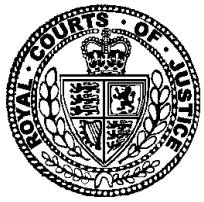

Neutral Citation Number: [2017] EWHC 2909 (Comm)

Case No: CL-2015-000101; CL-2015-000713; CL-2016-000348

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

Rolls Building, Fetter Lane
London EC2A 2LL

Date: 30th November 2017

Before :

CHRISTOPHER HANCOCK QC (SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

- -

IN THE MATTER OF AN ARBITRATION CONDUCED IN ACCORDANCE WITH THE RULES BETWEEN

Between :

STOCKMAN INTERHOLD S.A.	**Claimant**
- and -	
ARRICANO REAL ESTATE PLC (FORMERLY ARRICANO TRADING LIMITED)	**Defendant**

AND IN THE MATTER OF AN ARBITRATION CONDUCTED IN ACCORDANCE WITH THE LCIA RULES BETWEEN:

Between :

STOCKMAN INTERHOLD S.A.	**Claimant**
- and -	
ARRICANO REAL ESTATE PLC (FORMERLY ARRICANO TRADING LIMITED)	**Defendant**

- -
- -

James Collins QC & Siddharth Dhar (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimant**
Matthew Weiniger QC & Ula Cartwright Finch (instructed by Linklaters LLP) for the **Defendant**

Hearing dates: 25-28 July 2017

- -

APPROVED JUDGMENT

CHRISTOPHER HANCOCK QC (SITTING AS A DEPUTY JUDGE OF THE HIGH COURT) :

Introduction

1. There are before me a series of arbitration applications, involving a number of Awards, the details of which I set out below, in a relatively long running dispute between these parties, all of which Awards were made by an experienced commercial arbitrator, sitting as sole arbitrator. I set out full details of the precise applications below. I refer to the applicant as Stockman and the respondent as Arricano.

The contractual and factual background to the First LCIA Award.

2. The story commenced in 2009, when Mr Teder, of Arricano, sought investors in various shopping centre projects in Ukraine that he was developing, in particular the Sky Mall in Kiev. Those projects were held by a company called Assofit and its subsidiaries, and Mr Teder held his interest in Assofit through Arricano.

3. Mr Teder's property group was in need of a significant cash injection. To this end, he spoke to a number of potential investors, including Mr Andrey Adamovsky. Mr Adamovsky was interested in the Sky Mall project and he made an offer in November 2009 to buy shares in Assofit.

4. In December 2009, Mr Teder and Mr Adamovsky signed a letter of intent. One of the terms of that agreement was that, upon signing, Mr Teder would terminate any negotiations with other third parties in relation to the sale of a stake or investment in the Sky Mall project.

5. In addition, in December 2009, Mr Teder and Mr Adamovsky signed a Memorandum of Understanding, or MOU which described the proposed terms on which Stockman would acquire 50%+1 share in Assofit in order to acquire an interest in the "Property", described as the assets and liabilities in tow companies called Dniprovska Prystan and Pryzma Beta, constituting together an integral property complex, Sky Mall. The transaction was valued at USD 40 million.

6. The MOU noted that the parties agreed not to initiate the sale of shares, participation interests or the Property at any time sooner than 2 and a half years after the Project Phase 2 (as defined in a Share Holders Agreement, or SHA, of which more below).

7. The MOU also described a Call Option whereby Arricano would have the right to demand that Stockman sell all its shares to Arricano at any time within one year of the Transaction Completion.

8. Various agreements were then entered into between 29 December 2009 and 25 February 2010 by which Stockman agreed to purchase shares in Assofit from Arricano.

9. On 25 February 2010, Stockman and Arricano entered into two other agreements, being the SHA, and a Call Option Agreement, or COA.

10. The most relevant provisions of the SHA were as follows:

    (1) The parties to the SHA were Stockman and Arricano, who were shareholders in Assofit, a Cypriot company, with Arricano holding

1599 shares (49.97% of the issued share capital) and Stockman holding 1601 shares (50.03% of the issued share capital).

(2) The joint venture thus constituted held various assets, directly or indirectly, including (most importantly) the Sky Mall located in Kiev and the land and parking zones associated with it (the Project being defined as the *"construction, joint operation and servicing of single property complex trade and entertainment centre Sky Mall located at 2 Generala Vatutina Avenue, Kiev, Ukraine").*

(3) The parties had agreed to enter into the SHA for the purposes of the Joint Business, which was to promote the Project and to make profits to be distributed between the shareholders.

(4) The SHA also included a provision relating to a Call Option, namely clause 13.1, which provided that: *"[Arricano] is entitled to demand [Stockman] to sell all its JV shares ("Call Option") pursuant to the terms and conditions of the Option Agreement."*

11. As for the COA, it provided as follows (leaving out headings):

> *"2.1 In consideration of the mutual obligations under this Agreement and Shareholders Agreement, which are sufficient consideration, the Investor hereby grants to Arricano an option to require the Investor to sell all of the Option Shares on the terms set out in this Agreement (the "Call Option")….*
>
> *…3.1 The Call Option is effective within 12 months, starting from 15 March 2010 up to 15 March 2011 inclusive.*
>
> *3.2 Without prejudice to clause 3.1 above the Call Option Completion may be exercised exceptionally within period from 15 November 2010 to 15 March 2011 inclusive ("Call Option Completion Period").*

3.3 The Call Option shall be exercised only by Arricano giving to the Investor and the Escrow Agent the Call Option Exercise Notice which shall include:

3.3.1The date on which the Call Option Exercise Notice is given;

3.3.2a statement to the effect that Arricano is exercising the Call Option;

3.3.3 a date, which shall fall within the Call Option Period and shall accrue no less than in ten (10) and no more than forty-five (45) Business Days after the date of the Call Option Exercise Notice, on which the Option Completion is to take place ("Completion Date")

3.3.4 indication of the Option Price on the Completion Date which shall be calculated in accordance with Schedule 2; and

3.3.5a signature by authorized person on behalf of Arricano.

3.4 The agreed form of the Call Option Exercise Notice is attached as Schedule 1.

3.5 The Call Option may be exercised only in respect of all of the Option Shares.

4.1 The consideration due from Arricano in respect of the Option Shares shall be the payment by Arricano to the Investor of the Option Price on the Completion Date….

…6.1 Option Completion shall take place at the office of the Company at Grigori Afxentiou, 8 ELPA, LIVADIOTIS, 3rd Floor, Flat/Office 306, P.C. 6023, Larnaca, Cyprus, or at such other place as the Parties may agree when all of the following business shall be transacted:

6.1.1 Arricano shall pay the Option Price by funds transfer on the Completion Date to the Investor's bank account:

[Account details]

and the Investor hereby authorises payment of the Option Price into such account, which shall constitute a good discharge by Arricano in respect of it and

> *Arricano shall have no obligation as to the distribution or allocation of the Option Price to the Investor;*
>
> *6.1.2 on the Date of Completion Arricano's bank presents to the Escrow Agent the SWIFT-message confirming of payment of the Option Price to the Investor's bank account specified in clause 6.1.1 above;*
>
> *6.1.2 the Escrow Agent performs all such actions which are required in the Escrow Agreement for the completion of the Call Option Exercise by Arricano."…*
>
> *…16.1 Call Option and the Escrow Agreement shall be terminated in the event of a default by Arricano to perform its financial obligations set out in clause 3.5 of the Shareholders Agreement and passing of the resolution by the Board of Directors of the Company on additional investment in form, affirmed in Schedule 3."*

12. In addition to the above clauses, which I have set out verbatim, there were the following further clauses in the COA:

(1) A clause (clause 5) appointing Public Joint Stock Company "Corporate and Investment Bank Credit Agricole" ("Credit Agricole") as Escrow Agent. The Escrow Agent was to hold various documents, including share certificates, share transfer certificates, resignation letters of the directors appointed by the Investor, a resolution of the company authorising the sale of the Option Shares, and a further resolution authorising transfer.

(2) An entire agreement clause: clause 8

(3) A confidentiality clause: clause 10.

(4) A notices clause: clause 13.

(5) A prohibition against assignment: clause 14.

(6) An arbitration agreement: clause 15.

13. There was also an escrow arrangement, dated 24 March 2010, between Arricano, Stockman, and Credit Agricole, which provided that Credit Agricole, who was referred to as "the Keeper", was to be provided with a sealed envelope containing various documents selected by Stockman and Arricano. The agreement then provided the terms on which the envelope was to be returned to Stockman or Arricano, and defined the period of the return of the envelope to Arricano as being from 15 November 2010 to 15 March 2011.

14. Clause 2 of this agreement was the most important clause, and provided as follows:

> *"2.1 Return of the Envelope to Arricano may be made within the Period of the Return of the Envelope to Arricano only. To avoid any doubts, any documents mentioned in the article 2 hereof as a ground for the Return of the Envelope by the Keeper shall not be transferred to the Keeper before or after the Period of the Return of the Envelope to Arricano.*
>
> *2.2 The Envelope must be returned to Arricano in case of (i) presentation to the Keeper the Call Option Exercise Notice by Arricano's representative and (ii) the SWIFT-message from the Arricano's Bank.*
>
> *2.3. In case the Keeper receives within the Period of the Return of the Envelope to Arricano both documents according to the clause 2.2, the Keeper must check the correspondence of the documents to the samples as provided in Schedules 1, 2, 4 hereto and provide both Depositors with written notice not later than 3 (three) business days after receipt of such documents.*
>
> > *2.3.1 If both documents formally meet the requirements of this Agreement, the Keeper shall mark in its notice that the documents meet the requirements of the Agreement and indicate the date starting from*

which the Representative of Arricano may receive the Envelope;

2.3.2 If any document or both documents do not formally meet the requirements of this Agreement, the Keeper shall mark in the notice such discrepancy and inform that the Keeper shall perform any further actions with the Envelope only after joint written notice of Representatives of both Depositors or based on documents which shall meet formal requirements of this Agreement.

2.4 The Keeper shall return the Envelope to the Investor in the following cases:

2.4.1 If the Keeper within the Period of the Return of the Envelope to Arricano shall not receive from Arricano the Call Option Exercise Notice and a SWIFT-message from the Arricano's Bank; or

2.4.2 If the Keeper until 15 March 2011 inclusively shall receive personally from the Investor's representative apostilled Resolution of the Board of ASSOFIT HOLDING LIMITED on additional investment in the Project according to the pro-forma as provided in Schedule 3;

2.4.3 If the Keeper within the Period of the Return of the Envelope to Arricano shall receive joint written notice from both Depositors with the relevant instructions. Such notice shall be delivered to the Keeper personally by the Representatives of both Depositors. Separate written notices from each Depositor are prohibited.

2.5 The Return of the Envelope to Arricano or the Investor, as the case may be, shall be performed at the Keeper's location by executing the respective Protocol of Receipt/Transfer, signed by the Keeper and respective recipient Depositor's representative.

2.6 The Keeper shall send a written notice to both Depositors on Return of the Envelope."

15. Mr Teder was also negotiating at about this time with Dragon-Ukraine Properties and Development PLC ("DUPD") for DUPD to acquire a stake in Arricano. A Term Sheet was initialled by Mr Teder on 21 May 2010, stating that its purpose was for DUPD to acquire a minimum of 16.6% interest in

Arricano, with a maximum interest of 50%. It contemplated an investment of up to USD 90 million, and provided that approximately USD 50 million would be used to exercise the Call Option.

16. Various further transactions then took place which were designed to further DUPD's acquisition of shares in Arricano. I do not need to record the full details of these transactions for the purposes of this judgment. Suffice it to say that, as noted below, Stockman in due course relied on these transactions to assert breaches of the SHA, on the basis of which they terminated that agreement.

17. The next really relevant event was the exercise of the Call Option by Arricano, which took place on 5 November 2010. That was swiftly followed by a Notice of Termination of the SHA by Stockman, on the grounds that Arricano had committed a number of fundamental breaches of that agreement, by reason of the transactions with DUPD. Those breaches included the following, taken from the Notice of Termination:

(1) A breach of the change in control provision in clause 2.4 of the SHA by facilitating and/or approving and/or allowing control to be passed from Mr Teder, as Shareholder 1 Beneficiary, to DUPD without Stockman's consent;

(2) A breach of the confidentiality provisions in clause 15 of the SHA by disclosing "the activities of the Joint Business of the Agreement to a third party, namely DUPD, in order to access additional funding and to facilitate a change in control in the JV"; and

(3) A breach of the confidentiality provisions in clause 10.1 of the SHA by disclosing the "content of this agreement" to a third party, namely DUPD, apparently in order to access additional funding and to facilitate a change in control in Arricano.

The UNCITRAL arbitration and the LCIA arbitration.

18. On 9 November 2010, Stockman commenced the LCIA arbitration, pursuant to an arbitration clause in the COA.

19. Stockman also sought and obtained an injunction from the Cyprus courts stopping Arricano proceeding pursuant to the Call Option Notice. On 29 November 2010, lawyers acting for Arricano told Stockman that they were ready willing and able to proceed but could not do so because of the Cyprus court order.

20. On 21 December 2010, Arricano commenced the UNCITRAL arbitration proceedings under the SHA.

21. A tribunal of three arbitrators was appointed in relation to the UNCITRAL arbitration, whereas a sole arbitrator was appointed in the LCIA reference. The sole arbitrator in the LCIA reference was however also the chairman of the UNCITRAL tribunal.

22. By agreement, the LCIA arbitration was stayed pending the hearing of the UNCITRAL arbitration. It was also agreed that the findings of the UNCITRAL tribunal would be binding on the parties in the LCIA arbitration.

23. The UNCITRAL Tribunal issued its Award on 9 June 2011. In certain regards, the tribunal was not unanimous, and the dissenting arbitrator was in fact the chairman (who was the sole arbitrator in the LCIA arbitration). This latter fact is however of no relevance to my judgment.

24. The *dispositif* in the UNCITRAL Award reads as follows:

> *"242.1 The Tribunal declares that Stockman validly terminated the SHA on 8 November 2010.*
>
> *242.2 The Tribunal orders that:*
>
> *(a) Arricano takes all steps required for the Filgate Loan to Pryzma Beta to be brought under the joint control of Arricano and Stockman by Arricano arranging for the transfer of the loan from Filgate to a Cypriot Company owned directly or indirectly as to 49.97% by Arricano and 50.03% by Stockman.*
>
> *(b) Arricano arranges for the right to land of the Sky Mall project to be transferred to Pryzma Beta and that Arricano and Stockman sell all shares in Dnepreovskaya Prystan to a third party specified by Arricano for USD 1 or for another amount taking into account tax optimisation.*
>
> *242.3 The Tribunal declares that Arricano and Stockman, as shareholders in Assofit, and their nominees, owe one another fiduciary duties.*
>
> *242.4 Costs shall be dealt with in a separate Award.*
>
> *242.5 All other claims of both parties are dismissed."*

The first LCIA Award and remission of that Award.

25. The current arbitral story, in terms of Awards, begins with the first LCIA Award, made on 13 December 2011. In its submissions leading up to that Award, Arricano claimed that it had validly exercised the Call Option, and went on to claim various forms of relief.

26. In the light of the jurisdictional arguments that were addressed to me, it is particularly important to address certain of the paragraphs of Arricano's submissions, and the prayer for relief. I start with Arricano's initial submissions, served on 23 December 2010, which included the following passages.

> *"5.2 According to Schedule 2 to the COA, the Option Price increases on a daily basis. The Respondent therefore seeks a declaration that the price as at 29 November 2009, the Completion Price indicated in the Call Option Notice, should be the price at which it can acquire the Claimant's shares. The Respondent is entitled to such a declaration on the basis that it would put it in the same position as if the Claimant had not purported to terminate the COA in breach of its contractual obligations. The Respondent invited the Claimant to agree to this by the Letter dated 7 December 2010. However, the Claimant rejected this request by the Letter dated 15 December 2010.*
>
> *5.3 In addition, the Respondent seeks an order against the Claimant for payment of the costs and damages which it incurred as a result of the invalid termination of the COA and respectfully requests the Tribunal to allow it to set off such order against the Option Price. Given the potential difficulties which the Respondent will face when trying to enforce an award against the Claimant a company incorporated in the BVI with no known assets other than the shares in Assofit, it would be unjust if the Respondent were forced to pay a large sum over to the Claimant without any security that it will receive payment of the money which is owed in return. The Respondent again invited the Claimant to confirm its agreement to such a set-off in the Letter dated 7 December 2010. Again, the Claimant rejected this request."*
>
> ***6. THE RESPONDENT'S REQUEST FOR RELIEF.***
>
> *6.1 On the grounds set forth above, which will be supplemented and elaborated in due course, the Respondent hereby respectfully requests the Tribunal to:*
>
> > *6.1.1 Deny and dismiss the Claimant's claims and requests for relief in their entirety;*

> *6.1.2 Issue a declaratory order that:*
>
> *(1) The COA has not been validly terminated;*
>
> *(2) Arricano validly exercised the Call Option under Clause 3 of the COA by Notice dated 5 November 2010; and*
>
> *(3) The Option Price shall be the price as at 29 November 2010, i.e. US$51,397,260.27.*
>
> *6.1.3 Order the Claimant to bear all costs of this arbitration;*
>
> *6.1.4 Order the Claimant to reimburse the Respondent for all legal fees and other costs and expenses incurred by the Respondent as a result of the invalid termination of the COA;*
>
> *6.1.5 Allow the Respondent to set off any order under paragraphs 6.1.3 and 6.1.4 above against the Option Price; and*
>
> *6.1.6 Order such further relief as the Tribunal may deem appropriate in the circumstances."*

27. Next in time was Arricano's memorial, served on 24 June 2011. This read, in material part, as follows:

> *"7.1 As set out at paragraphs 2.3 and 5.1 above, by the time Stockman sent its Termination Notice to Arricano, Arricano had already exercised its Call Option….*
>
> *…7.3 By exercising its Call Option, Arricano created a new contract between Arricano and Stockman according to which Arricano was under an obligation to pay the Option Price to Stockman and Stockman under an obligation to transfer its Assofit shares to Arricano….*
>
> *…7.11 Even if the COA was subsequently terminated, either as a result of the termination of the SHA or as a result of Stockman accepting Arricano's repudiatory breach, this could therefore in any event not affect the validity of the exercise of the Call Option by Arricano and the obligation on Stockman to transfer its shares in Assofit to Arricano….*
>
> ***…10. ARRICANO'S COUNTERCLAIMS.***

10.1 Arricano counterclaims for a declaration that (1) the COA had not been validly terminated, (2) it validly exercised its Call Option and (3) the Option Price should be the price as at 29 November 2010.

