Approved Judgment

Neutral Citation Number: [2022] EWHC 1953 (Comm)

Case No: CL-2021-000667

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
IN THE MATTER OF THE ARBITRATION ACT 1996

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 July 2022

Before:

MR JUSTICE PICKEN

- -

Between:

(1) SEA MASTER SPECIAL MARITIME ENTERPRISE
(2) SEA MASTER SHIPPING INC

Claimants

- and -

ARAB BANK (SWITZERLAND) LIMITED

Defendant

- -
- -

Michael Collett QC (instructed by **Jackson Parton**) for the Claimants.
John Russell QC (instructed by **Holman Fenwick & Willan**) for the Defendant.

Hearing dates: 30 June 2022.
Judgment provided in draft: 14 July 2022.

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Approved Judgment

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

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Mr Justice Picken:

Introduction

1. This is an odd case. That is because it sees the Claimants (together 'Sea Master') contend before the Court for the purposes of their application under s. 67 of the Arbitration Act 1996 that certain claims which they *themselves* brought in arbitration are not claims which come within the ambit of the relevant arbitration agreement at all. They do so, moreover, arguing that it has previously been determined by the arbitrators appointed to hear the arbitration (the 'Tribunal') that the claims are not arbitrable because they fall outside the ambit of the relevant arbitration agreement despite the fact that neither the Claimants nor the Defendant ('Arab Bank') ever addressed the Tribunal on this issue.

2. The s. 67 application follows a determination by the Tribunal, in its Fifth Partial Final Award dated 1 November 2021 (the 'Fifth Award'), that the claims (strictly speaking, Sea Master's counterclaims for reasonable remuneration and quantum meruit) with which it is concerned are arbitrable or, as the Tribunal put it, are *"counterclaims in this reference that arise out of and in connection with"* bill of lading no.12 issued on 8 November 2016. As will become apparent, that is a conclusion with which I agree. First, however, I should set out some background, as to which there is no dispute. In the circumstances, what I have to say is largely taken from the skeleton argument which Mr Collett QC prepared on behalf of Sea Master.

The underlying dispute

3. Underlying the application is a long-running dispute relating to the voyage of the 'Sea Master' (the 'Vessel') from Argentina to the Mediterranean between April 2016 and February 2017. That dispute gave rise to two London arbitrations (one between Sea Master and Arab Bank and the other between Sea Master and cargo receivers Freiha) and to court proceedings in the US District Court, Connecticut.

4. The First Claimant, Sea Master Special Maritime Enterprise ('Sea Master Special') was the registered owner of the Vessel until 26 January 2017. On 26 January 2017, the Second Claimant, Sea Master Shipping Inc ('Sea Master Inc') became the registered owner of the Vessel, and Sea Master Special assigned to Sea Master all its *"rights, claims and obligations"* arising under or in any way related to the relevant charterparty and bills of lading issued pursuant to it, *"howsoever arising from the commercial operation of the vessel during the period of [Sea Master Special's] ownership of the vessel"*.

5. Sea Master Special chartered the Vessel to Agribusiness United DMCC ('Agribusiness') by a charterparty on the Norgrain 1989 form dated 25 April 2016 (the

'Charterparty') for a voyage carrying grains from one or two Argentina upriver ports to 1-3 safe ports in Morocco.

6. Arab Bank is a bank with offices in Zurich, which provided finance to Agribusiness for the purchase of the cargoes shipped on to the Vessel.

7. In June 2016 three parcels of cargo were loaded on to the Vessel in Argentina for carriage to Morocco: 26,696.515 mt of corn at Rosario, and 7,000 mt of soya bean meal and 7,000 mt of soya bean hulls at San Lorenzo. 30 bills of lading were issued, all providing for discharge in Morocco and all on the Congenbill 2007 form and incorporating the law and arbitration clause in the Charterparty.

8. This present application concerns the soya bean meal cargo, which was initially carried under bill nos. 12-18. On or about 20 September 2016, a single switch bill no.12 was issued for carriage to Algeria (instead of Morocco) (the 'First Switch Bill'). On 8 November 2016, a further single switch bill no.12 was issued for carriage to Lebanon (the 'Second Switch Bill' or the 'Switch Bill'). More specifically still, the present application concerns the scope of the arbitration agreement incorporated into the Switch Bill issued on 8 November 2016. There is no issue that this arbitration agreement provided, in part:

"any dispute arising out of or in connection with this Contract shall be referred to arbitration in London in accordance with the Arbitration Act 1996 …"

9. The corn and soya hull pellets were discharged in Morocco in August 2016, without production of the bills of lading. This led to a claim by Arab Bank for misdelivery in respect of some of the corn bills of lading.

10. As for the soya bean meal, the original sale fell through, and the cargo was not discharged until February 2017, in Tripoli, Lebanon. The cargo, therefore, remained on board for longer than anticipated.

