Neutral Citation Number: [2015] EWHC 2126 (Comm)

Case No: 2014 Folio 1391

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/07/2015

Before :

THE HON. MRS JUSTICE CARR DBE

- -

Between :

C **Claimant**

-and –

(1) D1
(2) D2
(3) D3

Defendants

- -
- -

Mr David Wolfson Q.C. and Mr Simon Gilson (instructed by **Hogan Lovells International LLP**) for the **Claimant**
Mr Toby Landau Q.C. and Mr Siddharth Dhar (instructed by **Stephenson Harwood LLP**) for the **Defendants**

Hearing dates: 29th and 30th June 2015

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HON. MRS JUSTICE CARR DBE

The Hon. Mrs Justice Carr DBE :

A. Introduction

1. This is a claim by the Claimant, C, challenging certain findings in a Partial Award dated 21st October 2014 ("the Award") under s.67 and/or 68 of the Arbitration Act 1996 ("the 1996 Act").

2. The Award was delivered in the context of a hearing of preliminary issues in arbitral proceedings brought by C against D1 and D2 relating to debt and guarantee claims under three English law contracts with LCIA London arbitration clauses. The arbitral panel consisted of Mr Thomas Webster (President), Mr Anthony Boswood QC and Professor Julian Lew QC (together "the Tribunal").

3. The Tribunal made five findings, of which two are under challenge. Those two are majority findings (Mr Boswood QC dissenting), as follows:

   a) that the Tribunal had jurisdiction over disputes concerning breaches of a Production Sharing Contract ("the PSC") (see paragraph 241(1) of the Award); and

   b) that the Tribunal had jurisdiction to join D3 to the arbitration without the consent of all existing parties (see paragraph 241(3) of the Award).

4. C challenges paragraph 241(1) of the Award under s.67 of the 1996 Act and paragraph 241(3) of the Award under s.67, and in the alternative s.68 of the 1996 Act. It seeks orders varying and/or setting aside those parts of the Award.

B. The 1996 Act

5. Sections 67 and 68 of the 1996 Act provide materially as follows :

> "*67(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court -*
>
> *(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.*
>
> *A party may lose the right to object (see s.73) and the right to apply is subject to the restrictions in s.70(2) and (3)…*
>
> *(3) On an application under this section…the court may by order –*
>
> *a) confirm the award,*
> *b) vary the award, or*
> *c) set aside the award in whole or in part…*
>
> *68(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity*

affecting the tribunal, the proceedings or the award. A party may lose the right to object (see s.73)…

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant-

b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction : see s.67)…"

6. Section 73 of the 1996 Act provides materially as follows :

"*73(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection-*

a) that the tribunal lacks substantive jurisdiction,

b) that the proceedings have been improperly conducted,

c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or

d) that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

(2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling-

a) by any available arbitral process of appeal or review, or

b) by challenging the award,

does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling."

7. By s.70(3) of the 1996 Act any application or appeal must be brought within 28 days of the date of the award.

8. The 1996 Act introduced radical changes to English arbitration law, as Lord Mustill and Stewart Boyd QC put it in the preface to *Commercial Arbitration : 2001 Companion Volume to the Second Edition*, giving it "*an entirely new face, a new policy and new foundations*". As Lord Steyn commented in *Lesotho Development v Impregilo SpA* [2006] 1 AC 221 ("*Lesotho*") (at paragraph 18), the ethos of the 1996 Act is to give to the court only those essential powers which it should have, namely to render assistance when arbitrators cannot act in the way of enforcement or procedural steps, or alternatively in the direction of correcting very fundamental errors. Arbitration, as far as possible, and subject to statutory guidelines, should be regarded as a freestanding system, free to settle its own procedure and it own substantive law. A major legislative purpose of the 1996 Act was "*to reduce drastically the extent of intervention of courts in the arbitral purpose*" (see paragraph 26) and to promote "*one-stop adjudication*" (see paragraph 34).

C. <u>An overview of the facts and relevant contractual instruments</u>

9. C is a Nigerian incorporated subsidiary of Z. Its ultimate parent company is an oil and gas major. D1 and D3 are affiliated companies, both incorporated in Nigeria, engaged in the exploration, drilling and production of crude oil. D2 is a company incorporated in the Cayman Islands and is the ultimate parent company of D1 and D3.

10. On 3rd June 1992 D1 was awarded an oil prospecting licence for block X ("Licence 1") offshore Nigeria by the Nigerian government. On 30th September 1992 D1 assigned a 2.5% participating interest to D3. From 1992 D1 and D3 undertook the exploration of Licence 1.

11. On 28th August 2002 Licence 1 was converted into two oil mining leases ("Lease 1" and "Lease 2", together "the Leases"). These leases relate to oil mining blocks located offshore Nigeria and are for a 20-year term commencing February 2001. The main producing asset was a deep-water oilfield.

12. In 2005, following the departure of the previous operator some years before, D1 and D3 sought a new operator to continue exploration of the Leases.

<u>The PSC</u>

13. On 22nd July 2005 D1, D3 and C entered into the PSC in respect of the Leases. The PSC set out the principal terms of the joint petroleum operations. C was appointed Operating Contractor of the Leases for a term of 20 years and received a 40% participating interest in the Leases. The majority 60% interest was retained by D1 (57.5%) and D3 (2.5%).

14. Article 7 set out the rights and obligations of the parties. Article 7.1 provided :

> "*In accordance with this Contract, [C] shall :*
>
> *a) prepare Work Programmes and Budgets and carry out approved Work Programmes in accordance with*

> *internationally acceptable petroleum industry practices and standards with the objective of avoiding waste and obtaining maximum ultimate recovery of Crude Oil at minimum costs;…*"

It is alleged breaches of Article 7 that found the counterclaims brought by D1 and D3 referred to below.

15. The PSC was governed by Nigerian law. Article 20 provided :

> "*This Contract shall be governed by and construed in accordance with the Laws of the Federation of Nigeria.*"

16. There is a dominant Nigerian flavour to the contractual relationship. Thus, for example, there was a preference to be given to the employment of Nigerian citizens (see Article 7.1(g)), preference to be given to the use of goods available in Nigeria and of services that could be rendered by Nigerian nationals (see Article 7.1(h)). All insurance policies that C was obliged to procure under Article 15 were to be "*taken out in the Nigerian insurance market*" where possible (see Article 15.4).

17. Article 23 then contained an arbitration agreement in the following terms:

> "*23.2 If a difference or dispute arises between the Parties, concerning the interpretation or performance of this Contract, and if the Parties fail to settle such difference or dispute by amicable agreement, then any Party may serve on the other a demand for arbitration.*
>
> *23.3 Within thirty (30) days of such demand being served, each of [D1 and D3] and [C] shall appoint an arbitrator and the two arbitrators thus appointed shall within a further thirty (30) days appoint a third arbitrator. If the arbitrators do not agree on the appointment of such third arbitrator, or if either [D1 and D3] or [C] fails to appoint the arbitrator to be appointed by it, such arbitrator or third arbitrator shall be appointed by the President of the Court of Arbitration of the International Chamber of Commerce (ICC) in Paris on the application of any other Party (notice of the intention to apply having been duly given in writing by the applicant Party to the other Parties). The third arbitrator when appointed shall convene meetings of the arbitration panel and act as chairman. If an arbitrator refuses or neglects to act or is incapable of acting or dies, a new arbitrator shall be appointed in his place and the above provisions of appointing arbitrators shall govern the appointment of such new arbitrator or arbitrators.*
>
> *23.4 The arbitration award shall be binding upon the Parties. The Nigerian Arbitration and Conciliation Act Cap 19, laws of the Federation of Nigeria, 1990 shall apply to this Contract and the judgment upon the award rendered by the arbitrators*

may be entered in a court having jurisdiction thereof. Each Party shall pay its own attorney's fees and costs.
+
23.5 The venue of the arbitration shall be Paris. The arbitration shall be conducted in the English language."

Article 25 contained an "entire agreement clause".

18. By Article 18.7, Articles 20 and 23 were to survive termination of the PSC:

> "*Notwithstanding termination of this Agreement, the Parties shall remain bound by the indemnity provisions of Articles 7.3(b), 22(d) and 22(f), as well as the provisions of Articles 20 and 23*."

19. On 7th April 2010 and 15th February 2011 D1 and D3 novated to Y the beneficial ownership of their respective interests in and all rights and obligations under the PSC.

The SPA

20. In late 2011, having decided to end the joint petroleum operations, C and D1 entered into a Sale and Purchase Agreement dated 29th December 2011 ("the SPA"). Under the SPA, C would relinquish its role as Operating Contractor under the PSC and return its 40% participating interest to D1.

21. Clause 2.1 of the SPA provided that, subject to various conditions, C as Seller should sell to and novate in favour of D1 as Purchaser and D1 should purchase the "*Transferred Interests*". These were defined as follows :

> "***Transferred Interests*** *means the undivided legal and beneficial interests of the Seller in the following, to be purchased by the Purchaser under this Agreement and more particularly described in Schedule 1 (Transferred Interests):*
>
> *(a) a 40% undivided participating interest in [Lease 1];*
>
> *(b) a 40% undivided participating interest in the [Lease 2]; and*
>
> *(c) all of the Seller'[s] rights, interests, duties, liabilities and obligations under the PSC or deriving therefrom, and the Joint Property, including for the avoidance of doubt all of C's rights, interests, liabilities and obligations as Contractor, as Operating Contractor and as one of the entities referred to collectively as the First Party (as such terms are defined in the PSC):*
>
> *(i) all of Seller's rights and interests to Cost Oil relating to the Joint Property to which Seller*

might be entitled thereto and any other rights arising out of, or in relation to, Operating Costs relating to the Joint Property incurred by Seller, including to the maximum extent allowed under applicable law, the use of such Operating Costs to offset revenue for purposes of determining Petroleum Profits Tax, subject to any applicable Nigerian tax authorities approval."

22. Schedule 1 set out the Leases and the PSC.

23. By Clauses 3.1(c) and 10, completion under the SPA was subject (among other things) to the execution of a Deed of Novation of the PSC which was, according to Schedule 6, to be agreed on or before 10 days after execution of the SPA. In consideration for selling the Transferred Interests, C was to receive US$250m, subject to adjustments, to be paid according to a payment schedule set out in Clause 4.

24. Clauses 9.1 and 9.2 of the SPA provided materially as follows :

"9.1 Until Completion…..

a) the Seller shall not do any of those things described in Part 1 of Schedule 3 … without the prior consent (not to be unreasonably withheld or delayed) of the Purchaser; and

b) *the Seller shall perform all those obligations described in Part 2 of Schedule 3...*

9.2 The Purchaser shall indemnify and hold harmless…the Seller…from and against any and all reasonable losses…which an Indemnified Person may suffer or incur from time to time arising out of or based upon or in connection with, whether directly or indirectly a) the proper performance by the Seller of its obligations described in Part 2 of Schedule 3."

Part 2 of Schedule 3 provided, amongst other things, that C would continue to carry on its activities in accordance with the PSC.

25. By Clause 9.3, Clause 9.1 was, amongst other exceptions, not to apply in respect of "*any act, omission or other matter…pursuant to any work programme and/or budget approved under and in accordance with*" the PSC prior to the Economic Date (referred to below).

26. As the SPA constituted the sale of operating assets relating to the Leases and the PSC, the parties had to agree some form of mechanism for the distribution of benefits and liabilities that had arisen or would arise in relation to those assets. The parties adopted the concept of an "Economic Date", which was selected as 1st September 2011 (i.e. some 4 months before the execution of the SPA on 29th December 2011), in order to allocate such benefits and liabilities. The SPA drew a distinction between those

benefits and those liabilities relating to the Leases and the PSC which were attributable to the period either before or after the Economic Date.

27. Broadly speaking (and with some caveats), the scheme worked as follows: Pre-Economic Date Benefits and Liabilities (as defined) were for C's account; and Post-Economic Date Benefits and Liabilities (as defined) were for D1's account.

28. The SPA defined Pre-Economic Date Benefits as follows:

> "*Pre-Economic Date Benefits means, all income, interests, receipts, rebates, benefits, credits, assets and other value relating to the Transferred Interests and calculated on an Accrual Basis of Accounting, that are attributable to the period up to, but excluding, the Economic Date*."

29. Pursuant to Clause 11.5, C was entitled to claim from D1 any Pre-Economic Date Benefits which D1 had received:

> "*[C] shall be entitled to all Pre-Economic Date Benefits and [D1] shall pay to [C] an amount equal to any Pre-Economic Date Benefits received by [D1] within ten (10) Business Days of receipt, together with interest at the Agreed Rate on that amount for the period from the date of receipt by [D1] up to but excluding the date of actual payment by [D1] to [C]*."