10.2 According to Schedule 2 to the COA, the Option Price increases on a daily basis. Arricano therefore seeks a declaration that the price as at 29 November 2009, the Completion Price indicated in the Call Option Notice, should be the price at which it can acquire Stockman's shares. Arricano is entitled to such a declaration on the basis that that it would put Arricano in the same position as if Stockman had not purported to terminate the COA in breach of its contractual obligations. Arricano invited Stockman to agree to this by letter dated 7 December 2010. However, Stockman rejected this request by letter dated 15 December 2010.

10.3 In addition, Arricano seeks an order that Stockman return the Assofit share certificates and remaining transfer documentation to Arricano so that Arricano can complete its exercise of the Call Option and be put in the situation it should have been in since 29 November 2010.

10.4 Finally, Arricano seeks an order against Stockman for payment of the costs and damages which it has incurred as a result of the invalid termination of the COA and respectfully requests the Tribunal to allow it to set off such order against the Option Price. Given the potential difficulties which Arricano will face when trying to enforce an award against Stockman, a company incorporated in the BVI with no known assets other than the shares in Assofit, it would be unjust to force Arricano to pay a large sum of money to Stockman without any security that Arricano will receive payment of the money which it is owed in return. Arricano again invited Stockman to confirm its agreement to such a set-off in the Letter dated 7 December 2010. Again, Stockman rejected this request.

11. ARRICANO'S REQUEST FOR RELIEF.

11.1 On the grounds set forth above, Arricano hereby respectfully requests the Tribunal to:

(1) Deny and dismiss Stockman's claims and requests for relief in their entirety;

(2) Issue a declaratory order that:

> *(i) The COA has not been validly terminated;*
>
> *(ii) Arricano validly exercised the Call Option under Clause 3 of the COA by Notice dated 5 November 2010; and*
>
> *(iii)The Option Price shall be the price as at 29 November 2016, i.e. US$51,397,260.27;*
>
> *(3) Order Stockman to transfer all the shares it holds in Assofit to Arricano by:*
>
> *(i)Executing the relevant instrument of transfer of shares in respect of all the shares it holds in Assofit to and in favour of Arricano; and*
>
> *(ii) Delivering the original share certificates in respect of all the shares it holds in Assofit to Arricano;*
>
> *(4) Order Stockman to bear all the costs of this arbitration;*
>
> *(5) Order Stockman to reimburse Arricano for all legal fees and other costs and expenses incurred by Arricano as a result of the invalid termination of the COA;*
>
> *(6) Allow Arricano to set off any order for costs against Stockman against the Option Price; and*
>
> *(7) Order such further relief as the Tribunal may deem appropriate in the circumstances."*

28. Moving on to Arricano's post hearing brief, served on 22 July 2011, Arricano submitted as follows:

> *"2.10 Thus, by exercising its Call Option, Arricano created a new contract between Arricano and Stockman according to which Arricano was under an obligation to pay the Option Price to Stockman and Stockman under an obligation to transfer its Assofit shares to Arricano. If, as it has done, Stockman fails to complete that contract, Arricano is entitled to specific performance and damages in addition or in lieu."*

29. Turning to the concluding sections of that document, these read as follows:

> *"9.1 Based on the above, Arricano exercised its Call Option in accordance with the terms of the COA before Stockman terminated the COA. By exercising the Call Option, Arricano exercised a unilateral contractual right which created a new*

share and purchase agreement requiring Stockman to transfer the Assofit shares and Assofit to pay the price. These obligations had accrued and did not terminate with the termination of the COA by Stockman.

9.2 Furthermore, there was no repudiatory conduct on behalf of Arricano – either in the form of a breach of fiduciary duties or the confidentiality obligations in the COA – which entitled Stockman to terminate the COA. In any event, the COA expressly excludes Stockman's right to terminate the COA as a result of Arricano's repudiatory conduct.

9.3 Accordingly, Arricano counterclaims for a declaration that (1) the COA has not been validly terminated (2) it validly exercised the Call Option and (3) the Option Price should be the price as at 29 November 2010.

9.4 On 21 December 2010, in order to protect its rights under the SHA, Arricano obtained an interim injunction from the Cypriot courts. On 14 July 2011 Stockman applied to discharge its Cypriot order (referred to at paragraphs 6.17ff above) and Arricano's injunction was also discharged. On 18 July 2011, Stockman gave notice to convene an Assofit board meeting, and Arricano obtained an injunction in Cyprus to protect its rights under the COA by prohibiting Stockman from selling or alienating its shares.

9.5 Following Stockman's notice of 18 July 2011, Arricano wrote to Stockman on several occasions, asking Stockman to clarify their agenda, proposing new issues for the agenda and requesting that the meeting be held in Kyiv instead of Larnaca. On 21 July 2011, counsel for Mr Teder called Mr Granovsky, who refused to hold the meeting in Kyiv and confirmed that the meeting would be held in Larnaca. At 12.00p.m. on 22 July 2011, Mr Teder, Ms Burkstska and Mr Christos Kinanis for Mr Pinchuk attended the meeting in Larnaca. None of Stockman's representatives attended the meeting.

9.6 According to Schedule 2 to the COA, the Option Price increases on a daily basis. Arricano therefore seeks a declaration that the price as at 29 November 2009, the Completion Price indicated in the Call Option Notice, should be the price at which it can acquire Stockman's shares. Arricano is entitled to be put into the same position as if Stockman had not purported to terminate the COA in breach of its contractual obligations. Arricano invited Stockman to agree to this by letter dated 7 December 2010. However, Stockman rejected this request by letter dated 15 December 2010.

> *9.7 In addition, Arricano seeks an order that Stockman transfer all the shares it holds in Assofit to Arricano by (1) executing the relevant instrument of transfer of shares in respect of all the shares it holds in Assofit to and in favour of Arricano and (2) delivering the original share certificates in respect of all the shares it holds in Assofit to Arricano. This should allow for Arricano to complete its exercise of the Call Option and be put in the situation it should have been in since 29 November 2010.*
>
> *9.8 Finally, Arricano seeks an order against Stockman for payment of the costs and damages which it has incurred as a result of the invalid termination of the COA and respectfully requests the Tribunal to allow it to set off such order against the Option Price.*
>
> *9.9 Given the potential difficulties which Arricano will face when trying to enforce an award against Stockman, a company incorporated in the BVI with no known assets other than the shares in Assofit, it would be unjust to force Arricano to pay a large sum of money to Stockman without any security that Arricano will receive payment of the money which it is owed in return. Arricano again invited Stockman to confirm its agreement to such a set-off in the Letter dated 7 December 2010. Again, Stockman has rejected this request.*
>
> *9.10 Accordingly, Arricano asks for the dismissal of Stockman's claims and for the reliefs sought in its Counterclaim."*

30. In the event, in his decision in the first LCIA Award, the arbitrator determined that the COA had been validly terminated, and that the option agreement in the COA had *not* been validly exercised, because the necessary procedural preconditions had not been satisfied. His *dispositif* read as follows:

> *341. "For the reasons set out above, the Arbitral Tribunal hereby makes the following Award:*
>
> *(a) The Call Option was validly terminated by Stockman;*
>
> *(b) The Call Option was not validly exercised by Arricano;*
>
> *(c) Arricano shall pay £14,281.34 to Stockman in respect of the Costs of the Arbitration, which shall accrue simple interest as from 1 January 2012 until payment at 1.5%;*
>
> *(d) Each Party shall bear its own legal costs.*

> *342. All other claims and counterclaims presented by either Party in this phase of the arbitration are dismissed.*
>
> *343. The Tribunal shall remain functus in respect of Stockman's alternative claim in damages (see its Memorial, para 106), if pursued.*

31. That alternative claim in damages was for the losses which Stockman asserted that it would suffer if Arricano was permitted to exercise the Call Option. They asserted that Stockman's interest in the company was worth significantly more than the amount of the Option Price, and that if the Call Option was held to be validly exercised, Stockman would be deprived of this extra value. Stockman asserted an entitlement to damages on this account by reason of Arricano's alleged breaches of confidentiality, breach of fiduciary duty and repudiatory conduct, and also claimed damages on account of an alleged necessity to commence the LCIA arbitration.

32. That Award (as well as the UNCITRAL Award) was the subject of a challenge by Arricano on a number of grounds. The challenge to the UNCITRAL Award failed in its entirety. Many of the grounds of challenge to the LCIA Award were also unsuccessful, but Arricano was successful on one application made under s.68 of the Arbitration Act 1996.

33. The issue in question was identified by Field J in his judgment, at paragraph 37, as follows:

> *"Arricano's first challenge to the LCIA Award is brought under s.68(2)(d) on the basis that the arbitrator failed to deal with an essential issue that was put to him, namely that non-compliance with the Escrow Agreement could not have vitiated Stockman's liability under the COA to sell its shares in Assofit to Arricano, because the Escrow Agreement was separate from and served a different purpose than that served by the COA."*

34. Field J's conclusion on this is set out in paragraphs 44 and 45 of his judgment, as follows:

> *"I conclude, therefore, that this issue was in play in the LCIA Arbitration. The arbitrator did not deal with this issue and, in my judgment, in failing to do so he was in breach of s.68(2)(d). What was required was that the issue be identified as an issue in the arbitration and then determined. It is not, in my opinion, to be inferred that the arbitrator dealt with the issue by upholding Stockman's contention that the COA had not been validly exercised because the option notice did not meet the requirements of clauses 2.2 and 9.1 of the Escrow Agreement.*
>
> *In my judgment, Arricano has or will suffer a substantial injustice by reason of this breach of s.68(2)(d), since its contention that breach of the requirements of the Escrow Agreement does not invalidate the exercise of the Call Option is reasonably arguable (cf Vee Networks Limited v Econet Wireless International Limited [2004] EWHC 2909 (Comm)"*

35. Field J thus rejected all of the other challenges to the LCIA Award, but upheld this one challenge made under s.68(2)(d). In view of the success of this application, the First LCIA Award was remitted by Field J to the arbitrator by order dated 31 July 2012. That order provided as follows:

> *"The LCIA Award be remitted to the arbitrator, Mr Audley Sheppard, for him to (a) reconsider his finding that the call option was not validly exercised by Arricano on account of its failure to comply with the requirements of the Escrow Agreement; and (b) thereafter, to decide any remaining issues that arise for determination."*

36. The precise scope of that remission is relevant to the jurisdictional issues that I consider later in this judgment.

Events leading up to the second LCIA Award.

37. Pursuant to that remission, submissions were made to the arbitrator. The parties were agreed as to the issues that arose on that remission, which, it was

common ground, were accurately summarised in Arricano's skeleton argument of 10 September 2012, as follows (and I quote):

> *"(1) Does non-compliance with the requirements of the Escrow Agreement vitiate Arricano's right under the COA to acquire Stockman's shares in Assofit?*
>
> *(2) If not, did Arricano exercise the Call Option lawfully? This issue was expressly left open in paragraph 305(b) of the Award; and*
>
> *(3) If so, did Arricano's right to acquire Stockman's shares in Assofit accrue prior to Stockman's termination of the COA? This issue was also expressly left open in paragraph 305(a) of the Award."*

38. A hearing then took place before the arbitrator on May 1 2014, at which both parties were represented by experienced legal teams.

39. However, shortly prior to the issuance of the Second Award, on 12 August 2014, Stockman wrote to Arricano to tell it that Stockman had transferred the shares in Assofit which were in issue to Althor, a wholly owned subsidiary of Stockman. The letter in question read as follows:

> *"Further, please be informed that on 25 July 2014, Stockman transferred all its shares in Assofit to Althor Property Investments Limited (copies of its constitution documents are attached as Appendix 2 hereto), a company fully owned by Stockman. Such transfer was properly authorised by the Board of Directors of Assofit (copy of the Resolution of the Board of Directors is attached as Appendix 3 hereto.*
>
> *In reply to the request mentioned in your aforementioned letter of 6th August 2014, we hereby confirm that such transfer took place in full compliance with applicable laws and regulations, including without limitation Article 34 of the Articles of Association of Assofit. Please note that such transfer falls within the permitted transfers provided for by Article 34(i)."*

40. In the light of this information, Arricano contacted the arbitrator to ask him to defer his Award.

41. In due course, there was then further correspondence between the parties and the arbitrator, as follows:

(1) On 13 August 2014, Freshfields, on behalf of Stockman, wrote to the arbitrator, saying that there was no need to delay issuing the award. They said that the transfer of shares could be of no relevance unless Arricano was the successful party, and that if Arricano was the successful party *"the proceedings will in any event continue and Arricano will then have ample opportunity to modify its prayers for relief"*.

(2) Later on 13 August 2014, Herbert Smith Freehills ("HSF"), who were then acting on behalf of Arricano, wrote indicating that they were concerned that the transfer of shares was an attempt to frustrate any award made in Arricano's favour. They therefore sought to amend the relief sought to include:

> *"An Order that Stockman procure that Althor and any other relevant subsidiaries or entities under its beneficial control transfer the shares that they hold in Assofit to Arricano. Given Stockman's position that Althor is a wholly-owned subsidiary, there can be no objection to an order in these terms; and*
>
> *A provision by which the Tribunal remains functus and retains jurisdiction to hear a claim for damages in lieu of specific performance, should the purported transfer of Stockman's shares in Assofit frustrate the enforcement of any Award that is made in Arricano's favour in this arbitration."*

(3) In response, Freshfields noted this last letter, but stated that they saw no need to add to what had been said before.

(4) Still on 13 August 2014, the arbitrator emailed Stockman to ask whether he was correct in understanding that Stockman was choosing not to comment on the amended relief sought by Arricano.

(5) Stockman responded to say that the arbitrator's understanding was correct, and that they had no further comments on the amended relief sought by Arricano.

42. This exchange of correspondence is important in the context of Arricano's submissions on waiver, and the potential expansion of the arbitrator's jurisdiction, to which I return below.

43. The Second LCIA Award was issued on 19 August 2014. The arbitrator's conclusions were as follows:

(1) Having reconsidered his conclusions as to whether the option had been validly exercised, he concluded that it had.

(2) He rejected Stockman's argument that the call option had been exercised unlawfully.

(3) He further concluded that the right created by the exercise of this option survived the termination of the COA.

(4) This in turn meant that Arricano was entitled to exchange the Option Price for the shares.

(5) However, since the "escrow" arrangements which were provided for in the COA had, by now, fallen away since the due date for finalisation of the transfer had come and gone, it was necessary for the arbitrator to

make a new arrangement to give effect to this exchange of money for shares.

(6) The arrangement that he directed was as follows:

> *For the reasons set out above, the Arbitral Tribunal hereby makes the following Award:*
>
> *(a) Declare that:*
>
> *(i) Arricano validly exercised the Call Option under clause 3 of the COA by Notice dated 5 November 2010;*
>
> *(ii) The Option Price shall be the price as at 29 November 2010, ie USD51,397,260.27;*
>
> *(b) Order Stockman to transfer, or to procure the transfer of, all the shares that it or its subsidiaries or any entities under its control hold in Assofit (whether directly or indirectly) to Arricano by:*
>
> *(i) Executing, and/or procuring that Althor Property Investments Limited and/or any other relevant subsidiaries or entities execute the relevant instrument or transfer of shares in respect of all of the shares that any of them hold in Assofit to and in favour of Arricano and delivering the same to Arricano;*
>
> *(ii) Delivering and/or procuring that Althor Property Investments Limited and/or any other relevant subsidiaries or entities deliver the original shares certificates in respect of all of the shares that any of them hold in Assofit to Arricano;*
>
> *(iii) Taking all further steps, and executing all further documents, and/or procuring that Althor Property Investments Limited and/or any other relevant subsidiaries or entities take all further steps and execute all further documents required to transfer all of the shares it holds in Assofit to Arricano;*
>
> *(c) Stockman's obligations pursuant to paragraph (b) above shall be subject to Arricano having first deposited the Option Price with an independent third party, by 1 January 2015, on terms that it shall be released to Stockman upon registration of the transfer of Stockman's (or its subsidiaries or other relevant entities') shares in Assofit to Arricano;*

> *(d) Direct that the Parties shall have a period of 30 days in which to seek to agree upon the identity of the third party referred to in paragraph (c) above and the terms on which the Option Price is to be deposited with such third party, in default of which the Parties may revert to the Tribunal for a further decision on the appropriate form of relief;…*
>
> *…All other claims and counterclaims presented by either Party in this Phase of the arbitration are dismissed."*

(7) In addition, the arbitrator noted the amended relief sought in the light of the transfer of the shares to Althor at paragraph 48 of his Award; gave permission to amend at paragraph 134; and at paragraph 168 of his Award, the arbitrator stated that *"I reserve jurisdiction to hear a claim by Arricano for damages in lieu of specific performance arising from the purported transfer of Stockman's shares in Assofit to Althor Property Investments Limited and any subsequent transfer."*

44. Stockman then raised various challenges to the Second Award by an Arbitration Application in 2014. In the event, those challenges were consolidated, by order of Burton J made in June 2014, with challenges made to the Fourth Award in early 2015, to which I refer below, both of which were dealt with by Burton J in a judgment dated 22 October 2015 after a hearing over two days in October 2015. I refer to this judgment further below, since one of the items which was left over by Burton J is before me.

The Third and Fourth LCIA Awards.

45. The arbitrator's hope that the parties would be able to agree an appropriate escrow methodology was not borne out by events. Thus, by October 2014,

some 2 months after the Second Award, there was still no agreement on an escrow arrangement.

46. It is necessary to explain Arricano's concerns, as expressed to me in submissions, at this stage. Because Stockman had transferred its shares at a time prior to the Second Award, Arricano wished to perform due diligence to ensure that the shares still had value before paying money over.