11. On 22 March 2017, Arab Bank commenced London arbitration against Sea Master Special, Sea Master Inc and the Vessel's managers (Mega Shipping Line Corporation) under the majority of the corn bills (bill nos. 2, 3, 4, 6, 7, 9, 10, 11, 29 and 30). Arab Bank claimed damages for misdelivery as holder and pledgee of those bills. Mr Timothy Marshall was appointed as arbitrator. This claim was ultimately dismissed by the Tribunal, in a fourth award, on the basis that, although there was a breach, Arab Bank had failed to prove that it had suffered any loss because it had not adduced sufficient evidence as to the realisable value of the cargo.

12. On the same day, Arab Bank commenced the Connecticut proceedings to obtain security for its misdelivery claim and arrested the Vessel in Connecticut.

13. On 27 March 2017, Sea Master appointed Mr Robert Bright QC as arbitrator in respect of Arab Bank's misdelivery claim and also under bill nos.1-30 in respect of Sea Master Inc's claims against Arab Bank as assignees for demurrage and damages for detention. The appointment was notified to Arab Bank on 28 March 2017, referring also to the Switch Bill issued on 8 November 2016 (mistakenly referred to as 7 November).

14. Whilst, on the face of it, Sea Master should have had a good claim against Agribusiness for demurrage or damages for detention, this was not a claim which was viable because Agribusiness was insolvent. So it was that Sea Master, instead, brought certain counterclaims against Arab Bank.

15. Arab Bank challenged the Tribunal's jurisdiction over Sea Master's counterclaims and sought the determination of that challenge as a preliminary issue. Arab Bank's challenge was raised by email on 30 March 2017, which was followed by an application for a preliminary award on jurisdiction on 28 April 2017.

16. It is common ground that, by the close of submissions on the jurisdiction application, specifically as a result of certain submissions served by Sea Master on 26 May 2017, Sea Master's counterclaims for reasonable remuneration and quantum meruit had been referred to the Tribunal.

17. The Tribunal (at this time comprising only Mr Marshall and Mr Bright QC) made its Final Award on Jurisdiction (the 'First Award') on 18 August 2017. The Tribunal decided that Arab Bank's challenges to its jurisdiction succeeded. Specifically, the dipositive part of the First Award stated:

> *"1. WE FIND AND HOLD THAT the Claimants' challenge to our jurisdiction succeeds.*
>
> *2. WE THEREFORE GRANT A DECLARATION THAT pursuant to section 30 of the Arbitration Act 1996, we do not have jurisdiction to determine the Respondents' counterclaims under the additional bills of lading."*

For the reasons given at paragraphs 99 to 101 of the Fifth Award, this was a determination that the Tribunal did not have jurisdiction over Sea Master's counterclaims for reasonable remuneration and quantum meruit (as well as Sea Master's counterclaims for demurrage and damages for detention).

18. Specifically, the Tribunal decided that it did not have jurisdiction over the counterclaims for demurrage and damages for detention because the Tribunal rejected Sea Master's submission that Arab Bank was an original party to the Switch Bill (see paragraph 103 of the First Award) and also rejected Sea Master's submission that Arab Bank was a holder of the soya bean meal bills from September 2016 which demanded delivery and made a claim under the contract of carriage so as to become liable under the contract pursuant to s.3(1) of the Carriage of Goods by Sea Act 1992 (see paragraphs 104-112).

19. The Tribunal did not, however, make any decision on Sea Master's further argument that, as an admitted holder of the soya bean meal and soya bean hulls bills of lading, Arab Bank was bound by the arbitration agreement whether or not it took the necessary steps to become liable under the contract pursuant to s.3(1) of the 1992 Act and regardless of whether it transferred the bills to a third party. At paragraph 112 the Tribunal said that, having decided that Arab Bank *"were not party to the additional bills"* it did not need to *"consider the effect, if any, of section 2 (5) and the transfer of rights and liabilities and whether or not the arbitration clause, being severable, would have survived the transfer"*.

20. Otherwise, at paragraphs 113-115 of the First Award, the Tribunal specifically addressed Sea Master's counterclaims for reasonable remuneration and quantum meruit: paragraphs 113-114 stating that the claims must fail on their merits and paragraph 115 dealing with the jurisdictional question in relation to the claims. The latter is the subject of some controversy, with (i) Sea Master saying that (notwithstanding that Sea Master itself introduced the claims into the arbitration and notwithstanding also that neither Sea Master nor Arab Bank addressed the Tribunal on the point) it contained a decision that the claims were outside the scope of the arbitration agreement and (ii) Arab Bank maintaining that it meant only that the claims were outside the arbitration agreement because Arab Bank was not a party to that agreement.

21. Sea Master challenged the First Award under s.67 of the 1996 Act by a claim form dated 15 September 2017. There is a dispute as to whether the challenge extended to the counterclaims for reasonable remuneration and quantum meruit. It is, however, common ground that Sea Master based its challenge on the argument that Arab Bank was an original party to the Switch Bill and, therefore, bound by the arbitration agreement incorporated into that bill.

