



Neutral Citation Number: [2026] EWHC 156 (Comm)

Case No: CL-2025-000046

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

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

Date: 30 January 2026

Before :

THE HONOURABLE MR JUSTICE TROWER

IN THE MATTER OF AN ARBITRATION CLAIM

B E T W E E N

THE REPUBLIC OF INDIA

Claimant

-and-

(1) CC DEVAS (MAURITIUS) LTD

(In Administration)

(2) TELCOM DEVAS MAURITIUS LIMITED

(In Administration)

(3) DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED

(In Administration)

Represented by Raj Law on the instructions of the Administrator

Defendants

-and-

(1) CC DEVAS (MAURITIUS) LTD

(2) TELCOM DEVAS MAURITIUS LIMITED

(3) DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED

Represented by King & Spalding LLP on the instructions of
the directors and shareholders of the said companies

Interveners

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N

**(1) CC DEVAS (MAURITIUS) LTD
(2) TELCOM DEVAS MAURITIUS LIMITED
(3) DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED**

Claimants

-and-

THE REPUBLIC OF INDIA

Respondent

ANDREW GREEN KC, PETER HEAD AND MYRON PHUA (instructed by **PCB BYRNE LLP**) for the **CLAIMANT and RESPONDENT**
BARNABY HOPE (instructed by **RAJ LAW**) for the **DEFENDANTS**
TOM SPRANGE KC, RUTH BYRNE KC AND KABIR BHALLA (instructed by **KING & SPALDING LLP**) for the **INTERVENERS**

Hearing date: 8 December 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE TROWER

Mr Justice Trower

Introduction

1. On 6 February 2025 the Republic of India (“India”) commenced this arbitration claim against three companies incorporated in the Republic of Mauritius (the “Mauritian Companies”), described in the claim form as CC/Devas (Mauritius) Ltd (in administration), Telcom Devas Mauritius Limited (in administration) and Devas Employees Mauritius Private Limited (in administration). The Mauritian Companies are shareholders in an Indian company, Devas Multimedia Private Ltd (“Devas India”), which is now in liquidation in India.
2. The arbitration with which this claim is concerned (the “Arbitration”, also known as the “BIT-2 Arbitration”) is PCA Case No 2022-34 in which the Mauritian Companies are the claimants and India is the respondent. It was commenced on 2 February 2022 under the terms of a bilateral treaty for the protection of investments made between India and the Republic of Mauritius on 4 September 1998 (the “BIT”).
3. The Arbitration is seated in London, and the arbitration agreement incorporates the 1976 UNCITRAL Arbitration Rules (the “1976 UNCITRAL Rules”) as specified by Article 8(2)(d) of the BIT. The arbitration tribunal (the “Tribunal”) originally comprised three arbitrators: Professor Eduardo Zuleta (presiding arbitrator), Professor Dr Stephan Schill, and Justice Goda Raghuram. The presiding arbitrator resigned for medical reasons on 8 August 2025 and has now been replaced.
4. At the outset of the Arbitration, each of the Mauritian Companies was represented by Gibson, Dunn & Crutcher UK LLP (“Gibson Dunn”), who had been empowered to act pursuant to a New York law power of attorney executed on behalf of each of the Mauritian Companies by a director immediately before the Arbitration commenced. It was not in issue that each of the powers of attorney was validly entered into by each of the Mauritian Companies at the time of its execution.
5. Just over a year after the commencement of the Arbitration, Mr Yuvraj Thacoor (“Mr Thacoor”) was appointed by the Supreme Court of Mauritius to be the administrator of each of the Mauritian Companies. In circumstances which I shall explain in more detail in due course, the Tribunal does not recognise Mr Thacoor as the representative of the Mauritian Companies or as a party in the Arbitration. The representation of the Mauritian Companies is at the heart of the matter with which this claim is concerned.

The Arbitration Claim and the Threshold Issues

6. By its claim form, India seeks an order pursuant to section 45 of the Arbitration Act 1996 (“section 45” and “the 1996 Act”) determining the following question of law relating to the Arbitration:

Is the Tribunal seated in England required to apply Mauritian law (and only Mauritian law) (being the law of the place of incorporation of the Defendants) to

determine who has authority to instruct lawyers to act on the Defendants' behalf in the Arbitration?

7. India's claim under section 45 (also called the "Section 45 Application") cannot be considered by the court unless it is made with the agreement of all the other parties to the proceedings (section 45(2)(a)) or the permission of the Tribunal (section 45(2)(b)). The claim form recites that "the application is being brought with the agreement of the Defendants (acting by its Administrator)" thereby asserting that the requirements of section 45(2)(a) are satisfied. For the purposes of this judgment, it is convenient to describe the Mauritian Companies as the Defendants when referring to them as acting by Mr Thacoor. The claim form also states on its face that it was to be served on the Defendants c/o Mishcon de Reya LLP ("Mishcon"), who received their instructions from Mr Thacoor. Mishcon have now been replaced by Raj Law and were represented at the hearing before me by Mr Barnaby Hope.
8. On 28 February 2025, Gibson Dunn issued an application, also on behalf of the Mauritian Companies, whom they described as the Interveners, for permission to intervene in the Section 45 Application. Gibson Dunn received their instructions in relation to the Section 45 Application from certain of the Mauritian Companies' directors and shareholders resident outside Mauritius, amongst which are a number of US-based private equity investors. For the purposes of this judgment, it is convenient to adopt that terminology and to describe the Mauritian Companies as the "Interveners" when referring to them as acting on the instructions of their directors. The Interveners also sought directions for the determination of a number of threshold issues in respect of the relief sought by India.
9. On 9 July 2025, Sir Nigel Teare made an order joining the Interveners, described as being "represented by Gibson Dunn & Crutcher LLP on the instructions of the directors and shareholders", as parties to the proceedings. Gibson Dunn have now been replaced by King & Spalding International LLP ("K&S") as legal representatives for the Interveners. They were represented at the hearing by Mr Tom Sprange KC, Ms Ruth Byrne KC and Mr Kabir Bhalla.
10. Sir Nigel Teare also ordered the trial of four threshold issues in respect of India's claim in the Section 45 Application and delivered a comprehensive judgment, [2025] EWHC 1738 (Comm) (the "Teare Judgment"), explaining why he had made the orders he did. The four threshold issues were as follows:
 - i) Does the Court have jurisdiction and/or power to hear the Section 45 Application and/or are the requirements of Section 45 not satisfied, in circumstances where: (a) the Interveners have not given their consent to the Section 45 Application within the meaning of s.45(2)(a) (and where the Arbitral Tribunal has not given its permission pursuant to s.45(2)(b)); and (b) by the terms of Procedural Order No.6 ("PO6") dated 3 January 2025 and Procedural Order No.7 dated 22 March 2025 ("PO7"), the consent of the Interveners is required for the purposes of section 45(2)(a)? ("Issue 1")
 - ii) Is the Section 45 Application an impermissible challenge to the Arbitral Tribunal's PO6 in respect of which the Court has no jurisdiction and/or power under Section 45? ("Issue 2")

- iii) Is section 45 of the Arbitration Act 1996 concerned only with prospective questions of English law arising in an arbitration so that the Court has no jurisdiction and/or power to revisit the question of law which has already been decided by the Arbitral Tribunal with binding effect on the parties pursuant to PO6? (“Issue 3”)
- iv) Is section 45 of the Arbitration Act 1996 ousted because the parties have not agreed to the application of substantive English law (or English conflicts of laws) but have instead agreed to the application of international law as the substantive governing law and agreed to the Tribunal having discretion as to the conflict of law rules to be applied pursuant to s.46(3) and Article 33 of the 1976 UNCITRAL Rules so that the question raised by the Section 45 Application does not fall within its scope and the Court has no jurisdiction and/or power to address it? (“Issue 4”)

Background to the BIT-2 Arbitration

11. The background to the Arbitration is both complex and highly contentious. For present purposes it is not appropriate for me to say very much about the detail, but a summary is necessary to set the four threshold issues in their proper context. Much of my description of that background is drawn from the Teare Judgment, which contains a very clear explanation of what has occurred.
12. It is appropriate for me to record that Mr Andrew Green KC who, together with Mr Peter Head and Mr Myron Phua, appeared for India was at pains to stress that the conduct of the parties was irrelevant to the four threshold issues. He made this point because much of what has been said both by the Interveners and by the Tribunal was very critical of India. In broad terms I accept that submission and I also accept that the court is not in a position on this application to reach any conclusions on whether the Interveners have established any of the allegations made against India. Some of them need to be described for context, but in doing so I should not be taken to be making any findings that they are well-founded.
13. Devas India was the counterparty to a contract dated 28 January 2005 (the “Agreement”) with Antrix Corporation Limited (“Antrix”), the commercial arm of the Indian Space Research Organisation. The Agreement was terminated by Antrix on 25 February 2011 on the grounds of force majeure. The termination of the Agreement led to two earlier arbitrations:
 - i) In June 2011, Devas India commenced an ICC arbitration seated in India against Antrix seeking damages for lost profits arising out of the wrongful repudiation of the Agreement. This culminated in an award of US\$562.5 million being made in favour of Devas India on 14 September 2015 (the “ICC Award”).
 - ii) Based on the India-Mauritius BIT, the Mauritian Companies also commenced an arbitration against India in connection with the termination of the Devas-Antrix Agreement (the “Initial BIT Arbitration”). This culminated in two further awards against India: on 25 July 2016, an award finding that India had

breached the BIT as alleged and, on 13 October 2020, an award ordering India to pay the Mauritian Companies US\$111 million plus interest and costs (the “BIT-1 Awards”).

14. Shortly after the BIT-1 Awards had been made and the process of confirming the ICC Award had commenced, Antrix issued proceedings for the winding up of Devas India under s.271(c) of the Indian Companies Act 2013. In January 2021, it obtained from the National Company Law Tribunal (the “NCLT”) an immediate appointment of provisional liquidators, one of whose early acts was to seek to terminate the engagement of all the Devas India arbitration and enforcement counsel, who were at that stage engaged in confirmation proceedings in multiple jurisdictions, including the US, France, and the UK.
15. There were then a number of hearings in the Indian courts and, on 25 May 2021, the NCLT converted the provisional liquidation order into a final liquidation order. It did so on the grounds of fraud, a decision which, after an unsuccessful intermediate appeal, was ultimately upheld by a lengthy judgment of the Supreme Court of India in January 2022. It is at the heart of the Interveners’ complaint that Devas India was never given a proper opportunity to mount its defence to these proceedings. In substance it was said that there was a lack of due process in the Indian courts. India’s response was to point out that, in a fully reasoned judgment, the country’s highest court has confirmed a finding of fraud against both Devas India itself and its shareholders (i.e., the Mauritian Companies).
16. Shortly thereafter (on 29 August 2022), the ICC Award was set aside by the High Court of Delhi on the grounds that it suffered from patent illegalities and fraud and was in conflict with the public policy of India. This decision was upheld by the Division Bench of the High Court of Delhi in a judgment delivered on 17 March 2023. By its order dated 6 October 2023, the Supreme Court of India refused to interfere with the High Court’s conclusions.
17. As explained in the Teare Judgment at [8], the Interveners have described the Indian proceedings as attempts “to unwind” the ICC Award and the BIT-1 Awards. They say that the allegations of fraud were not raised in the ICC Arbitration or the Initial BIT Arbitration but “were constructed responsively in liquidation proceedings brought against Devas in India by Antrix, acting on the instructions of India”. They say that the endorsement of the allegations was “despite the fact that the alleged illegality determinations (i) were premised on prima facie findings without a trial, document production or cross-examination, and (ii) amounted to no more than an acceptance of the case advanced by Antrix.”
18. At the hearing before Sir Nigel Teare, the court was informed that the Dutch, Swiss, Canadian and Singapore courts which have considered the allegations of fraud have rejected them in the context of the ICC Award and the BIT-1 Awards and have said that the Indian liquidation proceedings violated fundamental principles of due process. While there is no doubt that a number of courts outside India and Mauritius have refused to give weight to the January 2022 decision of the Supreme Court of India when considering enforcement of the awards, the way this was explained by Mr Sprange was slightly different from the impression I had gained from the Teare Judgment. Mr Sprange said in his oral submissions:

“I accept that those courts haven't engaged with allegations of fraud and looked at witnesses and made findings. What they have looked at is procedural questions and decided them on that basis. So I don't present those decisions as ones that have considered on the merits and rejected fraud allegations. They are procedural decisions made based on the application of local law instructions.”