30. A similar arrangement applied in D1's favour in respect of Post-Economic Date Benefits, that is to say benefits relating to the Transferred Interests attributable to the period from the Economic Date forwards.

31. The SPA defined Pre-Economic Date Liabilities as follows:

> "*Pre-Economic Date Liabilities means, all claims, costs, charges, expenses, obligations and liabilities relating to the Transferred Interests, other than all Environmental Liabilities, all Decommissioning Liabilities and calculated on an Accrual Basis of Accounting, that are attributable to the period up to, but excluding, the Economic Date*."

32. Thus, a "claim" related to C's obligations under the PSC, and which was attributable to the period up to the Economic Date, was a Pre-Economic Date Liability. Similarly, an "obligation" of C under the PSC; or an alleged breach of that obligation by C (i.e. a "liability") which was attributable to the period before 1 September 2011, was equally a Pre-Economic Date Liability.

33. By Clause 11, C and D1 exchanged a series of reciprocal indemnities. Clause 11.1 provided :

> *"11. INDEMNITY*
>
> *11.1 Subject to Clause 11.3, [C] shall be liable for all Pre-Economic Date Liabilities and such Post-Economic Date Liabilities that are attributable to the period from*

and after the Economic Date up to including December 31, 2011 (all of which have been already included in the Consideration) with the exception of those which are for the account of [D1] pursuant to Clause 11.2, and shall, on demand by [D1], indemnify [D1], each Affiliate of [D1], their successors and assigns, and their respective directors, officers and employees (each, for the purposes of this Clause 11.1, an Indemnified Person) from and against any and all claims (whether or not successful, compromised or settled), actions, liabilities, demands, proceedings or judgments which may be instituted, made, threatened, alleged, asserted or established (each, for the purposes of this Clause 11.1, an Indemnity Claim) in any jurisdiction against or otherwise involving an Indemnified Person and from all losses, costs, damages, charges or expenses (including legal expenses incurred each, for the purposes of this Clause 11.1, an Expense) which an Indemnified Person may suffer or incur from time to time (including all Expenses incurred in disputing any Indemnity Claim and/or in establishing a right to be indemnified pursuant to this Clause 11.1 and/or in seeking advice regarding any Indemnity Claim or in any way related to or in connection with this indemnity), in any such case arising out of, based upon or in connection with, whether directly or indirectly, the Pre-Economic Date Liabilities, and such Post-Economic Date Liabilities that are attributable to the period from and after the Economic Date up to including [sic] December 31, 2011 (all of which have been already included in the Consideration),with the exception of those which are for the account of [D1] pursuant to Clause 11.2…

11.4 The indemnities in Clauses 11.1, 11.2 and 11.3 shall not apply to the extent that any Indemnity Claim or Expense (as defined in the relevant Clause) is found by a court of competent jurisdiction (not subject to appeal) to have resulted from gross negligence, fraud or wilful default on the part of such Indemnified Person or of any person for whose actions such Indemnified Person is responsible or liable at law."

34. By Clause 11.8 the SPA provided :

"*In the event that there is any dispute as to any amount payable under this clause 11(indemnity) such dispute shall be referred to the independent accountants in accordance with clause 6 (independent accountants).*"

35. Clause 6 provided for the appointment of independent accountants to act as experts and not as arbitrators and for a tight procedural timetable. The costs of the determination, including the fees and expenses of the accountants were to be borne 50/50, and the determination of the accountants (absent manifest error) was to be final and binding on the parties.

36. By Clause 12.18 D1 waived all rights of set-off in respect of its payment obligations under the SPA.

37. Clause 5.8 provided that disputes regarding adjustments to the consideration were, in certain circumstances and subject to certain conditions, to be submitted to expert determination. By Clause 26.2, all other disputes :

> "*…arising out of or in connection with this Agreement including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the London Court of International Arbitration Rules which Rules are deemed to be incorporated by reference into this Clause 26*."

38. Clause 26.3 provided for the number and appointment of arbitrators.

39. Clause 26.4 provided for the seat of arbitration to be London, England.

40. As already indicated, the SPA is governed by English law (see Clause 26.1).

Amendment No. 1 to the SPA, the Guarantees, and the Deed of Novation of the PSC

41. Completion under the SPA occurred on 28th June 2012. On the same day:

> a) an amendment to the SPA was executed, varying in certain respects the conditions for completion;
>
> b) D2 executed three separate company guarantees ("the Guarantees") in favour of C, two of which guaranteed, subject to a financial limit, D1's payment obligations under the SPA; and
>
> c) C, D1, D3 and Y executed a Deed of Novation of the PSC ("the Deed of Novation").

42. The parties to the amendment to the SPA are C and D1. The parties to the Guarantees are C and D2. As a result of certain intra-group transfers in April 2010 and February 2011 of some of D1 and D3's rights and obligations under the PSC to Y, the parties to the Deed of Novation of the PSC are C, D1, D3 and Y.

43. Like the SPA, the Guarantees are governed by English law and contain agreements to submit all disputes to LCIA arbitration in London.

44. Clause 10 of the Deed of Novation provided:

> "10. *This Deed of Novation shall be governed by and construed in accordance with Nigerian law. Any dispute arising out of or in connection with this Deed of Novation, including any question regarding its existence, validity or termination which cannot be amicably resolved between the Parties, shall be settled by arbitration under the provisions of Article23 of the PSC. A dispute shall be deemed to have arisen when a Party notifies the other Party in writing to that effect.*"

As set out above, Article 23 of the PSC provides for *ad hoc* arbitration in Paris.

45. Clause 3 of the Deed of Novation also provided :

> "*3. Nothing contained herein shall prejudice the rights, obligations and liabilities of [C] and [D1] under the SPA or under any other agreement between them in respect of the Transferred Interest. For the avoidance of doubt, the foregoing sentence shall not negate the provisions of sub-clause 2.6 above. Notwithstanding any other provision of this Deed of Novation, to the extent that anything stated in this Deed of Novation is contrary to or inconsistent with the terms of the SPA between [C] and [D1] only, the terms of the SPA shall prevail.*"

D. <u>The arbitral proceedings up to and including the Award</u>

46. By a Request dated 18th September 2013, C commenced LCIA arbitration proceedings against D1 and D2, seeking performance of D1's payment obligations under the SPA and D2's obligations under the Guarantees. C's claims in the arbitration are debt claims against D1 and claims on the Guarantees against D2. As against D1, C relies exclusively on breaches of the SPA, particularly Clause 4; as against D2, C relies exclusively on breaches of the Guarantees. The arbitration proceedings were commenced in reliance on Clause 26 of the SPA and corresponding provisions in the Guarantees.

47. On 24th October 2013, D1 and D2 served a Response to C's claims from all three defendants. D1 and D2 raised certain defences under the SPA. But they also purported to bring counterclaims on behalf of D1 and D3. D1 and D2 claimed a right of set-off against any amounts owing to C. Subsequently, on 13th March 2014, D1 and D2 sought the joinder of D3 to the proceedings.

48. The Defendants' counterclaims fall into the following two categories:

a) D1 and D3 claim damages from C for alleged operational failures whilst C was Operating Contractor of the Leases. These are exclusively claims for breaches of Clause 7 of the PSC ("the PSC Claims").

b) D1 asserts claims under Clause 11.1 of the SPA for indemnities for D1 *and* D3, primarily in respect of losses

allegedly resulting from C's breaches of the PSC ("the D1 Indemnity Claims").

49. D3 has clarified that it does not seek bring any claim in its own right under Clause 11.1 of the SPA for an indemnity from C. As indicated, D2 did not bring a counterclaim, but sought to rely by way of set-off on a claim for damages due to D1 and D3.

50. On 14th March 2014 C issued its Statement of Case, to which the Defendants responded with a Defence and Counterclaim dated 30th May 2014.

51. On 14th July 2014 the parties submitted an agreed list of preliminary issues to the Tribunal, including the following :

> "***ISSUE 1 : JURISDICTION/INTERPRETATION OF CLAUSE 11.1***
>
> *a) Does Clause 26 of the SPA confer jurisdiction on the Tribunal to determine claims arising from alleged breaches by [C] of the terms of the PSC, as asserted by [D1]; and/or (if relevant) as asserted by, or on behalf of, [D3]*
>
> *i) under the PSC; and/or*
>
> *ii) under Clause 11.1 of the SPA?*
>
> *b) Whether on its true construction, Clause 11.1 of the SPA require [C] to indemnify [D1] in respect of alleged damages and losses suffered by [D1] and [D3] as a result of breaches by [C] of the PSC, as asserted by [D1]?*
>
> ***ISSUE 2 : JOINDER***
>
> *a) Is the Tribunal's power to join a third person to the arbitration as a party pursuant to Article 22.1(h) of the LCIA Rules available in the circumstances of this case?*
>
> b) *If that power is available, should the Tribunal exercise it in this case?*"

A hearing on these and other preliminary issues took place on 29th July 2014.

<u>The Award</u>

52. By the Award the Tribunal determined a number of preliminary issues in the arbitration in addition to those identified above. The Tribunal unanimously held that neither D1 nor D2 could rely on a set-off under the SPA or the Guarantees.

53. On the first two issues, however, and as indicated above the Tribunal held (at paragraph 241 of the Award) by a majority as follows:

"*(1) By majority decision, the Tribunal declares that Clause 26 the SPA does confer jurisdiction on the Tribunal to determine claims arising from alleged breaches by the Claimant of the terms of the PSC, as asserted by [D1]; and/or (if relevant) as asserted by, or on behalf of, [D3]*

(a) Under the PSC; and/or

(b) Under Clause 11.1 of the SPA.

(2) By majority decision, the Tribunal declares that Clause 11.1 of the SPA requires the Claimant to indemnify [D1] in respect of Pre-Economic Date Liabilities (including claims with respect to the PSC covered thereby) suffered by [D1] and its Affiliates subject to the limitations and other provisions of the SPA.

(3) By majority decision, the Tribunal decides that it has the power to join [D3] and that it should exercise such power to join [D3] to these proceedings."

54. As already indicated, Mr Boswood QC dissented from the determinations of his colleagues on these issues and issued a full written opinion setting out his reasons for doing so.

E. Steps following the Award

55. On 29th October 2014 the Defendants' solicitors wrote to C's solicitors (copied to the Tribunal) objecting to certain procedural directions set out in paragraphs 45 to 47 of the Award and inviting them to agree to a revised timetable for the determination of all of the remaining disputes before it :

"*In light of the Tribunal's invitations to the parties at paragraph 47 of the Partial Award to confer on procedural issues we write to seek agreement on the next steps in the arbitration.*

Paragraphs 45 to 47 of the Partial Award

1. As explained below the Respondents consider that the procedure contemplated by paragraphs 45 to 47 of the Partial Award is not suitable to the circumstances of this case in that it does not afford the Respondents an adequate opportunity to present their respective defences to [C]'s claims and answer the position that will be put forward by [C] in response to such defences…

7. The Respondents are also concerned that the procedure contemplated by the Tribunal for dealing with [C]'s Adjustment Guarantee claim and [D2]'s defence, will inevitably involve consideration of arguments and potentially decisions that

would have a direct bearing on [D1]'s defence to [C]'s Adjustments Claim. There is a risk that the proposed procedure could result in the summary disposal of issues central to [D1]'s defence of [C]'s claim without allowing [D1] a reasonable opportunity to put its case or answer the case advanced by [C]…

Other procedural issues

11. Thus, the Respondents are concerned that rather than saving time and cost, the bifurcation and summary consideration of [C]'s Guarantee claims will not only result in unfairness but in unnecessary duplication of costs. The Respondents are further concerned that the resolution of the remaining issues in the arbitration including, in particular, [D1] and [D3]'s counterclaims against [C], will also be unnecessarily delayed.

12. We therefore invite your client to agree that the Tribunal should issue a revised procedural order setting out a timetable for the determination of all of the remaining disputes before it…"

56. On 30th October 2014 the Defendants' solicitors wrote to Mr Boswood QC inviting him to resign as arbitrator on the basis that his dissenting opinion revealed that he had prejudged the merits of the underlying counterclaims which were not issues before the Tribunal for determination, at the same time inviting C to consent to such request. By letter dated 2nd November 2014 Mr Boswood QC informed the parties that he did not consider it necessary or appropriate for him to do so.