22. Popplewell J (as he then was) decided the case on a basis that was different from the way either party had argued the case on the s. 67 appeal since, at the hearing, Popplewell J identified that the argument that Arab Bank was bound by the arbitration agreement by virtue of having been a holder of the Switch Bill was potentially determinative and heard submissions on that argument, before handing down judgment on 25 July 2018, in which he decided that Arab Bank's admitted acquisition of rights of suit under the Switch Bill (under s.2 of the 1992 Act by virtue of becoming holder) meant that Arab Bank was bound by the arbitration agreement in the Switch Bill.

23. At the subsequent consequentials hearing on 30 July 2018, Popplewell J heard argument on the form of the order. The effect of the order and the circumstances in which it was made upon the jurisdiction of the Tribunal is another disputed issue. Be that as it may, there remained unresolved a dispute about whether Sea Master was bound by the Tribunal's decision in the First Award that Arab Bank was not an original party to the Switch Bill. That dispute was the subject of the Second Final Award dated 5 November 2018 (the 'Second Award'), which was made by a tribunal of three following the appointment of Mr James Baker on 7 August 2018. In that award the Tribunal held that there was no issue estoppel on what Popplewell J had described as the *"Substantive Issue"*, namely whether Arab Bank was a party to the Switch Bill or otherwise owed substantive obligations thereunder. As a matter of general principle, the Tribunal also held that a tribunal's decision that it does not have jurisdiction is binding on the parties and gives rise to an issue estoppel.

24. Although the Second Award envisaged that the next step in the arbitration would be for the Tribunal to decide whether Arab Bank was an original party to the Switch Bill as a preliminary issue, in the event the Tribunal next decided preliminary issues of law relating to the counterclaims for demurrage and damages for detention, Arab Bank arguing that the only party which could be liable in respect of the delay in discharge and the prolonged period of storage afloat was Agribusiness, the charterer. The Tribunal accepted this argument in its Partial Final Award dated 16 May 2019 (the 'Third Award'), deciding against Sea Master and leading to an appeal under s. 69 of the 1996 Act. That appeal was subsequently dismissed by HHJ Pelling QC.

25. Thereafter, the hearing of Arab Bank's misdelivery claim in relation to the corn bills having been fixed to be heard between 1 and 3 September 2020, on 25 August 2020, Arab Bank applied for a declaration that any and all claims by Sea Master against Arab Bank (including for reasonable remuneration and quantum meruit) had been dismissed, with a view to that declaration being used to assist in the release of certain counter-security in escrow which in the meantime Arab Bank had obtained in respect of its misdelivery claims in the context of proceedings brought in Connecticut.

26. Brief oral submissions were made on that application at the hearing, Sea Master's position as to the effect of the First Award and the order of Popplewell J being essentially the same as those advanced on this s. 67 application, namely that the Tribunal's jurisdictional ruling in the First Award was that the counterclaims for reasonable remuneration and quantum meruit fell outside the Tribunal's jurisdiction, that that ruling was not challenged on the s. 67 application and that the ruling was not disturbed by the order of Popplewell J.

27. The Fourth Partial Final Award (the 'Fourth Award') was issued on 21 December 2020. Arab Bank's misdelivery claim was dealt with in paragraph 2 of the disposition, paragraph 3 then going on to dismiss:

> *"The counterclaims brought by [Sea Master Inc] against the Claimant [Arab Bank] arising out of or in connection with the contract contained in or evidenced by [the Switch Bill]"*.

28. In February 2021, a dispute arose in the Connecticut proceedings as to whether the counter-security for Sea Master's counterclaims in escrow should be released.

29. Thereafter, on 10 September 2021, Sea Master filed a motion in the Connecticut proceedings seeking (among other matters) summary judgment *"under quasi-contract principles of unjust enrichment and quantum meruit"*. In response to this development, Arab Bank applied to the Tribunal for declaratory relief and an anti-suit injunction restraining Sea Master from pursuing the counterclaims in the Connecticut proceedings.

30. The application was heard on 28 October 2021 and the Award was made on 1 November 2021. It was decided that the counterclaims for reasonable remuneration and quantum meruit were counterclaims in the reference that arise out of or in connection with the Switch Bill. As a result, the Tribunal granted the anti-suit injunction and declared that the counterclaims were dismissed by paragraph 4 of the disposition of the Fourth Award.

Approach to applications under s. 67

31. Although a s. 67 challenge is a rehearing, the Court is, nonetheless, still entitled to have regard to the decision which the arbitrators have made (in the present case, the Fifth Award) on the jurisdictional issue.

32. In short, in determining the s. 67 challenge, the Court is not engaged in a review of the arbitrators' decision: see ***Dallah Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan*** [2010] UKSC 46 at [30]. As Butcher J put it in ***The Republic of Korea v Mohammad Reza Dayyani & Ors*** [2019] EWHC 3580 (Comm) at [26]:

> *"A challenge under s. 67 proceeds by way of a de novo rehearing of the jurisdiction issue(s). The award of the arbitrators has no automatic legal or evidential weight. Nevertheless, and given that the arbitral tribunal has considered the same issues, the Court will examine the award with care and interest. If and to the extent that the reasoning is persuasive, then there is no reason why the Court should not be persuaded by it."*

The issues which arise in this case

33. Unusually, perhaps, Mr Collett QC and Mr John Russell QC, who represented Arab Bank at the hearing before me, were unable to agree on the order in which to address the issues arising out of the application.

