

JUDGMENT : The Hon. Mr. Justice Moore-Bick : Commercial Court. 21st December 2000

1. This matter comes before the court by way of an application by Cuflet Chartering of Cuba under section 68 of the Arbitration Act 1996 to set aside an award made by Mr. Alec Kazantzis on 18th February 2000 on the grounds of serious irregularity affecting the proceedings.
2. On 24th May 1995 the respondents, who are the owners of the *Marie A* (then named *Marie H*) chartered the vessel to Cuflet on the Baltimex form for a period of 12 months. The charter was subsequently extended so as to expire on 3rd October 2000. By the early part of 1998 a dispute had arisen between the parties in relation to the payment of hire which led to the appointment of Mr. Kazantzis as sole arbitrator. On 12th January 1999 Mr. Kazantzis published an interim award in which he awarded the owners the sum of US\$1,922,995.19 in respect of unpaid hire. No challenge has been made to that award.
3. On 10th March 1999 Cuflet informed the owners that it regarded the vessel as having been redelivered to them with effect from 17th February so that the charter had been terminated as from that date. The owners treated that as a repudiation of the charter by Cuflet and it is common ground that as a result the charter was terminated in the spring of 1999. As a result the scope of the differences between the parties became broader because the owners alleged that hire earned since the period covered by the first award remained outstanding at the date of the termination of the charter and that they had suffered damage as a result of Cuflet's repudiation of the contract. For some months the owners did not take steps to pursue these claims by arbitration, but towards the end of the year they instructed their solicitors, Davies Johnson & Co, to pursue the matter. Accordingly, on or about 17th December 1999 Davies Johnson sent a letter (wrongly dated 17th June 1999) to Mr. Kazantzis submitting their claim together with supporting documents and inviting him to give directions for the future conduct of the reference. A copy of that letter was sent by fax to Cuflet and a hard copy together with a bundle of supporting documents was also sent by courier. Capt. Jorge Sell, Cuflet's managing director, gave evidence in support of the application in the course of which he confirmed that they had been safely received by Cuflet on 27th December 1999. On 20th December Mr. Kazantzis sent a fax message to both parties acknowledging the receipt of the owners' claim and directing that Cuflet should serve its defence by 31st January 2000.
4. During January 2000 events took a new turn when the owners arrested the vessel *Celia* at Barcelona in an attempt to obtain security for their claims against Cuflet. *Celia* was under charter to another Cuban entity, Coral Container Line and although Cuflet maintains that it has no interest in the vessel which would justify the arrest, the fact remains that it did prompt Cuflet to take more active steps to seek a compromise with the owners of the *Marie A*. Initial contacts through a Canadian lawyer, Mr. Marc de Man, who had previously acted as an intermediary between the owners and Cuflet, led to direct telephone contact between Capt. Sell and the representative of the vessel's managers, Mr. Constantinos Antonopoulos on 24th January. It emerged that both sides were interested in pursuing discussions in the hope of reaching an amicable settlement and accordingly arrangements were made for Capt. Sell to meet the owners' representatives in Athens for talks in early February.
5. It is not clear whether Davies Johnson were advised of these developments. At any rate, on 31st January they sent a fax to Mr. Kazantzis in which they reminded him of the order which he had made on 20th December and informed him that they had received no communication of any kind from Cuflet in response to their letter of claim. They therefore asked him to make a final and peremptory order for the service of Cuflet's defence. Mr. Kazantzis responded on 2nd February by a further fax message in which he made a final and peremptory order for the service of the defence by 9th February at the latest. He also warned Cuflet that if it failed to serve its defence by that date he would proceed to make an award on the basis of the documents before him. That was enough to stir Cuflet into action. On 3rd February Capt. Sell sent a fax to Mr. Kazantzis in which he referred to the fact that the parties were trying to reach an amicable solution and asked for an extension of time to 29th February for serving Cuflet's defence. Mr. Kazantzis replied on 7th February extending time to 14th February, at the same time making it clear that he would proceed to an award on the documents before him without further ado if Cuflet failed to serve its defence by that date. He also suggested that if the parties wanted more time in which to negotiate, Cuflet should ask the owners to send him a fax confirming that they concurred in an extension of time for that purpose.
6. Shortly after receiving that fax from Mr. Kazantzis Capt. Sell sent a fax to Mr. Antonopoulos in which he complained that it was unfair and unacceptable for the owners to press ahead with the arbitration while the parties were preparing to pursue negotiations. He asked Mr. Antonopoulos to send a fax to Mr. Kazantzis immediately asking him to allow ample time for negotiation and to send a copy of it to him. The only reason Capt. Sell can have had for asking for a copy of the fax was to provide confirmation that the message had indeed been sent. Mr. Antonopoulos did not, however, comply with Capt. Sell's request. Instead he responded with a message in which he pointed out that the arbitration had been going on for almost two years and said that it would have no effect on the owners' willingness to seek an amicable settlement. He assured Capt. Sell that the owners were ready to work with the charterers to reach a mutually beneficial settlement. That did not entirely satisfy Capt. Sell, however. In a further fax sent to Mr. Antonopoulos on 8th February shortly before he left Havana for Athens he complained that pressing ahead with the arbitration was inconsistent with owners' professions of goodwill and an interest in reaching a settlement and reminded them that they had the power to restore the situation by asking the arbitrator to stop all further proceedings and allow the parties time to reach agreement. He concluded by expressing the hope that on his arrival in Athens the owners would give him a copy of such a fax sent by them to the arbitrator in order to establish the right atmosphere of confidence and co-operation. Mr. Antonopoulos made no specific reply to that fax, but he concluded a subsequent e-mail dealing with travel and