57. On 31st October 2014 the Defendants' solicitors wrote to the Tribunal asking for a revised timetable as follows :

"*…Nevertheless, in light of the fourteen-day deadline provided for in paragraph 47 of the Partial Award, by this email the Respondents apply to the Tribunal* :

a) Reconsider the procedure set out in paragraphs 45-47 of the Partial Award; and

b) Issue a revised procedural order setting out a timetable for the determination of all remaining disputes before it;

for the reasons set out in our letter to Hogan Lovells and as proposed in it…"

58. C's solicitors responded to the application for a revised timetable by letter on the same day. The letter stated that :

"*...none of the various assertions or alleged and un-particularised "concerns" set out in your letter is accepted…*

> *The Tribunal will, of course, have taken full account of all relevant procedural matters in making its directions as set out at paragraphs 45 to 47 of the Partial Award. Those directions are perfectly clear and we look forward to receiving your clients' written submission within the time period stipulated by the Tribunal…*
>
> *The Tribunal is respectfully invited to dismiss forthwith the applications referred to in your email dated 31 October 2014. "*

59. On 1st November 2014 C's solicitors rejected the request that Mr Boswood QC resign as arbitrator.

60. On 5th November 2014 the Tribunal dismissed the Defendants' application for revised directions, but awarded an additional week for the filing of submissions. It also offered the parties a half day hearing on 8th December 2014.

61. The Defendants' solicitors responded the same day by indicating that they wished to defer a response in relation to a future hearing date. They also sought again a revised timetable for all remaining issues in dispute :

> "*4. In respect of both of [C]'s claims against [D2], the Respondents are concerned that the procedure envisaged by the Tribunal could result in the summary disposal of issues central to [D1]'s defence of [C]'s claims against it without allowing D1 an opportunity to put its case or answer the case made by [C] (because [D2]'s defences will involve a consideration of arguments and conclusions that are relevant to [D1]'s defences to [C]'s claims…*
>
> *6. Finally, in paragraph 12 of our letter dated 29th October 2014 we invited [C's solicitors] to agree to a revised procedural timetable for the determination of <u>all</u> remaining issues in dispute before the Tribunal. By an email of 31 October 2014 we applied to the Tribunal to issue a revised procedural timetable setting out the timetable for the resolution of <u>all</u> remaining issues in dispute before it….*
>
> *7. The Respondents respectfully request that the Tribunal set a timetable for the continuation of the reference…*"

62. On 6th November 2014 the Defendants applied to the LCIA Court for the removal of Mr Boswood QC as arbitrator.

63. On 7th November 2014 C's solicitors confirmed that a hearing on 8th December 2014 as offered would be helpful :

> "*...and will assist the Tribunal in finally disposing of part of the subject matter of this reference.*

For the avoidance of doubt, the Claimant's understanding and clear expectation is that the subject matter of the hearing will be the determination of its application for a partial final award against [D2] in respect of its liability to [C] pursuant to the two Guarantees…

In the event that the Tribunal wishes to hear the parties on any issue other than the above, we respectfully request the Tribunal to identify to the parties the nature of any such issue as soon as possible…"

64. As to the Defendants' solicitors' letter of 5th November 2014 C's solicitors stated :

" *We have received a copy of Stephenson Harwood's letter, also dated 5 November 2014. This appears largely to repeat the points referred to in their letter of October 29th 2014.…We invite the Tribunal to disregard the Respondents' request to defer their response to the Tribunal's email regarding the 8 December hearing…*

As to the suggestion that the Tribunal should set a timetable now for the remainder of the reference, again the Tribunal is invited to disregard this as wholly inappropriate at this stage. The remaining timetable is of course a matter to be discussed between the parties and agreed if possible, in close consultation with the Tribunal. We will write with [C's] proposals in this regard in due course and at the appropriate time."

65. On 12th November 2014 C wrote to the Tribunal (copied to the Defendants' solicitors and the LCIA) in the following terms :

"*We refer to those parts of the Tribunal's majority award dated 21 October 2014 which address the issues of (a) the Tribunal's jurisdiction over the Respondents' purported counterclaims and (b) the joinder of [D3] to the arbitral proceedings.*

We have now had an opportunity to obtain our client's instructions on those parts of the award. We confirm that our client respectfully objects to the Tribunal's award on jurisdiction and joinder and that accordingly it does not recognise the Tribunal's jurisdiction over the purported counterclaims nor the joinder of [D3]. We shall set out the detailed grounds for the Claimant's objection as soon as possible. In the meantime, and for the avoidance of doubt, the Claimant's continued participation in the arbitral proceedings is, of course, under protest as regards the Tribunal's determination of those issues."

66. On 14th November 2014 the Defendants' solicitors responded :

> "*…Your letter appears to foreshadow a challenge to the courts by the Claimant to the Tribunal's findings in its award on the Preliminary Issues dated 21 October 2014…*
>
> *The Respondents deny that there any grounds upon which the Claimant can challenge the Tribunal's findings on jurisdiction and joinder in the Preliminary Issues Award. If such grounds did exist, the Claimant would not have taken more than three weeks to notify the Tribunal of their existence. In any event, in circumstances where the Claimant has taken a number of steps in this arbitration since the Preliminary Issues Award (consisting of letters dated 31 October 2014, 1 November 2014 and 7 November 2014, and an email dated 7 November 2014) without objecting forthwith to the Tribunal's findings, the Claimant has waived any objection that it may have had.*
>
> *As you will appreciate, as your letter discloses no grounds for the Claimant's purported objections, it does not constitute an "objection" within the meaning of the Arbitration Act 1996…*"

67. C did not respond to that letter, but rather commenced the present proceedings on 18th November 2014.

68. On 30th December 2014 Professor Dr Bernard Hanotiau, who had been appointed by the LCIA to determine the Defendants' application for the removal of Mr Boswood QC, granted such application. The basis of the decision (at paragraph 50 of the determination) was that "*[Mr Boswood QC] had conveyed the impression to an objective and informed observer that he had prejudged the merits of the counterclaims at the jurisdictional phase, creating thereby an appearance of bias.*"

69. Mr Boswood QC has now been replaced by Lord Hoffmann.

70. The criticisms made by Professor Dr Bernard Hanotiau of Mr Boswood QC do not relate directly to his reasoning on jurisdictional matters, but rather to the fact that he appeared to have pre-judged the underlying merits of the counterclaims at the jurisdictional stage. However, the Defendants submit that the demonstration of bias on the merits tainted Mr Boswood QC's reasoning as a whole on all issues.

71. A draft Amended Defence and Counterclaim in the underlying proceedings was issued dated 23rd February 2015. C served a Reply to Defence and Defence to Counterclaim on 29th May 2015 (all expressly without prejudice to its jurisdictional objections).

F. <u>The issues on this challenge</u>

72. A challenge under sections 67 and 68 of the 1996 Act proceeds by way of re-hearing, not review: *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 ("*Dallah*") at paragraphs 25 and 26; see also *Azov Shipping Co v Baltic Shipping Co (No 2)* [1999] 1 All ER 476 at 478f-480b. Nevertheless, the Court will have regard to the Tribunal's reasoning if helpful (see paragraph 31 of *Dallah*). However, as has happened in this case, the

arguments on challenge *de novo* can be and are presented in fresh and different ways, and with different emphases.

73. The following principal issues arise on this application :

a) whether C has lost the right to challenge the Award ("issue 1");

b) whether the Tribunal has jurisdiction to determine disputes concerning alleged breaches of the PSC (a challenge to paragraph 241(1) of the Award) ("issue 2");

c) whether the Tribunal has jurisdiction to determine claims made by (rather than on behalf of) D3 (a challenge to paragraph 241(1) of the Award) ("issue 3"); and

d) Whether the Tribunal has the power to join D3 to the arbitral proceedings (a challenge to paragraph 241(3) of the Award) ("issue 4").

Although logically anterior, it is convenient to address Issue 1 last, as the parties did in their oral submissions.

G. Paragraph 241(2) of the Award

74. Before turning to the individual issues identified above, it is necessary to address a dispute that arose during the course of the hearing.

75. As already set out above, by a majority decision at paragraph 241(2), the Tribunal declared that Clause 11.1 of the SPA requires the Claimant to indemnify D1 in respect of Pre-Economic Date Liabilities (including claims with respect to the PSC covered thereby) suffered by D1 and its Affiliates subject to the limitations and other provisions of the SPA.

76. Although C does not agree with the majority determination at paragraphs 241(2) of the Award, it expressly does not seek to challenge it in this application, the determination not being one as to substantive jurisdiction. It recognises that there is no jurisdiction for such a challenge. It is a finding on the merits. Any challenge could only theoretically be under section 69 of the 1996 Act, but that route is not available under the LCIA Rules.

77. It does however, and of necessity by reference to its challenge to paragraph 241(1) of the Award, seek clarification that the Tribunal's jurisdiction in relation to D1's Indemnity Claims under Clause 11 of the SPA is limited to the granting of declarations as to D1's entitlement, and does not extend to jurisdiction over the underlying claims arising out of the PSC in respect of which the indemnity is sought.

78. Despite the lack of challenge to paragraph 241(2) as referred to above, C sought (in oral submission only, and perhaps recognising the difficulties in its path as a result of the finding of construction in paragraph 241(2) of the Award,) to contend that, on its proper construction, Clause 11.1 did not extend to claims by D1 against C under the PSC. C's central submission was that Clause 11 does not cover indemnities in respect

of any losses arising out of alleged breaches of the PSC. It does not cover claims by D1 against C, but rather is confined to third party claims. Properly construed, it is confined to dealing with quantum and adjustment disputes, as reflected in particular in the provision for the involvement of independent accountants as set out in Clause 11.8. Thus, in so far as the Tribunal relied on its construction of Clause 11 for jurisdictional purposes, it erred.

79. C's position on the construction of Clause 11.1 is in direct conflict with the Tribunal's reasoning on Clause 11.1 which underpins its unchallenged (and unchallengeable) finding at paragraph 241(2) of the Award. For the avoidance of doubt, it was expressly contended before the Tribunal for C that Clause 11.1 did not cover claims by D1 against C under the PSC. That contention was rejected by the Tribunal with full reasons set out in the Award. Thus, the point now sought to be raised by C has been argued and considered fully by the Tribunal.

80. Upon the oral submission being raised, D1 raised an immediate and robust objection to this attempt to re-open the debate on the proper construction of Clause 11.1. It pointed to the fact that C was expressly not challenging the ruling at paragraph 241(2) of the Award.

81. Overnight, C committed its position to paper as follows. On a section 67 challenge, the court determines the jurisdictional issues *de novo*, by way of a complete re-hearing. This means that no relevant issue is or can be *res judicata* or the subject of an issue estoppel. If and insofar as the meaning of <u>any</u> clause in the SPA is relevant to the issues before the court on C's section 67 challenge, the court is to determine the meaning of that clause itself, unfettered by any ruling by the Tribunal.

82. If the court were not able to determine any relevant issue afresh on a section 67 challenge, the applicant would not be able effectively to challenge the jurisdiction of the Tribunal. A tribunal could potentially extend its jurisdiction by deciding matters within its jurisdiction (pulling itself up by its bootstraps).

83. I cannot accept that it is open to C now to seek to challenge the Tribunal's reasoning and finding at paragraph 241(2), even if only for jurisdictional purposes.

84. The settled position for all purposes between the parties is that, pursuant to paragraph 241(2) of the Award, Clause 11.1 extends to claims arising out of breaches of the PSC. In the absence of a challenge to that finding, the finding is final and binding, enforceable under s.66 of the 1996 Act and under the New York Convention internationally. Any challenge under s.67 of the 1996 Act has to be to a finding on jurisdiction. Here there is no challenge to the Tribunal's jurisdiction for the purposes of paragraph 241(2) of the Award.