34. Mr Russell QC proposed that: (a) it should be asked who the parties are to the arbitration agreement; (b) whether the counterclaims for reasonable remuneration/quantum meruit are within the scope of the arbitration agreement; and (c) if the answer to both those questions is 'yes', whether there is some other reason why the Tribunal did not have (or have lost) jurisdiction in respect of those counterclaims and/or whether Sea Master can rely on an estoppel-based argument.

35. Issue (a) is not, in fact, an issue since it is (now at least, after the First Award and the order made by Popplewell J) common ground that both Arab Bank and Sea Master are parties to the arbitration agreement in the Switch Bill. Nonetheless, Mr Russell QC suggested that it is helpful to approach the issues in this order because: first, if the Court were to hold that the counterclaims are not within the scope of the arbitration agreement, then, that is the end of the matter and the other issues fall away; and, secondly, if the Court holds (correctly, he submitted) that the counterclaims are within the scope of the arbitration agreement, that will inform the answers to the third of the questions which he identified and, in particular, the meaning properly to be ascribed to the Popplewell Order, given that, Mr Russell QC observed, it would be very surprising if either the Tribunal or Popplewell J decided that some of Sea Master's counterclaims were to be excluded from the reference despite being within the scope of the arbitration agreement on a straightforward application of the well-known ***Fiona Trust*** case ([2007] EWCA Civ 20, [2007] UKHL 40) to which I will return later.

36. I agree with Mr Collett QC, however, that a more logical approach would be to consider the following issues in the following order: (i) the meaning of paragraphs 113-115 of the First Award; (ii) whether the dispositive part of the First Award affects Sea Master's counterclaims for reasonable remuneration/quantum meruit; (iii) whether, ignoring the s. 67 challenge to the First Award and the decision of Popplewell J, the First Award gives rise to an issue estoppel in relation to such counterclaims; (iv) if so, whether Popplewell J's decision affects this (whether as a matter of interpretation or estoppel); and (v) whether in the absence of any estoppel, Sea Master's counterclaims for reasonable remuneration/quantum meruit are within the scope of the arbitration clause in the Switch Bill.

37. I should, however, make two observations in this connection. The first is that, as will appear, it does not follow that it is necessary to address every issue identified by Mr Collett QC. Secondly and in any event, I agree with Mr Russell QC that, in considering the various issues (in particular, issue (i)), the ***Fiona Trust*** 'one-stop' presumption should be borne in mind, and so that it should not be too readily assumed that, in

deciding as they did, the Tribunal (and, indeed, Popplewell J) intended to remove the relevant counterclaims from the scope of the reference.

Issue (i): the meaning of paragraphs 113 to 115 of the First Award

38. In the Fifth Award the Tribunal had this to say at paragraph 83 concerning the approach to be adopted when considering the First Award, specifically at paragraphs 113 to 115:

"At the hearing of 28 October 2021, the parties did not make submissions about how the Tribunal should go about deciding the meaning of paragraphs 113-115 (although of course they made submissions about their own respective interpretations). However, we have in mind the view expressed by Lord Sumption in ***Sans Souci Ltd v. VRL Services Ltd*** *[2012] UKPC 6 at [13] (which the parties cited in a different context, and which we discuss below). Above all, we are conscious that we must approach the task objectively, rather than by reference to what may have been subjectively intended at the time."*

39. Neither Mr Collett QC nor Mr Russell QC quibbled with this before me; indeed, Mr Collett QC characterised what Lord Sumption had to say in ***Sans Souci Ltd v VRL Services Ltd*** [2012] UKPC 6 as the *"most authoritative statement of the correct approach to construction of a judicial order, which is equally applicable to arbitral awards"*. I agree about that.

40. In that case, an arbitral tribunal awarded damages to the manager for the unlawful repudiation of a hotel management agreement, only for the proprietor to succeed in challenging that award before the Court of Appeal of Jamaica on the basis that, in assessing damages, the tribunal had failed to make the appropriate findings about certain *"unrecoverable expenses"* or to take them into account in the assessment of damages or to explain why they had not done so. The Court remitted the award to the arbitrators in the following terms:

"The appeal against the award of damages is allowed and the matter is remitted to the Arbitrators to determine the issue of damages only."

41. On appeal to the Privy Council, the issue was as to the meaning of the words *"the issue of damages only"* in the order which the Court of Appeal made for remission, specifically whether they referred only to the question of *"unrecoverable expenses"* or to all points relevant to damages open to the arbitrators. In addressing this issue, Lord Sumption stated as follows at [13]:

"… 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. … ."

He went on at [14] to say this:

"It is generally unhelpful to look for an 'ambiguity', if by that is meant an expression capable of more than one meaning simply as a matter of language. True linguistic ambiguities are comparatively rare. The real issue is whether the meaning of the language is open to question. There are many reasons why it may be open to question, which are not limited to cases of ambiguity."