The BIT-2 Arbitration: commencement and challenge

19. Following the January 2022 decision of the Supreme Court of India, the Mauritian Companies commenced the BIT-2 Arbitration. They filed a notice of arbitration dated 2 February 2022 alleging that the liquidation of Devas India constituted a further breach by India of the BIT. The way that Mr Sprange described the BIT-2 Arbitration was that it was all about non-payment by Antrix and India of the amounts for which they were each liable under the ICC Award and the BIT-1 Awards.
20. The scope of the reference and other procedural matters were settled by the Tribunal's Terms of Appointment (the “ToA”), signed on 9 September 2022 by the members of the Tribunal, the Mauritian Companies, acting by their directors and India, acting by an Additional Secretary in the Indian Government's Department of Space. The ToA identified (at section 1) the parties to the BIT-2 Arbitration, the representatives of the parties and their counsel. In the case of the Mauritian Companies, their representatives were identified as certain of their directors, and their counsel were identified as Gibson Dunn.
21. Section 3 of the ToA confirmed that pursuant to Article 8(2)(d) of the BIT, the arbitration was to be conducted in accordance with the 1976 UNCITRAL Rules, and continued as follows:

“3.2 For procedural matters not addressed by the UNCITRAL Rules, the Tribunal shall apply the rules on which the Parties have agreed. In the absence of such agreement, the Tribunal shall apply the rules it deems appropriate in the circumstances, provided that the Parties are treated equally and that, at any stage of the proceedings, each Party is given a full opportunity of presenting its case, in accordance with Article 15(1) of the UNCITRAL Rules.”
22. Article 15(1) of the 1976 UNCITRAL Rules (“Article 15(1)”) is in the following form:

“Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case”
23. The parties also referred to two other provisions from the Rules in accordance with which the Arbitration is to be conducted: Article 4 of the 1976 UNCITRAL Rules (“Article 4”) and Article 33(1) of the 1976 UNCITRAL Rules (“Article 33(1)”):

“4 The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the

other party; such communication must specify whether the appointment is being made for purposes of representation or assistance.”

“33(1) The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”

24. Like Article 4, section 4 of the ToA also dealt with party representation. It provided as follows:

“4.1 The Parties have designated their respective representatives listed in section (1) of the Terms of Appointment, as being authorized to act on their behalf in these arbitration proceedings.

“4.2 In the event of any change by a Party of its representatives or of the contact details of any of its representatives, that change shall be notified promptly in writing to opposing counsel, to each member of the Tribunal, and to the Permanent Court of Arbitration (the “PCA”). The Tribunal reserves the right to exclude the participation of any representatives from any hearing or other meeting where their participation has not been duly notified sufficiently in advance of that hearing or meeting. The Tribunal may withhold approval of the intended change or addition and, after having heard the Parties, exclude the participation of any such representatives from the arbitration where their participation might create a conflict of interest or for other compelling reasons.”

25. It is the Interveners’ case that, once the BIT-2 Arbitration had commenced, India embarked on the process of seeking to undermine the Arbitration by arranging for control of the Mauritian Companies to be transferred away from their directors and into the hands of an insolvency administrator appointed by the courts in Mauritius.
26. The first step to this end was said to have been the signature by India and Mauritius on 11 July 2022 of a “Joint Interpretative Statement” on the BIT. This had the effect of providing that the BIT does not apply where there have been allegations of fraud against investors or any party owning or controlling them. It was said in evidence on behalf of the Interveners that this “can only have been designed to try to allow India to defeat the Defendants’ claims against it simply by alleging fraud against them or any party owning or controlling them (which India had already done in the context of the Indian criminal proceedings)”.
27. The next step to this end was said to be that, in January 2023, India applied in Mauritius for an *ex parte* interim injunction restraining and prohibiting the Mauritian Companies from pursuing the BIT-2 Arbitration. There were a number of grounds on which the injunction was sought, including an allegation that pursuit of the BIT-2 Arbitration was vexatious, oppressive and unlawful in the light of the judgment of the Supreme Court of India. The Supreme Court of Mauritius (Commercial Division) granted the injunction (the “Anti-Arbitration Injunction”) on 12 January 2023.
28. There is no dispute that the Anti-Arbitration Injunction remains in effect. However, a challenge to the original grant of the Anti-Arbitration Injunction remains outstanding. It is alleged that it was not obtained in a manner compliant with Mauritian law, which

requires interim measures relating to international arbitrations to be made under the International Arbitration Act 2008 and the Supreme Court (International Arbitration Claims) Rules 2013. The legislation provides that the court's power to issue any interim measure relating to arbitration proceedings is to be exercised "in such a manner as to support, and not to disrupt the ... arbitration proceedings".

29. In an Interim Award dated 10 March 2023 (the "Interim Award"), the Tribunal noted that the parties to the BIT-2 Arbitration had a duty to refrain from taking any action or measure that may affect the procedural integrity of the Arbitration, aggravate or extend the dispute, or that may interfere with the Tribunal's mandate to adjudicate international justice. It then held by a majority that India had breached that duty by pursuing and enforcing the Anti-Arbitration Injunction and ordered India to cease its breaches of that duty. As Sir Nigel Teare pointed out, this decision was supported by extensive reasoning.
30. In April 2023, the Mauritian Companies' Global Business Licences were suspended by the Mauritius Financial Services Commission (the "FSC") on the grounds that they had been operating fraudulently. The response of the Mauritian Companies was to seek and obtain an injunction on 24 April 2023, restraining the FSC from revoking the licences. This injunction was then stayed in part by the Chief Justice on 8 May 2023, with the consequence that the suspension of the licences was reinstated.

Appointment of Mr Thacoor and its consequences

31. Meanwhile, the Mauritian Registrar of Companies had taken steps under the Mauritian Insolvency Act 2009 to place each of the Mauritian Companies into administration. Applications were made without notice to the Mauritian Companies, their directors or shareholders. It is said that these applications were made in response to a request by the FSC in the light of India's allegations of fraud. On 28 April 2023 and 2 May 2023, the Supreme Court of Mauritius (Commercial Division) granted the applications. Orders (the "Appointment Orders") were made appointing Mr Thacoor as administrator "for the purposes of (i) taking control of the company's business property and affairs and (ii) performing any function and exercising any power, that the company or any of its officers could perform or exercise if the company were not in administration, including but not limited to representing the company in all cases and/or proceedings, whether local or abroad".
32. One of Mr Thacoor's first acts on his appointment was to inform the Tribunal that he, as representative of the Mauritian Companies, had terminated with immediate effect the mandate of Gibson Dunn as their counsel in the BIT-2 Arbitration. He said that he had appointed alternative counsel. He also requested that the Arbitration be stayed pending his final decision on the continuation of the proceedings. Gibson Dunn's response was to submit that the appointment of Mr Thacoor was the result of conduct by India that violated the Tribunal's March 2023 Interim Award. They requested that the Tribunal reject any attempt by India or Mr Thacoor to recognise Mr Thacoor's appointment, or the appointment by Mr Thacoor of any replacement counsel.
33. It is at the heart of the Interveners' case that, whatever the position may be as a matter of Mauritian law (as the law under which the Mauritian Companies were

incorporated), the Tribunal is not required to recognise Mr Thacoor as the person entitled to instruct legal representatives to act for the Mauritian Companies in the Arbitration. In that regard, the appointment of Mr Thacoor was followed by the taking of a number of steps in the Mauritian courts, the exchange of extensive correspondence and the making of substantial written and oral submissions to the Tribunal on the disputed issue of whether Gibson Dunn was entitled to continue to act in the Arbitration on behalf of the Mauritian Companies. However, for present purposes, it is only necessary to summarise what then occurred quite shortly.

34. On 5 May 2023, the Mauritian Companies acting through their directors, applied for and obtained from the Supreme Court of Mauritius, an *ex parte* interim order restraining Mr Thacoor from acting. This order, which had been granted on largely procedural grounds, was almost immediately discharged. The challenge to Mr Thacoor's appointment then made its way through the Mauritian appellate courts, initially culminating on 21 August 2023 in an order of the Court of Civil Appeal of the Supreme Court of Mauritius (which has been referred to as the "Blocking Order"), which, amongst other matters, restrained any of the parties from representing or taking any decision affecting any of the Mauritian Companies in any manner whatsoever in any legal or arbitral proceedings. The Blocking Order was then relied on by India and Mr Thacoor as good grounds for adopting a position that they were unable to participate in the Arbitration.
35. It was said by India that Gibson Dunn elected not to challenge the Appointment Orders via the ordinary routes available under Mauritian law but instead sought to appeal them. This is a reference to the fact that the law of Mauritius makes provision for administration orders to be set aside where an administration should cease, an administrator should be removed or there are doubts as to the validity of the original appointment. This was not a route which was adopted by the Interveners.
36. By Procedural Order No 3, issued on 9 September 2023, the Tribunal reserved any decision as to the representation of the Mauritian Companies, as well as any other pending requests by Gibson Dunn and Mr Thacoor, to a later stage of the Arbitration. It did so amongst other reasons because there had been no final decision on the issue of representation "because of the constant evolution of the litigation before the courts of Mauritius". This approach was further reflected in the Tribunal's Procedural Order No 4 dated 31 October 2023, which recorded that Mr Thacoor and Gibson Dunn appeared to agree that the Blocking Order prevented both of them from "initiating, pursuing, continuing or discontinuing this arbitration".
37. The Tribunal also recorded that:

"it has not decided on the issue of representation, which continues being debated in the courts of Mauritius. As of the date hereof, the courts of Mauritius have not issued a final determination on the issue of representation. In any event, any final determination on this matter by the courts of Mauritius would still be subject to the Tribunal's determination on whether and to what extent such decision is binding, or has to be recognized by, an international tribunal seated in London."
38. In broad terms this state of affairs continued until the Mauritian Court of Civil Appeal made a further order on 6 February 2024, which discharged all relevant orders of the Supreme Court of Mauritius other than the Appointment Orders. It did not set aside

the Appointment Orders because the correct means for challenging them had not been pursued. It held that what should have occurred was that the Interveners should have applied under one of the alternative procedural mechanisms I referred to above. The Judicial Committee of the Privy Council has refused permission to appeal the 6 February order and the Interveners have now adopted the course of issuing the further application to the Supreme Court's Commercial Division which the Court of Civil Appeal said that they should have pursued in the first place.

39. Gibson Dunn submitted that the effect of the 6 February order was that the Blocking Order has lapsed. The making of the 6 February order also led to a renewal of Gibson Dunn's request to the Tribunal to refuse recognition of Mr Thacoor's appointment as administrator, and to recognise instead Gibson Dunn as representative for the Mauritian Companies. In the alternative, Gibson Dunn requested permission for the Mauritian Companies' own (US) shareholders to be able to continue the Arbitration as a derivative claim.
40. The position adopted by India was to the opposite effect. It informed the Tribunal that, as a result of the order made on 6 February, the Mauritian Companies could only be represented by Mr Thacoor. It said that Gibson Dunn's request that the Tribunal refuse recognition of the Appointment Orders directly violated the decision of the Mauritian Supreme Court.
41. Meanwhile Mr Thacoor was seeking access to the case file for the Arbitration, a request to which the Tribunal acceded on 8 March 2024. Shortly before it did so, on 1 May 2024, India had written to the Tribunal asserting that it had failed to decide on what were called the "threshold issues," being the identity of the claimants in the Arbitration and the identity of their authorised legal representatives, causing unnecessary expense and undermining the fairness of the resolution of the matters falling to be determined. It did so even though India had made what the Tribunal called a manifest and clear decision not to participate in the Arbitration as a result of the Anti-Arbitration Injunction, a position which it has continued to maintain. India concluded its letter by stating:

"the present circumstances are exceptional. They call for the greatest circumspection by the Tribunal. The legal consequences that arise from the above-described factual circumstances are obvious: the Tribunal must either decide the Threshold Issues of the identity of the Claimant Parties and their representation in this arbitration; or – if for whatever reason it cannot – the arbitral proceedings cannot now continue."
42. Mr Thacoor's position was slightly different. Although, like India, he told the Tribunal that Gibson Dunn could no longer represent the Mauritian Companies in the Arbitration, he sought an immediate stay of the Arbitration pending the determination of the validity of the administration orders "as directed by the Court of Civil Appeal." He submitted that the stay should be granted on the basis of fundamental principles of natural justice. He continued to maintain this position, arguing that the issue of representation raised in the Arbitration "can only be determined by the Mauritian Commercial Court, and therefore the Tribunal lacks jurisdiction to hear and determine the issue of representation" of the Mauritian Companies.