47. Those concerns were expressed to the arbitrator in an application for emergency relief filed on 24 October 2014. In that document, Arricano said that *"Stockman's actions place Arricano in an impossible position. By paragraph 166(c) of the Second Award, Arricano must pay the Option Price into escrow by 1 January 2015. However, Stockman's conduct has deprived Arricano of the ability to raise the necessary funds. No rational lender or investor will advance monies to procure shares in a company whose main assets have been misappropriated. Moreover, even if Arricano is able to raise sufficient funds to implement the Second Award, Arricano faces the very real risk that it will pay Stockman in excess of USD 50 million for shares that are now worthless"*.

48. Initially, therefore, Arricano asked for an extension of time within which to deposit monies pursuant to the Second Award, and for directions to be given in respect of its damages claim. That application was opposed on jurisdictional grounds, and a hearing took place on 26 November 2014. It was made clear at the hearing that the application was interlinked with Arricano's damages claim, because it wished to be able to set off that claim against the

Option Price. At that hearing, the arbitrator suggested that Arricano might apply for some alternative form of relief.

49. By letter dated 3 December 2014, Arricano put forward such an application. The text of the order sought is at Annex 1 to this judgment.

50. Stockman replied on 5 December 2014 denying that the arbitrator had jurisdiction to grant any of the relief sought by Arricano.

51. In the event the arbitrator held, in his Third Award, issued on 8 December 2014, that he no longer had jurisdiction to extend time for the lodgment of the deposit. This was because the time limit for deposit had been included in the *dispositif* of the Second Award.

52. However, the arbitrator again asked Arricano whether they wished to make any further application, in the *dispositif* of this Award, in which he stated as follows:

> *"I did intend and do consider it permissible applying the wording of paragraph 166 that I should be able to make further orders concerning the choice of escrow agent and the terms of the escrow arrangement. The purpose of the reservation in paragraph 166(d) was to ensure that my decision in my Second Award that Stockman should transfer its Assofit shares to Arricano was not frustrated by the Parties being unable to agree an escrow agent or escrow terms. Accordingly, I do consider that I do have jurisdiction and authority to consider Arricano's alternative relief."*

53. Arricano responded the day after the arbitrator's request, on 10 December 2014, with an application that they should be permitted to examine the shares prior to exchange in order to ensure that the shares had the necessary "attributes". The order that Arricano sought was in the following terms:

> ***"(1) Deposition of the Call Option Price by Arricano.***
>
> *1. In order to retain the right to purchase the shares, by 1 January 2015, Arricano must provide evidence that it has deposited USD 51,397,260.27 (the "Call Option Price") with an independent third party.*
>
> *2. The Call Option Price shall be transferred to Stockman as soon as:*
>
> *i. Stockman has complied with sections (2) and (3) below;*
>
> *ii. Arricano's damages claim, if any, has been finally determined by the Sole Arbitrator (section (5) below) to the satisfaction of Arricano; and*
>
> *iii. Stockman has transferred, or procured the transfer of, all the shares that it or its subsidiaries of any entities under its control hold in Assofit (whether directly or indirectly) to Arricano pursuant to paragraph 166(b) of the Second Award.*
>
> *3. Arricano shall have no right to call for the return of the Call Option Price in the absence of a direction from the Sole Arbitrator prior to 30 June 2015, except in compliance with Section (4) paragraph 9 and Section (5) paragraph 12 below. The Sole Arbitrator shall have the right to extend this deadline at his sole discretion.*
>
> *4. Arricano further confirms that it will consent to the necessary variations of the Cypriot orders to enable Stockman to transfer its shares in Assofit to Arricano.*
>
> *5. Stockman and Arricano should endeavour to conclude an escrow agreement in order to facilitate the implementation of the terms of this Order."*

54. A copy of the full text of this draft order is annexed to this judgment as Appendix 2. However, in summary:

(1) Section (2) dealt with confirmation and documentary evidence to be provided by Stockman by 13 January 2015 as to the attributes of the Assofit shares and the fact that Assofit was still owner of the relevant assets;

(2) Section (3) dealt with production of financial disclosure relating to Assofit by Stockman to Arricano by 27 January 2015;

(3) Section (4) stated that in default of compliance with (2) and (3), Arricano could request the independent third party to return the Call Option Price, and that if Stockman complied, an independent auditor would be commissioned to confirm the financial position of Assofit;

(4) Section (5) dealt with damages, and stated that in the event that Stockman did not provide the confirmations required under (2) and (3) or provided information which showed that Assofit's value had been diminished, Arricano could either ask for the Call Option Price back or revert to the Sole Arbitrator to determine its damages claim to be set off against the Call Option Price, pending the determination of which the Call Option Price would remain on deposit, no substantial financial commitment would be entered into by Assofit or its related parties without Arricano's consent, and Stockman was to transfer the share transfer instruments to an independent third party.

55. Stockman responded on 12 December 2014, again refusing to address the merits prior to a decision on the jurisdictional issue. The parties' position was then reiterated in further correspondence leading up to the Fourth Award.

56. The arbitrator held, however, in his Fourth Award, dated 19 December 2014, that he did have jurisdiction to make an order of the type Arricano sought. He stated as follows:

> *"51. Nevertheless, I find that the jurisdiction and authority reserved by me is not as limited as Stockman contend. It is*

certainly not limited to a situation where there is a dispute about the identity of the escrow agent and the escrow arrangement terms: a disagreement about the latter is sufficient. In addition, given that the escrow arrangements have not been agreed, there is clearly a dispute about the latter.

52. Further, while any additional orders and awards may not alter the dispositive in the Second Award that Stockman shall transfer its shares in Assofit to Arricano (paragraph 166(b)), subject to Arricano first depositing the Option Price with an independent third party by 1 January 2015 (paragraph 165(c)), I reserved a broad discretion, if the parties could not agree, in respect of the "terms on which the Option price is to be deposited" with the independent third party, so as to ensure that the principal relief that I had awarded was not frustrated.

53. I acknowledge that the COA prescribed a mechanical procedure concerning the operation of the Call Option. However, in ordering specific performance, and the terms on which the Option Price is to be deposited in escrow, I am not required to apply the SHA word for word (see eg Gill v Tsang [2003] All ER (D) 175 at para 50; but I was also referred by Stockman to Quest Advisors Limited v McFeeley [2011] EWCA Civ 1517). The further escrow arrangement prescribed in my Second Award is not found in the COA, but it is consistent with the COA in that it protects both Parties and ensures that they get what they bargained for: the shares in Assofit in exchange for payment of the Option Price. It is implicit in that bargain that the shares should have the same attributes (in terms of ownership and control over assets) as existed at the time of the COA. I consider that it is reasonable for Arricano to have an opportunity to examine the attributes of the shares before the Option Price is released from escrow. If, as is alleged, but on which I have not made any finding, the shares are worthless, that would be wholly inconsistent with the COA and frustrate my Second Award.

54. However, having exercised the Call Option, and should it pay the Option Price into escrow, Arricano cannot retain discretion whether exchange of the shares for all of some of the Option Price takes place: if there is a dispute, that will have to be resolved by me.

55. In conclusion, I do not consider that adding qualifications to the release of the Option Price that recognises the possible change in circumstances and attributes of the shares during the interim period from the time of exercise of the Call Option, is altering the conditions in paragraph of paragraph (sic) 166(c) of my Second Award, but instead falls

> *within the jurisdiction and authority reserved by paragraph 166(d).*

57. Thus, he proceeded to make an order, on 19 December 2014, in the following terms:

> *"For the reasons set out above, the Arbitral Tribunal hereby makes the following Award:*
>
> *(a) Declares that the Arbitral Tribunal:*
>
> *(i) does have jurisdiction and authority under paragraph 166(c) of its Second Award to make further orders and awards concerning the terms on which the Option Price is to be deposited with an independent third party; and*
>
> *(ii) that such orders and awards may include allowing Arricano a reasonable opportunity to examine the attributes of the Call Option Shares before the Call Option Price is released from escrow."*

The deposit of the monies.

58. In the light of this Award dated 19 December 2014, and towards the very end of 2014, Arricano sought to obtain finance for the purchase of the shares. I heard a great deal, in particular from Mr Tymochko, as to the difficulties that Arricano had in arranging such finance. For present purposes, I need only record the following:

(1) The arrangements in fact made fall into two categories. As to the first:

a) This involved a loan from DRGN Limited ("DRGN"), a shareholder in Arricano.

b) The facility was negotiated between Mr Teder, on behalf of Arricano, and Mr Fiala on behalf of Dragon. Mr Tymochko was not involved in the negotiations themselves.

c) The negotiations led to two written agreements, dated 10 December 2014 and 26 December 2014, between Arricano and DRGN, on the one hand, and DRGN and Emergex, on the other. Whether the first agreement was signed on that date was a matter of dispute.

d) Under the terms of the Arricano/Dragon agreement, the money was to be retained until 31 January 2015.

e) Under the terms of the Dragon/Emergex agreement, Dragon could withdraw the money at any time.

f) A substantial amount was paid for the facility. For the initial facility, the sum of USD 500,000 was paid. There were later extensions, on 24 February 2015, 1 June 2015 and 5 August 2015, for which substantial additional amounts were to be paid.

(2) As to the second facility:

a) This involved an arrangement between Arricano, on the one hand, and Renaissance Asset Managers Limited GP of Guernsey ("Renaissance"), on the other.

b) The arrangements were negotiated between Mr Tymochko for Arricano and Mr Pivovar for Renaissance.

c) The arrangement was again endorsed by Mr Teder, for Arricano.

d) No written agreement was ever produced. Stockman suggested that there was in fact no loan agreement, but instead an agreement to produce a letter to show to the arbitrator.

e) A substantial sum was paid for this, being some $500,000.

59. In due course, on 31 December 2014, evidence of these arrangements was put before the arbitrator to establish purported compliance with the arbitrator's order. This, in due course, led to the dispute which led to the Fifth Award.

60. The evidence in fact put before the arbitrator is recorded in paragraphs 32 to 34 of his Fifth Award, as follows:

> *32. On 31 December 2014, Arricano wrote to the Tribunal stating that Arricano had deposited the equivalent of at least USD 51,450,000 as payment in full of its obligations to pay to Stockman the USD 51,397,260.27 Option Price and enclosing copies of two letters, both dated 30 December 2014, from (i) Renaissance Asset Managers GP Limited (ii) Emergex Business Solutions Limited, of Cyprus ("**Emergex**"), respectively. Those letters in turn attached copies of bank statements which purported to evidence such deposits. Arricano added that it would "write shortly with its further proposals as to … its examination of the Option Shares before the Option Price is released…"*
>
> *33. The letter from Renaissance stated that EUR 18,560,155 and USD 7,950,975, being the equivalent of at least USD 30,400,000 had been deposited in several accounts at Hellenic Bank. The monies were said to be deposited for the benefit of Arricano with Renaissance's wholly owned subsidiary Silverioco Limited ("**Silverioco**") as an independent third party for the purpose of financing the acquisition of 50%+1 share interest in Sky Mall shopping centre on terms that it shall be released to Stockman upon registration of the transfer of Stockman's (or its subsidiaries or other relevant entities') shares in Assofit to Arricano. The letter from Renaissance added:*
>
> *"The monies will only be released to Stockman subject to:*

> *1. Arricano and us having a reasonable opportunity to examine the attributes of the shares in Assofit in a way that would achieve the purpose of acquisition of 50%+1 share interest in Sky Mall shopping centre, which would generally and substantially be in the same condition as of the date when the Call Option became exercisable in 2010; and*
>
> *2. Subject to us, Arricano and Stockman agreeing an appropriate form of escrow arrangement.*

> *34. The letter from Emergex stated that USD 21,050,000 had been deposited in several accounts at J&T Banks a.s. Similar to the Renaissance letter, it stated that the monies were deposited for the benefit of Arricano with Emergex as an independent third party for the purpose of financing the acquisition of 50%+1 share interest in Sky Mall shopping centre on terms that it shall be released to Stockman upon registration of Stockman's (or its subsidiaries' or other relevant entities') shares in Assofit to Arricano. The letter also added:*
>
> *"The monies will only be released to Stockman subject to:*
>
> *1. Arricano and us having a reasonable opportunity to examine the attributes of the shares in Assofit in a way that would achieve the purpose of acquisition of 50%+1 share interest in Sky Mall shopping centre, which would generally and substantially be in the same condition as of the date when the Call Option became exercisable in 2010; and*
>
> *2. Subject to us, Arricano and Stockman agreeing an appropriate form of escrow arrangement.*

The dispute as to compliance, the correspondence leading to the Fifth LCIA Award, and the Fifth LCIA Award.

61. Following the production of the documentation intended to establish compliance with the condition precedent for exchange, Stockman wrote to the arbitrator on 31 December 2014, to contend that the arrangements that had in fact been made were not sufficient to amount to compliance with the condition precedent, with the result that the condition precedent had not been satisfied, and there should be no exchange.

62. There was then an exchange as to the appropriate procedure to be followed and, in particular, whether the issue of whether the arrangements put in place by Arricano satisfied the conditions of the Second Award should be determined as a preliminary issue. Arricano contended that the whole of the remaining dispute, including its claim for damages, should be determined; whereas Stockman contended that the issue of whether Arricano's arrangements satisfied the conditions of the Second Award should be determined as a preliminary issue. The arbitrator decided in favour of Stockman's proposal on 27 January 2015.

63. I interpose at this stage the fact that Stockman had, by Claim Form dated 15 January 2015, challenged the Fourth Award. It was this challenge that was in due course consolidated with the challenge to the Second Award, which was heard by Burton J, leading to his judgment of 22 October 2015, to which I make reference below.

64. Various submissions were served by both parties between late January and late February 2015. The parties were asked whether they wished for a hearing but declined. Accordingly, the arguments were considered by the arbitrator on paper.

65. Stockman put forward three arguments in support of their contentions.

(1) Certain of the monies had been deposited in euros. Since there had been movement of the dollar against the euro in the relevant time, it was said that the necessary funds had not been deposited.

(2) The third parties with whom monies had been "deposited", ie Emergex and Renaissance, were not in truth independent.

(3) The arrangement with Emergex was time limited and would expire at the end of January 2015.

66. It was these arguments that the arbitrator had to consider and did consider in his Fifth LCIA Award. I deal below with his findings.

67. However, in the context of the challenge to the Award based on fraud, Stockman relied on a number of documents, namely:

(1) The original letter of 31 December 2014 sent by HSF on behalf of Arricano.

(2) The submissions dated 5 February 2015 put in by Arricano.

(3) The reply submissions dated 25 February 2015 put in by Arricano.

68. I consider each in turn, concentrating in this part of my judgment on what was said in the letters, and the factual position as at the date of each of the letters, before I turn to the findings made by the arbitrator, what those findings indicate his understanding of the facts at the time was, and whether that understanding was induced by any fraud.

69. I start therefore with the letter of 31 December 2014. That letter, as I have stated, enclosed copies of letters from Renaissance and Emergex, and supporting bank statements, which were to evidence the fact that Arricano had deposited the Option Price. Arricano also confirmed that it accepted all of the terms of the Second, Third and Fourth Awards, and that the Call Option Price

would be treated in a manner consistent with those Awards. It also stated that now Arricano had paid the Option Price, it would write with proposals for its examination of the shares before the price was released, and as to the remainder of the relief sought in its claim for immediate relief dated 24 October 2014.

70. As far as the factual position as at this moment in time is concerned, the factual evidence is confined to the documents in fact presented. Those documents showed that there was at that moment money in the relevant accounts, although the Emergex agreement with Dragon showed that Dragon could withdraw the money at any time. I consider below, under the heading of fraudulent representation, what representations I consider were made by the tender of this material and whether those were knowingly false.

71. Going back to the chronology, then, as I have said, Stockman contended that this material did not evidence compliance with the condition precedent. The timetable for submissions was agreed after the decision to treat this issue as a preliminary issue, and Arricano's submissions were served first, on 5 February 2015.

72. Once again, it is important to note what was said.

(1) Arricano started off with an introduction, stating that in their submission they explained how the letters of 31 December from Renaissance and Emergex, together with the bank statements, demonstrated compliance with 166(c) of the Second Award.

(2) The submissions were accompanied by the Witness Statement of Mr Tymochko.

(3) Arricano referred to the fact that it had disclosed, with its letter of 19 January 2015, all of the documentation that Stockman had asked for in its earlier letter of 6 January 2015.