42. As Mr Collett QC pointed out, although Lord Sumption only expressly mentioned the Court's *"reasons"* as admissible circumstances, he appears to have recognised that the parties' submissions might also be relevant circumstances because he added at [15] that:

"it is admissible to construe an order of remission by reference to the issues in the arbitration".

This must mean that submissions can, at least in principle, be looked at since the issues in the arbitration might only be apparent from the parties' submissions. That said, as Mr Collett QC fairly went on to point out, in ***SDI Retail Services Ltd v The Rangers Football Club Ltd*** [2021] EWCA Civ 790, differing views were expressed in the Court of Appeal as to the weight to be placed on hearing transcripts. Thus, whilst Phillips LJ and Underhill LJ agreed that an order should not be interpreted by focusing exclusively on the precise words used and that context should be taken into account (see per Underhill LJ at [84] and Phillips LJ at [44(3)]) and Underhill LJ considered that it could be legitimate to have regard to the parties' submissions *"to the extent that they establish the relevant factual background and what the issues were understood to be"* (see [94]), Phillips LJ regarded a process of analysis of the parties' submissions to discover their motives for seeking particular orders to be *"a difficult and dubious exercise, with parallels to admitting evidence of negotiations in construing a contract"* (see [66]), a view with which Baker LJ agreed (see [80]).

43. As I see it, the Tribunal were right to approach matters on the basis that the exercise is to ascertain (objectively) the intention of the court or arbitral tribunal and, in this respect, it is permissible to have regard to parties' submissions, albeit being careful to avoid placing too much emphasis, in order to ascertain what the issues to be decided were or were understood to be. In addition, where a judge or arbitrator accepts a party's submissions, these can (and should) be looked at because they thereby become part of that judge's or arbitrator's reasons for making the relevant order or award. Beyond that, however, there is a real need for caution.

44. It is with these principles in mind that I go on to consider what the Tribunal had to say at paragraphs 113 to 115, noting, in the first instance, that these follow paragraph 112, in which the Tribunal stated its conclusion that Sea Master was not party to the *"additional bills"* (i.e. the corn bills which Arab Bank had not claimed under and the bills covering the soya bean hulls and soya bean meal) and so that there was no jurisdiction in relation to the counterclaims for demurrage and damages for detention.

45. There, then, follows a sub-heading, *"Reasonable remuneration/quantum meruit"*, and this at paragraph 113:

"We can consider these two claims together, reflecting, as they do, the legal principles set out by Andrew Smith J at first instance in The 'Bulk Chile' (supra) at [75]-[78] and [81]-[82] respectively. In that case, the claim for reasonable remuneration was said to depend on whether or not the sub-charterers had requested the owners to complete the

voyage (see at [77]); the Judge there ultimately finding that they did. When dealing with quantum meruit, the Judge stated that there could, in principle, be such a claim for services that were freely accepted, but not if the carrier was obliged to provide the carriage anyway, e.g. pursuant to bill of lading contracts with a third party which the alleged beneficiary could not prevent the carrier from performing (see at [82]). The Judge held that the quantum meruit claim failed on this ground."

46. The next paragraph, 114, states:

"The claims by the shipowners in The 'Bulk Chile' (supra) were made upon the sub-charterers after the termination of the time charter with the head charterers, and after the acceptance of instructions given to the owners by the sub-charterers for the continuation of the voyage. The facts in our case are very different. The charter was not terminated and the additional bills remained in force. Furthermore, we have found that the instructions to proceed, ultimately to Tripoli, were not given by or on behalf of the Claimants. The claim for reasonable remuneration must fail on this ground, and the claim for quantum meruit must fail on the same basis as the claim failed against the sub-charterer in The 'Bulk Chile' (supra)."

47. The third and last paragraph in this section, 115, is in these terms:

"Even if the claims had any merit, it is difficult to see why they should be covered by the additional bills and the arbitration clause. As we have said, they are ex-contractual and so we have no jurisdiction to determine them in this arbitration."

48. It was Mr Collett QC's submission that the natural and ordinary meaning of paragraph 115 is that the Tribunal had decided that the counterclaims for reasonable remuneration and quantum meruit were outside the scope of the arbitration agreement incorporated in the bills because they were *"ex-contractual"* (by which the Tribunal, it is common ground, meant extra-contractual) and therefore not *"covered by the arbitration clause"*. That this must be the case, Mr Collett QC submitted, is clear from the fact that the Tribunal included a separate section dealing with reasonable remuneration/quantum meruit since it would have been open to the Tribunal otherwise simply to include reference to those counterclaims in the section to which paragraph 112 is the conclusion. Furthermore, Mr Collett QC noted, the first sentence of paragraph 115, combined with the reference to extra-contractual in the second sentence, are only consistent with the reason why the Tribunal considered that those claims were not arbitrable being that they do not fall within the scope of the arbitration agreement.