43. India, Mr Thacoor and Gibson Dunn then engaged in a lengthy series of written submissions on the issue of the Mauritian Companies' representation before the Tribunal, culminating with a request from Gibson Dunn on 29 August 2024 that "(i) the Tribunal confirm that Gibson Dunn remains duly authorized to represent [the Mauritian Companies] in these proceedings; and (ii) the final hearing in this case be held as soon as possible thereafter." It follows from this that both India and Gibson Dunn were pressing the Tribunal to make a decision on the question of who should be entitled to represent the Mauritian Companies in the Arbitration, although they each argued for the opposite outcome, while Mr Thacoor sought a stay of the Arbitration to enable him to take stock.
44. The core of the case advanced by India and Mr Thacoor was that the Tribunal should recognise Mr Thacoor's ability to represent and give instructions on behalf of the Mauritian Companies because his appointment under the law of their incorporation was valid and no longer subject to the Blocking Order. In making that submission India relied on reports on English law prepared by Mr Ben Valentin KC. In these reports Mr Valentin explained that the representation of the Mauritian Companies is a procedural matter to be determined by the application of English law, as the law of the seat of the Arbitration. He also said that, from the perspective of English law, the impact of the Appointment Orders was a matter that must be determined according to the law of Mauritius, as the law of the place of incorporation of the Mauritian Companies.
45. On one level this is an uncontroversial starting point (Dicey, Morris & Collins on the Conflict of Laws (16th edn, 2025) ("Dicey") Rule 193). As explained in the Teare Judgment, the consequence of the legal position explained by Mr Valentin then flows from section 224(2) of the Mauritian Insolvency Act, the terms of which were in evidence before Sir Nigel Teare and at the hearing before me. This provides that a director of a company that is in administration may not exercise or perform, or purport to exercise or perform, a function or power as an officer of the company except with the prior written approval of the administrator.
46. Based on a combination of the decisions of the Mauritian courts and these provisions, the position of both Mr Thacoor and India was that:
 - i) the Appointment Orders were valid and enforceable;
 - ii) Mr Thacoor as administrator was the only party entitled and empowered to act on behalf of the Mauritian Companies and to represent them in any legal proceedings, including the Arbitration; and
 - iii) Mr Thacoor as administrator had not authorised the directors or shareholders of the Mauritian Companies or any of their agents or legal advisors, to act on their behalf.
47. However, Gibson Dunn mounted a robust response to Mr Thacoor's claim to represent the Mauritian Companies in the Arbitration, explaining why the Interveners did not accept that the Tribunal should recognise the authority of Mr Thacoor. They relied on the powers of attorney given to them prior to the initiation of the Arbitration and pointed out that none of the circumstances contemplated by the powers of attorney as giving rise to their expiration have transpired. They also said that any

dispute regarding their validity as between the Mauritian Companies and Gibson Dunn would have to be resolved by the New York courts under New York law.

48. They also said that English law does not support the recognition of Mr Thacoor as representative of the Mauritian Companies because the conflict of laws rules relied on by Mr Valentin refer to the constitution of a company not its representation and do not apply to a company in administration. More fundamentally, they contended that the appointment of Mr Thacoor involved serious public policy considerations that would preclude his recognition as a matter of English law. Those considerations included India's role, which was said to have involved illegitimate acts of collusion with the Mauritian authorities in requesting the administration orders, thereby violating the Tribunal's Interim Award. This was said, as a matter of international public policy, to preclude India from benefiting from its own wrongdoing. It was also said by Gibson Dunn that, if the Tribunal were to recognise Mr Thacoor's appointment, the Mauritian Companies would be denied access to international justice because Mr Thacoor was attempting to replace appointed counsel, to terminate the mandate of the Mauritian Companies' directors and to request a stay of the Arbitration.

PO6

49. The position adopted by India and Mr Thacoor was not accepted by the Tribunal. On 3 January 2025, it gave its decision on the Representation of Claimants in the form of PO6. The Tribunal ruled by a majority that it declined to recognise the authority of Mr Thacoor for the exclusive purposes of the Arbitration, that it declined to recognise Mr Thacoor's purported termination of the powers of attorney given to Gibson Dunn to represent the Mauritian Companies in the Arbitration and that it continued to recognise Gibson Dunn as their authorised representative.
50. The Tribunal gave lengthy reasons for its conclusions. It recited in great detail the procedural history of the Arbitration, a summary of which I have set out above. It recorded that it had now become clear, as confirmed by both Mr Thacoor and Gibson Dunn that "a definite and permanent decision in the Mauritian courts on the issue of the Mauritian Companies' representation would not be reached within the next year or two".
51. The Tribunal explained that its authority and mandate were both derived from the BIT. It was therefore bound to apply international law and the 1976 UNCITRAL Rules. It held that, pursuant to the ToA it was bound to "apply the rules it deems appropriate in the circumstances provided that the Parties are treated with equality and that at any stage of the proceedings, each party is given a full opportunity of presenting its case in accordance with Article 15(1) of the 1976 UNCITRAL Rules". The ToA reference was to section 3, which was entitled Applicable Procedural Rules and, like Article 15(1), gave the Tribunal a broad discretionary power to apply such procedural rules as it deemed appropriate. As Sir Nigel Teare explained "Thus the Tribunal appeared to have a discretion as to the rules which it applied (in the absence of an agreement or specific provision)".
52. The Tribunal also noted that, because it was seated in London it:

“is also bound to consider the provisions of the [1996 Act]. This is so, not least, because the [1996 Act] provides that the final award may be challenged for “serious irregularities” that cause “substantial injustice to the applicant,” which includes “the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy.” The [1996 Act] recognizes the Tribunal’s “general duty” to conduct the arbitral proceedings, to “adopt procedures suitable to the circumstances of the particular case” under standards of fairness and impartiality, and “to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.”

53. The Tribunal added in paragraph 143 of PO6 as follows:

“Consequently, the Tribunal must decide the issue of [the Mauritian Companies’] representation by considering international law, the 1976 UNCITRAL Rules, the [ToA], and the [1996 Act]. The question for this Tribunal is therefore not restricted to determining whether under the law of Mauritius, which is the place of incorporation of [the Mauritian Companies], Mr Thacoor is the representative or the administrator of [the Mauritian Companies]. This is the perspective of, and the law applied by, the courts of Mauritius. The issue before this Tribunal is whether under international law, the 1976 UNCITRAL Rules, the [ToA], and the [1996 Act] this Tribunal must recognize, for purposes of this arbitration, the decision of Mauritian courts pursuant to which Mr Thacoor has been appointed as representative of [the Mauritian Companies]. In its decision the Tribunal may not ignore the decisions of the courts of Mauritius but is not bound to blindly or automatically apply and recognize such decisions without considering the laws and rules that govern this arbitration.”

54. The Tribunal then explained that the issue with which it was concerned in PO6, was the question of the Mauritian Companies’ representation in the context of an international investment arbitration seated in London. It said that this was a procedural matter and pointed out that other investment tribunals had considered that the question of the legal representation of a party was a matter to be decided in accordance with international law. It also said that, while the domestic law of a party certainly has a role to play in an investment arbitration, it is not a source of international law in itself. To this extent, questions of representation, including the appointment of counsel, were to be determined pursuant to international law not domestic law.

55. In stating that this did not mean that the operation of domestic law is irrelevant to the determination of the representation issue under international law, the Tribunal accepted India’s submission that international tribunals tend to recognise the authority of the administrator of an insolvent company as its representative. But it went on to state that “this does not necessarily mean that the domestic laws of and domestic rulings at the place of incorporation of the insolvent company are dispositive in themselves of the question of who can be recognised as the legal representative in an international arbitration.”

56. Having analysed the applicable law, rules and standards which it was bound to apply, the Tribunal concluded that it could not recognise Mr Thacoor as having authority to represent the Mauritian Companies in the Arbitration. The first reason for this was that the validity and finality of the Appointment Orders were still in dispute in the

courts of Mauritius (paragraph 224 of PO6). It reached that conclusion having said earlier in PO6 (at paragraph 169) that both Mr Thacoor and Gibson Dunn recognised:

“not only that the matter is still subject to litigation in Mauritius, but also that a final decision on the issue may take another two to three years. However, it is not for this Tribunal to decide on the dispute that is pending before the courts of Mauritius as to the validity and finality of decisions issued by such courts. At the same time, Claimants’ right to pursue their claims in this arbitration cannot remain subject to the fluctuations of proceedings before local courts.”

57. The Tribunal also recognised that it may have to reconsider its decision in due course depending on what happens in Mauritius. It said the following in paragraph 225 of PO6:

“There is a possibility, of course, once all proceedings in Mauritius have come to an end, and the matter is final and binding also from the perspective of the Mauritian order, and in case the Tribunal were to reconfirm its position on the issue of representation in the present decision in the event of a change in the status quo, that this may result in a difference between how the representation of Claimants is dealt with from the perspective of Mauritian courts and how it is dealt with by other decision-making bodies that are not under the sovereignty of Mauritius and jurisdiction of Mauritian, such as this Tribunal.”

58. This was not the only reason the Tribunal gave for declining to recognise Mr Thacoor’s authority. It also said that it could not ignore that the Appointment Orders and Mr Thacoor’s conduct in the Arbitration raised fundamental rule-of-law concerns that had not been remedied in domestic court proceedings (see the Tribunal’s additional reason in paragraph 224 of PO6). It concluded that those concerns had an impact not only on the recognition of the Appointment Orders, but also affected the Mauritian Companies’ rights under the BIT to have access to arbitration, to have the Tribunal determine its own jurisdiction and, in case of a positive finding on jurisdiction, proceed to adjudicate the claims of the Mauritian Companies on the merits. It had earlier held (paragraph 171 of PO6) that these were “compelling reasons” within the meaning of section 4.2 of the ToA for the Tribunal to withhold approval of the legal representatives appointed by Mr Thacoor and to continue to recognize Gibson Dunn as the Mauritian Companies’ representative for the purposes of the Arbitration.

59. The Tribunal was particularly critical of the fact that the Appointment Orders had been made *ex parte* without any apparent justification and were accompanied by what it called “little to no reasoning”. It concluded on this part of its determination as follows:

“192. In sum, the Tribunal has serious concerns that the Appointment Orders that are being litigated in Mauritius contravene basic notions of due process under international law and English notions of substantive justice, such as the right to be heard and present one’s case and the right to receive a reasoned decision, and hence “fall short of the guarantee to a fair trial” under English law and international law standards.

193. These are additional reasons for the Tribunal to be reluctant at this stage to recognize the appointment of Mr Thacoor in this arbitration based on the Appointment Orders and to accept all acts Mr Thacoor has taken in the name of Claimants. This includes terminating the power of attorney of Gibson Dunn that validly had been given to them at the start of the present arbitration, which, consequently, continues to be valid.”

60. The Tribunal also gave detailed consideration to Mr Thacoor’s conduct and expressed concerns about his stance that the Arbitration should be stayed. It also expressed concern as to why Mr Thacoor had sought to terminate the mandate of Gibson Dunn, the only counsel who were intimately familiar with the proceedings and why, even after he had been granted access to the case file, he had not made submissions regarding the substantive merits, focusing instead on a stay. It characterised some of his conduct as disruptive and inconsistent and concluded that:

“It follows from the foregoing that Mr Thacoor failed to identify a specific prejudice or harm to Claimants’ rights if he is not recognized as their representative, and instead demonstrated with his conduct that his interests do not appear to be aligned with Claimants’ right to pursue their claim in this arbitration.”

61. The actual decision of the Tribunal was expressed in paragraph 228 of PO6 as follows:

“228. For the reasons mentioned above, the Tribunal, by majority:

a. **Decides** not to recognize, for the exclusive purposes of this arbitration, the appointment of Mr. Thacoor as the representative of Claimants based on the Appointment Orders, and therefore, does not give effect to his decision to terminate the powers of attorney given to Gibson Dunn to represent Claimants in this arbitration.

b. **Continues** to recognize Gibson Dunn as the representatives of Claimants in this arbitration.

c. **Invites** the Parties to confer and agree on the steps to follow in this arbitration, and specifically, on a procedural timetable before 31 January 2025 and inform the Tribunal accordingly. If no agreement is reached by said date, each Party must submit on that date its respective position.

d. **Reserves** the decision on costs to a later stage.”

62. In his submissions, Mr Green stressed the importance of the fact that the Interveners’ evidence accepted that Mr Thacoor’s appointment was what was called “presumptively valid”. The limit of the Interveners’ case was that the Appointment Orders should not have been made and it was accepted that, as the appointment was made by an order of the Mauritius court, it could not be said that it was invalid.