hotel arrangements with a brief message assuring Capt. Sell that the owners were looking forward to their meeting which they expected to be fruitful.

7. Capt. Sell left Havana on 8th February and arrived in Athens on 10th February where he was met by another representative of the vessel's managers, Mrs Gabriella Elia. During their conversations at his hotel Capt. Sell asked her whether the owners had sent a fax to the arbitrator. Whatever the precise terms of her reply, I think he can have been left in no doubt that no fax had been sent to Mr. Kazantzis. The next day Capt. Sell had a long meeting with Mr. Antonopulos and other representatives of the owners during which they discussed various aspects of the owners' claim. According to Mr. Antonopulos Capt. Sell accused the owners of "holding a gun to his head" in the negotiations by insisting on pressing ahead with the arbitration. Capt. Sell initially denied having said that, but he later described how, when introducing Cuflet's position, he had indeed said something of that kind. Although the witnesses differed in the significance they attributed to that part of the discussions, I am satisfied that Capt. Sell did make a remark of that kind and did use words such as "holding a gun to my head" or something very similar.
8. Meanwhile time for the service of Cuflet's defence was fast running out and Mr. Kazantzis had received no further communication from either party. On 15th February Davies Johnson sent a fax to Mr. Kazantzis which they copied to Capt. Sell in which they stated that Cuflet had not communicated further with them or the owners and asked him in the absence of a defence to proceed to an award on the documents before him. On 18th February Mr. Kazantzis published a final award in which he awarded the owners US\$1,846,902.97 in respect of their claims for arrears of hire and damages for repudiation of the charter. It is this award which Cuflet now seeks to challenge under section 68 of the Arbitration Act 1996.
9. Section 68 of the Arbitration Act 1996 (so far as is material to the present case) provides as follows:
 - (1) *A party to arbitral proceedings may apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.*
 - (2) *Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –*
 - (g) *the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy."*
10. Although he did not submit that the award had been procured by fraud as such, Mr. Kverndal did submit that this was a case in which the award had been procured in a way which was contrary to public policy. He originally submitted that both prior to and during the negotiations in Athens the owners had agreed to take steps to ensure that there was no risk of an award being made while the parties were engaged in discussions, thereby inducing Cuflet not to take steps on its own behalf to preserve its position. They then went back on that agreement and pressed the arbitrator to proceed to an award in default of defence. Later, in the light of the way in which the evidence had emerged, he submitted that even if the owners had not expressly agreed to halt the progress of the arbitration, they had nonetheless induced Cuflet to believe that they would take steps to ensure that no award was made while the parties were negotiating and having thus lulled Cuflet into a false sense of security had gone behind its back so as to obtain an award. In either case, Mr. Kverndal submitted, the owners had acted unconscionably and contrary to public policy and in support of his argument he drew my attention to the following dictum of Sir John Donaldson M.R. in *Deutsche Schachtbau und Tiefbohr-Gesellschaft m.b.H. v Shell International Petroleum Co. Ltd* [1990] 1 A.C. 295, 316 commenting on public policy as a ground for refusing enforcement of an award under section 5(3) of the Arbitration Act 1975: "*Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised."*

Mr. Kverndal submitted that the owners' conduct in this case was indeed such as to be wholly offensive to ordinary reasonable members of the public.