49. Tellingly, as Mr Collett QC put it, when Sea Master submitted on 26 August 2021 that the Tribunal had decided at paragraph 115 that the counterclaims for reasonable remuneration and quantum meruit were outside its jurisdiction, Arab Bank's reply of 24 September 2021 recognised that Sea Master's submission was that paragraph 115 was a decision on the scope of the arbitration agreement, albeit that Arab Bank submitted that paragraph 115 was wrong because, among other reasons, the Tribunal *"failed to take into account the Fiona Trust presumption"*.

50. For his part, Mr Russell QC submitted that what the Tribunal was doing at paragraph 115 was addressing what might be described as 'the party point' and not, therefore, any freestanding point concerned with the wording of the arbitration agreement. That former point, he observed, was the only point which was raised before the Tribunal and

so, he submitted, it is inherently unlikely that the latter point was the point which was being addressed at paragraph 115. The more so, given that not only was the leading authority, ***Fiona Trust***, not mentioned by the Tribunal but, in addition, nor did the Tribunal even set out the wording of the arbitration agreement anywhere in the First Award, still less in the section dealing with the reasonable remuneration/quantum meruit counterclaims between paragraphs 112 and 115.

51. As for what the Tribunal had to say on this topic in the Fifth Award, the passages at paragraphs 87 and 88 are instructive:

> *"87. Neither party suggested that the issue of jurisdiction in relation to what were, at that time, Owners' third and fourth potential counterclaims – reasonable remuneration and quantum meruit – raised any additional questions as regards jurisdiction. Both parties dealt with those claims separately from the main claims (i.e., demurrage and damages for detention), but they did so because it was not obvious that either claim was even properly arguable; not because either party contended that these claims were special or different in terms of the applicability of the agreement to arbitrate.*
>
> *88. In relation to demurrage and damages for detention, it was not necessary for Owners to spell out at length why there might be such claims, and they did not trouble themselves to do so. In relation to the claim for reasonable remuneration (in particular) and the claim for quantum meruit, Owners evidently sensed that it was incumbent on them to spend time explaining why these claims might exist at all, and they spent several paragraphs doing so, in each case citing the relevant passages from The Bulk Chile. However, they said nothing additional about jurisdiction, in the context of these claims. There was a bare assertion in paragraph 72(4) that 'The claims for reasonable remuneration fall within the ambit of the arbitration agreement but are not liabilities under the contracts of carriage contained in or evidenced by the bills of lading…', but there was no expansion on this, no explanation of why they must arise out of or be connected with the Second Switch Bill of Lading (or even a reference to the wording or the arbitration agreement) and no reference to any authority (e.g. Fiona Trust). Rather, it seemed to be taken for granted that, if the Bank was bound by the agreement to arbitrate – whether as original party or as statutory assignee – then the claims would be within the ambit of that agreement: despite the acknowledged fact that they were not 'under' the Second Switch Bill of Lading."*

52. The Tribunal, then, went on to say this at paragraph 89:

> *"In its reply submissions of 9 June 2017, the Bank naturally devoted much space to its case that it was neither an original party nor a statutory assignee – thus answering the Owners' case as to its two routes home on jurisdiction. When the Bank then turned to the claims for reasonable remuneration/quantum meruit, the Bank was no doubt struck by the effort that the Owners had put into suggesting that these claims had potential merit, and deduced that the Owners felt vulnerable on this. The Bank therefore responded, demonstrating that the claims were baseless. On jurisdiction in relation to these claims, the Bank said this:*
>
> *(1) As regards the claim for reasonable remuneration, at paragraph 16(c)(iii) the Bank first said: '… in any event [i.e., even if the claim had merit], this argument does*

not make [the Bank] a party to the arbitration clause in the Additional B/Ls …'. Thus, the Bank considered jurisdiction, for the purposes of this claim, solely in terms of whether the Bank was party to the agreement to arbitrate. This clearly referred to the Owners' arguments that the Bank was party to it, either as an originally party or as a statutory assignee.

(2) That sentence in the Bank's submissions then continued: '… nor does it assist [the Owners] on their argument on jurisdiction under these bills.' The Owners' only argument on jurisdiction was their case that the Bank was either an original party or a statutory assignee. The Bank was saying, therefore, that the bolting-on of an additional claim for reasonable remuneration did not make that case any stronger.

(3) As regards the claim for quantum meruit, at paragraph 16(d)(ii) the Bank said that this claim 'does not even begin to explain how this assists [the Owners'] case on jurisdiction under the arbitration agreement in the Bills of Lading.' Once again, the submission was that the addition of this claim did not strengthen the Owners' case, viz. the case that the Bank was either an original party or a statutory assignee."

53. The Tribunal continued at paragraphs 90 to 92 as follows:

"90. In short, even in the context of the claims for reasonable remuneration/quantum meruit, the Bank's submissions analysed jurisdiction in terms of whether or not it was party to the agreement to arbitrate (i.e. as an original party or a statutory assignee), rather than on the ambit of the agreement to arbitrate (i.e. the meaning of 'arising out of or in connection with').