63. In these circumstances, Mr Green submitted that the consequence of PO6 was that a validly appointed administrator was not being recognised by the Tribunal and was not being permitted to instruct his own team of lawyers recognised by the Tribunal to

enable him to form a view as to whether to continue the arbitral process. Instead, the Tribunal was recognising lawyers appointed by non-Mauritian and non-resident investors and shareholders in the Mauritian Companies who were refusing to accept the authority of the administrator even though they accepted that, unless and until he is replaced, his appointment was valid. The Tribunal's position was said to be surprising, because it appeared not to recognise that Mr Thacoor needed to consider whether the Arbitration itself was an attempt to reap the fruits of fraud.

The Arbitration Claim

64. On 6 February 2025, just over a month after the Tribunal had issued PO6, India commenced the Section 45 Application. In alleging that it was brought with the agreement of the Defendants acting by their administrator, India relied on the agreement of Mr Thacoor, whose solicitors stated that his objective was to ensure that the Tribunal accepted his authority to appoint representatives to appear in the Arbitration on behalf of the Mauritian Companies. On the same day, India made an application to the Tribunal to stay the Arbitration until this court had ruled on its application under section 45.
65. The Interveners' response was to seek an order adding them as a party to the Section 45 Application. They also said that it was defective for several reasons and in particular that it was a "disguised and impermissible appeal" against the decision of the Tribunal in PO6 and that section 45 cannot be used to determine issues already determined by the Tribunal. As explained in the Teare Judgment, they sought joinder so that the court could resolve those and other issues.
66. On 22 March 2025, some three weeks or so after the issue by the Interveners of the application which lead to the Teare Judgment, the Tribunal made Procedural Order 7 ("PO7") in response to India's application for a stay of the Arbitration. It refused that application and gave procedural directions for the further conduct of the Arbitration. In so ruling, the Tribunal made the following points:

"In Procedural Order No. 6, the Tribunal decided, after extensive submissions from [India's] counsel – despite their indication that [India] was not participating – and from Mr Thacoor and his counsel, that the representative of Claimants in this arbitration is Gibson Dunn. The Tribunal likewise dismissed Mr Thacoor's request to be recognized as representative of Claimants in this arbitration".

"The [Section 45 Application] was submitted by [India] – who is a party to this arbitration but claims not to be participating – and by counsel for Mr Thacoor who is neither a party to this arbitration nor a representative of Claimants according to the findings and the decision in Procedural Order No 6. Consequently, whatever the agreement reached between Mr Thacoor and his counsel and [India], it is not, for purposes of the present arbitration proceedings, an agreement of the parties to this arbitration for purposes of Section 45(4) of the [1996 Act]."

Section 45

67. It is common ground that the 1996 Act applies in the form it was in before the coming into force of the Arbitration Act 2025 (see section 17(4)(a)(ii) of that Act). The relevant parts of section 45 are as follows:

45 Determination of preliminary point of law.

(1) Unless otherwise agreed by the parties, the court may on the application of a party to arbitral proceedings (upon notice to the other parties) determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties.

...

(2) An application under this section shall not be considered unless—

(a) it is made with the agreement of all the other parties to the proceedings, or

(b) it is made with the permission of the tribunal and the court is satisfied —

(i) that the determination of the question is likely to produce substantial savings in costs, and

(ii) that the application was made without delay.

(3) The application shall identify the question of law to be determined and, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the question should be decided by the court.

(4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

(5) Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.”

68. Before turning to the threshold issues themselves, there are a number of introductory points relating to section 45 to be considered. The first is that the Interveners drew my attention to a passage in Russell on Arbitration (24th edn at 7-170) in which the editors say that applications under section 45 are extremely rare, although it can be a useful power when the parties all consider that it is appropriate for a question of law to be determined by the court at the outset. It may be more accurate to say that the section is relatively little used but has a useful role to play (*Goodwood Investments Holdings Inc v Thyssenkrupp Industrial Solutions AG* [2018] EWHC 1056 (Comm) at [1] per Males J). Both of these ways of expressing the point bear on how section 45 might be applied, although I think that the Defendants were correct to submit that rarity of invocation cannot be treated as a restriction on jurisdiction.

69. Secondly, it is well established that the court has a discretion on whether or not to determine any question of law raised on an application made under section 45 (*Taylor Woodrow Holdings Ltd v Barnes & Elliott Ltd* [2006] EWHC 1693 (TCC); [2006] All ER (Comm) 735 (“*Taylor Woodrow*”) at [55] to [56]). As the threshold issues are only concerned with the court’s jurisdiction and power, a point which was emphasised by Mr Green, the question of how the court should exercise that discretion is not a matter with which I was directly concerned at the hearing. Nonetheless, the fact that the court has such a discretion has some bearing on the threshold issues, as does the fact that the opening words of section 45(1) make clear that the parties may contract out of the section.
70. Thirdly, the Interveners submitted that section 45 “exists for those rare circumstances in which an arbitration involves a point of wide import and/or of interest to parties other than those who are arbitrating.” India’s response was that this proposition does not follow either from the relevant parts of the Departmental Advisory Committee’s Report on the Arbitration Bill (i.e. paragraphs 217-221), or the authorities on section 45 to which I was referred (e.g. *Taylor Woodrow* at [59], although in that case the point seems to have gone by agreement between the parties). I think that India was right to give the response it did, anyway in so far as the Interveners sought to suggest that the court had no power to grant relief in cases in which those circumstances were not present. In my view, the issue of whether the question of law is of wider interest ultimately only goes to the court’s exercise of its discretion, although doubtless there will be cases in which that is a significant factor in determining how to proceed.
71. Fourthly, it is possible for the parties to exclude the jurisdiction by agreeing that they will not apply to the court under section 45. This form of exclusion agreement is not uncommon, but there was no argument by the Interveners that any such agreement has been reached in the present case.
72. Finally, there are two express conditions for exercise of the power under section 45 which were raised by the threshold issues. The first is that either all of the parties to the proceedings must have agreed that the application may be made or the tribunal must have given its permission (section 45(2)). The application of the first part of this condition is raised by Issue 1. The second is that the relevant question must be one of English law (see section 45(1) and the definition of “question of law” in section 82(1) of the 1996 Act (“section 82(1)”). The application of this condition is raised anyway in part by Issue 4. The third express condition, viz. that the question to be asked under section 45 must substantially affect the rights of one or more of the parties, was not said by anybody to give rise to any relevant questions at this hearing.

Issue 1: the parties’ submissions

73. The core of the question to which Issue 1 is directed is whether the court has jurisdiction or power to hear the Section 45 Application (alternatively whether the requirements of section 45 are satisfied) in circumstances in which the Interveners have not given their consent to this claim, and on the hypothesis that by the terms of PO6 and PO7, the consent of the Interveners is required for the purposes of section 45(2)(a).

74. The Interveners submitted that both the parties, and the legal representative through whom their agreement can be given, must be identified from the arbitration proceedings to which section 45 refers. This can only be the Interveners acting through Gibson Dunn, because they are the parties whom the Tribunal have expressly recognised by PO6 and PO7 following detailed submissions, evidence and argument, including from India and Mr Thacoor.
75. India said that this submission was misconceived for two reasons. The first is that it ignores the language of section 45(2)(a), which refers to “parties to the proceedings” not the parties’ representatives. Those parties can (and might choose to) act for the purposes of an application under section 45 through the agency of entities who do not represent them in the arbitration. The second is that construing “parties to the proceedings” to mean only those parties acting only by their representatives in the arbitration would have the bizarre consequence that an individual who was not involved in the arbitration, but who otherwise had authority to act on behalf of a corporate party generally, would be incapable of agreeing on behalf of that party to an application under section 45 being made.
76. The Interveners also submitted that any conclusion that the consent of the Mauritian Companies could be found through the consent of Mr Thacoor acting on their behalf makes little sense in circumstances in which the Tribunal “ejected [him] following extensive evidence and argument”. This of course was a reference to the Tribunal’s PO6 decision not to recognise the appointment of Mr Thacoor and to continue to recognise Gibson Dunn as the representatives of the Mauritian Companies in the Arbitration.
77. It was said that, as a matter of construction of the statute, the agreement contemplated by section 45(2)(a) can only be given through the human agent of a party to the proceedings, and that can only occur where that human agent is recognised by the relevant tribunal. It certainly cannot be given through the human agency of a person (in this case Mr Thacoor) whose authority to conduct the Arbitration on behalf of one of the parties has been refused recognition by the Tribunal. This is said to be clear from the fact that the condition set out in section 45(2)(a) has to be satisfied before the application can be considered by the court, and cannot be satisfied here because the Tribunal has already determined that the person purporting to agree on behalf of the party should be refused recognition as having any authority to act for the purposes of the Arbitration.
78. India’s response to this submission was that it was conceptually muddled. It submitted that the English court has to assess for itself whether Mr Thacoor was authorised to agree to the Section 45 Application on behalf of the Mauritian Companies within the meaning of section 45(2)(a). It does not matter who the Tribunal recognised as the Mauritian Companies’ representatives in the Arbitration, because this did not answer the question of who can agree to the Section 45 Application, nor would such a finding (had it been made in PO6 which it was not) be binding on the parties or the court.
79. India emphasised that the Interveners’ submission confuses the identity of the parties to the Arbitration, which indisputably include the Mauritian Companies, with the identity of the persons who are entitled to represent the parties in the Arbitration. It submitted that what matters is whether it can be said that the Mauritian Companies

have given their agreement, a question the answer to which turns on the issue of whether Mr Thacoor had authority to agree on their behalf. It is said that he did because, as a matter of English private international law which this court is required to apply, the law of the place of incorporation determines who is entitled to act on behalf of a corporation (Dicey, Rule 193 and para 30-145), a principle which applies to administrators in the same manner as it applies to liquidators. It was submitted that, because, as a matter of Mauritian law, Mr Thacoor was entitled to act on behalf of the Mauritian Companies as their administrator, he was therefore entitled to agree on their behalf to the Section 45 Application being made.

80. It was also submitted by India that there were a number of reasons why the English court is not precluded by PO6 or PO7 from determining for itself whether Mr Thacoor was entitled to agree to the Section 45 Application on behalf of the Mauritian Companies, and why India was not debarred from contending before the court that Mr Thacoor was so entitled. It said that PO6 simply decided that Mr Thacoor was not to be recognised as representing the Mauritian Companies for the exclusive purposes of the Arbitration and did not determine whether Mr Thacoor could act on their behalf for other purposes.
81. In particular, India pointed out that the Tribunal expressly said (in paragraph 153 of PO6) that “English courts preserve any jurisdiction they may have under English law that involve assessing the appointment orders and/or any future award”. It also relied on the fact that when, in paragraph 23 of PO7, the Tribunal said that nothing agreed between India and Mr Thacoor was “an agreement of the parties to this arbitration” (see paragraph 66 above), that was explicitly said for the purposes of section 45(4) of the 1996 Act, a provision which is also concerned with a question for the tribunal as to whether the arbitration should be stayed pending resolution of an application under section 45. It was not concerned with an agreement within the meaning of section 45(2)(a), the existence of which is a matter for the court.
82. India also submitted that, even if the effect of PO6 and PO7 was that Mr Thacoor was not entitled to agree to the Section 45 Application being made on behalf of the Mauritian Companies, those rulings were procedural orders and not awards. They can therefore be revisited by the Tribunal and do not have the requisite finality to have *res judicata* effect: *Process & Industrial Developments Limited v Nigeria* [2019] EWHC 2241 (Comm); [2019] 2 Lloyd's Rep 361 (“*Process & Industrial*”), per Butcher J at [72].
83. In any event, India submitted that, on the true construction of section 45, the legislature intended for the courts to be able to make a *de novo* assessment of whether the requisite agreement had been reached, uninhibited by any prior arbitral ruling on the subject. It said that the terms of section 45(5), which provide that, unless the court gives permission, no appeal lies from a decision as to whether the conditions specified in section 45(2) are met, indicates that the court is intended to be the sole arbiter of that question.
84. Reliance was also placed by India on section 69(2)(a) of the 1996 Act (the right to appeal to the court on a point of law arising out of an award), which was said to include materially the same language as section 45(2)(a). It was then said that, if the Interveners’ construction was correct, an individual found by a tribunal not to have authority to act on behalf of a corporate party would be “precluded from exercising

section 45(2)(a) during the proceedings or section 69(2)(a) after the conclusion of the arbitration”, which would be what was characterised as a drastic outcome. It was said that it was far more likely that Parliament intended that a court should be able to assess for itself whether the preconditions for a section 45(2)(a) or a section 69(2)(a) application were satisfied, including any question of authority to reach an agreement.

