinery will buy and process for its own account in Skopja Refinery.*
2. *Manipulation under this agreement means receiving the Crude Oil from the vessel, storing in tanks and loading on Rail wagons supplied by the Refinery with destination Skopje Refinery.*
3. *The manipulation fee is fixed to USD 4.00. per MT for the period 1.11.1992 until 31.12.1994. If however, during a particular calendar year i.e. 1993 or 1994 the main quantity of 500.000 MT stipulated in the "Three Partions" contract is covered, then for any quantity over the 500.000 MT manipulated through this agreement a discount of USD 0.50 per MT will be granted.*

   Jetoil will invoice Refinery on the basis of Customs Protocol Quantity. The payment of the manipulation Invoice will be paid latest in 30 calendar days from the date of the invoice.

****

5. *Both parties agree to elaborate all technical and other details and include them in an Annex which will constitute an integral part of this agreement.*

   It is the intention of the parties to have ready and sign this annex within the next 3 weeks.
6. *Jetoil wishes and Refinery agrees to give to Jetoil first refusal for the purchase of the Crude Oil that the Refinery will make for its own account.*

   Jetoil reserves the right and the Refinery consents to assign the supply/sale of the Crude Oil to Moil-Coal Trading Co Ltd Nicosia, Cyprus or to an other company of its choice.
7. *This agreement is valid for 10 years starting from the date of the signature.*

A N N E X (to the 1993 contract)

****

4. *Neither party shall be responsible for damage caused by delay or failure to perform in whole or in part the stipulations of the present Agreement, when such delay of (sic) failure is attributable to earthquakes, acts of God, strikes, riots, rebellion, hostilities, fire, flood, acts or compliance with requests of any governmental or EC authority war conditions or other causes beyond the control of the party affected, whether or not similar to those enumerated.*

The party invoking force majeur (sic), shall give prompt notice to the other party by fax, telex followed by registered letter stating the kind of Force Majeure.

The certificate issued by the respective Chamber of Commerce and Industry shall be considered as sufficient proof of such circumstances and the duration.

5. *Any dispute arising under or in connection with this agreement and which cannot be amicably solved shall be referred to an arbitration in London, English law will apply.*

1998 Oil Supply Contract

CONTRACT

For the Sale/ Purchase of Crude Oil

This contract is made and signed in Athens today 27-08-1998 by and between OKTA-Crude Oil refinery A.D. domiciled in Skopje, hereinafter referred to as "Buyer", represented by Mr Bojan Zantevski and MOIL-COAL TRADING CO LTD domiciled in Nicosia Cyprus, 3 Th. Dervis Str., hereinafter referred to as "Seller" represented by Mr Kyriakos Mamidakis.

Whereas, Seller desires to sell to Buyer Crude Oil and whereas, Buyer desires to purchase such goods from Seller, now, therefore, Buyer and Seller agree as follows:

1. *QUANTITY*

About 500,000 MT in shipments of 25,000 to 80,000 MT to be delivered during twelve months period starting from September 1998 until August/September 1999. Smaller or larger shipments can be arranged by mutual agreement.

2. *QUALITY*

The Crude Oils to be delivered under this contract will be:

1) Kajan Tengiz

2) Siberian Light

3) Cheleken

4) Urals (REB) or other types of Crude Oils mutually agreed.

The quality of the above Crude Oils will be the usually available at the port of loading. Especially for Tengiz it is agreed that the below stated price shall decrease/increase by [illegible] .3 cents per Bbl for each full tenth (0.1) degree API below 47/ above 48.

Above Crude Oils depending on the availability and by mutual agreement will be delivered plain or blended at various proportions to suit the requirements of OKTA.

3. *DELIVERY*

Presently a delivery schedule can be indicated as per ANNEX 2.

Seller reserves the option mainly during the period September 98- March 99 to replace part of Cheleken with a blend of Tengiz and Urals.

The crude oil will be delivered ex-ship shore outturn Mamidoil-Jetoil Installation in Thessaloniki.

The Installation will arrange for receiving, storing and loading of the Crude Oil into the Rail Tanks as per Buyer's agreement with the a.m. company.

4. *PRICE*

The price of the above mentioned crude oils will be related with DTD Brent and the premium or discount per US Bbl will be as follows:

1) Tengiz	DTD Brent	plus	USD 1.05 per Bbl
2) Siberian Light			0.80
3) Cheleken			0.70
4) Urals (REB)			0.20

Russian Export Blend (Urals) Crude Oil price is based on a reference gravity of 32.00-32.09 degrees API. Should the actual density be above or below the basic density (32.00-32.09), the price is to be increased by 0.3 cents per barrel for each full tenth part of an API degree above 32.00 or to be decreased by 0.3 cents per barrel for each full tenth part of an API degree below 32.09.

The above prices, which are valid for payment at 80 days from B/L date, as mentioned in clause 6 below, are meant CIF shore outturn Mamidoil-Jetoil S.A. Installation in Salonica.

The premiums over DTD Brent are based on the quotations of the magazine NEFTE COMPASS, issue 16 July 1998, page 16 and will escalate/ de-escalate in relation with the quotations mentioned in the same magazine with publication date closest to the Bill of Lading date.

*****

5. PRICING

For each type of crude oil will be applied the pricing which will be more or less the common practice at the time of nomination. E.g. the average of the means of 3 or 5 quotations after B/L date. A certain number of quotations before/after or around NOR at discharge port etc.

The precise pricing will be given by Seller to Buyer together with the nomination of a cargo. Buyer has the right not to accept the proposed pricing and suggest an alternative.