91. Accordingly, the Tribunal was principally asked to determine whether the Bank was either an original party to the Additional Bills of Lading/Second Switch Bill of Lading, or was a statutory assignee. In relation to the claims for reasonable remuneration and quantum meruit, the Tribunal was further asked to determine whether those claims could have any merit. However, the Tribunal was not asked by either party to determine whether, if (i) the Bank was party to the agreement to arbitrate and (ii) those claims arose, they were or were not claims 'arising out of or in connection with' the Second Switch Bill of Lading.

92. In these circumstances, most of the First Award is devoted to the Owners' two arguments on jurisdiction, i.e., whether the Bank was either an original party or a statutory assignee. When the First Award then turns to the claims for reasonable remuneration/quantum meruit, it first addresses their merits, in paragraphs 113 and 114. It was then necessary also to give a conclusion as to jurisdiction in relation to those claims, but in circumstances where both parties were agreed that jurisdiction for these claims depended on the same arguments as the Owners' two main claims (demurrage and damages for detention), it was inevitable that the conclusion would be the same."

54. The Fifth Award continued at paragraphs 94 to 97 in this way when addressing paragraph 115 specifically:

"94. First, the Award stated that, even if the claims had merits, '… it is difficult to see why they should be covered by the additional bills and the arbitration clause'.

This was because it had already been decided that the Bank was not party to the Additional Bills, or to the agreement to arbitrate that they contained.

95. Next, the Award stated: '… they are ex-contractual and so we have no jurisdiction to determine them'. At the hearing on 28 October 2021, both parties agreed that this sentence contains an obvious typographical error: it should have read 'extra-contractual', with 'extra' having the meaning of 'outside'. This was certainly a finding that these claims against the Bank were outside the agreement to arbitrate but, this has to be read in the context of our earlier finding that the Bank was not a party to or otherwise bound by that agreement.

96. In oral submissions, Mr Collett QC argued vigorously that paragraph 115 'must be' an additional point on jurisdiction, which was specific to the claims for reasonable remuneration/quantum meruit and did not arise in respect of the other claims; his point being that the Tribunal therefore must have meant that they were not claims 'arising out of or in connection with' the Second Switch Bill of Lading. The fundamental problems with his arguments were (i) that neither party had suggested that there was any such new point in respect of these claims and (ii) that the Tribunal had not been asked to decide whether they were or were not claims 'arising out of or in connection with' the Second Switch Bill of Lading.

97. Indeed, if the Tribunal had purported to decide that whether or not they were claims 'arising out of or in connection with' the Second Switch Bill of Lading, despite not having been asked to do so, it would have been quite acting quite wrongly. To do so would have been a procedural error susceptible to challenge under section 68 of the Arbitration Act 1996. Still straining to be as objective as possible, the Tribunal does not see why paragraph 115 'must be' read in a way that means that the Tribunal was acting improperly. The normal, objective presumption would be the opposite."

55. The Tribunal's conclusion at paragraph 98 was this:

"Our conclusion on issue (1) therefore is that paragraphs 113 and 114 addressed the merits of the claims for reasonable remuneration/quantum meruit. The meaning of paragraph 115 was that, even if the claims had merit, they were outside the arbitration agreement because the Bank was not a party to that agreement. Paragraph 115 was not a decision, either way, as to whether those claims were within the ambit of the agreement to arbitrate in terms of their 'arising out of or in connection with' the Second Switch Bill of Lading, that being a question which was not raised by either party and which the Tribunal was not asked to address."

56. Having considered the matter afresh, whilst nonetheless in doing so adopting the approach described by Butcher J in ***The Republic of Korea***, I have reached the conclusion that the Tribunal's reasoning in these various passages is not merely persuasive but correct. I have reached this conclusion notwithstanding Mr Collett QC's submission that what was decided at paragraph 115 has to be read in the context of what was earlier decided at paragraph 112, namely that Arab Bank was not party to the arbitration agreement, since the fact that the Tribunal made the finding at paragraph 112 before going on to decide as they did at paragraph 115 shows that the Tribunal were stating a separate jurisdictional conclusion in relation to Sea Master's reasonable remuneration and quantum meruit counterclaims, and so that paragraph 115 must have

been intended to add something to the conclusion at paragraph 112. The difficulty with this submission, however, is that it glosses over the fact that what the Tribunal were addressing in the section of the First Award in which paragraph 112 was contained was concerned with the 1992 Act, specifically the alternative argument advanced by Sea Master in relation not to the reasonable remuneration and quantum meruit counterclaims but the other counterclaims set out in the First Award at paragraph 72, as follows:

"In the alternative, the Respondents [Sea Master] argued that, even if the Claimants [Arab Bank] had not been party to the switch bills, it did not follow that they were not bound by the arbitration clause. In this context, the Respondents submitted that the Claimants were holders of the bills and so, event if not an original party to the contract of carriage, all rights of suit had been transferred to and vested in them as if they had been a party to the contract. The Respondents submitted that the Claimants had become a statutory assignee of the contractual rights by virtue of section 2 (1) of COGSA."