85. I should say now that I do not regard the comparison made between the section 45 and the section 69 jurisdictions as founding a very persuasive submission. There is no equivalent preclusion in the case of section 69(2)(a), because, although the right to appeal is subject to the conditions in section 69(2) and the restrictions in section 70(2) and 70(3) of the 1996 Act, the court is able to give leave even where the Tribunal and the other parties to the proceedings do not agree. The same cannot be said for section 45.
86. The Interveners then submitted that the condition precedent to the court considering the Section 45 Application plainly has to be satisfied in advance. It cannot be satisfied “putatively”, through the Section 45 Application itself, which is what India and Mr Thacoor are trying to do. It was argued that they wanted to take this court’s English law finding to the Tribunal, alter the outcome of the authority issue in the Arbitration, and then turn that into some form of retrospective agreement for the purposes of section 45(2)(a). This submission was said to be supported by the terms of CPR 62.4 and CPR PD 62 para 3.1 which permits a court to order service of an arbitration claim at an address of a party’s solicitor or representative acting for them in the arbitration. It was said that, if India was right, the validity of service would depend on the outcome of the Section 45 Application and its subsequent deployment in the BIT-2 Arbitration.
87. India said that this was wrong. If, under the law which the court is required to apply when making the determination for itself, Mr Thacoor can agree to the Section 45 Application on the Mauritian Companies’ behalf, the requirements of section 45(2)(b) are satisfied because Mr Thacoor did agree to the Section 45 Application in that capacity.
88. It was also submitted by India that the Tribunal's findings in PO6 as to whether there were public policy objections to the recognition of the Appointment Orders are not binding on the parties in the Section 45 Application. This was partly because PO6 has no *res judicata* effect and is simply a procedural decision. It was also said to be because the views the Tribunal expressed were not necessary for its decision that the Appointment Orders should not be recognised in the Arbitration and therefore did not satisfy the test for an issue estoppel explained by Clarke LJ in *The Good Challenger* [2003] EWCA Civ 1668; [2004] 1 Lloyd’s Rep 67 at [72]. In any event, what India called the operative reason for the Tribunal’s decision was that the validity and finality of the Appointment Orders were still in dispute in the Mauritian courts. India submitted that, as a matter of English private international law, this was not a ground for denying recognition of the Mauritian court’s orders (and it relied on the decision of Henshaw J in *GFH Capital Ltd v Haigh* [2020] EWHC 1269 (Comm) at [42]-[43]).
89. India also said that it is for the English court to assess for itself whether English public policy militates against giving effect to the Appointment Orders in England because what English conceptions of public policy (and natural justice) require is “ultimately [...] a matter for the English Court”: *Stati v Kazakhstan* [2017] EWHC

1348 (Comm); [2017] 2 Lloyd's Rep 201 at [87] per Robin Knowles J, applying *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA 855; [2014] QB 458 (“*Yukos*”) at [147]. Indeed, not only are the Tribunal’s findings on public policy not binding, but they are also inadmissible opinion evidence pursuant to the rule in *Hollington v F Hewthorn & Co Ltd* [1943] KB 587, which applies to findings of fact made by arbitrators (*Rogers v Hoyle* [2014] EWCA Civ 257; [2015] QB 265 at [34]).

90. It followed from this, so India submitted that, if the Interveners wish to advance a public policy point on Issue 1, they cannot do so at this hearing, which is solely addressing threshold issues as to the “jurisdiction and/or power” of the court. It was said that this type of point, which is effectively an allegation of impropriety made against the Mauritian courts, cannot properly be determined on this hearing and is only capable of being determined once the Interveners have satisfied the burden of discharging the default position in favour of recognising the Appointment Orders.

Issue 1: conclusions

91. It is important to keep a clear focus on the ambit of Issue 1. The essence of the question is whether, in the light of PO6 and PO7, it is necessary for the Mauritian Companies acting by their directors and shareholders (viz. the Interveners) to have agreed to the making of the section 45 Application. The question is asked on the assumption that, by the terms of PO6 and PO7, the Tribunal has ruled that the consent of the Interveners is required for the purposes of section 45(2)(a).
92. It seems to me that the starting point is to identify the parties and the proceedings referred to in section 45(2)(a). The proceedings are the arbitral proceedings in the course of which the question of law referred to in section 45(1) has arisen. In the present case that is the BIT-2 Arbitration. There were times during the course of his submissions when Mr Sprange seemed to be saying that the Interveners participated in the Arbitration as separate parties from the Mauritian Companies. I think that is a confusing way of looking at the position.
93. I consider it to be clear that the parties, and the only parties, to the BIT-2 Arbitration are India and the Mauritian Companies. Although Gibson Dunn sought in the alternative permission for the US shareholders of the Mauritian Companies to continue the Arbitration as a derivative claim, that is not what occurred. It follows that it is the agreement of the Mauritian Companies which is required for section 45(2)(a) to be satisfied. In my view, the identity of those persons who are able to give instructions on behalf of the Mauritian Companies, or who represent them in the Arbitration, is a separate question from the identity of the parties themselves.
94. This distinction between the two was touched on in the Teare Judgment in the context of the Interveners’ application to be joined, because it was recorded by Sir Nigel Teare at [45] that India and Mr Thacoor had objected to the joinder of the Interveners on the grounds that the Mauritian Companies were already parties. However, he allowed the intervention because there was no dispute that Gibson Dunn and their clients be permitted to file evidence and make submissions in the Section 45 Application. It followed from this that, in that context, the issue was simply one of nomenclature on the record of the proceedings, rather than one of substance.

95. However, in the current context, the point matters in a different way, because it goes to the core question of whether consent can be given on behalf of one of the parties where the human agent by whom it is given is not recognised by the arbitral tribunal as a representative of that party, whether as instructing agent, legal representative or otherwise. I agree with India's submission that there is nothing in the language of section 45, which gives any indication that the simple question of who on behalf of each party can agree to the making of an application under section 45 is governed by anything other than the normal English law principles which apply where the court is concerned with ascertaining whether or not the agreement of a corporate entity has been given or obtained for the purposes of an English statutory provision.
96. Of course, in all cases in which a party to an arbitration is a corporate entity, the arbitral tribunal will have identified the human agents acting as instructing or legal representatives for that party in the arbitration proceedings (as certain directors and Gibson Dunn have been in relation to the Arbitration). There are obvious practical reasons why that is a necessary exercise for a tribunal to carry out and it is capable of becoming one of some complexity where that question is in dispute (see e.g., *Republic of Uganda v Rift Valley Railways (Uganda) Ltd and ors* [2021] EWHC 970 (Comm); [2023] Lloyd's Rep 665 ("*Uganda*") discussed below for an example of another case in which a similar point arose). The detail and care with which the Tribunal approached that issue in PO6 and PO7 reflects the practical importance which the answer has in the present case.
97. Nonetheless, I agree with India's submission that it does not follow from this that section 45 contemplates that, as a matter of pure jurisdiction, the human agents who are permitted to agree to the commencement of an application under section 45 must be the same human agents as those who are recognised by the arbitral tribunal. While that will normally be the case, there is no practical or juridical reason why that must always be the case or why it is necessary to add words to the effect of "acting by their representatives in the proceedings" at the end of section 45(2)(a).
98. As I have explained, the Interveners sought to mount an argument, based on CPR 62.4 and CPR PD 62 para 3.1, that the legislative scheme contemplated that a party's representatives in the arbitration had a role to play in any application under section 45. I do not think that rule or PD is capable of bearing the weight attributed to it by the Interveners. The PD is simply providing that the court may as a matter of discretion exercise its powers under CPR 6.15 to order service on a defendant's representative in the arbitration. Doubtless that is an order that it will sometimes be appropriate for the court to make in arbitration claims generally, but it has little bearing on the question of whether a representative of a party to an application under section 45 can always be treated as the same as the representative in the arbitration when the question of consent under section 45(2)(a) is in issue.
99. It follows that the question of whether or not an agreement has been reached by a party for the purposes of section 45(2)(b) is a matter of English law to be determined by this court as part of the process of deciding whether it is empowered to proceed to consider the Section 45 Application. As a matter of English law, the means by which the Mauritian Companies are able to agree to the making of the Section 45 Application goes to the authority of the putative agent and is itself governed by the law of the place of their incorporation. The position at common law (as to which see *Banco de Bilbao v Sancha and Rey* [1938] 2 KB 176) is as applicable to the impact of

the appointment of an insolvency office holder as it is to a dispute about the authority of competing boards of directors (see Dicey, Rule 193, para 30-145 and the authorities cited in footnotes 463 and 464).

100. Nonetheless, it remains possible that, notwithstanding the terms of section 45 itself, the parties may have become bound to accept that the only manner in which the Mauritian Companies could have given their agreement to the making of an application under section 45 was through the representatives who are recognised as their representatives by the arbitral tribunal. It is said by the Interveners that this was the effect of PO6 and PO7 and this was the assumption on which Sir Nigel Teare seems to have proceeded in the Teare Judgment at [58] to [60]. It seems to me that, however the issue with which the Tribunal was concerned is to be characterised, there are a number of reasons why that is not the case.
101. The first is that I agree with India that the Tribunal did not address, and did not purport to address, the narrow question of consent for the purposes of section 45(2) (a). Indeed, there were a number of parts of its reasoning in which it made clear that it was only recognising the Interveners' right to represent the Mauritian Companies for the purposes of the Arbitration. In my view the manner in which the Tribunal expressed itself did not even purport to extend this determination to any applications to court associated with the Arbitration. This is apparent from paragraph 153 of PO6 (also referred to in paragraph 81 above) in which the Tribunal said the following when considering the significance of the fact that the Appointment Orders had not been submitted for recognition in England:

“At the same time, by assessing the Appointment Orders for the exclusive purposes of ascertaining the identity of Claimants' representatives in this arbitration, the tribunal is not substituting English courts or Mauritian courts. English courts preserve any jurisdiction they may have under English law that involve assessing the Appointment Orders and/or any future award; similarly, Mauritian courts preserve any jurisdiction they have under Mauritian law to determine who the representative of a Mauritian company is under the laws of Mauritius. Likewise, this tribunal finds that it is within its remit to determine the issue of who represents claimants in this arbitration, without this having any impact on the decisions reached in other fora.”
102. In expressing itself in this manner, the Tribunal was making clear that it was limiting its ruling to the conduct of the Arbitration itself. It was not concerning itself with the manner in which the English court may approach the effect of the Appointment Orders on steps taken by the parties in the courts of England or Mauritius in relation to any award it may make. More specifically, I was unable to identify anything in the Tribunal's reasoning in PO6 which indicated that it was considering the question of how the Mauritian Companies might agree to the making of an application under section 45, whether on the question of authority or otherwise. The Section 45 Application was only commenced in response to PO6 and the possibility that any such application might be made was not mentioned at all in the lengthy reasoning.
103. I also agree that the question of agreement by the Mauritian Companies for the purposes of section 45(2)(a) was not addressed by the Tribunal in PO7. In that procedural order, the Tribunal was only concerned with the question of whether it should stay the arbitration having regard, amongst other matters, to the making of the

Section 45 Application, i.e., the issue addressed by section 45(4) of the 1996 Act as a matter of English law. It was argued by the Interveners that no stay should be granted because they had not agreed to any application under section 45 being made and so India and Mr Thacoor were blatantly ignoring PO6.