11. It will be apparent from this brief summary of Mr. Kverndal's submissions that Cuflet's case turns not simply on the allegation that the owners acted in a devious and underhand manner, but that they did so in a way which misled Cuflet into thinking that they had taken steps to prevent Mr. Kazantzis from proceeding to an award and that if Cuflet had been aware of the true position it could and would have taken steps itself to protect its interests. Mr. Nolan on behalf of the owners submitted that the court should only intervene under section 68 of the Arbitration Act in extreme cases and that the coupling of public policy with fraud in subsection (2)(g) was a clear indication that where, as in this case, the applicant relies on the conduct of the respondent in connection with the proceedings as constituting the serious irregularity the court must be satisfied that it was of a genuinely reprehensible character. There was, therefore, little difference between the parties as to the approach which should be taken in this case.
12. Public policy is capable of covering a wide variety of matters and it is neither necessary nor desirable in this case to attempt to define the circumstances in which subsection (2)(g) is capable of being invoked. However, where, as in the present case, one party to arbitral proceedings bases his complaint on the manner in which the other conducted himself in relation to the proceedings, I doubt whether anything short of unconscionable conduct would justify the court in setting aside the award. Mr. Kverndal was therefore right in my judgment to concede that it

would not be enough to show that the owners had inadvertently misled Cuflet, however carelessly they might have expressed themselves. However, once it is recognised that the allegation is one of serious impropriety it must also be recognised that cogent evidence will be required to satisfy the court that the owners did behave in such a manner.

13. Before returning to the exchanges between the parties which took place during the period immediately prior to the talks in Athens it is necessary to say a little more about the history of the relationship between them. When he gave evidence Mr. Antonopulos was at pains to emphasise that the service of the owners' letter of claim in December 1999 was only the latest stage in proceedings which had by then been going on for the best part of two years. During that time the owners had obtained one award which had been substantially, but not fully, satisfied as a result of their having earlier obtained security. During the summer of 1999 they had been involved in negotiations with Cuflet which led to an agreement for the payment of the outstanding balance by instalments which Cuflet had failed to honour. It is not surprising, therefore, that Mr. Antonopulos considered that without security a further award would be of little or no value to the owners. However, the arrest of the *Celia* in early January 2000 had had two consequences which the owners were keen to exploit: it put pressure on Cuflet to re-open negotiations and it offered the prospect of security for any award which they might obtain. According to Mr. Antonopulos, although the owners were willing to negotiate a settlement with Cuflet in order to obtain an early payment, they were not willing to give up either of these bargaining counters.
14. Mr. Kverndal submitted that there were three separate but related situations in which the owners responded to Cuflet's concerns about the arbitration by giving assurances that they would take steps to ensure that the proceedings did not progress to an award while negotiations were going on. The first was the exchange of correspondence between the parties in the ten days or so leading up to Capt. Sell's arrival in Athens on 10th February 2000. The second covered the meetings which Capt. Sell had with various members of the owners' organisation in Athens on 10th and 11th February. The third arose out of the fax which Davies Johnson sent to Mr. Kazantzis on 15th February. However, although I accept that the developing relationship between the parties can be viewed as falling into these three rather different phases, each takes its colour from what had gone before and each had a significant bearing on what came after it. Accordingly I find it more satisfactory to view them as one continuous course of dealing.
15. For practical purposes one can begin with the submission by the owners of the letter of claim on 17th December. Capt. Sell confirmed that Cuflet did not appoint solicitors or take any other steps to respond to the claim, despite the fact that it received by fax Mr. Kazantzis' order that it should serve its defence by 31st January. That and the fact that Cuflet made no attempt to re-open negotiations with the owners until after the arrest of the *Celia* points strongly to the conclusion that it had previously been prepared to allow the arbitration to go by default. I have no doubt that as from 20th January Cuflet was anxious to negotiate a settlement, but there is little to indicate that it was minded to protect its position in the arbitration by taking the necessary steps to prepare and serve a defence.
16. In their fax of 31st January which was copied to Cuflet Davies Johnson made it quite clear that the owners were asking Mr. Kazantzis to proceed without delay to a final award if Cuflet did not comply with the order for the service of its defence and on receipt of Mr. Kazantzis' fax of 2nd February Capt. Sell cannot have been under any illusion as to the arbitrator's intention in that regard. I can quite understand that in normal circumstances a party in Cuflet's position might assume that the opposite party would not expect to press ahead with proceedings while negotiations were in progress (although that is not invariably the case), but the previous relationship between these two parties did not make that a foregone conclusion by any means. Whatever Capt. Sell might have expected, however, he can have been left in no doubt about the position once he had received Mr. Kazantzis' fax of 7th February. As he himself acknowledged, Mr. Kazantzis made it quite clear in that fax that he would only grant a further extension of time if the owners confirmed their agreement to it. That Capt. Sell was fully aware of that fact is confirmed by the messages he sent to Mr. Antonopulos later on 7th February and also on 8th February in which he expressly requested the owners to send a fax to the arbitrator confirming their agreement to an extension of time. The fact that in the first of those messages he asked the owners to send him a copy of the fax in confirmation that they had complied with his request and, in the second, that he asked them to provide him with a copy of such a fax on his arrival in Athens, suggests that he was not willing to accept bland assurances from them without something concrete to back them up.
17. It is clear now that whatever enthusiasm the owners may have had for further negotiations with Cuflet, they were not willing to relax their grip by allowing more time for service of the defence. It is quite true that in none of the messages which he sent to Capt. Sell during that period did Mr. Antonopulos state in terms that the owners would not concur in making a request for more time and it is also true that he assured Capt Sell more than once of the owners' good will and of their intention to put all their best efforts into reaching an amicable settlement. However, in my view general assurances of that kind do not take the matter very far. In his fax of 8th February Mr. Antonopulos referred to the arbitration proceedings and assured Capt. Sell that they would not prejudice the owners' willingness to seek an amicable solution, but he did not suggest that the owners were willing to suspend them while talks were going on and it is interesting to see that in his response later the same day Capt. Sell again referred to the fact that it was within the power of the owners to hold up the proceedings by sending a fax to Mr. Kazantzis. Whether or not Mr. Antonopulos had stated in terms during one of his telephone conversations with Capt. Sell that the owners were simply not prepared to entertain the idea of holding up the proceedings, the correspondence makes it clear that at no time prior to his arrival in Athens did Capt. Sell think that a fax of the