85. This position is consistent with the decision of Colman J in *Westland Helicopters Ltd v Sheikh Salah Al-Hejailan* [2004] 2 Lloyd's Report 523 (*"Westland Helicopters"*). There an issue arose as to the amount payable to a legal consultant engaged to negotiate a settlement in relation to a series of awards relating to a contract for the supply of helicopters. The arbitrator was faced with the question of whether or not he had jurisdiction to award interest and, if so, how to exercise it. At paragraphs 33 and 34 Colman J said :

> "*33. Westland, although not formally admitting that the arbitrator had, as he concluded, jurisdiction to resolve the dispute as to quantum by reference to an annual retainer, never applied to set aside the Second Award on the grounds that he had no jurisdiction…the consequence of that decision is that, in as much as the Second Award determined that such jurisdiction existed, there is a decision binding on the parties to that effect. Moreover, it is now too late either to apply to set aside the award under s.67 or to apply it by applying for leave under s.69.*
>
> *34. It follows that it is not open to Westland to deploy as a basis for their case that the arbitrator had no jurisdiction to award interest the submission that there was not jurisdiction to award the capital sum by reference to which such interest was awarded. This is because there is an issue estoppel in respect of the award of the capital sum…*"

86. Colman J then confirmed that there was no doubt that the general principles of issue estoppel applied as between arbitration awards relating to the same reference. And at paragraph 37 he went on to say :

> "*37. By parity of reasoning, where issues A and B have been determined by an arbitrator who has issued an interim award and the losing party wishes to use a procedure under the 1996 Act for challenging the arbitrator's conclusion on issue B but not on issue A, it is not open to him to challenge the conclusion on issue B by arguing that the arbitrator should have reached a different conclusion on issue A.*"

This last paragraph is directly on point and confirms that it is not open to C to challenge paragraph 241(1) by reference to a challenge to paragraph 241(2), in relation to which finding there is an issue estoppel.

87. This is the result of the scheme of the Act and the LCIA Rules under which the parties chose to contract. If the Tribunal made an error of law on the merits (rather than jurisdiction), absent the possibility of any challenge under s.68 of the 1996 Act, the parties have elected finality.

88. If I am wrong in this conclusion, and even if it were open in principle to C to re-run the constructional argument on Clause 11.1 for jurisdictional purposes, I do not consider that it is open procedurally for it to do so.

89. The claim form states in terms :

> " *…7. For the avoidance of doubt, [C] does not challenge the Tribunal's determination that it had jurisdiction over claims brought against [C] by [D1] or an indemnity under Clause 11.1 of the SPA in reliance on alleged breaches by the Claimant of the terms of the PSC…*"

90. The witness statement in support (at paragraph 27) again confirms that "*[C] does not challenge the Tribunal's determination at paragraph 241(2) of the Award.*"

91. Consistent with this, C's skeleton for this hearing made no challenge to the Tribunal's construction of Clause 11.1, or contained any submissions as to the proper construction of Clause 11.1. Quite to the contrary, what was said (at paragraph 26) was :

> "*Although [C] does not agree with the Tribunal's majority determination at paragraph 241(2) as to the meaning and effect of Clause 11.1 of the SPA, [C] does not seek to challenge it in this application (since it is not a determination as to the Tribunal's substantive jurisdiction).*"

92. It seems to me that, in these circumstances, D1 was entitled to say, as it did, that it was taken wholly by surprise and "ambushed" by C's submissions on this point, and it would be quite wrong to allow the point to be taken by C at such a late stage. D1 did not come to court prepared to re-argue the proper construction of Clause 11.1. *Westland Helicopters* is of illustrative assistance. There Colman J refused to allow a challenge to be raised for the first time in counsel's skeleton argument, referring to the principles of finality under the 1996 Act.

93. For these reasons, the jurisdictional debate below must therefore proceed on the basis that Clause 11.1 of the SPA extends to claims by D1 against C, including claims under the PSC.

H. Issue 2 : does the Tribunal have jurisdiction to determine disputes concerning alleged breaches of the PSC?

94. As is already apparent, there are two aspects to the disputes concerning alleged breaches by C of the PSC :

a) first, free-standing claims by D1 for breaches of the PSC under Article 7 of the PSC, the PSC claims; and

b) secondly, the D1 Indemnity Claims under Clause 11 of the SPA.

They can conveniently, however, be addressed together, since the arguments of construction are largely overlapping.

The law

95. The basic approach to contractual interpretation is well-known and common ground (see for example the opinion of Lord Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 at 912 to 913). The exercise is to ascertain the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation they were in at the time of the contract.

96. The relevant line of authorities with respect to the scope of arbitration agreements can be traced through as follows.

97. The starting point is the well-known case of *Fiona Trust Corp and anr v Privalov and ors* [2007] 4 All ER 951 ("*Fiona Trust*"). There, in the context of a single contract with multiple issues, Lord Hoffmann stated :

> "*[5] Both of these defences raise the same fundamental question about the attitude of the courts to arbitration. Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.*
>
> *[6] In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.*
>
> *[7] If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If as appears to be generally accepted there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another one would need to find very clear language before deciding that they must have had such an intention.*
>
> …

[11] With that background, I turn to the question of construction. Your Lordships were referred to a number of cases in which various forms of words in arbitration clauses have been considered. Some of them draw a distinction between disputes 'arising under' and 'arising out of' the agreement. In Heyman Darwins Ltd [1942] 1 All ER 337 at 360, [1942] AC 356 at 399 Lord Porter said that the former had a narrower meaning than the latter but in Union of India v E B Aaby's Rederi A/S, The Evje [1974] 2 All ER 874, [1975] AC 797 Viscount Dihorne ([1974] 2 All ER 874 at 885, [1975] AC 797 at 814), and Lord Salmon ([1974] 2 All ER 874 at 887, [1975] AC 797 at 817) said that they could not see the difference between them. Nevertheless, in Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd [1988]2 Lloyd's Rep 63 at 6, Evans J said that there was a broad distinction between clauses which referred 'only those disputes which may arise regarding the rights and obligations which are created by the contract itself' and those which 'show an intention to refer some wider class or classes of disputes.' The former may be said to arise 'under' the contract while the latter would arise 'in relation to' or 'in connection with' the contract. In Fillite (Runcorn) Ltd v Aqua-Lift (1989) 26 ConLR 66 at 76 Slade LJ said that the phrase 'under a contract' was not wide enough to include disputes which did not concern obligations created by or incorporated in the contract. Nourse LJ gave a judgment to the same effect. The court does not seem to have been referred to Mackender v Feldia AG [1966] 3 All FR 847, [1967] 2 QB 590, in which a court which included Lord Denning MR and Diplock LJ decided that a clause in an insurance policy submitting disputes 'arising thereunder' to a foreign jurisdiction was wide enough to cover the question of whether the contract could be avoided for non-disclosure.

…

[13] In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked at [17] : "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."…

[26] … No contract of this kind is complete without a clause which identifies the law to be applied and the methods to be used for the determination of disputes. Its purpose is to avoid

the expense and delay of having to argue about these matters later. It is the kind of clause to which ordinary businessmen readily give their agreement so long as its general meaning is clear. They are unlikely to trouble themselves too much about its precise language or to wish to explore the way it has been interpreted in the numerous authorities, not all of which speak with one voice. Of course, the court must do what it can to provide charterers and shipowners with legal certainty at the negotiation stage as to what they are agreeing to. But there is no conflict between that proposition and the guidance which Longmore LJ gave at [17]-[19] of the Court of Appeal's judgment ([2007] EWCA Civ 20, [2007] 1 All ER (Comm) 891, [2007] Bus LR 686) about the interpretation of jurisdiction and arbitration clauses in international commercial contracts. The proposition that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed promotes legal certainty. It serves to underline the golden rule that if the parties wish to have issues as to the validity of their contract decided by one tribunal and issues as to its meaning or performance decided by another, they must say so expressly. Otherwise they will be taken to have agreed on a single tribunal for the resolution of all such disputes.

…

[28] As Bingham LJ said in Ashville Investments Ltd v Elmer Contractors Ltd [1988] 2 All ER 577 at 599, [1989] QB 488 at 517, one should be slow to attribute to reasonable parties an intention that there should in any foreseeable eventuality be two sets of proceedings. If the parties have confidence in their chosen jurisdiction for one purpose why should they not have confidence in it for the other? Why having chosen their jurisdiction for one purpose should they leave the question which court is to have jurisdiction for the other purpose unspoken, with all the risks that this may give rise to? For them, everything is to be gained by avoiding litigation in two different jurisdictions. The same approach applies to the arbitration clause." (emphasis added)

98. In *UBS AG v HSH Nordbank AG* [2010] 1 All ER (Comm) 727, a case involving multiple contracts, Lord Collins stated :

"*[82] Are these claims within the dealer's confirmation jurisdiction clause? I accept UBS's submission that the proper approach to the construction of clauses agreeing jurisdiction is to construe them widely and generously: see Donohue v Armco Inc [2001] UKHL 64 at [14], [2002] 1 All ER (Comm) 97 at [14]. I also accept that in the usual case the words 'arising out of' or 'in connection with' apply to claims arising from pre-inception matters such as misrepresentation: see Fiona Trust*

and Holding Comp v Privalov [2007] EWCA Civ 20, [2007] 1 All ER (Comm) 891 (affd [2007] UKHL 40, [2007] 2 All ER (Comm) 1053), Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc [2008] EWA Civ 1091, [2009] 2 All ER (Comm) 129 and Ashville Investments Ltd v Elmer Contractors Ltd [1988] 2 All ER 577 [1989] QB 488.

[83] But the essential task is to construe the jurisdiction agreement in the light of the transaction as a whole. As I suggested in Satyam Computer Services Ltd v Upaid Systems Ltd [2008] EWCA Civ 487 at [93] [2008] 2 All ER (Comm) 465 at [93] whether a dispute falls within one or more related agreements depends on the intention of the parties as revealed by the agreements.

[84] Plainly the parties did not actually contemplate at the time of the conclusion of the contracts that there would be litigation in two countries involving allegations of misrepresentation in the inception and performance of the agreements. But in my judgment sensible business people would not have intended that a dispute of this kind would have been within the scope of two inconsistent jurisdiction agreements. The agreements were all connected and part of one package and it seems to me plain that the result for which UBS contends would be a wholly un-commercial result and one that sensible business people cannot have intended.

[85] It is fanciful to suppose (as UBS contends) that the dealer's confirmation jurisdiction clause had been specially renegotiated to provide expressly for the exclusive jurisdiction of the English court to deal with disputes of this kind or that the parties must have envisaged the risk of a clash.

…

[95] In this case it is not necessary to go so far. Whether a jurisdiction clause applies to a dispute is a question of construction. Where there are numerous jurisdiction agreements which may overlap, the parties must be presumed to be acting commercially, and not to intend that similar claims should be the subject of inconsistent jurisdiction clauses. The jurisdiction clause in the dealer's confirmation is a 'boiler plate' bond issue jurisdiction clause, and is primarily intended to deal with technical banking disputes. Where the parties have entered into a complex transaction it is the jurisdiction clauses in the agreements which are at the commercial centre of the transaction which the parties must have intended to apply to such claims as are made in the New York complaint and reflected in the draft particulars of claim in England." (emphasis added)

99. In *Deutsche Bank AG v Sebastian Holdings (No 2)* [2011] 2 All ER 245 (Comm), another case involving multiple contracts, Thomas LJ stated :

> "*iii) The applicable principles*
>
> *[39] It is clear that in construing a jurisdiction clause, a broad and purposive construction must be followed: see Donohue v Armco Inc [2001] UKHL 64, [2002] I All ER (Comm) 97 and Fiona Trust and Holding Corp v Privalov [2007] EWCA Civ 20, [2007] 1 All ER (Comm) 891 affirmed in [2007] UKHL 40, [2007] 2 All ER (Comm) 1053 where Lord Hoffmann observed (at [7]):*
>
> > *'If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.'*
>
> *[40] The Supreme Court emphasised in Re Sigma Finance Corp (in administrative receivership), Re the Insolvency Act 1986 [2009] UKSC 2, (2010) I All ER 571 the need, when looking at a complex series of agreements, to construe an agreement which was part of a series of agreements by taking into account the overall scheme of the agreements and reading sentences and phrases in the context of that overall scheme.*
>
> *[41] It is generally to be assumed on these principles that just as parties to a single agreement do not intend as rational businessmen that disputes under the same agreement be determined by different tribunals, parties to an arrangement between them set out in multiple related agreements do not generally intend a dispute to be litigated in two different tribunals.*
>
> *[42]However, where there are multiple related agreements, the task of the court in determining whether a dispute falls within the jurisdiction clauses of one or more related agreements, depends upon the intention of the parties as revealed by the agreements against these general principles: see Lawrence Collins LJ in Satyam Computer Services Ltd v Upaid Systems Ltd [2008] EWCA Civ 487 at [93], [2008] 2 All ER (Comm) 465 at [93] and the UBS case [2010] 1 All ER (Comm) 727 at [83]….*

[46] Before turning to the UBS case, it is convenient to note Lord Collins' comment:

> *'The essence of Rix J's first reason is that under the contra proferentem principle, the intention must be taken to have been that, where a dispute fell within the wording of both jurisdiction agreements, it was the GMRA which was to be taken as the agreed position. The second reason, which he must have meant as a matter of construction, was that the parties must be taken to have intended that, where a dispute fell within both sets of agreements, it should be governed by the jurisdiction clause in the contract which was closer to the claim.' (See [2010] 1 All ER (Comm) 727 at [94].)…'*