73. Arricano then turned to an explanation of what it said the documents established. In view of the importance of this letter, and the allegations of fraud, I quote the most relevant passages in full. They read as follows:

> *"18. As explained in Mr Tymochko's witness statement, the negotiations with Renaissance and Emergex took place under enormous time pressure mostly between 24 and 30 December 2014. Mr Tymochko led the negotiations with Renaissance. The content of these negotiations is evidenced by the email correspondence at Exhibit C42. This consists of all the emails passing between Mr Tymochko and Renaissance for the purpose of arranging this part of the financing. In summary, Mr Tymochko managed to agree with Mr Roman Pivovar of Roden Capital Limited ("**Roden**") that Renaissance would put up USD30.4 million for the benefit of Arricano for the purpose of financing the acquisition of Stockman's shares in Assofit. The parties agreed that the money would be held by Silverioco Limited ("Silverioco"), a wholly owned subsidiary of Renaissance, and deposited on several bank accounts with Hellenic Bank in Cyprus, some in EUR and some in USD. The parties further agreed that the money would be released to Stockman upon (1) registration of the transfer of Stockman's shares in Assofit to Arricano; (2) Arricano and Renaissance having had a reasonable opportunity to examine the attributes of Stockman's shares in Assofit to ensure that they would generally and substantially be in the condition as of the date when the Call Option became exercisable in 2010; and (3) Renaissance, Arricano and Stockman agreeing an appropriate form of escrow agreement. Arricano undertook to pay Roden USD500,000 for arranging the USD30.4 million financing and another USD 500,000 if the deal went ahead. In exchange, Renaissance undertook to provide Arricano with a letter confirming that the USD30.4 million had been deposited on behalf of Arricano on Silverioco's bank accounts with Hellenic Bank.*

*19. As also explained in Mr Tymochko's witness statement, the negotiations with Emergex resulted in Emergex agreeing to deposit USD 21,050,000 on a bank account with J&T Banka for the benefit of Arricano for the purpose of financing the acquisition of Stockman's shares in Assofit (50%+1 share). The details of the transaction were recorded in two parallel agreements, the Agreement on Intermediary and Financial Services dated 10 December 2014 between DRGN and Arricano dated 10 December 2014 ("**the DRGN-Arricano Agreement**") (**Exhibit C43**) and the Agreement on Intermediary Services between DRGN and Emergex dated 26 December 2014 (the "**DRGN-Emergex Agreement**")(**Exhibit C44**).*

*20. Under the DRGN-Arricano Agreement, DRGN confirmed that it would guarantee the amount of USD21 million until 31 January 2015 and would transfer USD21 million to Emergex by 31 December 2014. In exchange, Arricano agreed to pay DRGN a service provider fee of USD500,000. DRGN further undertook to instruct Emergex to (1) issue a confirmation letter regarding the deposit of the USD21 million and to submit this letter together with the relevant bank statement to Arricano and (2) pay to Stockman the purchase price (not exceeding the amount actually transferred by DRGN to Emergex) for Stockman's shares in Assofit as specified in a notice to be sent by Arricano and accepted by DRGN "the **Payment Notice**"). Clause 2.7 of the DRGN-Arricano Agreement made clear that the Payment Notice could only be accepted by DRGN if (1) Arricano and DRGN had a reasonable opportunity to examine the attributes of Stockman's shares in Assofit to ensure that they would generally and substantially be in the condition as of the date when the Call Option became exercisable in 2010; and (2) DRGN, Arricano and Stockman could agree an appropriate form of escrow agreement.*

21. Under the DRGN-Emergex Agreement, DRGN confirmed that it was willing to collect a guarantee amount of up to USD52 million to secure the acquisition of Stockman's Assofit shares and that this guarantee amount may be paid to Emergex's account (in one or in a number of instalments) at any time within 3 month. (sic) Emergex agreed to pay to Stockman the purchase price (not exceeding the amount actually pre-paid by DRGN to Emergex) for Stockman's Assofit shares if and when requested to do so by DRGN. In exchange for this money, DRGN agreed to pay Emergex USD5,000.

22. As set out in the letters from Renaissance and Emergex dated 30 December 2014, the deposits will be released to Stockman subject to them agreeing with Arricano and Stockman an appropriate form of escrow arrangement. It has

> *therefore always been intended for the unilateral deposits made by Arricano by 31 December 2014 to be provisional only and for them to be replaced with an agreement between the independent third parties and Arricano and Stockman as soon as possible….*
>
> *[There then followed two paragraphs dealing with the question of the independence of the third parties.]*
>
> …
>
> *25. According to paragraph 166(c) of the Second Award, Arricano was required to deposit "the Option Price with an independent third party, by 1 January 2015, on terms that it shall be released to Stockman upon registration of the transfer of Stockman's (or its subsidiaries' or other relevant entities') shares in Assofit to Arricano."*
>
> *26. Accordingly, all that the Second Award required Arricano to do by 1 January 2015 was to deposit the Option Price with an independent third party. The manner in which the money was deposited had to enable it to be released to Stockman upon registration of the share transfer. This central importance of the deposit of the Call Option Price was confirmed by the Sole Arbitrator at the hearing on 26 November 2014 where he stated that Arricano had to "put up or shut up" by the Call Option deadline. By transferring the equivalent of at least USD 51,450,000 to Renaissance and Emergex by 31 December 2014 Emergex complied with this requirement."*

74. The statements made in this covering letter were supported by the witness statement of Mr Tymochko, which was appended to the letter, along with the other exhibits mentioned.

75. Again, however, it is also important for me to note what had been happening with the "deposits" in the interim period, and the witness evidence as to this. I have the benefit of both the findings of the arbitrator in this regard, and the evidence of the witnesses from whom I have heard, namely Mr Merkulov and Mr Tymochko.

(1) The evidence shows that monies were taken out of the Hellenic Bank accounts in the name of Silverioco at some unknown time prior to 31 January 2015. As at this latter date, at least USD 7.9million and EUR 1.4 million had been withdrawn. Not all of the relevant bank accounts have been disclosed, as I understand matters.

(2) The Emergex monies remained on the account.

76. I deal below, in my discussion of the legal issues, with the question of the knowledge of Arricano of these facts.

77. Stockman responded to the Arricano submissions on 17 February 2015. Having noted that there might be objection to the arbitrator determining the issue of whether there had been compliance with the terms of the Second Award, it expressly waived this objection. However it "reserved its right" to object to the arbitrator determining any other issues in the arbitration, including, without limitation, Arricano's claims for damages and set off.

78. Stockman made a number of points, which I have already summarized, in paragraph 65 above.

79. Arricano's reply submission, as I have noted, was dated 25 February 2015. In that document, the following statements were made (and again I quote):

> *"14….As explained in the second witness statement of Mr Tymochko dated 25 February 2015, Arricano had to agree to pay a further USD 250,000 to extend its agreement with DRGN until 1 March 2015 (see **Exhibit C45)**. For a further fee, a further extension until 16 March 2015 could be agreed if necessary. These are substantial costs which Arricano had to incur, and continues to incur pending resolution of the parties' dispute, as a result of Stockman preventing Arricano from obtaining financing from ordinary sources….*

The DRGN-Arricano Agreement

24. As confirmed by Mr Tymochko in his second witness statement, the DRGN-Arricano Agreement has been extended until 1 March 2015. A further extension until 16 March 2015 could be agreed if necessary."

80. As is apparent from the quotation above, this submission was accompanied by the witness statement of Mr Tymochko which attested to the facts set out above. I do not need to cite any further from that statement since the summation above is an accurate one.

81. Turning to the evidence of what had happened in fact, there is no further evidence of the state of affairs on the Renaissance side, although it is said that there has not been full disclosure of this, an assertion which in my judgment is likely to be correct. There was as at this date, as I understand it, no further movement from the Emergex account.

82. Again, I deal with the knowledge of Arricano in my discussion of the legal issues.

83. On 11 March 2015, there was a further movement of money, this time out of the Emergex account. The sum of USD 21.045 million was paid to DRGN leaving only USD5,000 in the account. No notice of this fact was passed on to the arbitrator.

84. As to who knew of this transfer, again I discuss this further below.

85. The Fifth Award was rendered on 31 March 2015. The arbitrator rejected each of Stockman's contentions. For the purposes of this judgment, the most relevant issue was the question of whether the monies remained available in

the escrow account. In relation to that issue, the most relevant parts of the Fifth Award read as follows:

> *"89. Third, Stockman contended that a portion of the funds appear to be held to the benefit of Arricano only for a limited time. I agree that the terms of the deposit of USD 21.05m with Emergex at J&T Banka a.s are confusing. I understood from Herbert Smith Freehill's letter dated 31 December 2014 that USD 20.05m had been deposited for an unlimited period of time or at least for a sufficient period to allow the attributes of the Option Shares to be examined pursuant to any further orders that I might make. However, Volodmyr Tymochko in his second witness statement seems to say that a further extension until 16 March 2015 of the financing provided by DRGN "could be agreed if necessary" (at para 4). I am prepared to assume for present purposes that I would have been informed by Herbert Smith Freehills if the full USD 20.05m was no longer held on deposit. Accordingly, this ground of non-compliance is rejected."*

The challenge to the Fifth LCIA Award and the manner in which this was dealt with.

86. Following the Fifth Award, Stockman continued to press for disclosure of documents relevant to the question of the period of the deposit, in particular. Thus, by letter dated 8 April 2015, Freshfields, on behalf of Stockman, requested that (given the date of 16 March 2015 referred to in paragraph 89 of the Fifth Award quoted above) HSF confirm that the funds continued to be held on deposit for Arricano's benefit, and provided them with copies of any agreements by which this had been done. Following a holding response from HSF, Freshfields applied on 8 May for an order from the arbitrator.

87. HSF initially asked for further time to respond, since Arricano had been experiencing financial difficulties. Before they had a chance to respond substantively, the arbitrator made the order that had been requested. Immediately following this, Arricano sent a further, substantive response

(probably drafted before the arbitrator's order) in a letter dated 6 May 2015, in which they said as follows:

> *"3. As you are aware from the documents that have been disclosed in the arbitration, Arricano is incurring very substantial financing costs in order to keep the Option Price on deposit with Emergex and Renaissance/Silverioco. Those costs are adding to Arricano's existing financial difficulties, which have been caused (at least in part) by Stockman's misappropriation of the assets of the parties' joint venture, including Arricano's share of the profits generated by Sky Mall. Moreover, those costs have been greatly increased (and will continue to increase) by the delay in resolving this arbitration, which delay is the direct result of Stockman's conduct in misappropriating Assofit's assets.*
>
> *Given that it is likely to be some time before the Option Price is required to be released from the escrow account, Arricano proposes that it be permitted to withdraw the sums currently deposited with Emergex and Renaissance/Silverioco, and that the escrow agreement provide for Arricano to fund the escrow account in full within 60 days of the Damages Award…[sc an Award in which the arbitrator determines Arricano's damages claim.]"*

88. On 7 May, USD 21.05 million was paid into the Emergex account by DRGN Limited, but on the same day the amount of USD21 million was paid to a different Emergex account. It was Arricano's case that this was a transfer from a current to a deposit account.

89. The next day, 8 May, the arbitrator noted what had been said by HSF, but went on to say that Arricano was to confirm that the Option Price remained deposited with the third parties. HSF responded on the same day stating that they had provided evidence of the extension of the agreement between Arricano and DRGN with their letter of 6 May, and that the balance was covered by the arrangement with Renaissance which "had no expiry date and thus remains valid today." The arbitrator confirmed, in response, that he had

noted the DRGN agreement, which was a guarantee, and asked for confirmation that there was a deposit.

90. As regards Renaissance, there was then an email exchange on 8 and 9 May between Mr Tymochko and Mr Pivovar. Mr Tymochko said that the arbitrator had asked for confirmation that the amount was still deposited, that bank statements were unnecessary and that a simple email confirmation would do. Mr Pivovar responded to say that he was on vacation, as was most of his office, to which Mr Tymochko said that the confirmation just needed to come from Arricano, so "just an OK from you will do at this stage". Mr Pivovar responded saying: "Then I guess no need to ask me ;) ok" As Mr Tymochko accepted in cross examination, the ;) was a winking face.

91. On 11 May, HSF responded to the arbitrator. They said that "the reference to a "Guarantee" comes from the original agreement of 10 December 2014 between Arricano and DRGN which defined the money to be held by Emergex as the "Guaranty Amount". As shown by the bank statement dated 30 December 2014 this sum is held by Emergex Solutions as cash on an account and the Additional Agreement confirms that it will be kept there until 1 June 2015."

92. On 15 May, Arricano again requested that it should be permitted to withdraw funds from the deposited monies, a request repeated in its application to the arbitrator as to the procedure to be adopted going forward, filed on 28 May 2015.

93. On 1 June 2015, there was a hearing in relation to, amongst other things, Arricano's application to withdraw monies. On the same day, USD

21,002,451.21 was deposited in the Emergex account by Emergex Business Solutions Limited, whilst USD 21,052,445.21 was withdrawn and paid to DRGN Ltd. This left a balance of USD8,800.57.

94. On 9 June, Freshfields wrote asking for documentation showing all movements on the bank accounts since 31 December 2014. This was in the light of the fact that the most recent extension of the guarantee had expired on 1 June 2014. The application was reiterated on 3 July.

95. On 8 July 2015, the arbitrator issued an order rejecting Arricano's application to be able to withdraw monies, and stating that those monies had to be retained by independent third parties. In the light of this, Freshfields asked for confirmation again that the monies had been retained. In addition, the arbitrator, by letter dated 10 July 2015, asked for an update on the status of the Option Price, to be provided by 13 July 2015, a deadline which was extended at Arricano's request to 20 July 2015.

96. On 20 July 2015, DRGN Ltd paid USD21.05 million into the Emergex accounts.

97. On the same day, at 19:02, HSF wrote to the arbitrator stating that:

> *"1. The previous arrangements concerning the deposit remain in place.*
>
> *2. Arricano has concluded a further agreement with DRGN Limited, by which DRGN has agreed to make the funds advanced by it available until 1 September 2015. DRGN and Emergex had also entered into an Addendum to the Agreement on Intermediary Services, extending the term of that agreement. The effective date of both agreements, (copies of both of what are attached) is 1 June 2015.*

> *3. As previously noted, Arricano's arrangements with Renaissance are not time limited."*

98. 2 days after this letter, on 22 July, USD21.05 million was withdrawn from the Emergex account and paid to DRGN Ltd, leaving a balance of USD8,800.

99. On 23 July Freshfields reiterated their request for disclosure of bank statements, and the arbitrator, on 25 July, invited a response.

100. On 27 July, Mr Tymochko was told by Mr Pivovar, that as of 31 January 2015, the balance in the Renaissance account had dropped to USD24,788,000.

101. After prompting from Freshfields, the arbitrator ordered that Arricano respond by 3 August to Freshfield's letter of 23 July 2015.

102. On 3 August, for the first time, Arricano informed the arbitrator and Stockman that withdrawals had been made from the various accounts, and indicated that Arricano should be in a position to provide copies of statements by 7 August.

103. Arricano, in this regard, disclosed (on 10 August 2015) a number of pieces of documentation, namely the Emergex and Renaissance bank statements to which I have made reference earlier in my judgment. Although the arbitrator ordered further disclosure on 16 August 2015, no further disclosure was provided.

104. Following this disclosure, Stockman applied, by Claim Form dated 2 October 2015, to set aside the Fifth Award, under s. 68(2)(g) of the Arbitration Act 1996, on the grounds that it had been procured by fraud, in that the arbitrator had been led to believe that the monies remained on deposit as at the date of

his Award, whereas they did not. More precisely, to quote the wording of the Stockman challenge:

> *"In particular, the Defendant knew that at the time of the Fifth Award the full Option Price had not been maintained in the relevant accounts but both gave the impression to the Arbitrator that the full Option price was maintained and failed to disclose that this was not in fact the case. The Defendant's fraudulent conduct caused the Claimant substantial injustice in that it had an important influence on the Fifth Award and/or because the result would probably have been different if the fraud had not taken place."*

105. That application was out of time, and Arricano opposed the application for an extension of time under s.79 of the Arbitration Act 1996. However, Males J granted that application by order dated 26 November 2015. Directions were then given for the trial of the fraud allegation by Blair J on 9 December 2016, along with directions for trial of the challenges to the Seventh Award, which I deal with below.

106. On 8 October, the Sixth Award was issued, which dealt with the costs of the Third, Fourth and Fifth Awards.

107. Again, I need at this point to interpose into the chronology the fact that, as I have noted above, the hearing of the challenges to the Second and Fourth Awards took place before Burton J on 12 and 13 October 2015. Stockman were largely unsuccessful on its challenges.

108. However, the judge left open what he referred to as the "paragraph 168 point", that being a reference to paragraph 168 of the Second Award.

109. In relation to this point, the judge said:

"31 I referred in paragraph 11 above to what I call the "paragraph 168 point". In that paragraph of the Second Award, after making the declaration and the order for specific performance of the Call Option, the Arbitrator recorded:

"I reserve jurisdiction to hear a claim by [the Defendant] for damages in lieu of specific performance arising from the purported transfer of [the Claimant's] shares in Assofit to Althor Property Investments Limited and any subsequent transfer."

This arose as a result of the discovery, only just prior to the Second Award, that the Claimant had, it seemed, transferred its shares in Assofit, which might render any order for specific performance nugatory. The Claimant has challenged in these proceedings whether the Arbitrator would have any jurisdiction to hear such a claim, whether for damages in lieu of specific performance or indeed damages in addition to specific performance. The paragraph is ambiguous, and the Defendant is content through counsel to accept what has in fact ensued, namely that the Arbitrator did not purport to assert jurisdiction, but was reserving the question of jurisdiction, and indeed the parties have taken part in subsequent proceedings, and there have been further awards and orders, with a view to a decision by the Arbitrator as to whether he has such jurisdiction. By an Order dated 16 June 2015 he has directed that the issue of jurisdiction be tried together with the merits of the claims for damages. Accordingly the parties have agreed that I do not need to address the paragraph 168 point upon the basis that it be read as if it had said what it seems the Arbitrator, and at any rate the Defendant, believed it to say, namely " I reserve the question as to whether I have jurisdiction *".*

32 In an additional Arbitration Claim Form dated 16 January 2015 two further matters were raised by the Claimant, relating to paragraph 166(d) of the Second Award and paragraph 57(a)(ii) of a Fourth Award dated 19 December 2014, arising out of a further discovery namely that there has or may have been disposition of Assofit's interest in the Sky Mall; and relating to whether, under those paragraphs or otherwise, the further disclosure orders, which have in fact been made by the Arbitrator and at least partially complied with by the Claimant, could be made. After hearing argument, and in particular being informed that the Arbitrator himself will be dealing with all questions of jurisdiction whether to make those orders or otherwise, I adjourn the issues raised by the second Claim Form, to be restored to this court if necessary after the further hearing or hearings before the Arbitrator.

> *33 With the exception of the issues thus agreed or adjourned, I dismiss the Claimant's claims for relief under the Act."*

The continuation of the arbitration and the Seventh LCIA Award.

110. Whilst the challenge to the Fifth Award was being pursued in Court, the arbitration was being pursued, a continuation which in due course led to the Seventh Award. The parties' applications and submissions on the issues which were dealt with in this Award were occurring during the same period of time as the exchanges which in due course led to the Seventh Award, which was rendered on 5 May 2016.

111. The course of this part of the arbitration was as follows:

(1) On 24 July 2015, Arricano filed its submission on its claim for Damages and Further Relief, which updated its request dated 24 October 2014.

(2) Stockman served its response in two parts, the first dealing with jurisdiction and its legal and factual defences to Arricano's damages claim and the second dealing with its contention that Arricano's right to purchase the option shares had lapsed because of Arricano's alleged fundamental breach. The first was served on 4 September 2015 and the second on 11 September 2015.

(3) Arricano's reply was served on 19 October 2015.