kind he was asking them to send to the arbitrator had actually been sent. Moreover, although he said in evidence that he felt confident that the owners would not pursue the arbitration while negotiations were going on, there is nothing either in the correspondence or in Capt. Sell's evidence to support the conclusion that prior to his departure for Athens Mr. Antonopoulos had agreed not to press ahead for an award. The very most that can be said is that Mr. Antonopoulos expressed himself in a way which laid emphasis on the owners' willingness to negotiate and that Capt. Sell may have allowed himself to believe that they would not pursue the proceedings while negotiations were going on. However, both the terms of the correspondence and his subsequent insistence after his arrival in Athens on knowing whether a fax had been sent point clearly to the conclusion that he did not think that the owners had taken steps to protect Cuflet's position in the arbitration.

18. Other aspects of the evidence also point against there having been any agreement on the part of the owners to suspend the arbitration. Capt Sell agreed that Mrs Elia had confirmed soon after his arrival in Athens that the owners had not sent a fax to Mr. Kazantzis. That apparently did not elicit any protest from him at the time, but since their meeting was essentially a social occasion it would be wrong to read too much into that. He did protest at an early stage in the meeting with the owners representatives the next day, complaining that they were expecting him to negotiate with a gun to his head. One can understand that complaint, of course, but the striking thing is that he did not complain that they were going back on an agreement to suspend the arbitration, nor did he refuse to continue with the negotiations unless they agreed to suspend the arbitration.
19. Recognising the difficulty of establishing that there had been any kind of explicit agreement to suspend the arbitration, Mr. Kverndal also sought to put the case in a slightly different way. He submitted that both prior to and during the discussions Capt. Sell had expressed his concerns about the arbitration and had made it clear to Mr. Antonopoulos that he was unwilling to travel to Athens to meet the owners or to take part in negotiations unless they took whatever steps might be necessary to suspend the proceedings. The owners, he said, through Mr. Antonopoulos had given Capt. Sell many assurances that his concerns were recognised and that he need have no fears so as to lead him to believe that they would take whatever steps were necessary to ensure that Mr. Kazantzis did not proceed to an award. Having done so, they instructed their solicitors behind his back to ask the arbitrator for an award in default of defence.
20. Behaviour of that kind could properly be described as dishonest and, as I indicated earlier, I should require clear evidence before being satisfied that the owners had acted in that way. In my judgment, however, the evidence does not support any such conclusion. It is necessary to bear in mind that both Capt. Sell and Mr. Antonopoulos are experienced businessmen who, moreover, had had previous experience of negotiating with each other. Whether or not Capt. Sell was relatively inexperienced in the process of arbitration, therefore, this was not a case of an experienced businessman seeking to take advantage of an inexperienced newcomer. It is also necessary to remember that English, the language in which Capt. Sell and Mr. Antonopoulos communicated, is not the first language of either of them. Each of them speaks good English, but as their faxes and some of their evidence showed, there was still room for misunderstanding. I am unable to accept that the faxes sent by Mr. Antonopoulos are capable of bearing the meaning which Mr. Kverndal sought to place on them. Moreover, having heard Mr. Antonopoulos give evidence I am quite able to understand why they are worded in the way they are. His intention was to reassure Capt. Sell that the owners were willing to do their best to reach a compromise and that if the negotiations succeeded the arbitration would cease to have any relevance, whatever the outcome. I am unable to accept that he intended Capt. Sell to understand them as undertakings to suspend the arbitration; nor am I persuaded that he believed Capt. Sell to have done so.