[49] The decisions in the Credit Suisse First Boston Europe) case and the UBS case are both examples of the process of construction that has to be undertaken, using the well-recognised general principles and tools of contractual construction in the context of the principles relating to different jurisdiction clauses in related agreements. The overall task of the court is summarised in the 2010 supplement to Dicey, Morris and Collins on the Conflict of Laws (14th Ed. 2006) (para 12-094):

> *'But the decision in Fiona Trust has limited application to the questions which arise where parties are bound by several contracts which contain jurisdiction agreements for different countries. There is no presumption that a jurisdiction (or arbitration) agreement in contract A, even if expressed in wide language, was intended to capture disputes under contract B; the question is entirely one of construction ... The same approach to the construction of potentially-overlapping agreements on jurisdiction (but there will, in this respect, be no difference between the construction of agreements on jurisdiction, arbitration agreements and service of suit clauses) was taken in [UBS]…*
>
> *In the final analysis, the question simply requires the careful and commercially-minded construction of the various agreements providing for the resolution of disputes, the point of departure being that agreements which appear to have been deliberately and professionally drafted are to be given effect so far as it is possible and commercially rational to do so, even where this may result in a degree of fragmentation in the resolution of disputes. <u>It may be necessary to enquire under which of a number of inter-related contractual</u>*

> *agreements a dispute actually arises; this may be answered by seeking to locate its centre of gravity.*
>
> *The same approach, namely to focus on the commercially-rational construction, governs the interpretation of agreements on jurisdiction as exclusive or non-exclusive, and of agreements which specifically provide that the parties will not take objection to the bringing of proceedings if proceedings are brought in more courts than one.'*
> *(Omitting the citation of the authorities.)…*

[57] Jurisdiction clauses are rarely the subject of detailed negotiation and there is nothing to suggest that in these transactions any detailed attention was paid in the negotiations to the jurisdiction clauses; in most transactions in the financial markets this is the case as little attention seems to be paid to this element of risk management discussed by Richard Fentiman in International Commercial Litigation (2010). There are, however, three factors which can objectively be seen as important when considering the construction of these clauses. (i) The clauses in all the agreements where Sebastian undertook direct financial obligations to the bank contained clauses which gave the bank the right to bring proceedings against Sebastian under that agreement in a named forum (in most cases London) and in some of the agreements the express right to bring claims in any other forum where jurisdiction might be obtained. (ii) Although it is common ground that dealing in equities was all to be carried out in London, it is equally important that agreements did not provide that the FX dealings were, as asserted by Sebastian, entirely to be carried on in the United States. The obligations in the FX dealings incurred by Sebastian to the bank were under the offsetting transactions to be made under the FX agent master agreement; these were expressly governed by English law with its English jurisdiction clause, in contradistinction to the bank's obligations to the named counterparties which were governed by New York law and had a New York jurisdiction clause. (iii) The agreements were entered into over a two-year period. This is not the case of financial transactions closely related in time such as where conflicting clauses might be found within the agreements contained in the transaction bible or are different agreements which are part of one package (as in the UBS case)." …

[65] Businessmen agreeing to different jurisdiction clauses in a series of related contracts cannot have been taken to have intended that the entitlement to bring that claim in the chosen forum in respect of one contract should depend on whether a defence had been raised prior to the bringing of the claim and that the defence to that claim might place the centre of gravity of the dispute as

being related to a different contract with a different jurisdiction clause…" (emphases added)

100. In *Monde Petroleum SA v WesternZagros Ltd* [2015] 1 Lloyd's Rep 330 ("*Monde Petroleum*"), a case involving a chain of contracts, Popplewell J stated :

> "*38. The presumption in favour of one-stop adjudication may have particular potency where there is an agreement which is entered into for the purpose of terminating an earlier agreement between the same parties or settling disputes which have arisen under such an agreement. Where parties to a contractual dispute enter into a settlement agreement, the disputes which it can be envisaged may subsequently arise will often give rise to issues which relate both to the settlement agreement itself and to the previous contract which gave rise to the dispute. It is not uncommon for one party to wish to impeach the settlement agreement and to advance a claim based on his rights under the previous contract. In such circumstances rational businessmen would intend that all aspects of such a dispute should be resolved in a single forum. Where the settlement/termination agreement contains a dispute resolution provision which is different from, and incompatible with, a dispute resolution clause in the earlier agreement, the parties are likely to have intended that it is the settlement/termination agreement clause which is to govern all aspects of outstanding disputes, and to supersede the clause in the earlier agreement, for a number of reasons. Firstly it comes second in time and has been agreed by the parties in the light of the specific circumstances which have given rise to the disputes which are being settled and/or the circumstances leading to the termination of the earlier agreement. Secondly it is the operative clause governing issues concerning the validity or effect of the termination/settlement agreement and therefore the only clause capable of applying to disputes which arise out of or relate to the termination/settlement agreement. Thirdly, in considering any dispute about the scope or efficacy of a settlement or termination agreement, the tribunal is likely to have to consider the background, of which an important element will often be the circumstances in which the dispute arose and the rights of the parties under the earlier contract. There will therefore often arise a risk of inconsistent findings if the tribunal addressing the validity or efficacy of the termination/settlement jurisdiction is not seised of disputes arising out of the earlier contract and the latter fall to be determined by a different tribunal.*
>
> *39. In such circumstances, therefore, the dispute resolution clause in the termination/settlement agreement should be construed on the basis that the parties are likely to have intended that it should supersede the clause in the earlier*

agreement and apply to all disputes arising out of both agreements. Whether it does so in any particular case will depend upon the language of the clause and other surrounding circumstances.

…

42. That was not however a case in which there was a new dispute resolution clause in the terminating agreement, or any risk of fragmentation of issues. Where the terminating agreement contains a new dispute resolution provision which differs from that in the agreement which it terminates, different considerations arise. It is then necessary to determine which dispute resolution clause applies and it is likely that the parties should wish the earlier dispute resolution provision, in the form of an arbitration agreement, to be superseded for the reasons I have endeavoured to identify, Whether that is so will depend upon the proper construction of the clause in the terminating agreement in all the surrounding circumstances, but I would not accept that it could only have that effect by making express reference to termination of the arbitration agreement and DDT Trucks is not authority for any such proposition.

…

44. A termination or settlement agreement which contains no new dispute resolution clause is unlikely to be treated as a direct impeachment of an arbitration clause in an earlier agreement, in the absence of clear language, because it is directed merely at a challenge to the continued substantive rights under the matrix agreement, not the separate arbitration agreement within it. But a new and inconsistent dispute resolution provision will raise the presumption that the parties intended to impeach not just the earlier agreement but also the dispute resolution agreement within it and so go directly to impeach the arbitration agreement. This is not a failure to give effect to the doctrine of separability, but the reverse: it recognises that a dispute resolution provision in the second agreement raises a presumption that the parties intended to address the separate arbitration agreement within the earlier agreement because both clauses are concerned with how and where disputes are to be resolved and in this respect are in conflict."

101. Penultimately, there is the recent appellate decision in *AmTrust Europe Limited v Trust Risk Group* [2015] EWCA Civ 437 ("*AmTrust"*), a case dealing with two competing contracts. There Beatson LJ said :

"***44b) The scope of the Fiona Trust presumption:*** *In Fiona Trust & Holding Corporation v Primalov [2007] UKHL 40,*

reported at [2008] 1 Lloyd's Rep. 254 at [13] Lord Hoffmann stated (at [6]) that, in adopting an arbitration clause, the parties show they want disputes in their relationship to be "decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration, and the unobtrusive efficiency of its supervisory law". After asking (at [7]) whether there is any rational basis upon which businessmen would be likely to have different questions about the contract decided by different tribunals, and stating that one would need to find very clear language before deciding that they would have had such an intention, he concluded (at [13])

> *"[I]n my opinion, the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction".*

45. That case concerned the scope of a single arbitration clause. This case concerns an overall agreement package which contains two express choice of law and jurisdiction clauses, one of English law and jurisdiction, the other of Italian law and arbitration. Mr Samek submitted that, although the present case is not about the scope of a single arbitration clause, the Fiona Trust "one-stop"/"one jurisdiction" presumption remains a useful starting point. In principle, and subject to the qualification in the next paragraph, I agree. As Lord Collins stated in UBS AG v HSH Nordbank AG [2009] EWCA Civ 585, reported at [2009] 2 Lloyd's Rep 272 at [84], where the agreements are all connected and part of one package, "sensible businesspeople would not have intended that a dispute of this kind would have been within the scope of two inconsistent jurisdiction agreements".

46. Where the overall contractual arrangements contain two or more differently expressed choices of jurisdiction and/or law in respect of different agreements, however, the position differs in that one does not approach the construction of those arrangements with a presumption. So the 14th edition of Dicey, Morris and Collins on the Conflict of Laws stated :

> *"The decision in Fiona Trust has limited application to the questions which arise where parties are bound by several contracts which contain jurisdiction agreements for different countries. There is no presumption that a jurisdiction (or arbitration) agreement in contract A, even if expressed in wide language, was intended to capture disputes in contract B; the question is entirely one of construction..." (§12-094)*

That reflects inter alia the statement of Rix J in Boston (Europe) Ltd v MLC (Bermuda,) Ltd [1999] 1 Lloyd's Rep 767 at 777 that:

> *"Where different agreements are entered into for different aspects of an overall relationship, and those different agreements contain different terms as to jurisdiction, it would seem to be applying too broad and indiscriminate a brush simply to ignore the parties' careful selection of palette".*

47. In Sebastian Holdings Inc v Deutsche Bank AG (No 2,) [2010] EWCA Civ 998, reported at [2011] I Lloyd's Rep 106, a case involving a complex series of eight agreements, Thomas LJ referred with approval (at [42] and [49]) to the passages from Dicey, Morris and Collins and the judgment of Rix J. I have set out. He summed up the position as follows:

> *"(1) …[I]n construing a jurisdiction clause, a broad and purposive construction must be followed : see [39];*
>
> *(2)…[A]n agreement which [is] part of a series of agreements [should be construed] by taking into account the overall scheme of the agreements and reading sentences and phrases in the context of that overall scheme": see [40];*
>
> *(3) It is generally to be assumed ... that just as parties to a single agreement do not intend as rational businessmen that disputes under the same agreement be determined by different tribunals, parties to an arrangement between them set out in multiple related agreements do not generally intend a dispute to be litigated in two different tribunals": see [41]; but*
>
> *(4) ...[W]here there are multiple related agreements, the task of the court in determining whether the dispute falls within the jurisdiction clauses of one or more related agreements depends upon the intention of the Parties as revealed by the agreements as against these general principles": see [42].*

48. The current (16th) edition of Dicey, Morris and Collins states (at § 12-110) that:

> "*Where a complex financial or other commercial transaction is put in place by means of a number of interlinked contracts, and each has its own provision for the resolution of disputes, the point of departure will be that it is improbable that a jurisdiction clause in one contract, even expressed in ample terms, was intended to capture disputes more naturally seen as arising under a related contract… Even if the effect is that there will be a risk of fragmentation of the overall process for the resolution of disputes, this is not by itself sufficient to override the construction, and consequent giving of effect to, the complex agreements for the resolution of disputes which the parties have made.*"

In short, what is required is a careful and commercially-minded construction of the agreements providing for the resolution of disputes. This may include enquiring under which of a number of inter-related contractual agreements a dispute actually arises, and seeking to do so by locating its centre of gravity and thus which jurisdiction clause is "closer to the claim". In determining the intention of the parties and construing the agreement, some weight may also be given to the fact that the terms are standard forms plainly drafted by one of the parties.

49. There may be a difference between a complex series of agreements about a single transaction or enabling particular types of transactions, and the situation in which there is a single contract creating a relationship which is followed by a later contract embodying a subsequent agreement about the relationship. The agreements in the UBS case about the issues of securities under a collateralised debt obligation transaction which were "all connected and part of one package", and those in the Sebastian Holdings case enabling over the counter derivative contracts and trading in foreign exchange and equities are examples of the former. The agreements in this case, separated in time by just under six months, are an example of the latter. Where the contracts are not "part of one package", it may be easier to conclude that the parties chose to have different jurisdictions to deal with different aspects of the relationship."