(4) Stockman served a rejoinder on 21 November 2015.

112. It will be noted that the challenge to the Fifth Award was issued on 2 October 2015, as stated above. However, by agreement between the parties, the

hearing of this challenge was deferred pending the production of the Seventh Award.

113. A further arbitration hearing took place on the 25 and 26 November 2015. At that hearing, the arbitrator noted that Stockman had put it out of its power to comply with any order to transfer the shares, since those shares had been transferred to an independent third party trust. Arricano has relied in front of me on the fact that the arbitrator was misled by Stockman as to the true position and that his decision at earlier stages might well have been different had he known the true position.

114. Arricano had only become aware of the fact that the shares had been transferred to an independent third party, rather than a subsidiary, by virtue of documents produced in BVI proceedings. Arricano referred to this fact in its claim submissions served on 24 July 2015, and this was also the first time the arbitrator learnt of the allegation, an allegation which was accepted at the hearing in November 2015 to be correct.

115. Turning to the Seventh Award itself, this can be subdivided into two parts, as follows:

(1) The first part of the Seventh Award dealt with the question of whether Arricano had lost the right to exercise its rights under the COA by virtue of the making of the various withdrawals that I have outlined above.

(2) The second related to Arricano's claims for damages in lieu of and in addition to specific performance.

116. I deal with each aspect in turn, and will seek to summarise the arbitrator's reasoning.

(1) Stockman initially sought to argue that this meant that the *condition precedent* had not been satisfied by the deposit arrangements that had been made, but eventually conceded that the arbitrator did not have jurisdiction to revisit his conclusion on this unless and until the Court remitted that matter to him: this appears from paragraphs 88 and 89 of the Seventh Award.

(2) Stockman then sought to argue that, by virtue of the withdrawals, there had been a fundamental or repudiatory breach. Certainly, this is how the arbitrator understood the argument and dealt with it, and it has not been suggested before me that he was wrong to do so. No question of jurisdiction arose on this aspect.

(3) The arbitrator considered this in paragraphs 90 to 159 of his Seventh Award. Having set out the parties' submissions, he reasoned as follows:

a) First, he accepted Stockman's submissions that he was not functus in relation to this issue.

b) Secondly, he made his "factual findings" in relation to this contention, in paragraphs 95 to 127. I will not set these out in full, but in summary, he held that he had been given the impression by Arricano that the Option Price remained on deposit throughout, whilst in fact, withdrawals had been made

in the period between 1 January and 1 June 2016 (in the case of the Emergex and Renaissance accounts) and after 1 June 2016, in the case of the Emergex accounts.

c) Thirdly, he found, in relation to the prohibition against withdrawal, a distinction was to be drawn between the position prior to 8 July 2016, when there was room for some doubt as to the existence of such, and the position after 8 July, when the order made on that date made the position crystal clear.

d) Fourthly, he turned to the question of Arricano's culpability, which he regarded as relevant to the seriousness or gravity of the breach. In this regard, he found as follows:

i) First, he held that it was likely that Mr Tymochko and/or Mr Merkulov and/or Mr Teder intentionally "turned a blind eye" to whether the Renaissance monies were still on deposit, but held that there was insufficient evidence to enable him to conclude that anyone at Arricano *instructed* Renaissance to withdraw funds.

ii) Secondly, as regards the Emergex monies:

(A) He recorded Stockman's submission that since Mr Tymochko knew of the withdrawal, Arricano did.

(B) He also recorded Mr Tymochko's witness evidence that he chose not to tell Arricano in

order to conceal DRGN's potential breaches of agreement with Arricano.

(C) He found that Mr Tymochko knew of the various withdrawals and redeposits in May 2015.

(D) Again, he found that Mr Merkulov and Mr Teder turned a blind eye to whether or not there were monies in the account but did not instruct Emergex to make withdrawals.

iii) He then considered whether Mr Tymochko's knowledge, up to 8 July 2015, was to be imputed to Arricano. He held that the relevant question in law was whether Mr Tymochko was the directing mind and will of the entity in respect of the specific activity, and concluded that the answer to this question was no. Instead, Mr Merkulov and Mr Teder were to be regarded as the directing minds and will of Arricano.

iv) He then found that, as regards withdrawals after 8 July 2015, Mr Tymochko must have told others at Arricano about this.

(4) Finally, he concluded that the breach of obligations, both before and after the 8 July, was not sufficiently fundamental to have the consequence that the right to exercise the COA lapsed.

117. He then turned to the second part of the dispute, namely Arricano's claim for damages. His findings in this regard were as follows.

118. First, he reiterated the fact, initially stated in his order dated 16 June 2015, that he did not in fact intend in his Second Award to conclude that he did have jurisdiction to award damages. Instead, he was reserving the jurisdiction to hear all aspects of these claims, including jurisdiction, merits and quantum.

119. Secondly, he turned to the issue of jurisdiction, and dealt with this under various heads.

(1) First, he asked himself whether the arbitration clause covered the dispute, and concluded that it clearly did.

(2) Secondly, he considered whether the remission was broad enough to encompass the claim. In this regard, having referred to the authorities, he stated his conclusion as follows:

> *"187. The reconsideration mandated by paragraph 1 of Mr Justice Field's Order, which resulted in my Second Award, was carried out based on the same facts, but after hearing further argument including a hearing with Counsel. Paragraph 2(b) of the Order is broadly worded to include ("any remaining issues that arise for determination".) I understand this to allow Arricano (and Stockman) to raise claims and arguments consequential upon reconsideration of whether the Call Option was validly exercised and they (and I) are not limited to only those facts and issues that had been submitted earlier in the arbitration and prior to my First Award, which was issued in December 2011. Having decided that Arricano had validly exercised the Call Option and Stockman was in breach in 2010 by not transferring the Option Shares to Arricano, one of the most relevant "remaining issues" consequential upon that decision was whether in fact Stockman was still able to transfer the Option Shares and whether specific performance was an appropriate remedy. Given the effluxion of time from December 2011 to August 2014, it was inevitable that new facts and matters would inform that determination. I do not consider*

> *that it can have been the intention of Mr Justice Field that any change in circumstances relating to Option Shares since my First Award in December 2011 should be ignored. To do otherwise in this case given the time between my First and Second Awards (31 months) and Stockman's conduct during that period (see below) could and would lead to injustice.*
>
> *188. I also note that Stockman did not take this issue when Arricano became aware of the transfer to Althor and sought to amend the relief sought to add damages in lieu of specific performance. Freshfields stated that Arricano could amend its relief after my Second Award, should Arricano be successful.*
>
> *189. I further note that Stockman itself has submitted additional exhibits and witness statements, addressing matters that arose since my First Award.*
>
> *190. Having issued an award of specific performance, I consider that I have an ongoing jurisdiction to make that order work (see Gill v Tsang, per Vos J, above) I consider this is within the scope of "any remaining issues" mandated by the Order of Mr Justice Field".*

(3) Thirdly, he considered an argument by Stockman to the effect that, having ordered specific performance, he was functus officio in respect of any other damages relief. Stockman relied in this regard on *Jaggard v Sawyer* [1995] 1 WLR 269. In this regard:

a) He rejected Arricano's initial contention that Stockman had waived the right to take this jurisdictional objection, under ss. 31(2) and 73(1) of the Arbitration Act 1996.

b) He held, however, that he was not *functus officio*, on a number of grounds. Thus, he held that he had not made a final and unqualified award for specific performance, because he had reserved the right to hear other claims, including the claim for damages in lieu of specific performance; because he had made no final order for transfer, as opposed to an order for the deposit

of the purchase price with an option then for the parties to come back to him if no final form of transfer arrangement could be agreed; and because, on the basis of *Gill v Tsang*, he considered he had power to police his award.

(4) Fourthly, he considered Stockman's case that he had no power to order damages *in addition to* specific performance. He rejected this case, giving a number of reasons.

a) First, he stated that although Arricano's original request had been for damages in lieu of, rather than in addition to, specific performance, there was no objection by Stockman, who indicated that Arricano could amend its prayer for relief if it was successful, and that Stockman could not now complain that Arricano, having learnt of the full extent of Stockman's wrongdoing, had now formulated their claim more broadly.

b) Secondly, he stated that, in any event, he did not consider paragraph 168 of the Second Award to be limited to damages in lieu, in circumstances in which the shares were worthless, so that the shares plus the damages were equal to the damages alone.

c) Third, he concluded that paragraph 166(d) of his Second Award enabled him to order that the Option Price should not be released to Stockman.

d) Fourthly, he concluded, again, that he had the power to make his order work, applying *Gill v Tsang*.

e) Lastly, under this head, he gave leave to amend under the LCIA Rules, Article 22.1(a).

(5) Lastly he rejected a *forum conveniens* argument, which is not before me.

120. After this somewhat lengthy account of the facts, I turn to the issues before me.

The applications before me.

121. The applications which were listed to be heard before me were as follows:

(1) An application to set aside the Fourth Award, on the basis that the arbitrator had exercised a jurisdiction that he did not in fact have. This was a s.67 application.

(2) An application to set aside the Fifth Award, pursuant to s.68(2)(g) of the Arbitration Act 1996, on the grounds that it was procured by fraud.

(3) An application to set aside the Seventh Award, pursuant to either s.67 or s.68 of the Arbitration Act 1996, on the ground that the arbitrator did not have jurisdiction to determine the matters purportedly determined or that the Seventh Award was also procured by fraud, being undermined by the acceptance of the wrongly procured Fifth Award.

The issues before me.

122. I will deal with the issues which, in my view, arise, in category and chronological order, as follows:

(1) As to jurisdiction:

a) What was the scope of the remission by Field J? What, in the light of this, was the jurisdiction of the arbitrator?

b) Was the jurisdiction of the arbitrator thereafter expanded to include a claim for damages in lieu of specific performance?

c) Was the jurisdiction of the arbitrator expanded at any time after the initial remission to include a claim for damages in addition to specific performance?

d) Did the arbitrator become functus officio in relation to any claim for damages by virtue of the award of specific performance in his Second Award?

e) Did the arbitrator have jurisdiction to allow amendment of the claim on the basis of the LCIA Rules?

(2) As to the claim to set aside the Fifth Award on the basis that it was induced by fraud:

a) Was there a fraudulent misrepresentation?

b) Was the Fifth Award induced by such?

c) Should the Fifth Award be set aside in the light of the conclusions reached under (a) and (b) above?

Jurisdiction.

The limit of the initial remission.

123. In my judgment, it is most helpful to look at matters chronologically, beginning with the position as it stood as at the making of the First Award. Simply stated, at this stage the arbitrator was *functus officio* and no longer had any jurisdiction in relation to any claim of Arricano. The only jurisdiction he had reserved was as to a claim for damages by Stockman, the details of which I have outlined above.

124. However, the arbitrator's jurisdiction was revived by virtue of the remission by Field J. The question at this stage is as to the extent of the revival of jurisdiction. It should be remembered that the relevant context was as follows:

(1) Arricano had made a claim for specific performance of the obligation to transfer the shares;

(2) Arricano had asked for a declaration as to what the Option Price was;

(3) Arricano had also, in its submissions, indicated a claim for damages in lieu of or in addition to specific performance, but had made no submissions in relation to the quantum of such, or the basis for such, save that it claimed damages in the amount of legal expenses and costs

incurred and claimed to be entitled to set off that claim against the Option Price;

(4) The claim for relief, other than the claim for "further and other relief" contained no relevant claim for damages.

125. The leading authority on this issue is the decision of Rix J (as he then was) in *The Avala* [1996] 2 Lloyd's Rep. 311. In that case, Rix J said:

> *"In my judgment the extent of the remission in this case has to be interpreted by reference to the order in the light of the background to that order. That background includes not only the judgment of Mr. Justice Tuckey but also of course the circumstances in which the order came to be made, as I have mentioned by agreement and without argument, and also in the light of the issues upon quantum which were raised before Mr. Justice Tuckey by the charterers' notice of originating motion. It is clear, and it has been frankly accepted before me, that the issue now in question, that concerning the bringing into credit of the expenses which would have been incurred by the owners if the voyage to Turkey had been performed, had not been before the arbitrator at the time of his First Award, was not raised in the notice of originating motion, had not been before Mr. Justice Gatehouse at the time that he gave leave to appeal, and had not been raised or mentioned before Mr. Justice Tuckey upon the hearing of that appeal.*
>
> *Moreover, it is clear from the terms of the notice of originating motion that the request for remission, which it will be recalled arose by reason of the arbitrator's misunderstanding as to the width of the matters before him, was that he had "failed to deal with all of the issues before him". It seems to me that, prima facie, a limited remission to an arbitrator will be a remission for the arbitrator to reconsider matters on the issues pleaded or otherwise (even informally) before him at the original hearing. Otherwise a remission arising out of matters before an arbitrator could be made the ground and opportunity for a party to entirely change the scope of an arbitration. It does not seem to me to matter for these purposes that an arbitrator may of course originally (i.e. on the original reference of a dispute to him), have had jurisdiction to allow in his discretion a broadening of the issues pleaded before him by way of amendment.*

Once, however, an arbitrator has made his award, he is functus officio, and his jurisdiction is revived only to the extent of the Court's remission. I do not think that, prima facie, it should be thought likely that in remitting a matter to an arbitrator the Court does intend to remit to him matters which had not been pleaded nor were otherwise informally before him previously, but which could only be raised before him by way of amendment. A remission is not like an original reference. An original reference is a reference of a given dispute in general, and the arbitrator has jurisdiction in general to allow any amendment which falls within the general scope of the dispute referred.

When, however, a Court remits an award to an arbitrator, it is not remitting a whole dispute, unless upon the terms of the order it expressly does so. It generally remits something narrower, and where it does so against the background of an arbitration which has already been defined by pleadings and argument before an arbitrator, it is some one or more of the issues as so defined within the scope of the reference that in general must be considered to be the subject matter of the remission.

I think that this is reflected in the decision of the Court of Appeal in The Vimeira. If the Court had not expressly given to the arbitrators upon remission jurisdiction to entertain an amendment in respect of the tightness or insufficiency of the turning circle, the arbitrators would not have had jurisdiction to do so. That, it seems to me, follows from the fact that the arbitrators there did not have jurisdiction to entertain an amendment in respect of the presence of concrete blocks. It was not that there was any express disavowal in the order in The Vimeira as to jurisdiction in respect of an amendment relating to the concrete blocks; nor do I think that the express reference to jurisdiction in respect of an amendment relating to the insufficiency of the turning circle was there regarded as an implied disavowal of any further amendment. Rather it was that the question of liability in that case was remitted upon the issues that were before the arbitrators in the case, save there was an express extension in respect of the permission of an application to amend relating to the insufficiency of the turning circle. If it were otherwise there would be no limit to the jurisdiction of an arbitrator upon a matter remitted to him, save in his discretion by means of his refusal of any amendment relating to that matter.

For these reasons I hold, in my judgment, that the arbitrator did not have jurisdiction to entertain the new issue relating to the hypothetical expenses upon the voyage to Turkey."

126. Similar reasoning can be found in other cases to which I was referred, including the decision of the Privy Council in *Sans Souci Limited v VRL Services Limited* [2012] UKPC 6, where it was said that:

> *"10 Section 11 of the Arbitration Act empowers the Court to "remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire." This statutory power has its origin in section 8 of the English Common Law. It exists in order to enable the tribunal, which would otherwise have been* functus officio *from the publication of its award, to address issues which were part of the submission to arbitration but were not resolved, or not properly resolved, in the award. Leaving aside the perhaps anomalous category of cases in which an award has been remitted on the ground that fresh evidence has become available since it was made, the essential condition for the exercise of the power is that something has gone wrong with the proceedings before the arbitrators. Some error, oversight, misunderstanding or misconduct must have occurred which resulted in the tribunal failing to complete its task and justifies reopening what would otherwise be a conclusive resolution of the dispute.*
>
> *11 It is apparent from the reasons given by the Court of Appeal in December 2008 that, in ordering a remission, they were concerned only with the way in which the arbitrators had dealt with, or failed to deal with, the "unrecoverable expenses." Harrison P., delivering the leading judgment, identified the error or oversight which justified the remission at paragraph 69:*
>
> *"Whether or not expenses incurred by the Respondent were in fact 'unrecoverable', as claimed by the appellant in its Points of Defence, or reimbursable as contended by the Respondents, should have been determined by the arbitrators. The arbitrators were required to demonstrate in their award that they accepted that the expenses were 'unrecoverable', or alternatively payable by the Appellant. At its lowest, the arbitrators should have demonstrated that they considered the issue of 'unrecoverable expenses' as contended for by the Appellant."*
>
> *No other matter is identified by the Court of Appeal as warranting a remission. Indeed, no other criticism was made of the way in which the arbitrators had dealt with damages.*

12 The Proprietor's response is simple, perhaps too simple. It is that the scope of the remission is determined by the Court of Appeal's order. The order allowed "the appeal against the award of damages", and remitted the award to the arbitrators to determine "the issue of damages". In the absence of any words of limitation, it is said that this unambiguously means the entire issue as to damages as formulated in the arbitrators' Terms of Reference. In the absence of any ambiguity in the language of the order, it should not be construed by reference to the limited reasons given for making it.

13 In the opinion of the Board, this approach to the construction of a judicial order is mistaken. It is of course correct that the scope of a remission depends on the construction of the order to remit. But implicit in the Proprietor's argument is the suggestion that the process of construing the order is to be carried out in two discrete stages, the first of which is concerned only with the meaning of the words, and the second with the resolution of any "ambiguities" which may emerge from the first. The Court's reasons, so it is said, are relevant only at the second stage, and then only if an "ambiguity" has been found. The Board is unable to accept these propositions, because the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve….