21. The position did not change significantly after Capt. Sell arrived in Athens. The evidence does not support the conclusion that he was given an assurance that steps would be taken to halt the proceedings. That would have represented an inexplicable change of position on the part of the owners. Mr. Kverndal suggested that if no such assurance had been given Capt. Sell would have taken steps to ask the arbitrator for more time, but I am unimpressed by that argument. Mr. Kazantzis had made the position very clear and the faxes which Capt. Sell had sent Mr. Antonopoulos on 7th and 8th February make it clear that he understood the fact. In my view he was aware that Mr. Kazantzis would proceed to an award if Cuflet did not serve its defence and the owners did not concur in asking for Cuflet to be allowed more time. He knew that the owners had not made any such application and it must have become increasingly clear as time went on that they were not willing to do so. Although he protested at the owners' attitude, he did not continue the negotiations because he believed that they would somehow suspend the proceedings, but because he hoped to reach a solution which would render the proceedings academic.
22. It is against this background that Davies Johnson's fax of 15th February and the parties' response to it must be viewed. Mr. Antonopoulos confirmed that he had not informed Davies Johnson of the exchanges which had taken place between Cuflet and the owners since 7th February because he regarded the arbitration and the negotiations as entirely separate matters. As a result Davies Johnson stated in their fax to the arbitrator that Cuflet had not communicated either with the owners or with themselves to seek an extension of time as had been suggested in his fax of 7th February. That, of course, was untrue because Cuflet had made a number of requests to the owners to concur in asking for more time. A copy of that fax was sent to Mr. Antonopoulos, but he did not take any steps to inform either Davies Johnson or Mr. Kazantzis of the true position.
23. On his copy of the fax Capt. Sell had written the following note:
"Athens 16/02/00 – 10.³⁰

Discussed in full with Mr. Antonopulos that under no circumstances this can be accepted whilst negotiations for a settlement are under way!

He assured that there is no reason to be worry since we are "friendly" discussing our dispute."

In his statement Mr. Antonopulos denied having had any conversation of this kind with Capt. Sell and this led to suggestions on both sides that witnesses were putting forward false evidence: Capt. Sell by creating a false record of a conversation which had not taken place; Mr. Antonopulos by falsely denying a conversation which he knew had taken place. Having seen and heard both witnesses cross-examined on this question I was left in little doubt that the conflict between their evidence was in reality less stark than that would suggest. Although he said he could remember no such conversation and was able to offer some reasons for saying that it was unlikely that it had taken place, Mr. Antonopulos was unwilling under cross-examination to state categorically that it had not. In the case of Capt. Sell, the main attack on his evidence was founded on the fact that the note was written in English rather than in Spanish, his native tongue. However, as he pointed out, he generally uses English for business purposes and in my view the fact that the note was written in English rather than Spanish is in this context a flimsy basis for suggesting that he was setting out to fabricate a record for use in the future. I am satisfied that a conversation did take place in which Capt. Sell protested at the owners' obvious intention to press ahead to an award and Mr. Antonopulos once again tried to reassure him that there was nothing to worry about since the talks were progressing so well. It was one of many conversations between the two of them during that period and probably did not differ very greatly in tone or content from others they had had.