102. It is significant that *AmTrust* was a case where there were two parallel lines of business between the parties operating contemporaneously. This is expressly reflected at paragraph 65 of the judgment :

> "*65. Before examining the clauses of the Framework Agreement upon which Mr Samek particularly relied, I make four observations:*
>
> *(1) It was common ground before the judge that the business arising under the ToBA was a separate and distinct stream of business to that arising under the Framework Agreement and the Agency Agreement…*"

103. C also referred to the recent decision of Burton J in *Hashwani and others v OMV Maurice Energy Ltd* [2015] EWHC 1811 (Comm). There Burton J referred to a submission by reference to *Fiona Trust* to the effect that, if there be one arbitration, rational businessmen must have intended that it would deal with all issues. Burton J commented :

> "*Such a concept may not be portable to a case where there are two available arbitration provisions in different contracts to which all are parties…* "

104. Drawing this line of authorities together, the following relevant principles can be derived :

a) the exercise of determining whether a dispute falls within an arbitration clause is one of interpretation requiring a careful and commercially-minded construction. It is a question of determining objectively the intention of the parties as revealed by the agreement or agreements;

b) in construing an arbitration clause, a broad and purposive construction should be followed;

c) in general, parties to an arbitration agreement do not intend that disputes under that agreement should be determined by different tribunals ("the Fiona Trust presumption"). This presumption may apply where there are multiple related agreements between the parties. If there are inconsistent arbitration agreements, it may be necessary to identify where the centre of gravity lies and which agreement lies at the commercial centre of the transaction (or is closer to the claim), or under which series of agreements the dispute essentially arises. It is the arbitration agreement in that agreement that will cover all issues. Fragmentation may of course occur if, on its true construction, the clear wording and inherent scheme leads to that conclusion;

d) the Fiona Trust presumption may not apply where there are two or more agreements with separate and distinct arbitration clauses addressing parallel but different aspects of the overall continuing relationship between the parties. A dispute rising under one contract would not be intended to be caught by an arbitration clause in another contract. But I do not accept C's

broader submission that the Fiona Trust presumption does not apply where the overall contractual arrangements between two parties contain two or more differently expressed choices of jurisdiction in respect of different agreements. The position is more subtle, as a proper reading of *AmTrust* reveals; and

e) where there is an agreement subsequently entered into by the parties for the purpose of terminating the commercial relationship created by an earlier agreement, the Fiona Trust presumption may apply with particular potency.

The law applied

105. The relevant wording of Clause 26 is here repeated for ease of reference :

> "*26.2 Save as otherwise expressly provided in this Agreement, any dispute arising out of or in connection with this Agreement including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the London Court of International Arbitration Rules which Rules are deemed to be incorporated by reference into this Clause 26*." (emphasis added)

106. For C, it is said that a straightforward allocation of disputes between the SPA arbitration agreement and the PSC/Deed of Novation arbitration agreement is readily apparent and must be taken to have been intended by the contracting parties : disputes such as the PSC claims, which exclusively concern breaches of the PSC, clearly arise under the PSC. Their centre of gravity is the PSC, just as the centre of gravity for C's claims for breaches of the SPA is the SPA. The D1 Indemnity claims might "*at first blush*" appear to give rise to an overlap between the SPA and the PSC since they are claims under Clause 11.1 of the SPA but D1's entitlement to an indemnity depends on establishing C's liability under the PSC. However, there is in reality no overlap: the substantive dispute concerning C's liability for alleged breaches of the PSC falls within the PSC arbitration agreement, while the issue of D1's entitlement under Clause 11 falls within the SPA arbitration agreement. Such an approach is said to be consistent with common practice regarding indemnities and consistent with the fact that the indemnities under Clause 11 cover a wide range of liabilities. Moreover, any claim against C under the PSC is very likely to give rise to a dispute under the Deed of Novation. This could lead to fragmentation of the dispute if the PSC and Deed Novation contained different dispute resolution mechanisms. The incorporation of Article 23 of the PSC into the Deed of Novation arbitration agreement supports the conclusion that the parties intended disputes relating to alleged breaches of the PSC to be determined under Article 23.

107. C contends that it is thus clear from the contractual structure that C and D1 chose different governing laws and different dispute resolution mechanisms with different costs regimes and constitutional provisions to govern different aspects of their business relationship. C and D1 chose LCIA arbitration and English law clauses for the aspects of their business relationship, concerning them only, and not the other parties to the joint petroleum operations, namely the buyout by D1 of C's interest in the Leases and D1's takeover of C's rights and responsibilities as operating contractor

under the PSC. The express preservation by Clause 10 of the Deed of Novation of Article 23 of the PSC is significant, concerning a wider range of parties, including D3 and Y, and is governed by Nigerian law, no doubt in part because it regulates a set of activities principally taking place in and around Nigeria.

108. In my judgment, however, an objective and commercial construction points in the other direction. The proper commercial and objective construction of Clause 26 is that it was intended to cover claims such as both the D1 Indemnity and the PSC Claims.

109. First, the sequence of events and the structure of the parties' relationship demonstrate that the centre of gravity of the disputes lies in the SPA, not the PSC or the Deed of Novation. There were three separate phases of activity :

a) the period before C was involved with D1 or any of the defendants at all, namely 1992 to 2005. Here D1 and D3 operated the exploration project. After some thirteen years or so they sought a new operator;

b) the period from when C joined the project under the PSC in 2005. The purpose of the PSC was the joint undertaking and funding of exploration, appraisal, development, production and abandonment operations, with C as the operating contractor. During this period problems arose between the parties, and it was agreed that C would exit the project;

c) C then exited by relinquishing its role as operating contractor by i) entering the SPA by which D1 bought back C's 40% interest in the PSC and ii) on completion, novation of the PSC such that C would be removed from the PSC, and C would be replaced by D1 as the operator of the project.

Each phase had its own contractual regime. The third phase was the exit regime.

110. Of central significance is the fact that under the SPA C's rights and obligations under the PSC were to be shifted from the PSC into the SPA (via Clause 2.1 of the SPA whereby D1 was to purchase the "*Transferred Interests*" as defined and set out above). Thus there was a fundamental shift in the parties' relationship, with their commercial relationship migrating from the PSC to the SPA. And in that new relationship under the SPA, the parties expressly agreed a very wide arbitration clause, notably broader than that contained in the PSC. That D3 was not a party to the SPA does not diminish the force of this approach, not least since it held only a small minority interest and was in any event a subsidiary of D1. In the chain of events, Clause 26 superseded Article 23.

111. C counters for present purposes that the SPA was not the termination of the relationship, and not a terminating event. Termination might well not have occurred, since completion may not have come to pass. Many provisions in the SPA demonstrate as much, catering as they do for possible non-completion. The situation is very different from the termination agreement in *Monde Petroleum*, for example. But that ignores the fact that on any view the SPA was a central and important step

towards termination. It was part of the exit package. Its purpose was to achieve termination and termination was what was contemplated. Indeed, C advanced this proposition itself before the Tribunal. In written submissions on the preliminary issues it stated :

> "*The effect of the SPA was to draw a line under the parties' commercial relationship, save as regards the terms and conditions of sale of the transferred interests.*"

And it maintains the same position in its substantive Defence and Counterclaim (at paragraph 148). In the event of non-completion, the centre of gravity would shift back to the PSC. But that is not what occurred.

112. It is at this stage that C's analysis falls down. C's reliance on *AmTrust* is misplaced. The facts here are very different. Unlike the position in *AmTrust,* at the point when the SPA came into force, there were no two parallel co-existing streams of business. Rather there was a single process during which the parties' relationship changed fundamentally from one of joint operation under the PSC to an exit process under the SPA. Once that is understood, it is clear that the governing primary instrument between the parties, and the centre of gravity of the parties' disputes moved to the SPA, into which the rights and obligations of the parties under the PSC were to be, and were upon completion, transferred.

113. This leads on to a consideration of the Deed of Novation, which contained its own arbitration clause (Clause 10), as set out above, and which referred back to Article 23 of the PSC. It is significant that at the time of completion, no amendment was made to Clause 26 of the SPA (though other amendments were made). Against that background, a commercial construction as to how the two arbitration agreements sit together has to be performed. The agreements have to be reconciled.

114. That exercise is answered by a renewed search for the centre of gravity of the claims in circumstances where the parties are in a single and terminating relationship. It cannot be said that that centre shifted from the SPA to the Deed of Novation. Neither the D1 Indemnity Claims nor the PSC Claims arise out of the Deed of Novation. The Deed of Novation was a condition of completion, but it was performing the mechanical function of novation, not the far broader and more intricate exercise of agreement to the transfer of C's rights and obligations under the PSC. That is reflected in the relative brevity and simplicity of the document.

115. The supremacy of the SPA is also expressly recognised by Clause 3 of the Deed of Novation, as set out above. Thereby the parties agreed that in the event of any inconsistency between the terms of the Deed of Novation and the SPA, the terms of the SPA should prevail.

116. Thus, although broadly worded, Clause 10 of the Deed of Novation must be read in alignment with and subject to Clause 26 of the SPA. On a proper construction, Clause 10 must be read as limited to an arbitration agreement covering issues going to the Deed of Novation itself, such as its existence or validity.

117. On the above analysis, on a broad commercial and purposive construction, the words of Clause 26 are wide enough and apt to cover both the D1 Indemnity Claims and the PSC Claims which can be said to "*arise out of or in connection with*" the SPA.

118. Secondly, the Tribunal has concluded that Clause 11.1 of the SPA extends to claims by D1 against C under the PSC. Once the PSC is before the Tribunal, it cannot be argued that PSC-related claims do not "*arise out of or in connection with the SPA*". Additionally, the issues and material under the D1 Indemnity Claims will overlap with the issues and material under the PSC claims. So far as the D1 Indemnity Claims specifically are concerned, it would be an extraordinary fragmentation for the Tribunal to have jurisdiction to make a declaration of indemnity in respect of liability on the part of C under the PSC to D1, but not to have jurisdiction to adjudicate on the underlying claims. It would need the clearest wording for such an impractical and un-commercial result to have been intended by the parties and there is no such wording in Clause 11 to suggest such an outcome. It would be a result that would offend the clear line of authorities starting with *Fiona Trust* and following.

119. Thirdly, other provisions of the SPA also point clearly to issues under and relating to the PSC being before a tribunal appointed under Clause 26 both before and after completion :

a) by Clause 2.1 of the SPA C was to sell to and novate in favour of D1 and D1 was to purchase the "*Transferred Interests*", defined as being the rights and liabilities arising out of the PSC. Schedule 1 sets out the mining leases and the PSC. Any dispute about the nature or extent of those rights and obligations under the PSC would fall to be resolved under Clause 26;

b) by Clauses 11.5 and 11.6 the parties were entitled to claim Pre-Economic and Post-Economic Date benefits from each other as agreed. Those benefits were defined by reference to income and other value "*relating to the Transferred Interests*". Likewise, by Clause 11.1 C was to be liable for all Pre-Economic Date liabilities, defined as claims and other liabilities "*relating to the Transferred Interests*". Thus, in order to resolve any disputes under Clause 11 relating to Pre- or Post-Economic Date Benefits or Pre-Economic Date Liability, a tribunal under Clause 26 would have to engage directly with issues under the PSC;

c) by Clauses 9.1 of the SPA C covenanted until completion not to do certain things and to perform certain obligations, by reference to Parts 1 and 2 of Schedule 3 of the SPA. By Part 1 C was not entitled without consent, amongst other things, to amend, terminate or suspend the oil mining leases or the PSC, or to take any action that would increase Post-Economic Date Liabilities subject to certain exceptions. It agreed not without consent to make or agree any new expenditure "*except in the ordinary course of business in accordance with Seller's past practices in relation to the Petroleum Operations*" (defined as

having the meaning ascribed in the PSC). A tribunal under Clause 26 resolving any dispute in this regard would have to consider past practices and business under the PSC. Part 2 required C to perform in accordance with the PSC. It also required C to perform "*in ordinary course*" and in compliance with Good Oilfield Practice. Whether or not those two additional requirements add anything is unclear, but on any view the PSC is directly engaged. Part 2 also required C to pay "*all Cash Calls made*". Cash Calls were defined as having the meaning ascribed in the PSC, namely "*the amount in all currencies which Operating Contractor estimates a Party must pay in any given month pursuant to Article 7.4 and in accordance with the provisions of the Accounting Procedure*". Any tribunal under Clause 26 resolving a dispute in respect of the covenant to pay Cash Calls would be addressing the operation of the PSC;

d) by Clause 9.2 D1 granted C an indemnity against all reasonable losses and costs arising out of C's proper performance of its obligations under the SPA. Thus, if C properly performed its obligations under the PSC, it was entitled to an indemnity from D1 under the SPA against costs and losses. Again, a tribunal under Clause 26 of the SPA would be required, in the event of any dispute, to be resolving issues arising out of C's performance of the PSC;

e) by Clause 9.3 the covenants in Clause 9.1 were not to apply in respect of any act, omission or other matter "*pursuant to any work programme and/or budget approved under and in accordance with the Transferred Interest Documents prior to the Economic Date*". Thus the application of the covenants in Clause 9.1 turned on whether or not an act or omission had been approved under and in accordance with the PSC. The parties clearly intended that a tribunal under Clause 26 would be charged with such issues; and Clause 12.7 addressed the method of quantification of damages in respect of claims for breach of warranties or of the SPA or in respect of any matter arising out of the SPA or any Completion Document. Where the monetary value was not clearly established, damages were to be assessed on the basis of the diminution in value of the "*Transferred Interests…directly attributable to the matter or circumstance giving rise to that Claim*". Again, a tribunal under Clause 26 would be grappling with the PSC (and/or the oil mining leases) and assessing any relevant diminution in value.