15.… As Rix J pointed out in his valuable judgment in Glencore International A.G. v. Beogradska Plovidba (The "AVALA") [1996] 2 Lloyd's Rep. 311 , 316:

"When … a Court remits an award to an arbitrator, it is not remitting a whole dispute, unless upon the terms of the order it expressly does so. It generally remits something narrower, and where it does so against the background of an arbitration which has already been defined by pleadings and argument before an arbitrator, it is some one or more of the issues as so defined within the scope of the reference that in general must be considered to be the subject matter of the remission."…

… 17 These considerations apply generally to the construction of judicial orders. But there are particular reasons for giving effect to them in the context of the judicial supervision of

> *arbitration proceedings. An arbitration award is prima facie conclusive. The Court has only limited powers of intervention. It exercises them on well- established grounds such as (to take the case arising here) the arbitrators' failure to deal with some matter falling within the submission. The reopening by the arbitrators of findings which there were no grounds for remitting and which they had already conclusively decided would therefore have been contrary to the scheme of the Arbitration Act . The terms of the order may of course in some cases be such that it must be concluded that the Court did exceed the proper limits of its functions. But it should not readily be assumed to have done so, especially when its reasons show that it has not."*

127. Hence, the arbitrator's jurisdiction comes to an end when the initial Award is rendered, and it is only revived in relation to the particular issues remitted. Moreover, the arbitrator cannot, on the face of things, allow an amendment to enable a party to introduce a new dispute into the reference which has, by definition, ended at the time of the making of the Award. The scope of the reference must be judged, in my judgment, as at the date of the initial award, since it is only matters within that reference that jurisdiction can be revived in respect of. However, in the final analysis, everything must depend on the proper construction of the Order of remission, viewed against the relevant background.

128. How then does this principle fall to be applied to the current facts?

(1) Arricano submitted that the remission by Field J, having regard to the terms of the order that I have set out above, was entirely general. I do not accept that submission in the very broad terms set out above. The only challenge to the First Award which was successful was that based on the argument that the arbitrator had failed to deal with an argument that Arricano had run before him, namely that the failure to comply

with the provisions of the escrow agreement did not invalidate Arricano's exercise of the Call Option. It was that issue which was remitted. In addition, of course, it was necessary to remit to the arbitrator issues which would arise in the event that the arbitrator found that the Call Option had been validly exercised.

(2) However, this was the limit of the remission. It is only to the extent that a claim for damages was initially made in the arbitration that the remission could revive the arbitrator's jurisdiction in relation to such claim.

129. In order to determine whether such a claim was made, it is necessary to return to the claim submissions prior to the first LCIA Award. Arricano pointed to the fact that, in paragraph 10.4 of its initial submissions, a claim for damages was indeed made. Stockman countered by saying that there was no claim for damages in the prayer for relief, other than in relation to costs, which Arricano sought to set off. In addition, Arricano pointed to paragraph 2.10 of its post hearing brief, which stated that it was entitled to damages in addition to or in lieu of specific performance. Stockman again contended that the only damages sought were costs, and that no facts were set out in support of the claim for damages *subsequently* made (and now relied on). This was hardly surprising, as both parties accepted, since the relevant facts which are now relied on occurred by reason of Stockman's subsequent conduct.

130. I have concluded that the scope of the initial remission did include a remission in respect of a claim for damages in addition to or in lieu of specific performance. I reach this conclusion for the following reasons.

(1) It was common ground that an arbitrator may make the same orders in respect of specific performance as a Court: see s.48(5) of the Arbitration Act 1996.

(2) It was also common ground that a Court has power to grant damages in lieu of or in addition to specific performance: see, for example *Grant v Dawkins* [1973] 1 WLR 1406, where damages were granted in addition to specific performance.

(3) Accordingly, if a claim for damages in addition to or in lieu of specific performance had been pleaded and particularised as at the date of the original award, there could be no doubt but that the arbitrator had jurisdiction to deal with such a claim.

(4) In fact, such a claim was particularised and pleaded, being the claim for damages by way of legal expenses. As I have stated, Arricano specifically claimed to be entitled to offset that claim against the Option Price.

(5) There was thus a claim for damages in addition to specific performance.

(6) The result of the remission was that the arbitrator was required, first, to reconsider the question of whether the Call Option had been validly exercised and, secondly, if he found that it had been, to deal with the further issues that would arise in the light of that determination.

(7) One such issue would be whether to order specific performance or damages or both.

131. Thus far, it seems to me that the question is straightforward. Stockman's real point is that he did not have jurisdiction to award further damages arising out of conduct which had taken place after the date of the First Award.

132. I agree with the arbitrator that this is too narrow an approach. As Rix J said in *The Avala*, ref supra, then, *prima facie*, a limited remission would be to deal with the matters before the arbitrator on the pleadings before him at the date of the original Award. However, this can only be a *prima facie* rule, and, in an appropriate case and, depending on the breadth of the order of remission, it may be that the arbitrator has to deal with matters that have occurred since the date of the First Award.

133. Here, the remission was a broad one, in that it required the arbitrator to revisit ground that, because of his decision in his First Award that the Call Option had not been validly exercised, he had not addressed. He therefore had to consider this question afresh, including the question of whether specific performance and damages should be awarded. In my judgment, it cannot be right that in considering those issues, he should be precluded from taking into account matters which would be relevant thereto simply because they had occurred after his initial Award. There is, in my judgment, a difference between, effectively, freezing the dispute, including disallowing reference to all relevant facts occurring after the First Award, which is not in my judgment the correct approach, and allowing a wholly new issue to be raised on the remission.

134. In this case, the breach by Stockman of which Arricano complained initially was its breach in wrongly challenging the exercise of the Call Option. Had that breach not occurred, then, in line with the regime set out above, Arricano would have tendered the Option Price (being the amount due as found by the arbitrator on 29 November 2010); the Escrow Agent would then have handed over the share documentation to Arricano; and Stockman would have received the Option Price. In fact, because of Stockman's breach, this did not happen, and instead the share documentation was returned to Stockman whilst the dispute between the parties was ongoing, enabling Stockman to take the action of which Arricano now complain – ie to transfer the shares to a third party.

135. In my judgment, therefore, although the facts which led to this enhanced damages claim occurred after the First Award, the remission incorporated the necessity to consider the damages claim itself, and this entitled the arbitrator to take into account events which led to an increase (or decrease) in the quantum of that claim occurring after the date of the First Award.

136. It is, therefore, strictly speaking, unnecessary for me to consider the alternative arguments put forward before me as to the scope of the arbitrator's jurisdiction at the moment that he published his Second Award. However, in case this matter should go further, and because the points have been very fully argued, I set out my views on them.

Was there an extension of the arbitrator's jurisdiction by reason of the correspondence immediately prior to the issuance of the Second Award?

137. I have set out the terms of the relevant correspondence which took place immediately prior to the issuance of the Second Award above. Arricano

contended that, by virtue of this correspondence, Stockman either consented to an extension of the jurisdiction of the arbitrator to enable him to deal with a claim for damages, or alternatively, since they did not object to his giving of leave to amend as soon as possible, lost the right to object by virtue of s.73 of the Arbitration Act 1996.

Express agreement.

138. I will deal with the question of express agreement first, and then the question of waiver. In addition, I need to deal separately with the claim for damages in lieu of specific performance and the claim for damages in addition to specific performance.

139. As to express agreement, this argument was not put very clearly in advance of the hearing before me. However, I am satisfied that by the time of closing submissions, the argument was being advanced, albeit somewhat hesitantly.

140. Although technically not binding on me, I consider the approach of the arbitrator in this regard as relevant evidentially. His approach was as follows:

(1) The exchange of correspondence to which I have referred occurred shortly before the issuance of the Second Award.

(2) The arbitrator gave leave to amend in that Award. He also reserved jurisdiction to deal with the claim.

(3) On the challenge before Burton J it was agreed that the matter should be left for the arbitrator to clarify whether he had decided that he had jurisdiction, or had simply reserved this question.

(4) In his Seventh Award, and in an earlier Order, he stated that his intention had been to reserve jurisdiction to determine, firstly, whether he had jurisdiction, and, secondly, how he should exercise that jurisdiction.

(5) He therefore dealt with the issue in his Seventh Award. In that Award, he found as follows:

a) First, as I have noted above, under the heading of "Outside Remitted Issues", he noted that Stockman had not raised any objection to the matter being dealt with in the arbitration when it was first raised by Arricano. He did not however, draw any particular conclusion from this, although his conclusion under this head, as I have noted, was that the matter was not outside the remission.

b) Secondly, he may have dealt with it under the heading of "Functus Officio". This is logically a separate issue; and it was dealt with as a matter of waiver. As a result, I consider it below.

c) Thirdly, he dealt with it again under the heading of "Varying Second Award". Here, the argument Stockman was raising was that jurisdiction had been reserved to deal with damages in lieu of specific performance whereas what was now sought was damages in addition to specific performance. Here, he held (in paragraph 207) that, although Arricano had not articulated its claim as precisely as it might have done, having only just learnt

> of the transfer to Althor, "*Stockman did not object outright and appeared open to Arricano modifying its prayer for relief after the Second Award if it was successful"*. He held that it was not open to Stockman to complain that Arricano, having only thereafter found out the full extent of Stockman's wrongdoing, had reformulated its relief.

141. On a fair reading of the Seventh Award, therefore, then it seems to me clear that the arbitrator was indeed finding that there had been an ad hoc reference of these issues. In particular, the quotation from paragraph 207 suggests quite clearly that this was his view.

142. Once again, I am in agreement with the arbitrator. In my judgment, the following is the appropriate analysis.

(1) In its initial communication, Arricano made clear that what they wished to have included in the reference was their claim for damages, if any, arising out of the transaction involving Althor. They did not at this stage know the full details of this transaction, and in particular they did not know that Althor had passed on the shares to an independent third party.

(2) The relief that was formulated at that stage was a claim for damages in lieu of specific performance.

(3) Stockman's response was not to suggest that this claim could not be brought into the reference. Instead, they stated that if Arricano succeeded on their argument that they had validly exercised the Call

Option, then they would be able to amend the relief sought, thus clearly indicating in my view that they had no objection to such a course of action being taken. They did not seek to limit the nature of the relief that they said could be introduced.

(4) Objectively speaking, in my view this was a clear acceptance of a request to refer a claim for damages in lieu of specific performance.

(5) The more difficult question is whether there was an acceptance of a request to refer a claim for damages in addition to specific performance. On the one hand, as Arricano contended, it was its claim for damages arising out of the Althor transaction that they sought to introduce the fact that the relief then stated as being sought should not be taken to limit the breadth of that claim. Stockman, for its part, contended that if there was any agreement, which they denied, it could only relate to a claim for damages in lieu of specific performance.

143. Overall, in my judgment, again in agreement with the arbitrator, I hold that, on its true construction, this agreement was to refer the claim for damages arising out of the Althor transaction and that this was broad enough to refer both a claim for damages in lieu of specific performance or a claim for damages in addition to specific performance.

Waiver.

144. The question of waiver is also an involved one. The starting point must be the provisions of the Arbitration Act 1996. The relevant provision is s.73(1), which provides as follows:

> *"73 Loss of right to object.*
>
> *(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."*

145. Section 31 of the 1996 Act provides as follows:

> ***"31 Objection to substantive jurisdiction of tribunal.***
>
> *(1)An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction.*
>
> *A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.*

> *(2)Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.*
>
> *(3)The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified."*

146. Here Arricano submitted that:

(1) The moment when Stockman should have objected to the jurisdiction of the arbitrator was when the claim for damages in lieu of specific performance was first put forward;

(2) No objection was made "forthwith". The first such jurisdictional objection was only taken after the Second Award was rendered, when the challenge eventually heard by Burton J was made.

(3) No application was made to the arbitrator for an extension of time within which to raise the objection.

147. Stockman, for its part, submitted as follows:

(1) It accepts that the first jurisdictional objection made was made when the Second Award was challenged.

(2) However, when that jurisdictional objection was made, Arricano argued that Stockman had lost the right to raise such an objection.

(3) The arbitrator decided, in his Seventh Award, that Stockman had not lost the right. In this connection, Stockman referred to paragraph 196 of the Seventh Award.

(4) He then went on to consider the merits of the point.

(5) It was inherent in this decision that he must have been extending time for the making of the challenge. In this regard, they relied on the *obiter dicta* of Flaux J. in *Gulf Import and Export Co v Bunge S.A.* [2007] EWHC 2667 (Comm).

(6) In that case, the principal question was whether the Board of Appeal of GAFTA had jurisdiction to exercise a discretion, on the proper construction of the GAFTA Rules, to allow a claim to proceed after the expiry of a one year time limit provided for in the Rules. Flaux J decided that they did, and accordingly, did not need to consider the alternative submission that the point that they did not have such jurisdiction was raised too late.

(7) Flaux J said as follows:

> *"47 That leaves Bunge's arguments that the objection came too late, based upon sections 31 and 73 (1) of the Arbitration Act 1996 . If, as I have held, the application falls within section 68 rather than section 67 , those provisions are not applicable because they are only concerned with challenges to the substantive jurisdiction of the tribunal, not with serious irregularity. It is not necessary to consider sections 31 and 73 (1) further, save to say that I consider that Mr Males is right in his submission that, in circumstances where the Board of Appeal allowed the objection to the exercise of discretion by it to be fully argued on the merits and decided the point, albeit against Gulf, it would be bizarre if Bunge could successfully argue before the Court that the objection was too late by reference to either section 31 or section 73 (1) . In effect, Gulf would be worse off than if Bunge or the Board of Appeal had protested about the point being raised late and the Board had then ruled that the objection could still be argued. It seems to me that the Board has allowed the point to be argued and if it would otherwise have been too late, it is not precluded by section 31 or section 73(1) , either because section 31(3) comes into play or because the objection has been raised*

> *"within such time as is allowed by … the tribunal" within the meaning of the opening words of section 73(1) ."*

(8) Although, in this case, the arbitrator then ruled against Stockman, and held that although Stockman had not lost the right to contend that he had no jurisdiction, he was satisfied that he did have such jurisdiction, Stockman contended that a finding by the arbitrator as to the extent of his own jurisdiction could not be binding.

148. In my judgment, on the face of things, Arricano are right in saying that Stockman did not raise the point that the arbitrator did not have jurisdiction to deal with such a damages claim "forthwith". Accordingly, *prima facie*, Stockman lost the right to make such an objection by virtue of s.73. Stockman did not at any stage ask the arbitrator expressly for an extension of time to challenge his jurisdiction on this basis.

149. The only ground on which Stockman can now rely as justifying an extension of time would be that set out in the *obiter dicta* of Flaux J that I have set out, namely that because the arbitrator dealt with the merits of the point, the tribunal must be taken to have allowed an extension of time.

150. I do not think that I need to express any concluded view on whether or not the comments of Flaux J set out above are correct, since in my judgment the issue must always depend on the facts of the individual case. On the facts of the current case, I have concluded that there was no implicit extension of time. I have reached this conclusion for the following reasons:

(1) As I have noted, in my judgment the objection to jurisdiction was not made forthwith.

(2) It was thus for Stockman to make an application to the arbitrator for an extension of time. Only the arbitrator had a discretion to extend time, and this would have been a matter of discretion, applying the principles established under s.73 and/or s.31(3).

(3) Because such an application was not made, the arbitrator did not have to consider these principles.

(4) In circumstances in which the arbitrator did not have to address his mind to the question of whether or not to extend time, because no such application was made, I do not think it is safe to assume that he would have done so, particularly since the consequence of so doing would have been that his decisions on jurisdiction would become challengeable in a way that they would not be absent such an extension.

151. Accordingly, I hold that Stockman also waived its right to object to the jurisdiction of the arbitrator to deal with the claims for damages relating to the Althor transaction.

Was the arbitrator functus officio after the Second Award, so as to preclude an award of damages?

152. I turn to the next argument put forward by Stockman, namely that having granted specific performance, in his Second Award, the arbitrator was *functus officio* and could not grant any damages, whether in lieu of, or in addition to, specific performance.

153. For its part, Arricano contended, first, that Stockman had waived this point by continuing to take part in the proceedings after the Second Award, and, secondly, that the arbitrator, like the Court, had power under s.48(5) of the Arbitration Act 1996, to award damages in lieu of or in addition to the grant of specific performance.

154. Stockman countered by arguing that whilst the arbitrator would have had power to grant damages in addition to or in lieu of specific performance "at first instance", once he had made a decision, he lost such power.

155. The arbitrator decided that he was not *functus officio*, for the reasons set out above. I have concluded that he was clearly correct. In my judgment, the correct analysis is as follows:

(1) At the outset of a reference in which specific performance is claimed, it is clearly open to the arbitrator to make the same orders as a Court may make in relation to specific performance: see s.48(5) of the Arbitration Act 1996. This proposition was not challenged by Stockman.

(2) The arbitrator would thus clearly have had the power to order damages in addition to or in lieu of specific performance at the outset. Again, this was not challenged by Stockman.

(3) The first question is thus whether, on the assumption that, as at the time of the Second Award, the arbitrator had the jurisdiction to award such remedies. This depends on the question of the scope of the remission or expansion of remission, addressed above.

(4) On the assumption that that arbitrator did indeed have this power immediately prior to the rendering of the Second Award, then, since the arbitrator expressly reserved such jurisdiction at the time of the making of the Second Award to award damages in lieu of specific performance, there can in my view be no question of the arbitrator becoming *functus officio* in relation to such a claim.

(5) In addition, as the arbitrator noted, he reserved jurisdiction, in the event that the parties could not agree appropriate escrow arrangements, to give a decision on the appropriate form of relief. Accordingly, in my judgment, he could not be *functus officio* in relation to anything properly within his jurisdiction at the time the Second Award was rendered.

156. In the light of this analysis, I conclude that the arbitrator retained jurisdiction to deal with a claim for damages at least in lieu of specific performance.

157. In the light of these conclusions, I do not need to reach any concluded view as to whether the arbitrator was right to find that he had the same power as was held to be vested in the Court in *Gill v Tsang* [2003] WL 21554631.

158. The claim for damages in addition to specific performance may be said to be more difficult. I deal with this in the next section.

Could the Second Award be varied?

159. Under this heading, Stockman argued that the arbitrator only reserved jurisdiction in respect of the claim for damages in lieu of specific performance, whereas what was now being claimed was damages in addition

to specific performance. Accordingly, it was argued, even if the arbitrator was not *functus* in relation to the former claim, he was *functus* in relation to the latter.

160. It will be seen that this argument is again independent of the contentions in relation to the scope of the original remission. What is said under this head was that, even if a claim for such damages was initially remitted or was the subject of some expanded jurisdiction initially, then the arbitrator, by virtue of making the order that he did at the time of the Second Award, had lost the right to make any order granting damages in addition to specific performance.