24. Mr. Kverndal criticised the owners for failing to ensure that the error in Davies Johnson's fax was immediately brought to the attention of Mr. Kazantzis and for lulling Cuflet into a false sense of security once again, thereby causing it to refrain from approaching the arbitrator on its own behalf to seek an extension of time. He also suggested that if Cuflet had asked for an extension of time Mr. Kazantzis would probably have granted one and also that if Mr. Kazantzis had known the true position he would in any event not have proceeded to make his award on 18th February.
25. It is unfortunate that Davies Johnson's message contained that error and that once it was discovered it was not rectified promptly, but I am unable to accept that it has given rise to a serious irregularity of a kind which has caused substantial injustice to Cuflet. As far as Mr. Kazantzis' position is concerned, it is clear from the earlier correspondence that he was willing to grant only a short extension of time for service of the defence unless the owners agreed otherwise and that in default of defence he intended to proceed to his award. He had said as much in plain terms. The fact that Cuflet had seemingly ignored his orders and had then failed even to attempt to grasp the lifeline offered to it might possibly have hardened his heart a little, but in reality the point had been reached at which, in the absence of a defence or the owners' agreement to a further extension of time, he had little choice but to pursue the course which he had indicated in his earlier order. I find it difficult to believe that if he had been told that Cuflet had asked the owners to concur in an application for a further extension but that they had declined to do so, he would have granted an extension of time even though he had not received any application from Cuflet itself. Had he done so the owners might justifiably have felt aggrieved.
26. As far as the owners are concerned, again I am unable to accept that they acted in the devious and underhand way suggested of them. Neither the note itself nor Capt. Sell's account of the conversation supports the conclusion that Mr. Antonopulos did in fact go so far as to assure Capt. Sell that the arbitrator would not be allowed to proceed to an award. Nor does the evidence support the conclusion that Mr. Antonopulos had reason to think that that was how Capt. Sell had interpreted his remarks. As far as Capt. Sell is concerned, I do not think that he was in any real doubt about what was going on. He did not like it, but I am unable to accept that as a result of his conversation with Mr. Antonopulos he thought the owners were at that late stage willing to hold up the arbitration. Nor do I think that he refrained from approaching Mr. Kazantzis direct on behalf of Cuflet because he thought Mr. Antonopulos was going to do so. I doubt whether a unilateral request for more time would have impressed Mr. Kazantzis very much, but the fact remains that this is not a case in which the owners acted in an unconscionable way in order to obtain an award behind the charterer's back.
27. In these circumstances it is unnecessary to consider at any length the question whether, if the award had been improperly procured, Cuflet would have suffered substantial injustice. Mr. Kverndal relied on the fact that there is evidence that during the period for which the owners were claiming hire the vessel was detained for 25 days by Port State Control in Quebec. However, the owners say that she was unable to sail for reasons to do with the cargo and that she was always ready to provide the service required of her. There is, therefore, a dispute about whether she was or was not off hire during any part of that period. In these circumstances Mr. Kverndal rightly acknowledged that the evidence before me on this application is too meagre to enable any reliable view to be reached on the merits of Cuflet's defence, but he submitted that the mere fact that Cuflet had been deprived of the opportunity of putting forward its case constituted a substantial injustice. I can see some force in that argument in a case where the court can see that a party's case had some realistic prospects of success, but I find it difficult to accept in the present case where Cuflet has failed to reach even that threshold.
28. Finally, I should mention that Cuflet did not issue this application until 13th April 2000 and that it was therefore necessary for it to apply for an extension of time under section 79 of the Arbitration Act. However, in view of the fact that this application must in any event fail there is nothing to be gained by granting an extension of time.

Mr. Simon Kverndal instructed by Clyde & Co appeared for the applicants.

Mr. Michael Nolan instructed by Davies Johnson & Co appeared for the respondents.