120. The Defendants can say with some force that, in circumstances where the parties agreed to refer disputes under Clause 9 to arbitration under Clause 26 in relation to pre-completion events, when C was still a party to the PSC, the position is all the

clearer post-completion, namely that the Tribunal under Clause 26 was intended to have carriage of claims under the PSC.

121. Fourthly, beyond the fragmentation considerations identified above in relation to Clause 11, there are additional fragmentation considerations. By way of example, C relies heavily on the SPA in defence to the counterclaims against it. It is difficult to see how such defences could be deployed on claims brought by the Defendants against C in a tribunal under Article 23 of the PSC. C might have to bring a claim before a tribunal under Clause 26 of the SPA for a separate negative declaration. There is a risk of increased cost and inconsistent outcomes, which all of the authorities speak against.

122. For all these reasons, I conclude that both the D1 Indemnity Claims and the PSC Claims fall within the scope of Clause 26 of the SPA.

I. Issue 3 : does the Tribunal have jurisdiction to determine claims made by (rather than on behalf of) D3?

123. This is a short point, the value of which is dependent on my findings on the other issues. C accepted that in the event it was to lose on issues 2 and 4, there would be little value to it for success on the point.

124. D3 only seeks to bring a counterclaim against C under the PSC. C contends that it cannot bring such a claim before the Tribunal. D3 is not a party to the SPA, nor is it a party to the arbitration agreement in Clause 26 of the SPA. Reference was made to Clause 23.6 of the SPA which provided :

> "*Except as expressly stated in this Agreement, a person who is not a party to this Agreement may not enforce any of its terms under the Contracts (Rights of Third Parties) Act 1999.*"

125. In my judgment, as the Defendants contended, the only real question for present purposes is that of joinder. If D3 is properly joined to the arbitral reference, then the Tribunal has jurisdiction over it. Whether D3 has claims that it can properly advance under the PSC in that reference is not a jurisdictional issue, but a merits issue. The point is made most clearly by the Tribunal itself at paragraph 205 of the Award (in the context of deciding to exercise its power to join a third party):

> "*205. Therefore, the Tribunal has concluded that it is appropriate in the interests of one-stop adjudication for [D3] to be joined as a party to this arbitration. This decision is however without prejudice to whether any claims which may be presented by [D3] in this arbitration may properly be brought*." (emphasis added)

126. Putting it another way, the issue under challenge by C is one that has not yet in fact arisen for or been decided by the Tribunal.

J. Issue 4 : does the Tribunal have power to join D3 to the arbitral proceedings?

127. The Tribunal decided that it had power to join D3 to the arbitral proceedings pursuant to Article 22.1(h) of the LCIA Rules 1998 which are deemed to be incorporated by reference into Clause 26 of the SPA. Article 22.1(h) provides materially as follows :

> "*22.1 Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views :…*
>
> *(h) to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration;…*"

128. Two issues arise :

a) whether or not the Tribunal's decision to join D3 is challengeable under s.67, alternatively s.68(2)(b) of the 1996 Act; and

b) if so, whether or not the Tribunal had the power to join D3 under Article 22.1(h) of the LCIA Rules.

129. In my judgment, the decision is not challengeable under s.67, but is challengeable under s.68(2)(b). My reasoning is as follows.

130. Section 67 is limited to challenges to any award as to the tribunal's "*substantive jurisdiction*". Section 82(1) of the 1996 Act defines "*substantive jurisdiction*" as "*referring to the matters specified in s.30(1)(a) to (c), and references to the tribunal exceeding its substantive jurisdiction shall be construed accordingly*."

131. Section 30 of the 1996 Act provides :

> "***Competence of tribunal to rule on its own jurisdiction***
>
> *(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to-*
>
> *a) whether there is a valid arbitration agreement,*
>
> *b) whether the tribunal is properly constituted, and*
>
> *c) what matters have been submitted to arbitration in accordance with the arbitration agreement.*
>
> *(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.*"

132. C's challenge does not involve any challenge falling within s.30 (1). C sought to suggest that section 30 did not contain an exhaustive definition of matters falling within a jurisdictional challenge for the purpose of s.67 by reference to Merkin & Flannery *Arbitration Act 1996 : A Commentary (5th Ed)* ("Merkin & Flannery"). There the authors stated :

> "*It is uncertain whether the list of jurisdictional issues in s.30(1) is exhaustive. Although the sense of the provision would appear that it is (particularly by including the words "that is, as to"), the draftsman did not make it expressly so. Accordingly, it appears fairly well settled that s.30 applies to other matters…for example the question of whether a reference to arbitration was, in the light of other agreed dispute resolution mechanisms that had not been exhausted, premature…We consider that this expansive approach to the provision is the correct one; a restrictive approach would only undermine the separability principle set out in s.7 and give rise to a legislative incongruity that was probably not intended*."

133. Eder J had to consider this passage and other relevant authorities in *Union Marine Classification Services LLC v The Government of the Union of Comoros* [2015] EWHC 508 (Comm). He concluded that the complaint before him could not properly be made under s.67, eschewing the expansive approach advocated by *Merkin & Flannery*. At paragraph 23 he stated :

> "*23. Rather, it seems to me that Mr Jacobs' threshold objection is correct for the following reasons. First, it is, in my view, more consistent with the ordinary language of s.30(1)(c) i.e. the only question in that context is to identify what matters have been submitted to arbitration. Here, it is common ground that the matters the subject of the Second Award had been referred to arbitration. Second, I do not consider that the suggested "expansive approach" urged by Mr Cutress is supported by the cases referred to in Merkin and Flannery. Moreover, in my view, such suggested "expansive approach" urged by Mr Cutress is contrary to the general principle as stated in s.1(c) of the 1996Act ("…in matters governed by this Part the court should not intervene except as provided in this Part") as well as the underlying thrust of the decision of the House of Lords in Lesotho. Third, I do not accept that this reading of s.30(1)(c) is somehow"unfair"or"un-commercial"as Mr Cutress suggested. This would perhaps be so if there were no other remedy available to an applicant in circumstances such as these apart from s.67 of the 1996 Act. However, as Mr Jacobs submitted, it seems to me that there is an available remedy under s.68(2)(b) of the 1996 Act. Mr Cutress countered by submitting, in effect, that this was not a sufficient or satisfactory remedy in particular because s.68 places additional hurdles in the way of an applicant – including the requirement of showing "substantial injustice". However, I do not consider this renders*

> *the remedy under s.68 insufficient or inadequate. Fourth, as Mr Cutress accepted, his case on this point is inconsistent with the decision of Burton J in CNH. Although that decision is not binding on me, it strongly supports the case in this respect advanced by Mr Jacobs; and I would not be minded to disagree with that decision unless I was persuaded that it was wrong which I am not.*"

134. In *CNH Global v PGN Logistics Ltd* [2009] 1 CLC 807 Burton J had said (at paragraph 18) :

> "*I have no doubt whatever that s.67 relates to situations in which it is alleged that the arbitral tribunal lacks substantive jurisdiction i.e. that there was in fact no arbitration clause at all, and no jurisdiction for the arbitrators to act at all at any rate in relation to the relevant dispute, and not situations in which arbitrators properly appointed were alleged to have exceeded their powers.*"

135. It seems to me that s.30 is likely to contain an exhaustive definition of jurisdictional matters, particularly when s.82 is taken into account. Its wording, namely "*that is*", is consistent only with such a conclusion. And, like Eder J, I can see no basis for an expansive approach, particularly given the policy behind the 1996 Act.

136. That leads one to consider C's alternative case, namely that it can bring a challenge under s.68(2)(b) of the 1996 Act.

137. The Defendants contend that C cannot. The highest that C can put its complaint is that the Tribunal made an error of law. The complaint is that the Tribunal should have concluded that the parties had "*agreed otherwise*" for the purpose of the exception in Article 22.1(h). The point was argued fully before the Tribunal which rejected it (even if it did not address it directly or in any detail in the Award). The erroneous exercise of an available power cannot by itself amount to an excess of power. There was here a mere error of law, not an excess of power under s.68(2)(b).

138. The Defendants rely heavily on *Lesotho*, where again the relevant question was whether, by their underlying contract, the parties had "otherwise agreed" to contract out of default remedies available to the tribunal under s.48 of the 1996 Act, specifically out of the power to order payment of a sum of money in any currency. The House of Lords held that the tribunal had (at most) committed an error of law.

139. The relevant passages can be taken as follows :

> "*23. Contrary to the view I have expressed, I will now assume that the tribunal committed an error of law. That error of law could have taken more than one form. The judge ([2003] 1 All ER (Comm) 22, para 25) and the Court of Appeal [2004] 1 All ER (Comm) 97, para 35) approached the matter on the basis that the tribunal erred in the interpretation of the underlying contract. Another possibility is that the tribunal misinterpreted its powers, under s.48(4) to express the award in any currency.*

Let me approach the matter on the basis that there was a mistake by the tribunal in one of these forms. Whichever is the case, the highest the case can be put is that the tribunal committed an error of law.

24. But the issue was whether the tribunal "exceeded its powers" within the meaning of s.68(2)(b). This required the courts below to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have. If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under s.68(2)(b) is involved. Once the matter is approached correctly, it is clear that at the highest in the present case, on the currency point, there was no more than an erroneous exercise of the power available under s.48(4). The jurisdictional challenge must therefore fail…

29. It will be observed that the list of irregularities under s.68 may be divided into those which affect the arbitral procedure and those which affect the award. But nowhere in s.68, is there any hint that a failure by the tribunal to arrive at the "correct decision" could afford a ground for challenge under s.68. On the other hand, s.68 has a meaningful role to play. An example of an excess of power under s.68(2)(b) may be where, in conflict with an agreement in writing of the parties under s.37, the tribunal appointed an expert to report to it. At the hearing of the appeal my noble and learned friend, Lord Phillips of Worth Matravers MR, also gave the example where an arbitration agreement expressly permitted only the award of simple interest and the arbitrators in disregard of the agreement awarded compound interest. There is a close affinity between s.68(2)(b) and s.68(2)(e). The latter provision deals with the position when an arbitral institution vested by the parties with powers in relation to the proceedings or an award exceeds its powers. The institution would exceed its power of appointment by appointing a tribunal of three persons where the arbitration agreement specified a sole arbitrator…

31. By its very terms s.68(2)(b) assumes that the tribunal acted within its substantive jurisdiction. It is aimed at the tribunal exceeding its powers under the arbitration agreement, terms of reference or the 1996 Act. Section 68(2)(b) does not permit a challenge on the ground that the tribunal arrived at a wrong conclusion as a matter of law or fact. It is not apt to cover a mere error of law. This view is reinforced if one takes into account that a mistake in interpreting the contract is the paradigm of a "question of law" which may in the circumstances specified in s.69 be appealed unless the parties have excluded that right by agreement. In cases where the right of appeal has by agreement, sanctioned by the Act, been

> *excluded, it would be curious to allow a challenge under s.68(2)(b) to be based on a mistaken interpretation of the underlying contract. Moreover, it would be strange where there is no exclusion agreement, to allow parallel challenges under s.68(2)(b) and s.69.*
>
> *32. In order to decide whether s.68(2)(b) is engaged it will be necessary to focus intensely on the particular power under an arbitration agreement, the terms of reference, or the 1996 Act which is involved, judged in all the circumstances of the case. In making this general observation it must always be borne in mind that the erroneous exercise of an available power cannot by itself amount to an excess of power. A mere error of law will not amount to an excess of power under s.68(2)(b).*"

140. I do not accept that *Lesotho* is so clearly in the Defendants' favour as they contend. Paragraph 29 of *Lesotho* gives as possible examples of an excess of power under s.68(2)(b) a situation where, in conflict with an agreement in writing of the parties under s.37, the tribunal appointed an expert to report to it. Section 37 provides as follows :

> "*Unless otherwise agreed by the parties, the Tribunal may appoint experts...*"

141. Another example given is the making of an award of compound interest when the arbitration agreement expressly permitted only the award of simple interest.