161. Arricano, for its part, contended that the important point was that at all times the arbitrator had had, as Chitty on Contracts (32nd ed) puts it "*the power … to substitute an order for specific performance with damages either in addition or in lieu"*.

162. The arbitrator concluded that the initial formulation of relief put forward by Arricano could be varied, and that he had jurisdiction to award damages either in lieu of in addition to specific performance.

163. Again, I am in agreement with the arbitrator. In my judgment, the arbitrator had, as I have said, jurisdiction to grant damages in addition to or in lieu of specific performance as at the time that the Second Award was rendered. The arbitrator then reserved jurisdiction to deal with not only the claim for damages in lieu, but also the appropriate form of relief if the parties could not agree on escrow arrangements, which they did not. Accordingly, in my judgment, his jurisdiction remained the same as at the time of the Second

Award as it had been when the matter was remitted, and he did not lose any jurisdiction by virtue of the issuance of that Second Award.

Did the arbitrator have jurisdiction to grant leave to amend pursuant to the LCIA Rules?

164. In the light of the conclusions I have already expressed, it is not strictly necessary for me to deal with the further question of whether the arbitrator had jurisdiction, under the LCIA Rules, to amend to add the claim for damages in addition to specific performance as he purported to do at paragraph 211 of the Seventh Award. However, in case this matter goes further, I will set out my brief views.

165. This matter was not the subject matter of detailed argument, but I was referred to the views of the learned authors of *A Guide to the LCIA Arbitration Rules*, 1st ed.. They take the view (at paragraphs 6.10 to 6.11) that the LCIA Rules only permit the arbitrators to admit new claims which are within the jurisdiction of the arbitrators. In my judgment, this is correct: see for example *Merkin on Arbitration Law*, at 14.22. Here, the question is complicated by the fact that the remission, as I have indicated, determined the scope of the tribunal's jurisdiction. For the reasons that I have already outlined, I take the view that this remission was broad enough to encompass all further matters which were necessary to determine in the light of the tribunal's determination on the issue of whether the Call Option had been validly exercised. In my judgment, therefore, the amendment which the tribunal permitted was within the scope of that jurisdiction. It was therefore an amendment which he had

power to allow. There is no challenge to the exercise of the tribunal's discretion in this regard.

166. It follows from all of the above, in my judgment, that the arbitrator did indeed have jurisdiction, as he has held in his Seventh Award, to award damages in addition to specific performance.

167. I turn therefore to the separate challenge to the Fifth Award.

Was the Fifth Award procured by fraud?

The legal principles.

168. I start with the provisions of the statute, namely s.68(2)(g) of the Arbitration Act 1996, which provides as follows:

> *"68Challenging the award: serious irregularity.*
>
> *(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 section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).*
>
> *(2)Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—…*
>
> *… (g)the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;"*

169. The relevant legal principles were not really in dispute between the parties. Hence:

(1) As with any allegation of fraud, the accuser must "*demonstrate its case to a high standard of proof*": see *Elektrim v Vivendi* [2007] EWHC 11 (Comm) at paragraph 81. I did not accept the proposition that the onus is higher still on a s.68 challenge but, in the event, I do not think that this was really pursued.

(2) There must be a sufficient causative link between the fraud and the obtaining of the Fifth Award. The authorities to which I was helpfully referred have expressed this in various ways, as follows:

a) There must have been "reprehensible or unconscionable conduct that contributed in a substantial way to the obtaining of the award": see Double K Oil & Products Ltd v Neste Oil OYJ [2010] EWHC 3380 (Comm) at para 33;

b) The applicant must show that the evidence relied on to demonstrate the fraud would have had an important influence on the result of the arbitration: see *Thyssen Canada Ltd v Mariana Maritime SA* [2005] EWHC 219 (Comm) at para 60, citing *Westacre Investments Inc v Jugoimport-SPDR Holding Co. Ltd* [2000] QB 288, at para 307.

(3) As regards the question of whether an award has been procured contrary to public policy, then similar comments apply. It has also been said, by Moore-Bick J (as he then was) in *Cuflet Chartering v Carousel Shipping Co Ltd* [2001] 1 AA ER (Comm) 398 at para 10, that "*there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that*

enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised".

(4) It must also be shown that the fraudulent conduct has caused substantial injustice in the sense that the fraud had an important influence on the award and/or that the result in the award might realistically have been, or might well have been, different if the true facts had been known. This test was common ground between the parties: see *Mass v Musion* [2015] EWHC 1346 (Comm). In the words of *Merkin on Arbitration Law*, which were accepted as authoritative in the *Mass* case:

> *"If the result would most likely have been the same despite the irregularity there is no basis for overturning an award. However, in determining whether there has been substantial injustice, the court is not required to attempt to determine for itself exactly what result the arbitrator would have come to but for the alleged irregularity, as this process would in effect amount to a rehearing of the arbitration. Instead, if the court is satisfied that the applicant had not been deprived of his opportunity to present his case properly, and that he would have acted in the same way with or without the alleged irregularity, then the award will be upheld. By contrast, if it is realistically possible that the arbitrator could have reached the opposite conclusion had he acted properly in that the argument was better than hopeless, there is potentially substantial injustice. The accepted test now seems to be that there is substantial injustice if it can be shown that the irregularity in the procedure caused the arbitrators to reach a conclusion which, but for the irregularity, they might not have reached, as long as the alternative was reasonably arguable."*

The issues in outline.

170. Here, therefore, as I have noted above, the issues are as follows:

(1) What representations were made to the tribunal?

(2) Were those representations fraudulent?

(3) Did those representations induce the Fifth Award?

(4) Did the irregularity (ie the procurement of the Fifth Award by fraud) cause substantial injustice to Stockman?

171. I consider each of these questions in turn.

The relevance of the arbitrator's findings.

172. However, before I do, there is in my view a logically anterior question, which is as to what the relevance is, in this Court, of the findings already made by the arbitrator in the Seventh Award.

173. I raised this point during the hearing with Counsel on both side.

174. In its closing submissions, Stockman contended as follows (though without any citation of authority):

(1) Findings that form the basis of the conclusion that the Arbitrator had jurisdiction to determine the damages claims (eg as to the scope of the remission) could not be binding.

(2) Findings that were made on the basis that the Arbitrator did have jurisdiction to determine the damages claims (eg breach of the COA) are binding. If the jurisdiction challenge succeeds, these are not binding. If it fails, they are, subject to the point made in (4) below.

(3) Findings in respect of which there is no jurisdiction issue (eg the knowledge of individuals about the withdrawals from the accounts), are binding (insofar as they go) subject to the point made in (4) below.

(4) If the Fraud Challenge succeeds, the Seventh Award needs to be remitted to the arbitrator so that he can consider the consequential impact on the Seventh Award of his redetermination of the issues addressed in the Fifth Award. If this happens, it is not final and conclusive. Consequently, it can give rise to no issue estoppel.

175. For its part, Arricano contended that there was a simpler bifurcation of issues. On the one hand, issues which were within the arbitrator's jurisdiction were binding. On the other hand, issues which were not within the arbitrator's jurisdiction were not binding. Findings which were within the arbitrator's jurisdiction could not cease to be so simply because the Fifth Award was remitted.

176. In my judgment, this is in reality a question of the application of normal principles of issue estoppel. Insofar as the relevant matters were within the jurisdiction of the arbitrator, then findings on such matters are binding on the parties and thus on me. If they are not within the arbitrator's jurisdiction (or are findings on which jurisdiction rests), they are not binding on me.

177. With this summary in mind, I turn to the four issues identified above, indicating my own views where relevant.

The representations.

178. The representations to the arbitrator are those made in the HSF letter sent on 31 December 2014, the submissions dated 5 February 2015 put in by Arricano, and the reply submissions dated 25 February 2015 put in by Arricano to which I have made reference.

179. The question that I have to address is what those letters would have conveyed to a reasonable reader. In this regard, the arbitrator's statements as to what he understood from those letters is evidence of this – and in my judgment powerful evidence – but is not conclusive. It is not conclusive because this fraud claim was not before him in any of his Awards.

180. Dealing with each letter in turn, then:

(1) In my view, the letter of 31 December 2014, read against the background of what had gone before, and in particular the orders which Arricano had asked the arbitrator to make, included the following representations:

a) That the monies were in the Silverioco and Emergex accounts as at 31 December 2014.

b) That Arricano had no *intention* to take those monies out, pending provision by Stockman of the information that Arricano had asked for, to enable it to scrutinise the attributes of the Assofit shares.

(2) Turning to the letter of 5 February 2015, then that, in my judgment, clearly indicated that there had been no change in relation to the Renaissance monies since the 30 December 2014 letter. As regards

the Emergex accounts, the letter made clear that the agreement was up to 31 January 2015, but that this had been intended to enable arrangements to be made to inspect the Stockman material. In my judgment, this letter indicated that the Renaissance monies were still on deposit as at 5 February 2015, and that the Emergex monies had been on deposit until 31 January 2015. Again, in my judgment, there was an implicit representation that there was no intention on the part of Arricano to withdraw monies.

(3) Next, there is the letter of 25 February 2015. In my judgment, that letter contained the following representations:

a) That the Renaissance and Emergex monies remained on deposit as at that date.

b) That the Emergex agreement was valid until 1 March 2015 and could be extended until 16 March 2015.

c) That the Renaissance agreement had no expiry period.

d) That, again, Arricano had no intention to withdraw the monies.

(4) Finally, I accept that if Arricano learnt that any of these representations, though initially true, had become untrue prior to the date of the Fifth Award, they owed a duty to correct them.

Falsity?

181. The next question is whether any of these statements were false. I deal with each letter in turn. Again, in my view, the findings of the arbitrator are not binding since he did not have to consider the question of the falsity of the representations directly.

182. As regards the 31 December 2014 letter, I would not regard the statements in this letter as proven to be untrue.

(1) The monies were in fact in the accounts as at this date.

(2) There is no sufficient evidence to conclude that there was no intention to leave the monies in place for a reasonable time or until escrow account arrangements were agreed.

183. As regards the 5 February 2015 submissions:

(1) Since there had been withdrawals from the Silverioco accounts as at this date, then this representation was untrue.

(2) There had been no withdrawals from the Emergex accounts, so that there was no falsity in this regard.

(3) There is no sufficient evidence of any intention on the part of Arricano to withdraw monies.

184. This leaves the letter of 25 February 2015. By this time, on the evidence before me, no further withdrawals had been made from either the Renaissance/Silverioco accounts or the Emergex accounts. Accordingly, the position remained, in my judgment, as it stood as at 5 February 2015.

185. The next event of relevance was the withdrawal of monies from the Emergex accounts on 11 March 2015. This rendered the representations made in the earlier letters untrue. No notice of this fact was given to the arbitrator.

186. Accordingly, I conclude that the representations made in the letters to the arbitrator of 5 and 25 February 2015 were, or became untrue. To the extent that they became untrue, then (if Arricano had the relevant knowledge) they should have been corrected, but were not.

Knowledge of falsity.

187. The next question is whether Arricano knew that the statements that were being made to the arbitrator were false. It is here that the relevance of the arbitrator's findings is most acute, since the arbitrator, as noted above, made a number of potentially relevant findings by which, in my judgment, I am bound.

188. The question for me is whether, as at the time that the Fifth Award was rendered, the statements that had been made to the arbitrator were, to the knowledge of Arricano, false. In this regard:

(1) I accept the submission of Arricano that the situation must be judged as at the time that the Fifth Award was rendered, although I also accept that, in relation to questions of credibility, evidence as to what happened thereafter would be relevant.

(2) As I have noted above, I accept the submission of Stockman that there is a duty to correct statements which a party finds out are incorrect after they are made. I have considered the relevant statements above.

189. I start with the findings of the arbitrator.

190. Looking at matters as at the date of the Fifth Award, ie 31 March 2015:

(1) There had been a number of withdrawals from both the Emergex accounts and the Renaissance accounts;

(2) As regards the Renaissance accounts, in relation to which the withdrawal was made in January 2015, it was likely that Mr Tymochko and/or Mr Teder and/or Mr Merkulov intentionally "turned a blind eye".

(3) As regards the Emergex accounts, in relation to which the withdrawal was made on 11 March 2015:

a) Mr Tymochko knew of these withdrawals, but his knowledge was not to be ascribed to Arricano;

b) Mr Teder and Mr Merkulov again "turned a blind eye" to the withdrawals.

191. On the basis of these findings, then in my judgment it must follow that:

(1) Arricano did not have knowledge as a result of the direct knowledge of Mr Tymochko.

(2) However, if Mr Merkulov and Mr Teder deliberately turned a blind eye to the actual state of the accounts prior to the Fifth Award, then Arricano must be treated as having had "blind eye" knowledge of the truth.

192. It would follow that the Fifth Award was indeed procured by fraud.

193. In the light of this conclusion, it is, strictly speaking, unnecessary for me to consider Stockman's case that Mr Tymochko's knowledge was in fact to be treated as Arricano's knowledge, despite the finding of the arbitrator to the contrary. Accordingly what follows is not necessary to my decision.

194. However, in case I am wrong in my holding that the arbitrator's finding on this is binding on me, I consider the relevant authorities.

195. I start with Arricano's contentions. Arricano contended that Mr Tymochko's knowledge could not be ascribed to it because:

(1) He was not the directing mind and will of the company.

(2) He obtained the knowledge in his capacity as director of DRGN and not Arricano;

(3) He was acting in breach of his duties to Arricano;

196. Stockman, for its part, contended that:

(1) Mr Tymochko was, *for these purposes* (ie procuring and having knowledge of the state of the bank accounts) the directing mind and will;

(2) There was no reason to hold that, simply because Mr Tymochko was a non-executive of DRGN, his knowledge should not also be ascribed to Arricano;

(3) Either Mr Tymochko was not acting in fraud of, or in breach of duty towards, Arricano, or, even if he was, then this would not prevent his knowledge from being ascribed to Arricano in the context of a claim by a third party against the company.

197. I will deal with each issue, beginning with the question of what is meant by directing mind and will. That concept was helpfully analysed by Lord Hoffman in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] AC 500, where he said (at p. 506-7):

> *"The phrase 'directing mind and will' comes of course from the celebrated speech of Viscount Haldane L.C. in Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. [1915] A.C. 705, 713. But their Lordships think that there has been some misunderstanding of the true principle upon which that case was decided. It may be helpful to start by stating the nature of the problem in a case like this and then come back to Lennard's case later.*
>
> *Any proposition about a company necessarily involves a reference to a set of rules. A company exists because there is a rule (usually in a statute) which says that a persona ficta shall be deemed to exist and to have certain of the powers, rights and duties of a natural person. But there would be little sense in deeming such a persona ficta to exist unless there were also rules to tell one what acts were to count as acts of the company. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called 'the rules of attribution.'*
>
> *The company's primary rules of attribution will generally be found in its constitution, typically the articles of association, and will say things such as 'for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company' or 'the decisions of the board in managing the company's business shall be the decisions of the company.' There are also primary rules of attribution which are not expressly stated in the articles but implied by company law, such as*
>
> *'the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company:' see Multinational Gas and Petrochemical Co. v. Multinational Gas and Petrochemical Services Ltd. [1983] Ch. 258.*

These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company. and having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort.

It is worth pausing at this stage to make what may seem an obvious point. Any statement about what a company has or has not done, or can or cannot do, is necessarily a reference to the rules of attribution (primary and general) as they apply to that company. Judges sometimes say that a company 'as such' cannot do anything; it must act by servants or agents. This may seem an unexceptionable, even banal remark. and of course the meaning is usually perfectly clear. But a reference to a company 'as such' might suggest that there is something out there called the company of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as the company as such, no ding an sich, only the applicable rules. To say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as an act of the company.

The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person 'himself,' as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the actus reus and mens rea of the defendant himself. How is such a rule to be applied to a company?

One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all; for example, a law which created an offence for which the only penalty was community service. Another possibility is that the court might interpret the law as meaning that it could apply to a company only

> *on the basis of its primary rules of attribution, i.e. if the act giving rise to liability was specifically authorised by a resolution of the board or an unanimous agreement of the shareholders. But there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy."*

198. Applying this approach, I turn to the facts of this case, on the basis of the evidence that was before me. I would regard the following as of importance.

(1) Mr Tymochko was an non-executive director of Arricano. It is quite true that he was appointed to the Board of Arricano to represent the interests of Dragon Capital; but it remains the case that he was a non-executive director.

(2) As the arbitrator observed, he was probably *primus inter pares* amongst the non-executive directors.

(3) He was responsible for arranging the Renaissance funding, and was also in touch with others at DRGN in relation to the funding that they provided.

(4) He accepted in cross examination that it would be to him that those at Arricano would look for information in relation to the state of the accounts.

(5) His evidence was that Mr Teder would deal with the big picture but would probably not be concerned with the detail of what the state of the accounts was.

(6) I heard from Mr Merkulov. It was clear from his evidence that he was not concerned in the relevant period with the state of the relevant bank accounts.

199. In my judgment, the evidence before me (which may of course not be the same as that in front of the arbitrator) establishes that Mr Tymochko was the directing mind and will of Arricano, as that phrase is properly to be understood in the light of the exegesis in *Meridian Global*, set out above.

200. I turn to the second and third of the arguments put forward by Arricano in this connection, which are in my view linked. The question is whether there is some reason why the knowledge of the individual, Mr Tymochko, who was an officer of Dragon Capital and Arricano, should not be treated as the knowledge of Arricano.

201. The first way in which Arricano put this was to say that Mr Tymochko received the knowledge as an officer of Dragon Capital. This is what the arbitrator found. In this connection, Arricano pointed to the decision in *Re Hampshire Land Co.* [1896] 2 Ch 473.

(1) In that case, a company borrowed from a building society, in circumstances in which the relevant requirements for authorisation of the borrowing had not been satisfied. This was known to an individual who was both an officer of the company and of the building society.

The issue was whether the building society, by virtue of the fact that this individual knew that the relevant authorisation was lacking, was also to be taken to have that knowledge, so as to negative the normal principle that a third party is entitled to assume that a decision to borrow has been properly authorised.