***

ANNEX No. 2

to the Contract No. 08/1-3817 dated 27.08.1998 signed between

OKTA Crude Oil Refinery-Skopje and Moil Coal Trading Co. Ltd Nicosia-Cyprus

1. *This Annex is going to regulate quarterly the types and quantities of crude oil that are going to be purchased in that period of time, in accordance with the annual Contract.*

   For each quarter of the annual Contract, at least 30 days before the beginning of the quarter, new Annex will be prepared.

   In the first quarter (September 1998, October 1998, November 1998) Siberian light crude oil (or Cheleken crude oil as substitute) is nominated to be purchased with total quantity of cca 154,000 MT. Cargoes with crude oil in the first quarter can be deliverd with following dynamics:

   September 25-30th 1998- 64.000 MT Siberian light

   October 25-31st 1998 - 50.000 MT Siberian light

   November 25-30th 1998- 40.000 MT Siberian light

2. *All other terms as per Contract No 08/1-3817 dated 27.08.1998*

The Force – Majeure letter of 16 November 1999

[crest]

Government of the Republic of Macedonia

Ministry of Trade

No.0814-7094/1

16. .11.1999

SKOPJE

To

"OKTA" Crude Oil Refinery A.D.

SKOPJE

Dear Sirs,

We are a State body of the Republic of Macedonia authorised to deal with matters connected with energy provision and a supervisory body of the refinery which your company manages.

We have been informed by a Greek company named Mamidol – Jetoil Greek Petroleum Company S.A. that there is a written agreement between this company and Okta (of 05 March 1993, with subsequent amendments) regarding the restriction of your ability to ship the crude oil which you purchase. However, based on the fact that, in respect of your agreement with the above-mentioned company, you requested their assistance for the shipping and the expedition of crude oil at a price, which was offered to you by another Greek company, and which for you was more favourable, the above company did not accept this price. It is thus clear to us that in this way it has violated the above-mentioned agreement and thereby cannot restrict your rights regarding the shipping and expedition of the crude oil, which you purchase for your requirements.

Given this situation and disregarding the above-mentioned agreement which has been violated by the other party and taking into account the importance of the provision of crude oil for the Republic of Macedonia and also in view of the extremely negative influence of such a provision, we hereby instruct you to continue to supply the refinery with crude oil from a partner which you consider most favourable to you. Given this situation, the clauses of the agreement should not be considered as obligatory for you. We consider that according to the conditions of this document you should agree with our instructions, which are considered to be force majeure (Annex to the primary agreement – 060393 para 4).

The Minister

Nicola Gruevski

[stamp]

Ministry of Trade

Republic of Macedonia

The Force – Majeure Letter of 26 November 1999

GOVERNMENT OF THE REPUBLIC OF MACEDONIA

MINISTRY OF TRADE

No.

26.11.1999

Skopje

To

"Okta" Crude Oil Refinery A.D. Skopje

Sirs,

We are a competent government body of the Republic of Macedonia dealing with questions connected with the energy supply and a supervision body regarding the prices of the oil deliveries of the refinery managed by your company.

We were informed, in a written form, by a Greek company under the name "Mamidoil – Jetoil Greek Petroleum Company S.A. that there is a written contract between that company and OKTA (from 05 March 1993, amendments are following) in order to limit your possibility to get the manipulation of the raw fuel that you are buying. Having in mind the importance that the supply of crude oil has for the Republic of Macedonia and in that context the elements that influence the final price of the oil derivatives, which include the price that Your company has to pay for the manipulation of the crude oil per unit of barrel, given in the above mentioned Agreement, and which is substantially higher than the price for this service offered by another company, no matter of the obligatory or the non obligatory nature of the Agreement, for the purpose of avoiding the consequences by its respecting, which would have extremely negative influence on the economic relations in the state, we give you instructions to accept supplies of crude oil for your company, manipulated through an instruction of a partner which you will evaluate that it is most suitable for you and for our country. In these circumstances the regulations of the Agreement for you should not be obligatory. It is our opinion that by the conditions of this document you should agree with our instructions, which are considered as a higher force (Addendum from 06.03.1993 par 4 on the Basic Agreement from 05.03.193.)

This is the only valid document by which you can act and use for your needs.

MINISTER

Nikola Gruevski

The Force Majeure Letter of 30 May 2001

Government of the Republic of Macedonia
Ministry of Economic Affairs
No. 24-4149
20. .05.2001
Skopje
To
"OKTA" Crude Oil Refinery A.D. Skopje
Re: Letter No. 01814-7094/1 of 16 November 1999
Dear Sirs

I refer to our letter of 16 November 1999 ("the Letter"). With our new letter I can confirm and reaffirm the position taken by the Ministry of Economic Affairs, which is the competent government authority of the Republic of Macedonia for matters relating to energy supply and a supervisory boy(sic) of the Refinery which is under the management of your company as expressed in the letter of 16 November 1999.

In order to avoid any kind of doubt in connection with the Letter of 16 November 1999 we request/require you not to implement any part of the document that seems to have been concluded between the refinery and the Greek company Mamidoil-Jetoil Greek petroleum – Company S.A. of 5 March 1993.

In view of the importance of the supply of crude oil for our total economy and the state, especially in the newly-arisen present situation and circumstances in which the country finds itself, you can realise the supply of crude oil and its manipulation under the conditions you will decide on for commercial convenience in the context of the reliability of relations that might beneficially affect the national economy.

We consider that, in accordance with this document, you should concur with our instructions which, if the Annex to the basic document of 5.03.1993. is valid, point 4 is considered to be force majeure.

THE MINISTER
[illegible]
[signature and stamp – illegible]