142. Paragraph 32 of *Lesotho* makes it clear that in order to decide whether s.68(2)(b) is engaged it is necessary to focus on the particular power under an arbitration agreement which is engaged judged in all the circumstances of the case. The power of joinder is fundamentally different in scope and effect to, for example, the power to make an arbitral award in a certain currency (which was the power under scrutiny in *Lesotho*). The scope of any tribunal's jurisdiction is defined in terms of its power to determine specific disputes between particular parties. Adding a party to the arbitration is a jurisdictional decision in substance, since it expands the jurisdiction of the tribunal over the parties to be bound as against each other by the tribunal's decision. As it was put for C, the exercise of a power to join is "*functionally equivalent to a decision on jurisdiction*". In all the circumstances of this case, it seems to me that s.68(2)(b) is engaged. This was no mere alleged error of law, but something more that would, if established, amount to an excess of power.

143. Turning then to the second issue, and the question of whether or not there was an excess of power. The only issue is whether or not the parties had "*at any time otherwise agreed in writing*" that the Tribunal should not have the power contained in Article 22.1(h). (The Claimant reserved its position for present purposes as to whether or not, on its proper construction, Article 22.1(h) created a power of "forced joinder". If the effect of Article 22.1(h) was that if A and B agreed to arbitrate, a tribunal appointed pursuant to this agreement could join a non-party, C, to the arbitration provided that B and C consented to the joinder, however vehemently A might object, that would be fundamentally at odds with the consensual nature of arbitration. This

point was resisted strongly by the Defendants and in any event not pursued by the Claimant.)

144. C contends that the parties "*agreed otherwise*" by the PSC and the novation agreement where it was agreed that D3's claims would be brought in Paris and only in Paris. Had C and D1 intended to make D3 a party to the SPA and to its arbitration agreement, it would have been a simple matter to say so (see, for example, the novation agreement). The express provisions of the arbitration agreement in the PSC should be given greater weight, being tailor-made, in contrast to a rule incorporated by reference into a standard-form arbitration clause. Faced with a conflict, the special terms should prevail. Here the conflict should simply be resolved by holding that the parties had "*agreed otherwise*".

145. In my judgment, it cannot be said that the parties "*agreed otherwise*" for the purpose of Article 22.1(h). What the exception requires is more than the existence of a separate (and earlier) arbitration clause (or clauses) providing for arbitration elsewhere and under a different regime but which did not address the scope of the LCIA Rules if incorporated, or address in any way the power of a tribunal to join a third party such as D3 in a future arbitration process incorporating the LCIA Rules (or any other rules). What would be expected is a clear written agreement to the effect that, in circumstances where the LCIA Rules were to be incorporated, Article 22.1(h) was not to apply/there would be no power of joinder as contemplated there. The natural point for such agreement would be at the time of the SPA or completion of the SPA. C agreed in the SPA that the LCIA Rules would be incorporated without reservation. And on completion, even when the SPA was otherwise amended, no attempt was made to limit the scope of incorporation of the LCIA Rules. I do not consider, as it was put for C, that such a course would have been contrary to the expectations of rational businesspeople, if the parties had intended it to reflect the position between them. Nor is there any basis for reading the necessary agreement into Clause 10 of the Deed of Novation, particularly given the "override" provision in Clause 3.

146. The earlier agreements do not assist C on this point. There was no agreement to exclude any power to join D3 in subsequent arbitral proceedings either in the SPA or the PSC or the novation agreement, whether in the context of the LCIA Rules or more generally. Thus, neither the PSC nor the Deed of Novation says anything about an arbitral tribunal's power to join D3 or any other third party in any future arbitral proceedings.

147. For all these reasons, I find that the Tribunal had the power to join D3 to the arbitral proceedings. The parties to the SPA had not agreed otherwise.

K. Issue 1 : has C lost the right to challenge the Award?

148. All of the above is subject to the question of whether C has lost the ability to challenge under s.67 and/or 68 of the 1996 Act as a result of its post-Award conduct. The point is now somewhat academic, given my substantive rejection of the challenge. But I deal with it nevertheless for the sake of completeness and because it is the gateway to the challenge in the first place.

149. The Defendants' attack to C's right to challenge is based on an alleged waiver under s.73(1) of the 1996 Act and/or at common law.

150. I remind myself at the outset of the broad policy in play, as identified in *Primetrade AG v Ythan Ltd* ("the *Ythan*") [2006] 1 All ER 367. As Moore-Bick J said in *Rustal Trading v Gill & Duffus SA* [2000] 1 Lloyd's Rep 14 (at paragraph 19), s.73(1) is designed to ensure that if a person believes he has grounds for objecting to the constitution of the tribunal or the conduct of the proceedings, he raises those objections as soon as he is aware of them or ought to be aware of them. It would be unfair if he took part in arbitration yet kept an objection up his sleeve and only attempted to deploy it later. Having considered that and other authorities and materials, Aikens J said this in *Primetrade* (at paragraph 59) :

> "*It is clear that the intention behind s.73 is to ensure that a party objecting to jurisdiction, who has decided to take part in the arbitral proceedings, should bring forward his objections in those proceedings before the arbitrators. He should not hold them in reserve for a challenge to jurisdiction in the court. I agree with Colman J that this intention reflects a principle of "openness and fair dealing" between parties who may, or may not, be bound by an arbitration clause…*"

151. At a general level, there can be no question here of C keeping its jurisdictional challenge up its sleeve. It indicated its challenge once the challenge had been identified with its lawyers and instructions given, and in good time, namely three weeks after the Award and before any further substantive step in the reference had occurred.

152. Turning then to the specific arguments advanced by the Defendants, as indicated, reliance is placed on s.73(1) in relation to both the s.67 and 68 challenges. They rely on s.73(1)(c) as applying to C's s.68 challenge, and state that s.73(1) applies where a defendant participates in arbitral proceedings following a partial award : see *Colliers International Property Consultants v Colliers Jordan Lee Jafaar* [2008] EWHC 1524 (Comm) (at paragraph 33) and *Merkin, Arbitration Law (Looseleaf)* at paragraph 20.5. The Defendants also contend that Article 32.1 of the LCIA Rules applies to a partial award, and rely on that Article which provides :

> "*32.1 A party who knows that any provision of the Arbitration Agreement (including these Rules) has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, shall be treated as having irrevocably waived its right to object.*"

153. In the alternative, the Defendants rely on waiver at common law. In "*The Kanchenjunga*" [1990] 1 Lloyd's Rep 391 Lord Goff spelt out the requirements for a waiver by election (at 398 to 399) :

> "*Election itself is a concept which may be relevant in more than one context. In the present case we are concerned with an election which may arise in the context of a binding contract, when a state of affairs comes into existence in which one party*

> *becomes entitled, either under the terms of the contract or by the general law, to exercise a right, and he has to decide whether or not to do so. His decision, being a matter of choice for him, is called in law an election. … In particular, where with knowledge of the relevant facts a party has acted in a manner which is consistent only with his having chosen one of the two alternative and inconsistent courses of action then open to him – for example to determine a contract or effectively to affirm it – he is held to have made his election accordingly, just as a buyer may be deemed to have accepted un-contractual goods in the circumstances specified in s.35 of the 1979 Act.… But of course an election may not be made in this way. It can be communicated to the other party by words or conduct; though, perhaps because a party who elects not to exercise a right which has become available to him is abandoning that right, he will only be held to have done so if he has so communicated his election to the other party in clear and unequivocal terms…Once an election is made, however, it is final and binding…*"

Lord Goff went on, when contrasting the doctrine of election with equitable estoppel, to emphasise an important similarity, namely :

> "*… that each requires an unequivocal representation, perhaps because each may involve a loss, permanent or temporary, of the relevant party's rights*."

154. The Defendants contend that between 21st October 2014 and 12th November 2014 C had fully participated in the arbitration without objection or reservation of its position. It unequivocally demonstrated acceptance of the Award.

155. C contends that s.73(2), not s.73(1) is the relevant provision. It is s.73(2) that deals with challenges to substantive jurisdiction when there has been an award. C clearly complied with s.73(2) by raising a challenge within time. But in any event, for the purpose of s.73(1) and its s.67 challenge, C indicated its objection to the Tribunal's jurisdiction from the very outset. It was that very objection that led to the hearing of preliminary issues leading to the Award. As for its s.68 challenge, it is a challenge based on an irregularity affecting the Award, not the Tribunal or the proceedings. Thus, it is excluded from s.73(1)(d), which appears deliberately to omit reference to any irregularity affecting an award. As for the Defendants' reliance on s.73(1)(c), there is no objection by C based on a failure to comply with an arbitration agreement or any relevant provision of the 1996 Act.

156. But in any event, in relation to both its s.67 and 68 challenges, C raised its objections "*forthwith*" as required by s.73(1), which for the purpose of s.73(1) means as soon as reasonably possible (see *Margulead Ltd v Exide Technologies* [2004] 2 All ER (Comm) 727 (at 734 e-f).

157. I do not find it necessary to resolve the debate as to whether s.73(1) or s.73(2) applies, or whether or not s.73(1)(c) extends to C's s.68 challenge, since on any view I can

find no proper basis for any waiver by C of its right to challenge either under statute or at common law.

158. The relevant correspondence and communications are set out in section E above. It is right to say that in the period immediately after the Award until 12th November 2014 when C first declared its jurisdictional challenge, the correspondence went beyond addressing procedural issues arising out of paragraphs 45 to 47 of the Award (which dealt with issues in the arbitral proceedings entirely unrelated to the subject of C's challenges to the counterclaims and which would continue in any event). Specifically, the Defendants' solicitors requested a revised timetable for all issues in the arbitral proceedings.

159. But it does not seem to me that a fair reading of the correspondence as a whole results in any compromise of C's ability to challenge jurisdiction as it now seeks to do.

160. First, it is common ground that C launched its jurisdictional challenge within the time frame prescribed by the 1996 Act (under s.70(3)). Whilst C is not insulated from waiver simply because it brought its claim within the statutory deadline, C's compliance and the fact that the communications relied upon by the Defendants were made during the currency of the "live" period for challenge remains relevant. Secondly, the correspondence relied upon was driven by the Defendants' response to the Tribunal's directions in paragraphs 45 to 47 of the Award, which were the main focus of the correspondence. As already indicated, those paragraphs were not concerned in any way with the Defendants' counterclaims. The procedural issues relating to the other issues in the arbitral proceedings were raised as consequential matters. Thirdly, the correspondence dealt with procedural matters only. Fourthly and significantly, C was only ever acting responsively on the procedural matters raised, and then only in the negative. It was not taking any pro-active steps in relation to the Defendants' counterclaims (or in fact more generally at all). On 7th November 2014 it expressly stated that it would be "*wholly inappropriate*" to determine a timetable for all issues in the arbitration at that stage. The only occasion when it did respond positively (to the Tribunal's offer of a half day hearing in December 2014), the response was specifically by reference to an issue wholly unrelated to the Defendants' counterclaims, namely the question of D2's liability pursuant to the Guarantees.

161. Thus, C did not lose its right to challenge under s.73 of the 1996 Act. Article 32.1 does not assist the Defendants, not least since it begs the question of whether or not C delayed in stating its objection once it had knowledge thereof (which seems unlikely on the correspondence that I have seen). Equally, assuming in the Defendants' favour that there is room for the common law doctrine of election within the statutory regime of the 1996 Act (see s.81(1) of the 1996 Act), nothing in my judgment in C's conduct came close to a clear and unequivocal communication to the effect that it had chosen not to exercise its rights of jurisdictional challenge. Nor was there any unequivocal representation to that effect.

L. <u>Conclusion</u>

162. For the reasons set out above, I find :

a) that C did not lose its right to challenge the Award; but that

b) C's challenge to paragraphs 241(1) and 241(3) of the Award under ss.67 and 68 of the 1996 Act fails.

163. The claim thus falls to be dismissed. I invite the parties to draw up an order reflecting the above and to agree all consequential matters, including costs, so far as possible. I conclude by recording my gratitude to all counsel for their courteous and skilled presentation of the issues.