104. But the basis on which the Tribunal proceeded was simply that, absent agreement to the contrary, section 45(4) gave an arbitral tribunal a discretion to continue the arbitration proceedings and make an award even though an application to the court under section 45 was pending. The fact that the Tribunal decided that any agreement for a section 45(4) stay of the Arbitration could not be reached by India and Mr Thacoor without the consent of the Interveners arises within the Arbitration itself, not in any proceedings before the English court. It is a quite different question to whether the parties to the Arbitration have agreed for the purposes of section 45(2)(a) that a Section 45 Application can be made to the court in the first place.
105. I also consider that, even if PO6 or PO7 were rulings to the effect that an agreement within the meaning of section 45(2)(a) could not be reached without the consent of the Interveners, or indeed that Mr Thacoor was not entitled to agree on behalf of the Mauritian Companies to the Section 45 Application being made, the decision of Butcher J in *Process & Industrial* at [72] (see paragraph 82 above) is inconsistent with the argument that it is not open to India to contend before this court that it has power to take a contrary view. For an issue estoppel to arise in this type of circumstance, the decision of the foreign court or arbitral tribunal must be “final and conclusive on the merits”. Butcher J explained, and I agree, that it is certainly possible for an issue estoppel to arise in relation to a procedural order, but the requirement for finality means that the decision must on its own terms no longer be reviewable by the relevant tribunal. This would only be likely to be the case in relation to a procedural order if it was in reality an award which finally determined the issue between the parties.
106. In the present case, it is my view that PO6 does not have that quality, because it is clear (see e.g., paragraphs 224 and 225 of PO6 referred to in paragraphs 56 and 57 above) that the questions of both the Mauritian Companies’ representation and Mr Thacoor’s authority to take steps on their behalf may have to be reviewed and reconsidered by the Tribunal once the proceedings in the Mauritian courts have come to an end and once the orders made in Mauritius have become final and binding.
107. I have reached a similar conclusion, albeit for slightly different reasons, in relation to the issue of whether the public policy objections, which were advanced by the Tribunal as grounds for refusing to recognise the Appointment Orders as the source of Mr Thacoor’s authority to act for the Mauritian Companies in the Arbitration, mean that India is estopped from arguing that Mr Thacoor can give section 45(2)(a) consent on behalf of the Mauritian Companies in the Section 45 Application. I do not think that it is.
108. As I have already explained, the mere fact that it was a procedural decision does not render it incapable of having *res judicata* effect, but in my opinion the manner in which the Tribunal expressed its conclusions do. The lack of finality in the Mauritian court proceedings was said to be “in itself sufficient for the Tribunal not to recognize at this stage Mr Thacoor as the representative of Claimants” (paragraph 170 of PO6), while the Tribunal’s public policy concerns about the procedures which were adopted

by the Mauritian courts were said to be additional reasons for the Tribunal's reluctance at this stage to recognise the appointment Mr Thacoor (paragraph 193 of PO6). Likewise, the public policy criticisms made of Mr Thacoor's own conduct as a ground for refusing to recognise his appointment was specifically said to confirm that the validity and finality of the Appointment Orders remained in dispute (paragraph 211 of PO6).

109. In these circumstances, I think that India was correct to submit that the determinations by the Tribunal that public policy pointed against the recognition of Mr Thacoor being recognised as the Mauritian Companies' representative in the Arbitration was not treated by it as necessary to the final decision it reached in PO6 (see the discussion by Clarke LJ in *The Good Challenger* at [65] to [72] and in particular his conclusion of the correct approach at [72]). It was simply a finding which was treated by the Tribunal as no more than additional to or confirmatory of a conclusion that it would in any event have reached.
110. I also consider that any public policy issues which may arise for the English court in deciding the question of consent on the Section 45 Application are questions of English law and English public policy, while the public policy questions with which the Tribunal was concerned arose by reference to what is described as "the standards of international law, the 1976 UNCITRAL Rules, [and] the ToA" as well as the 1996 Act and the English conflict of laws rules. These different public policies may have much in common, but the very fact that the source is different points against any form of issue estoppel arising out of the impact which PO6 (and PO7) may have on the current question; viz. whether English public policy considerations tell against the acceptance by the English court of Mr Thacoor's authority to reach an agreement under section 45(2)(a) on behalf of the Mauritian Companies. As Rix LJ said in *Yukos* at [155], "the English court will make up its own mind according to its own concept of public order, not that of some other state".
111. In these circumstances, the rulings made by PO6 and PO7 do not themselves mean that the consent of the Interveners is required before the Mauritian Companies can be held to have agreed to the making of the Section 45 Application. In the present case, it is a matter for this court to determine whether the Mauritian Companies have given their agreement. As I have explained, the starting point is that English law will look to the law of Mauritius to determine the extent of Mr Thacoor's authority to agree, although whether that is the correct answer in the present case is not a question which the determination of Issue 1 of itself resolves.

Issues 2 and 3: the parties' submissions

112. The essence of Issue 2 is whether the Section 45 Application amounts to a challenge to PO6 and, if so, whether it is impermissible on the basis that the court is not empowered to intervene in, revisit or overturn procedural orders during the course of an arbitration (whether or not based on or dealing with questions of English law). Many of the questions which arise on Issue 2 are also relevant to Issue 3, which asks whether section 45 is limited to prospective questions of law or whether it also extends to questions which have already been decided by the arbitral tribunal with binding effect on the parties. It is convenient to consider them together.

113. By way of introduction to their submissions on both Issues 2 and 3, the Interveners stressed the rarity of applications under section 45, and said that, when construing section 45, it was necessary for the court to have in mind the general principles of party autonomy (section 1(b) of the 1996 Act) and the legislative direction given by section 1(c) of the 1996 Act that, in matters governed by Part I, “the court should not intervene except as provided by this Part”. In other words, it is necessary to identify a specific legislative power to act as the foundation for the relief the court is asked to grant. This was, they submitted, a reflection of criticisms which had been made of excessive court intervention in preceding English arbitration legislation. As Lord Steyn said in *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43; [2006] 1 AC 221 (“Lesotho”) at [26]: “A major purpose of the new Act was to reduce drastically the extent of intervention of courts in the arbitral process”.
114. They also said that section 45 is not just limited by the fact that it does not empower the court to engage in questions of foreign law or international law (a point which also bears on Issue 4). It also does not empower the court to engage in decision-making on the facts and does not empower the court to intervene in, revisit or overturn procedural orders made during the course of an arbitration even where that order deals with questions of English law. In short, as a matter of construction, section 45 does not empower the court to determine a question of law which has already been determined by a procedural order or direction during the course of the arbitration. The only jurisdiction which permits challenges to arbitrators’ decisions on questions of law is section 69 of the 1996 Act and that is limited to questions of law arising out of an award not a procedural order.
115. In support of this submission, the Interveners relied on the judgment of Butcher J in *Uganda*, a case which had some similarities with the present one. There was a dispute as to the validity of the appointment of an insolvency officeholder over the claimant. The tribunal considered whether the arbitration should be stayed and (subsequently) whether the case should be dismissed as the Republic of Uganda sought to argue, because the liquidator had made no positive decision that the arbitration be continued. The relevant procedural order was made after a hearing at which the authority of the claimant’s original controllers to continue to act on its behalf was in issue. By that order the tribunal allowed the arbitration to continue pending any decision by the liquidator (which may or may not be made) to express a view one way or the other on its continuation.
116. The difference between *Uganda* and the present case was that the arbitration claim with which Butcher J was then concerned was brought by the Republic under section 67 of the 1996 Act for the setting aside of the relevant procedural order on the basis that it was an award of the tribunal as to its substantive jurisdiction. The challenge was that it was not an award at all and that the section 67 application therefore failed in limine. In that context, Butcher J said at [44] and [45]:

“44. The court does not have a general power to supervise the conduct of an arbitration prior to award: see *Charles M Willie & Co (Shipping) Ltd v Ocean Laser Shipping Ltd (The Smaro)* [1999] 1 Lloyd’s Rep 225, per Rix J. As it was put by Steyn J in *K/S A/S Bill Biakh v Hyundai Corporation* [1988] 1 Lloyd’s Rep 187 at page 189 col 1:

“In the interests of expedition and finality of arbitration proceedings, it is of the first importance that judicial intrusion in the arbitral process should be kept to a minimum. A judicial power to correct during the course of the reference procedural rulings of an arbitrator which are within his jurisdiction is unknown in advanced arbitration systems ...”

45. Consistently with this, in *Fletamentos Maritimos SA v Effjohn International BV (No 2)* [1997] 2 Lloyd’s Rep 302 Waller LJ said this, at page 306 col 2:

“I have always understood the position to be that there are no circumstances which could give rise to a power to review an interlocutory direction not made in the form of an award. Basically, the position is, as I understand the authorities, that the Court has never had some general power to supervise arbitration and review interlocutory decisions. ...”

117. Butcher J also went on to deal with a subsidiary point on what was called the standing application. This was an application for declaratory relief that the claimant’s former management had no standing to take any action on behalf of the claimant in the section 67 arbitration claim. It was refused on the grounds that the section 67 application itself had failed and that all parties had agreed that the issue of standing could be decided by the tribunal in the first instance.
118. It was therefore said that this court has no power to review PO6. The Interveners sought to bolster this submission by reference to section 34 of the 1996 Act (“section 34”), which provides that: “It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.” It was submitted that this is particularly clear in the case of the Arbitration because of section 3.2 of the ToA (see paragraph 21 above) and the terms of Article 15(1) (see paragraph 22 above).
119. More generally, it was submitted that the extent of the court’s powers under section 45 has to be read in the context of other provisions in the same section of Part I of the 1996 Act (sections 42, 43 and 44) which make clear that, when it comes to the exercise of the court’s powers during the course of an arbitration, the court has a supportive role which involves it in making orders where the tribunal has no power itself or is unable to act effectively. It was said that, absent the applicable conditions, which include in each case a proviso excluding the relevant power where the parties agree otherwise, the court has no jurisdiction to make interim decisions and certainly no power to review, revisit or overrule interim orders which a tribunal has itself made. In short, the part of the 1996 Act in which section 45 appears is all about supporting an arbitral tribunal in the exercise of its powers. It is not about setting aside the orders it has made on the grounds that they are wrong. For that the 1996 Act looks to sections 67, 68 and 69 to the extent they are applicable, not the essentially supportive provisions of section 45.
120. It followed, so the Interveners argued, that it is impossible to reconcile a tribunal’s broad dominion over procedure as set out in section 34 with India’s proposition that section 45 empowers the court to overturn procedural decisions in which questions of law have been decided. They said that India and Mr Thacoor are wrong to argue that they do not seek to challenge PO6, because what is the purpose of the Section 45 Application if not to mount such a challenge? The Interveners submitted that it is

plain that any decision of the English court in the Section 45 Application would be deployed before the Tribunal with a view to undermining the findings it has already made regarding authority.

121. The Interveners also pointed out that section 45 was entitled “Preliminary Point of Law” and that none of the consequential relief available to the court under section 67 of the 1996 Act (challenges to awards relating to a tribunal’s substantive jurisdiction) appears in section 45. Both of these were said to be clear indications that section 45 was only engaged when the point had not already been decided by the tribunal and were therefore prospective in effect.
122. It was also submitted that any retrospective application of section 45 would subvert the letter and spirit of the 1996 Act. The Interveners said that, taken to its logical conclusion, it would open the floodgates to a raft of litigation by which unhappy arbitrating parties sought to challenge legal questions decided in procedural orders. India said that the floodgates argument was fanciful because the conditions in section 45(2) would not be met in most cases, given that an application under section 45 requires the parties’ agreement or the tribunal’s permission. It also said that questions of law are rarely determined in procedural orders.
123. The Interveners anticipated India’s reliance on *The Vasso* [1983] 1 W.L.R. 838 as an example of a case in which the court had granted relief after a procedural order had been made. This case involved a challenge to an arbitrator’s order for inspection of a fire-damaged vessel which was the subject of the arbitration. One of the arguments was that the arbitrator had no power to make such an order, and the matter came before Lloyd J on an application under section 2 of the Arbitration Act 1979 (described by India as the predecessor to section 45) to which the arbitrator had consented. However, there was no objection to Lloyd J’s determination of the point of law on the grounds that it amounted to a retrospective challenge to a procedural order which the arbitrator had already made. Furthermore, when considering the question of whether or not he had jurisdiction to grant relief under section 2, Lloyd J did not consider that retrospectivity might be a bar to his determination of the issue.
124. The Interveners submitted that *The Vasso* did not assist, because the 1996 Act did away with all relevance of prior arbitration precedents. In support of this submission they relied on *Lesotho* at [19], in which Lord Steyn approved a statement by Thomas J in *Seabridge Shipping AB v Orsleff’s Eff’s AS* [1999] 2 Lloyd’s Rep 685, 690 to the effect that it would be a retrograde step if, when a point arose under the 1996 Act, reference had to be made to pre-1996 Act cases. This was part of a broader submission to the effect that the proper approach to construction of section 45 had to take into account the fact that a major purpose of the 1996 Act had been to reduce dramatically the extent of intervention of courts in the arbitral process (*Lesotho* at [26]).
125. India did not dissent from the broader submission in relation to one of the major purposes of the 1996 Act but submitted that there was nothing in the wording of section 45 which limited the court’s power to ruling on prospective questions of law in relation to which the Tribunal had not yet made a decision. It said that the language “any question of law arising in the course of the proceedings” is not restricted to questions of law which the tribunal has not yet decided in an interlocutory order. The phrase “course of the proceedings” simply means at any point before the tribunal

becomes *functus officio* in respect of the relevant claim. Both India and the Defendants submitted that the approach of the Interveners sought to place a gloss on the plain wording of section 45 which does not exist.