(2) Vaughan Williams J held that there was no general rule that knowledge obtained by a common officer of two companies was to be ascribed to both. He then considered where the line was to be drawn. His conclusion, on the facts of the case, was set out as follows:

> *"First, was it within the scope of the duty of the officer to give notice to the other company of the information he had got; and, secondly, was it within the scope of his duty, as the officer of the company sought to be affected by notice, to receive such notice? It seems to me that that is not at all the case here. The case is very much more like the one which both Mr. Bramwell Davis and Mr. Jenkins had to admit was an exception to the general rule that they sought to lay down, for they admitted that if Wills had been guilty of a fraud, the personal knowledge of Wills of the fraud that he had committed upon the company would not have been knowledge of the society of the facts constituting that fraud; because common sense at once leads one to the conclusion that it would be impossible to infer that the duty, either of giving or receiving notice, will be fulfilled where the common agent is himself guilty of fraud. It seems to me that if you assume here that Mr. Wills was guilty of irregularity—a breach of duty in respect of these transactions—the same inference is to be drawn as if he had been guilty of fraud. I do not know, I am sure, whether he was guilty of actual fraud; but whether his conduct amounted to fraud or to breach of duty, I decline to hold that his knowledge of his own fraud or of his own breach of duty is, under the circumstances, the knowledge of the company."*

202. In my judgment, this case is not authority for the proposition that the knowledge of an officer of two companies must be treated as the knowledge of one company only. The individual's knowledge is his knowledge. The

question then is which company is to be treated as having that knowledge. On the face of matters, then both companies would have that knowledge, in my judgment. However, that may not in fact be the case, for example, if, as in the *Hampshire Land* case, the individual in question is acting in fraud of, or in breach of duty towards, one of the companies. This is particularly so where, as in the *Hampshire Land* case, both companies were innocent, as Vaughan Williams J pointed out.

203. Arricano's contentions under this head thus came down to the proposition that Mr Tymochko was acting in breach of his duty towards Arricano in not passing on notice of the withdrawals. Accordingly, they argued, his knowledge should not be ascribed to the company. In that connection, they relied on the decisions in *Re Hampshire Land Co.* [1896] 2 Ch 743, at 479 (cited above) and *JC Houghton v Nothard, Lowe & Wills Ltd* [1928] AC 1, at 19. Those cases are said to be authority for the so called "fraud exception" whereby the knowledge of an agent which would otherwise be imputed to his principal will not be because he is acting in fraud of his principal, or otherwise in breach of duty to the principal.

204. The rationale for this "exception" was stated in the *Houghton* case as follows:

> *"Has knowledge then been brought home to the respondent company on which to found the alleged standing by? In the case of a natural person, if information is intelligibly conveyed to and received by him, its source, whether a servant or a stranger, whether he is high or low, matters little, if at all. With an artificial incorporated person it must necessarily be otherwise, for an impersonal corporation cannot read or hear except by the eyes and ears of others. Who are to be the organs, by which it receives knowledge so as to affect its rights, may be specially determined by the articles of its constitution, but otherwise, in a matter where knowledge may lead to a*

> *modification of the company's rights according as it is or is not followed by action, the knowledge, which is relevant, is that of directors themselves, since it is their board that deals with the company's rights. The mind, so to speak, of a company is not reached or affected by information merely possessed by its clerks, nor is it deemed automatically to know everything that appears in its ledgers. What a director knows or ought in the course of his duty to know may be the knowledge of the company, for it may be deemed to have been duly used so as to lead to the action, which a fully informed corporation would proceed to take on the strength of it.*
>
> *There are two exceptions, however, to this rule, which are now material. The directors, other than the Lowes, did not in fact know till a late date what the Lowes had been doing, and when they found out they took prompt and proper action. The circumstances have been detailed by my noble and learned friend. It is plain, and I think uncontested, that they could not have been made personally liable for any neglect or misfeasance, and, if so, the company cannot be affected as if it had known from them, what they neither knew nor could have been expected to know under the system of domestic management established by the company. On the other hand, the Lowes knew everything all along, and if, by their keeping the matter to themselves, their company could be estopped from denying that it was bound by the 70 per cent. arrangement, they would have relieved themselves and Mr. Prescott from personal liability under their guarantee at the sacrifice of their company's interests. Their silence was accordingly a notable breach of duty.* ***It has long been recognized that it would be contrary to justice and common sense to treat the knowledge of such persons as that of their company, as if one were to assume that they would make a clean breast of their delinquency. Hence, for the purpose of estopping the company, some knowledge other than theirs has to be brought home to other directors, who can be presumed not to be concerned to suppress it. This was laid down, following earlier cases, in In re Hampshire Land Co. , and was even then treated as incontestable. So far as I know it has never been doubted since.*** *If so, there was in this case no standing by and no estoppel. The cases on which the above propositions are based were not contested by Sir John Simon in his reply, nor were any authorities cited which conflicted with them. It is not for us to dispute settled law, and accordingly the appeal fails." (my emphasis).*

205. Stockman, for its part, relied first on the decision of the Court of Appeal in *El Ajou v Dollar Holdings Limited* [1994] BCC 143. There, the Court of Appeal

held that there were two clearly distinguishable theories on the basis of which the knowledge of an individual might be treated as that of the company. To quote Hoffman LJ (as he then was), at pages 155-156:

> *"The judge correctly analysed the various capacities in which Mr Ferdman was involved in the transaction between DLH and the Canadians. First, he acted as a broker, introducing the Canadians to DLH in return for a five per cent commission. In this capacity he was not acting as agent for DLH but as an independent contractor performing a service for a fee. Secondly, he was authorised agent of DLH to sign the agreement with Yulara. Thirdly, he was at all material times a director and chairman of the board of DLH. There are two ways in which Mr Ferdman's knowledge can be attributed to DLH. The first is that as agent of DLH his knowledge can be imputed to the company. The second is that for this purpose he was DLH and his knowledge was its knowledge."*

206. This important distinction, between the knowledge of an individual being that of the company, and the knowledge of an individual as agent being imputed to the principal, led the Court of Appeal in that case to conclude that, because Mr Ferdman was acting in fraud of the company, his knowledge was not to be imputed to the company; but, nevertheless, because he was the directing mind and will of the company in relation to the relevant transaction, his knowledge was indeed the company's knowledge.

207. On this logic, then the knowledge of Mr Tymochko, in his capacity as agent of Arricano, would not be ascribed to Arricano if and insofar as he was acting in breach of duty to Arricano; but would be ascribed if he was to be regarded as the directing mind and will of Arricano.

208. More recently, the rationale for, and extent of, this so called exception has been the subject matter of consideration by the Supreme Court in *Bilta (UK) Limited (in liquidation) and others v Nazir and others (No 2)* [2016] AC 1. In

that case, the Supreme Court held that there was no general "fraud exception" in English law.

209. A number of passages in the judgments make clear the general principles which must now be applied. In particular, there are two passages, one in the judgment of Lord Sumption and one in the joint judgment of Lords Walker and Hodge, which are of particular importance.

(1) Lord Sumption said this:

> *"87 There are three situations in which the question of attribution may arise. First, a third party may sue the company for a wrong such as fraud which involves a mental element. Secondly, the company may sue either its directors for the breach of duty involved in causing it to commit that fraud, or third parties acting in concert with them, or (as in the present case) both. Third, the company may sue a third party who was not involved in the directors' breach of duty for an indemnity against its consequences.*
>
> *88 In the first situation, the illegality defence does not arise. The company has no claim which could be barred, but is responding to a claim by the third party. It will be vicariously liable for any act within the course of the relevant agent's employment, and in the great majority of cases no question will arise of attributing the wrong, as opposed to the liability, to the company. Where the law requires as a condition of liability that that the company should be personally culpable, as Lord Nicholls appears to have assumed it did in Royal Brunei Airlines , the sole function of attribution is to fix the company with the state of mind of certain classes of its agents for the purpose of making it liable. The same is true in cases like McNicholas , involving statutory civil penalties for quasi-criminal acts. It is also true of cases like El Ajou where the relevant act (receipt of the money) was unquestionably done by the company but the law required as a condition of liability that it should have been done with knowledge of some matter. This will commonly be the case with proprietary claims, where vicarious liability is irrelevant.*
>
> *89 A claim by a company against its directors, on the other hand, is the paradigm case for the application of the breach of duty exception. An agent owes fiduciary duties to his principal, which in the case of a director are statutory. It would be a*

remarkable paradox if the mere breach of those duties by doing an illegal act adverse to the company's interest was enough to make the duty unenforceable at the suit of the company to whom it is owed. The reason why it is wrong is that the theory which identifies the state of mind of the company with that of its controlling directors cannot apply when the issue is whether those directors are liable to the company. The duty of which they are in breach exists for the protection of the company against the directors. The nature of the issue is therefore itself such as to prevent identification. In that situation it is in reality the dishonest directors who are relying on their own dishonesty to found a defence. The company's culpability is wholly derived from them, which is the very matter of which complaint is made."

(2) Lords Walker and Hodge said as follows:

"204 It is helpful in the civil sphere, to consider the attribution of knowledge to a company in three different contexts, namely (i) when a third party is pursuing a claim against the company arising from the misconduct of a director, employee or agent, (ii) when the company is pursuing a claim against a director or an employee for breach of duty or breach of contract, and (iii) when the company is pursuing a claim against a third party.

205 In the first case, where a third party makes a claim against the company, the rules of agency will normally suffice to attribute to the company not only the act of the director or employee but also his or her state of mind, where relevant. In this context, the company is like the absent human owner of a business who leaves it to his managers to run the business, while he spends his days on the grouse moors (to borrow Staughton LJ's colourful metaphor in PCW Syndicates v PCW Reinsurers [1996] 1 WLR 1136 , 1142). Where the rules of agency do not achieve that result, but the terms of a statute or contract are construed as imposing a direct liability which requires such attribution, the court can invoke the concept of the directing mind and will as a special rule of attribution. Thus where the company incurs direct liability as a result of a wrongful act or omission of another (as in Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd and McNicholas Construction Co Ltd v Customs and Excise Comrs) it is deemed a wrongdoer because of those acts or omissions. If it is only vicariously liable for its employee's tort, it is responsible for the act of the other without itself being deemed a wrongdoer and without the employee's state of mind being attributed to it.

206 In the second case, where the company pursues a claim against a director or employee for breach of duty, it would defeat the company's claim and negate the director's or employee's duty to the company if the act or the state of mind of the latter were to be attributed to the company and the company were thereby to be estopped from founding on the wrong. It would also run counter to sections 171 to 177 of the 2006 Act, which sets out the director's duties, for the act and state of mind of the defendant to be attributed to the company. This is so whether or not the company is insolvent. A company can be attributed with knowledge of a breach of duty when, acting within its powers and in accordance with section 239 of the 2006 Act, its members pass a resolution to ratify the conduct of the director. But, as this court discussed in Prest v Prest [2013] 2 AC 415 , para 41, shareholders of a solvent company do not have a free hand to treat a company's assets as their own. Further, as we have discussed, actual or impending insolvency will require the directors to consider the interests of the company's creditors when exercising their powers. This might prevent them from seeking such ratification. Similarly, where a company ratifies a breach of duty by an agent or employee, it must be attributed with the relevant knowledge. But otherwise, as the courts have recognised since at least Gluckstein v Barnes [1900] AC 240 , it is absurd to attribute knowledge to the company and so defeat its claim.

207 In the third case, where the company claims against a third party, whether or not there is attribution of the director's or employee's act or state of mind depends on the nature of the claim. For example, if the company were claiming under an insurance policy, the knowledge of the board or a director or employee or agent could readily be attributed to the company in accordance with the normal rules of agency if there had been a failure to disclose a material fact. But if the claim by the company, for example for conspiracy, dishonest assistance or knowing receipt, arose from the involvement of a third party as an accessory to a breach of fiduciary duty by a director, there is no good policy reason to attribute to the company the act or the state of mind of the director who was in breach of his fiduciary duty. If the company chose not to sue the director who was in breach of his duty, the third party defendant could seek a contribution from him or her under the Civil Liability (Contribution) Act 1978 . We have set out above why we consider that the defence of illegality is not available to a company's directors or their associates who are involved in a conspiracy against the company or otherwise act as accessories to the directors' breach of duty. Equally, there is no basis for attributing knowledge of such behaviour to the company to found an estoppel.

> *208 In the present case Patten LJ rightly stated that attribution of the conduct of an agent so as to create liability on the part of the company depends very much on the context in which the issue arises. He said that as between the company and the defrauded third party, the company should be treated as a perpetrator of the fraud; but that in the different context of a claim between the company and the directors, the defaulting directors should not be able to rely on their own breach of duty to defeat the operation of the provisions of the Companies Act 2006 in cases where those provisions were intended to protect the company: paras 34, 35.*
>
> *209 We agree. Accordingly, if, contrary to our view, the doctrine of illegality were insensitive to context and to competing aspects of public policy, the rules of attribution would achieve the same result and preserve Bilta's claim."*

210. Accordingly, as the learned editors of *Bowstead on Agency*, 20th ed, make clear, English law no longer recognises any general "fraud exception": see Article 95(4).

211. I turn to apply these principles to the facts of this case. The evidence before me established the following:

(1) Mr Tymochko, as I have noted, knew of the fact of the withdrawals.

(2) His evidence was that he did not pass on this knowledge to the other directors of Arricano. I have no reason to doubt this evidence.

(3) He also stated, in his witness statement (which formed the basis of his oral evidence before me) that he did not pass on the information because it was his belief that the withdrawal should not have been made. I would not have accepted this evidence.

a) The agreement between DRGN and Arricano in force at the relevant time allowed withdrawal of the monies. Thus, there was no breach of duty.

b) Mr Tymochko, in his oral evidence, gave no explanation of why he believed the step which was not forbidden to be forbidden.

c) It was clear to me that his witness statement was drafted by lawyers, not by himself. Indeed, in his oral evidence, he accepted that this was the case.

(4) Accordingly, I would not have accepted that the failure to pass on the fact of the withdrawal was because of a belief that this withdrawal was a breach of duty owed to Arricano.

(5) On the facts, therefore, I would not have accepted that there was a breach of duty to Arricano.

212. As a matter of law, I do not accept that Mr Tymochko's knowledge is not to be attributed to Arricano. I would follow the guidance of the Supreme Court in the *Bilta* case. Here, the question arises in the context of a claim by an innocent third party against the company. The situation is thus the first of those considered by Lords Walker and Hodge in the *Bilta* case. There the company is to be treated as having the knowledge of its officer under normal principles. The so called "fraud exception" has no application because the claim is not one by the company against its fraudulent agent, but is a claim by the innocent third party against the company.

213. As I have indicated, then in my judgment:

(1) Mr Tymochko was the directing mind and will of Arricano in relation to providing information as to the balances in the accounts, and for the purposes of possession of knowledge of these matters; and

(2) DRGN would not have been in breach of their duty to Arricano in withdrawing funds as at the relevant dates, so that there is no reason to negative the attribution of the knowledge of Mr Tymochko to Arricano.

(3) In any event, following the approach in *Bilta*, even had there been a breach of duty owed by Mr Tymochko to Arricano, that would not have prevented his knowledge from being ascribed to Arricano in the context of a claim by an innocent third party.

214. Accordingly, I would have found that:

(1) Mr Tymochko did know of the facts of the withdrawals;

(2) His knowledge should be treated as that of Arricano;

(3) Arricano would thus have known of the withdrawals;

(4) Arricano's false statements, as set out above, were knowingly false;

(5) The Fifth Award was thus procured by fraud.

215. Accordingly, even if the arbitrator's findings had not been binding on me, I would have reached the same result, albeit by a different route.

Substantial injustice.

216. I turn then to the last question, which is whether there was serious injustice caused by the fact that the Fifth Award was procured by fraud. I have noted above the accepted test for serious irregularity in this context – ie that it needs to be "*shown that the irregularity in the procedure caused the arbitrators to*

reach a conclusion which, but for the irregularity, they might not have reached, as long as the alternative was reasonably arguable."

217. In this context, again, the parties' submissions were relatively simple and indeed stark.

218. Arricano, for its part, contended that there was no possibility that the arbitrator would have reached a different conclusion and that this was possible to deduce from the Seventh Award. That was because, it was argued, the arbitrator held, with full knowledge of the frauds now relied on before me, Arricano had not acted in repudiatory breach of the Call Option Agreement and/or any contract brought into being by the exercise of that Call Option.

219. Stockman countered by saying that this was to mischaracterise the relevant issue. The question which the arbitrator had to address in his Fifth Award was whether or not, by reason of the failures alleged by Stockman on the part of Arricano, there was a failure to comply with the condition precedent to Stockman's obligation to transfer the shares; whereas the question addressed in the Seventh Award was whether there was a repudiatory breach bringing an end to the parties' primary obligations under the Option contract.

220. Applying the test set out above, there are in my judgment two related questions:

(1) Did the irregularity cause the arbitrator to reach a conclusion he might not otherwise have reached?

(2) Was the alternative conclusion that it is said the arbitrator might have reached reasonably arguable?

221. Here, the irregularity complained of is that the arbitrator did not know that the monies were not in fact still in the relevant accounts as at the moment that he issued the Fifth Award. That this is so is clear from that fact that, as I have recorded above, he understood that he would have been told if the monies had been taken out of the account. In fact, the monies had been withdrawn, and he had not been told.

222. The next question is thus whether he might have found that, if the monies had been deposited as required, but then withdrawn, this would have meant that the relevant condition precedent had not been satisfied. Allied to this question is whether any such conclusion on his part would have been reasonably arguable.

223. I have reached the conclusion that the arbitrator either would, or should, have concluded that there was no failure to comply with a condition precedent even if, after the event, amounts were withdrawn from the account. In my judgment, the question of whether a condition precedent has been satisfied must be judged as at the moment when the condition has to be satisfied. If, at that moment, the condition has been satisfied, nothing that happens thereafter could reasonably affect that conclusion.

224. Accordingly, I conclude that there was no substantial injustice by reason of any fraud on the part of Arricano.

225. Accordingly, I decline to order remission of the Fifth Award to the arbitrator.