126. India also submitted that it would be contrary to the party autonomy reflected in section 1(b) of the 1996 Act for section 45 to be limited to prospective questions. It said that there was no good reason why the parties to an arbitration should not be able to agree to ask the court to address a question which the tribunal has previously addressed. It said that if PO6 had been an award the parties would have been entitled to agree to ask the court to address the issue raised by the Section 45 Application under section 69, and that it would be very odd if they could not do so under section 45 before an award had been made.
127. India also submitted that the Section 45 Application could not properly be characterised as an “impermissible challenge” to PO6 for a number of other reasons. The first, as anticipated by the Interveners, was that any challenge would not be impermissible because it was established by *The Vasso* (at pp.842H-844F) that the court has jurisdiction under section 45 to determine a question of law which has previously been decided by an arbitrator in a procedural order.
128. To similar effect, India relied on the post-1996 Act case of *National Boat Shows Limited v Tameside Marine* (Unrep 1/1/01) in which Judge Michael Kershaw QC (sitting as a High Court Judge) was concerned with, amongst other matters, a certificate from an arbitrator that he would be assisted in the further conduct of the reference by the decision of the court as to certain questions. The judge made a passing reference (at the end of [11]) to the machinery in section 45 for the court to decide matters of law, which he appeared to be doing in the context of a request for assistance on points in respect of which the arbitrator had already ruled.
129. India’s second reason was that there is nothing in the broad wording of section 45 which justifies the Interveners’ argument that a court has no “jurisdiction and/or power” to determine a question of law which has been the subject of a procedural order by the tribunal. The Interveners had identified no authority for the proposition that section 45 is restricted in this way. Indeed, it was submitted that, if all parties to an arbitration have consented to the court determining the question of law, it would be extraordinary if the court had no “jurisdiction/power” simply because the tribunal had already determined the issue in a procedural order.
130. The third reason is that the court deciding the Section 45 Application would not be invited to determine that the Tribunal’s order should be set aside or declared null and void. It was said that there is therefore no question of the court being asked to review the decision of the Tribunal made in PO6. Instead, the court will be asked to have the question determined so that the Tribunal will be informed of the correct approach to identifying the law governing the issue of whether Mr Thacoor has authority to act for the Mauritian Companies in the Arbitration going forward. India submitted that, if the question is answered in India’s favour, PO6 will remain unaffected unless and until the Tribunal reconsiders it, which it will be entitled to do because it is a procedural order, not an award: see the passage from *Process & Industrial Developments* referred to in paragraphs 82 and 105 above.

131. It was also said that the real nature of the Interveners' submission was not one based on the fact that the English court lacked jurisdiction or power. Rather it amounted to a submission that the court should exercise its residual discretion not to entertain the Section 45 Application or to dismiss it as an abuse of process, both of which were arguments requiring a holistic factual assessment. Any such exercise does not arise for determination at this hearing.
132. India's final reason for contending that it is not mounting an impermissible challenge to PO6 is that, although a procedural ruling of an arbitrator cannot be reviewed by a court (see the passage from the *Uganda* case set out in paragraph 116 above), this simply means that a court cannot review an arbitral decision which is not an award. *Uganda* was a case in which the court was asked to set aside a procedural order under section 67 of the 1996 Act. The court declined to do so because the order was not an award; sections 67 to 69 of the 1996 Act only apply to awards and there is no power at common law to review a decision which is not an award.
133. That is not what the court is being asked to do in the present case and is why the decision in *Uganda* is irrelevant. It does not follow from what was said in *Uganda* that the court has no jurisdiction or power to entertain an application under section 45 concerning a question which, if decided in the applicant's favour, would imply that an arbitrator's reasoning in a previous procedural order was incorrect in some if not all respects. The reason for that is that section 45 is not a procedure for reviewing arbitral decisions but is simply a speedy procedure designed to interrupt the arbitration to the minimum possible extent which is an exception to the general rule that courts do not intervene in the course of an arbitration.
134. A similar point was made by the Defendants, who submitted that the correct analysis of the position was reflected in Russell on Arbitration (24th edn) at 7-173 in which the editors identify questions of law on points of procedure which arise in the course of the reference as the types of question for which an application under section 45 might be appropriate. They contrasted this with the exercise of a discretion to make or refuse to make an order as an example of the types of decision which are not open to challenge under section 45. This is said to illustrate the key point, which is whether the Section 45 Application raises a question of law as opposed to a procedural discretion.
135. Indeed, this was said to be made clear by the passage from *The Oltenia* [1982] 1 WLR 871 at 882D-E (per Donaldson LJ) cited with approval in the context of section 45 in *Taylor Woodrow* at [56] (per Jackson J):

“The use of the word ‘may’ in the first line of section 45 is a clear indication that the court has a discretion. Further guidance is to be obtained from the Court of Appeal's decision in *Babanaft International Co. SA v Avant Petroleum Inc* [1982] 1 WLR 871. *Babanaft* concerned an application to the High Court to determine a question of law arising in the course of a reference pursuant to section 2 of the Arbitration Act 1979. At page 882 Donaldson LJ said this:

“The judge has to consider the application on its inherent merits. If he is not satisfied that the question of law proposed for determination ought to be determined at that stage he should refuse the application...

“Section 2 is the successor in title to the old consultative case which more aptly describes its nature. Put colloquially the arbitrator or the parties nip down the road to pick the brains of one of Her Majesty's judges and, thus enlightened, resume the arbitration. It is essentially a speedy procedure designed to interrupt the arbitration to the minimum possible extent and it is an exception to the general rule that the courts do not intervene in the course of an arbitration”.

Although much has changed in the law of arbitration since *Babanaft* was decided, in my view the passage just quoted from the judgment of Donaldson LJ is apposite to section 45 of the Arbitration Act 1996.”

Issues 2 and 3: conclusions

136. The question of law which the court is asked to consider in the substantive Section 45 Application is whether the Tribunal, seated as it is in England, is required to apply Mauritian law and only Mauritian law to determine who has authority to act on behalf of the Mauritian Companies in the Arbitration. Issues 2 and 3 are whether, looked at as a matter of jurisdiction, asking that question is an impermissible challenge to PO6, and whether the court has any jurisdiction to answer it in circumstances in which it has already been decided by the Tribunal with binding effect on the parties.
137. The starting point is that India's question is properly to be characterised as “arising in the course of the proceedings” because it has arisen during the course of the Arbitration and is related to it and is a question which “substantially affects the rights of one or more of the parties”. It seems to me that it does because it affects the significant issue of who is entitled to be heard by the Tribunal as representing in the Arbitration the corporate entities that are the Mauritian Companies. It is also a legal question and, subject to the kinds of question with which Issue 4 is concerned, is therefore capable of being a question of law within the meaning of section 45(1).
138. I also do not consider that there is anything in the language of section 45(1), which restricts the court's jurisdiction to circumstances in which the Tribunal has not given some form of ruling on the issue. Subject to what I say below, I also think that there is force in India's submission that the principle of party autonomy reflected in section 1(b) of the 1996 Act means that it would be strange if the parties could not agree to the court granting relief under section 45 in order to assist the arbitrators in their task, merely because they had already reached a procedural determination which binds the parties, but only unless and until varied or set aside.
139. Bearing in mind that the heading is there to serve as a brief guide to the contents of the section, I agree that the part of the 1996 Act in which section 45 appears and its heading “Determination of preliminary point of law” gives support to the submission that section 45 is focused on a stage in the arbitral process which occurs before an award, or in any event before the arbitrators have concluded their task. The drafter seems to have contemplated that the circumstances in which it will be invoked are anterior to those contemplated by sections 66 to 71 of the 1996 Act, which are concerned with what occurs after an award has been made.

140. However, I do not think that this indicates that the court's power or jurisdiction under section 45 was intended to be further limited, whether by reference to the issue to which the point of law might go or the stage in the arbitration at which an answer is sought. The concept of a point of law being preliminary is to distinguish the context in which section 45 applies from the context in which section 69 applies, viz. where a party seeks to appeal to the court on a question of law arising out of an award.
141. This is consistent with the fact that section 45 is contained within that part of the 1996 Act which is concerned with relief designed to support the arbitration rather than to challenge decisions made by the tribunal but makes no provision for the court to grant consequential relief such as that provided for by sections 67(3), 68(3) and 69(7) of the 1996 Act. The absence of any such provision points to a legislative intent that, having answered the question of law, the court's role under section 45 is over and it is then a matter for the tribunal to determine how to proceed in the light of the answer. I consider this to be a clear indication that, while section 45 may be said to have no utility or purpose once the tribunal has made an award which determines the point to which the question goes, there is no reason why that should be the case where the tribunal has made a procedural order and it still remains open to it to change its view on how to proceed with the arbitration going forward, whether based on a change of circumstance or otherwise.
142. I also agree that *Uganda*, and the authorities considered and applied by Butcher J in *Uganda*, establish that the court does not have a general power to supervise the process of an arbitration by reviewing and correcting procedural rulings. This is not just because section 45 makes no provision for that to occur but is also consistent with the provisions of section 34, which provides that, subject to the right of the parties to agree any matter, it is for the tribunal to decide all procedural and evidential matters.
143. Of course, it may be the case that a tribunal's procedural failings are called into question by a challenge to an award based on section 68 of the 1996 Act where an award has already been made and there has been a serious irregularity affecting the tribunal. But it does not apply where that stage has not been reached and the party's complaint relates to a procedural order which is not an award. I agree that, in that context, there is no basis on which the court can intervene to correct a procedural order that has already been made.
144. The Interveners made play of the fact that it was obvious that India would deploy any decision of the court in the Section 45 Application before the Tribunal in order to undermine the findings on authority which the Tribunal had already made. It followed that the court should reject India's suggestion that the Section 45 Application should not be treated as an attempt to obtain relief which challenged PO6 and PO7, which was something that *Uganda* confirmed that the court had no power to do.
145. I agree that it appears to be India's intention to use any section 45 determination as to English law in support of an application to the Tribunal to revisit PO6 and PO7, because, as the Interveners pointed out, there could be no other reason for India to have issued the Section 45 Application. However, India has eschewed any intention to invite the court itself to review the decisions made in PO6 and PO7 and to that extent the Section 45 Application is not a challenge to those procedural orders. Even if that had not been India's position, the Section 45 Application could not have

achieved that result. PO6 and PO7 will remain effective procedural orders unless and until the Tribunal reconsiders them.

146. In conclusion on Issues 2 and 3, I do not consider that the floodgates argument advanced by the Interveners has any real substance. I agree with India that the conditions in section 45(2) would not be met in most cases, given that an application under section 45 requires the parties' agreement or the tribunal's permission. As the Defendants also submitted, the narrow circumstances in which section 45 can be invoked are the reason why it is unnecessary and inappropriate to superimpose additional limits.
147. It is also of importance that section 45 is restricted to questions of English law. There can be no question of it being used for any broader supervisory purpose relating to findings of fact or the exercise of a tribunal's discretion or in any circumstance in which the parties' agreement or the tribunals permission has not been obtained.
148. It follows from this that I do not agree that the court has no jurisdiction or power to grant the relief under section 45 for the reasons identified in the formulation of Issues 2 and 3. In my view, as a matter of pure jurisdiction, the court has power to determine the point of English law identified in the Section 45 Application, which bears as it does on a procedural order which is not an award, even though that order stands as binding on the parties until reviewed or set aside by the Tribunal. For all of these reasons the answer to both Issue 2 and Issue 3 is no.
149. It may be that, at any hearing of the Section 45 Application, the court will take the view that, as a matter of discretion, it should not grant India any relief or it may be that the relief sought by India is not found by the court to be a complete or accurate reflection of English law. That may be because the court is not satisfied that it is appropriate relief for the court to grant, given the supporting function which is contemplated by the jurisdiction, or it may be for some other reason. However, in my view, the fact that PO6 and PO7 have been determined in the way that they have does not prevent India from submitting at that hearing (as Mr Green did in his oral submissions and Mr Hope did in his skeleton argument) that it is sensible that the Tribunal be given the opportunity to avoid the possibility of a subsequent challenge under section 68 or section 69 by seeing the answer of the English court to that question of English law.

Issue 4: the parties' submissions

150. The fourth and final issue is whether section 45 is ousted because the parties have not agreed to the application of substantive English law (or English conflicts of laws), but have instead agreed to the application of international law as the substantive governing law, and have agreed to the Tribunal having discretion as to the conflict of law rules to be applied pursuant to section 46(3) of the 1996 Act ("section 46(3)") and Article 33, so that the question raised by the Section 45 Application does not fall within its scope and the court has no jurisdiction and/or power to address it.
151. It is not in issue that section 45 only authorises the court to determine a question of English law (see the definition in section 82(1)). The Interveners' starting point was

that the Section 45 Application does not involve a question of English law because, even though the seat of the Arbitration was in England, the Tribunal was not mandated to apply English conflict of laws rules but was granted a discretion and chose not to do so. In those circumstances, the fact that the parties' choice of seat was London does not give the answer.

152. In particular, the Interveners relied again on section 34 (see paragraph 118 above) and Article 15(1) (see paragraph 22 above), both of which give the Tribunal a very broad discretion over procedure, and which are further reinforced by section 3.2 of the ToA (see paragraph 21 above). They also relied on Article 33(1) (see paragraph 23 above) and section 46(3). The whole of section 46 provides as follows:

“46 Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute –

(a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or

(b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.

(2) For this purpose, the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules.

(3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”

153. It was the Interveners' case that the Tribunal was therefore correct to find (as it did in paragraphs 140 to 143 of PO6) that international law as the law governing the BIT governed the parties' substantive rights but beyond that the Tribunal had discretion as to what rules to apply. This was permissible because English law was not chosen and was only considered as a guide in PO6.

154. They went on to say that, even in the context of substantive law, a tribunal seated in London and applying the 1976 UNCITRAL Rules is not bound to apply English conflict of laws provisions but has a discretion. The designation of a London seat only means that Part I of the 1996 Act applies (in so far as its provisions are not excluded), but this does not mean that, where the 1996 Act is silent or affords a discretion to tribunals (or the court), the rules that would be applicable in English litigation should be interposed. To the contrary, a key purpose and effect of the 1996 Act was to do away with any such suggestion.

155. In support of this submission the Interveners referred to two texts. The first was Born, International Commercial Arbitration (Kluwer, 3rd edn, updated to February 2024 at 19.03(B)[1]) in which the editors said:

“ ... virtually all developed jurisdictions have abandoned this approach to the choice of substantive law in international arbitration. The view that international arbitral tribunals are assimilated to national courts, and mandatorily required to

apply the same conflict of laws rules as national judges, has been almost universally rejected as contrary to the basic premises of international arbitration, as well as the parties' intentions.

156. The second was a passage from Merkin and Flannery on the Arbitration Act 1996 (6th edn) at p.378 in which the editors said that:
- “The basic effect of section 34 is that it is not possible to attack arbitration awards on the basis that judicial rules of evidence and procedure have not been followed. This is, however, subject to the general principles in section 33 that the arbitrators are to act impartially, to allow each party to put his case and to adopt a procedure suitable to the circumstances of the case. Whatever procedure is agreed upon must, therefore, be impartial, fair and appropriate. Subject to that, the arbitrators are, in default of agreement between the parties, given almost total autonomy.”
157. They concluded their submissions by contending that there was nothing in the law and rules applicable to the BIT-2 Arbitration that obliged the Tribunal to apply English conflicts rules to questions such as the representative authority of those appearing before it. It therefore followed that there was no question of English law to be determined and section 45 would not therefore be engaged even if the question had not already been disposed of by the Tribunal in PO6.
158. India submitted that it was important to concentrate more closely on the question directed to be determined which was whether section 45 is ousted because the parties have not agreed to the application of substantive English law. Issue 4 posits that this is because the parties have agreed (a) to the application of international law as the substantive governing law and (b) to the Tribunal having discretion as to the conflict of laws rules to be applied pursuant to section 46(3) and Article 33.
159. It submitted that there was no ouster of section 45 for a number of reasons. The first was that the mere fact that the parties have agreed that the substantive claims in the Arbitration are governed by international law as the *lex causae* does not have any logical consequence on the application of section 45 or indeed any other English law issue that arises as a result of the Arbitration having its seat in England. The decision of Sir Ross Cranston in *Union of India v Reliance Industries Ltd* [2022] EWHC 1407 (Comm); [2022] 2 Lloyd's Rep 201 (“*Reliance Industries*”) at [59]-[60] was cited as a case in which Indian law was the *lex causae* but the application of the *Henderson v Henderson* principle was a matter of procedure to which English law (as the law of the seat) was to be applied.
160. Secondly India said that section 46(3) could not possibly serve to oust section 45 as they were both provisions in the same Act, but that in any event section 46 was concerned with the law applicable to the substance of the dispute. It provides that where the parties have expressed no choice as to the substantive law, then that substantive law will be determined by the conflict of laws rules which the tribunal considers applicable. It does not make provision for the law regulating procedural matters or the conflicts of law rules that apply to determine procedural matters; nor does it confer on a tribunal an unfettered discretion to apply whatever conflicts rules it wishes to questions of procedure. It was said that, as the question of law raised by the Section 45 Application plainly relates to a procedural issue, any argument based on

section 46(3) does not assist the Interveners. India made the same argument in relation to Article 33 (the terms of which are set out in paragraph 23 above).

161. India's next linked reason was that it is well established that an English-seated tribunal is required to apply English private international law to identify the law which governs issues that do not relate to the substance of the dispute. As explained in Dicey at para 16-045, this can be traced back to the fact that, before the enactment of the 1996 Act, an English-seated tribunal was required to apply English private international law to all conflict of laws issues whether substantive or otherwise. This was changed by section 46 in relation to the law applicable to the merits (with which Article 33 is also concerned) but, as no change was made to non-substantive issues, the pre-1996 Act position remains unchanged. An English-seated tribunal is required to apply English conflict of laws rules to determine the law governing those issues, including the question of law identified in the Section 45 Application, which is a non-substantive issue relating to party representation.
162. India submitted that this analysis was confirmed by the reasoning of Sir Ross Cranston in *Reliance Industries*, to which I have already referred. This was a section 69 appeal arising out of an award made in an English-seated arbitration to which the 1976 UNCITRAL Rules applied. It was said that the judgment necessarily involved a conclusion that section 46(3) did not apply to choice of law determinations on issues that did not concern the substance of the dispute, because otherwise he would have concluded that the tribunal in that case was not required to apply English law rules on abuse of process. Instead, his conclusion accepted that the tribunal was required to recognise the distinction between substance and procedure and apply the law of the seat to matters of procedure.
163. India also submitted that section 34 did not change the analysis because it simply provided that it is for the tribunal to decide all procedural and evidential matters but does not speak to the law the tribunal should apply to decide them. Likewise, Article 15(1) simply states that the tribunal may conduct the arbitration in such manner as it considers appropriate, a formulation which does not address the law choice of law rules it should apply. It was submitted that if the drafters of the 1976 UNCITRAL Rules intended to confer on the arbitrators a similar discretion to that granted by Article 33 they would have made express provision for it and would not have limited Article 33 to the substance of the dispute.
164. As to section 3.2 of the ToA, India pointed out that it was not mentioned in the wording of Issue 4 and is irrelevant because it only applies to procedural matters which are not addressed by the 1976 UNCITRAL Rules, but the question of representation is already addressed by Article 4. It was also said that section 3.2 does not address what conflict of laws rules the tribunal is to apply.
165. The Defendants took a slightly different approach to Issue 4. They submitted that section 45 simply requires there to be a question of English law to be determined, which does not mean that a legal question ceases to be a question of English law (as defined by section 82(1)) simply because other systems of law, whether international law or Mauritian law are also engaged. They said that it is clear that the Tribunal applied English law as one of what they called the controlling legal systems to determine the representation issue and they identified a number of parts of the reasoning in PO6 in which this was done, both by reference to the effect of foreign

insolvency measures on proceedings seated in England and the rules in Dicey 193 and its public policy limitations. It was said that it is therefore impossible to characterise PO6 as an exercise of procedural discretion divorced from English law.

Issue 4: conclusions

166. Issue 4 can be distilled as follows. It raises the question of whether the Section 45 Application falls outside the scope of the jurisdiction on which it seeks to rely on the grounds that section 45 has been ousted because (a) the substantive law to which the parties have agreed is international law, not English law, and (b) the parties have agreed to the Tribunal having discretion as to the conflicts rules to be applied pursuant to section 46(3) and Article 33.
167. As to the first aspect of the question, I agree with India that the fact that the parties have fixed on international law as the substantive governing law of the Arbitration, does not of itself operate to oust the application of section 45. Whether or not that is the case in relation to the use of the court's power to determine a question of substantive law, is in my view not relevant. As the agreement of the parties to which Issue 4 refers is limited to the substance of the dispute, I do not see how that agreement can of itself oust section 45 in relation to any question of law which arises (admittedly unusually) on a question of procedure rather than one relating to the merits.
168. Much the same can be said in relation to section 46(3) (see paragraph 152 above) and Article 33 (see paragraph 23 above). The language of section 46(3) is concerned with the substance of the dispute. It gives flexibility to a tribunal to apply such conflict of laws rules as it considers applicable to determine the law to be applied to the substance of the dispute where the parties have not chosen the law themselves. It says nothing about the laws or other rules to be applied by a tribunal in relation to matters of procedure. In my view the language of Article 33 is to the same effect.
169. I agree with India that Sir Ross Cranston's decision in *Reliance Industries* is of assistance on Issue 4. In that case, the rules governing the arbitration were the UNCITRAL Rules and the governing law of the relevant agreements was Indian law, which was therefore applicable to the substance of the dispute. England was the seat of the arbitration and there was an appeal to the court under section 69, which, like an application to the court under section 45, is concerned with a "question of law" as defined by section 82(1) (i.e., a question of the law of England and Wales) albeit one which arises out of an award rather than one arising in the course of the proceedings. The appeal was dismissed because the tribunal was held not to have been wrong in applying the English law principles of *res judicata* and *Henderson v Henderson* abuse of process as a complete answer to an argument advanced by the claimant.
170. In his analysis of the arguments, Sir Ross Cranston confirmed at [53] that "procedural matters are ordinarily determined according to the law of the seat of the arbitration (as we have seen, English law), regardless of the governing law of the contract". He then held, applying the judgment of Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160, that application of the *Henderson v Henderson* principle was a procedural power rather than a matter of

substantive law (at [58]), that it applied in arbitrations and that in his view there could be no question about the correctness of the tribunal's approach (see at [64]).

171. The significance of this decision is that it confirms that, whatever the substantive law of an English-seated UNCITRAL arbitration, questions of law arising out of the award which are procedural are a matter for the law of the seat. There does not seem to me to any logical reason why a different approach should be taken where, instead of the question of law arising out of the award in the context of section 69, it is a question of law which arises in the course of the arbitration proceedings in the context of section 45.
172. I also agree with India that the Interveners' reliance on section 34 (see paragraph 118 above) and Article 15(1) (see paragraph 22 above) begs the question. It is of course the case that section 34 gives to the Tribunal the entitlement to decide all procedural and evidential matters. However, section 34 makes no reference to the law which governs the principles by which those decisions are to be made. It seems to me that the discretion which is granted to the tribunal to decide all procedural and evidential matters must operate within a legal structure and that, in the absence of provision to the contrary (and there is none), where the question arises other than on the substance of the dispute, it is the general principle identified in Dicey Rule 65(2) applies and the law of the seat will govern the arbitral proceedings.
173. I have reached much the same conclusion in relation to Article 15(1). This gives the Tribunal a wide discretion to conduct the Arbitration in such manner as it considers appropriate, subject to provisos relating to equality of treatment and the giving to each party a full opportunity to present their case. However, that does not of itself oust section 45 on the grounds that the issue which arises in the Section 45 Application is not one of English law. In the same way that in *Reliance Industries*, Sir Ross Cranston held that the tribunal was required to apply the non-substantive *Henderson v Henderson* principles in an arbitration conducted under the 1976 UNCITRAL Rules, so the non-substantive question of party representation is also a matter of procedure in respect of which the court's jurisdiction under section 45 is not ousted by Article 15(1).
174. It follows that I consider that the answer to Issue 4 is no, in large part for the reasons advanced by India. In reaching that conclusion without expressing any view on the validity of the arguments advanced by the Defendants, I should not be taken to have expressed a view one way or the other on the merits of the points which they made. However, I take the view that the question of whether the court can exercise its jurisdiction under section 45 where the Tribunal has taken account of English law in reaching a conclusion, but has also had regard to principles derived from other laws, is a question which falls outside the parameters of Issue 4. It is not therefore one on which it is appropriate for me to express a view.