57. This was an alternative to the argument described at paragraph 71 in this way:

"The Respondents [Sea Master] referred to the switch of the bills of lading on 7 November and submitted that the Claimants [Arab Bank] were party to the new bills as shippers and so were bound by them and thus subject to the arbitration clause. Even if the Claimants had endorsed and delivered the bills to a third party, this did not affect the Claimants' rights and liabilities as an original party to the contract of carriage. The Respondents referred to sections 2(5) and 3(3) of COGSA."

58. The arguments were also set out at paragraph 77:

"The Respondents [Sea Master] turned to the possibility that the Claimants [Arab Bank] might contend that, having transferred the bills to third parties, they had divested themselves of liabilities under the bills (The 'Berge Sisar' (supra)). The Respondents said that they had four answers as set out below:

(1) The principle did not apply contracts of carriage to which the Claimants were the original party (as was the case with the switch bills.)

(2) If the Claimants were transferees who transferred the bills to third parties, thereby divesting themselves of any liability, the Claimants would remain subject to the arbitration agreement, which was severable and would survive the COGSA statutory assignments (Russell on Arbitration at paragraph 2-009).

(3) The Respondents had relied upon the conduct of the Claimants and had sent the vessel to Oran and then to Tripoli: they had kept the cargo on board until a party had been prepared to take delivery. The Claimants were therefore estopped from asserting that they (both in respect of the liabilities and the arbitration clause)."

59. It was these matters which resulted in the conclusion at paragraph 112 in relation to other (non-reasonable remuneration/quantum meruit) counterclaims. That is why paragraph 112 did not itself address the reasonable remuneration and quantum meruit counterclaims and paragraph 115 did. Those counterclaims were being addressed separately. It does not follow, however, that the Tribunal were dealing with those counterclaims differently when it came to the matter of jurisdiction.

60. Furthermore, what was stated at paragraph 115 needs to be read in the context of what the Tribunal had already said at paragraph 77(4), which records Sea Master's submission that:

> *"(4) The claims for reasonable remuneration fell within the scope of the arbitration clause, but were not liabilities under the contracts of carriage evidenced by the bills. Accordingly, any transfer of the bills did not have the effect of divesting the Claimants of their liabilities for those claims or of the obligation to comply with the arbitration clause."*

It is clear, in the circumstances, that this is the contention which was being addressed at paragraph 115, and so that the Tribunal's focus was (again) on the party point rather than any argument concerning the ambit of the arbitration agreement. Indeed, as Mr Collett QC himself went on to highlight when seeking to criticise the Tribunal's observation in the Fifth Award at paragraph 91 that neither party asked the Tribunal to decide whether these counterclaims were within the scope of the arbitration agreement, the fact that Sea Master submitted as it did at paragraph 72(4) of its submissions dated 26 May 2017 (reproduced in the First Award at paragraph 77(4)) that the counterclaims *"fell within the ambit of the arbitration agreement"* serves to underline the fact that the Tribunal was not (actually could not have been) considering the ambit point and must, instead, have been addressing the party point, specifically the argument set out at paragraph 77(4) which took as its starting point the proposition that the counterclaims *"fell within the scope of the arbitration clause"*.

61. This explains the admittedly somewhat ambiguous *"ex-contractual"* reference at paragraph 115, in the second sentence, which should, in my view, be understood as a reference not to the ambit of the arbitration agreement but to Sea Master's contention, as set out at paragraph 112, that *"any transfer of the bills did not have the effect of divesting [Arab Bank] of their liabilities for those claims or of the obligation to comply with the arbitration clause"*. The Tribunal were saying, in effect, that that contention was not accepted because of the party point which it had addressed earlier (by way of conclusion) at paragraph 112, hence the reason why the second sentence begins with the words *"As we have said"*. In the earlier sections of the First Award, the Tribunal had said that Arab Bank was not a party to the arbitration agreement; and so, in that sense, all the claims against Arab Bank made in the arbitration were outside the arbitration agreement and thus *"extra-contractual"*.

62. In short, the Tribunal were not raising, still less deciding, an entirely new point on the construction and scope of the arbitration agreement. Given that nowhere previously had the Tribunal *"said"* anything about any ambit point and given that Sea Master was itself basing its argument on the relevant counterclaims falling within the ambit of the arbitration agreement, it is unrealistic to suppose that the Tribunal were, instead, purporting to address a non-point, namely the ambit of the arbitration agreement. Indeed, I agree with the Tribunal at paragraph 97 of the Fifth Award that *"if the Tribunal had purported to decide that whether or not they were claims 'arising out of or in connection with' the Second Switch Bill of Lading, despite not having been asked to do so, it would have been quite acting quite wrongly"* and that to have done so *"would have been a procedural error susceptible to challenge under section 68 of the Arbitration Act 1996"*.

63. It is all the more unrealistic to suppose that the Tribunal would decide as Sea Master now suggests without, to repeat, making any reference in the First Award to the wording of the arbitration agreement or to the ***Fiona Trust*** principles. The Tribunal did not do this because it was unnecessary for them to do so where the only issue in play was whether Arab Bank was bound by the arbitration agreement, not whether Sea Master's claims fell within its scope. It is, in addition, wholly implausible that the Tribunal would decide as Mr Collett QC suggested in the space of barely four lines.

64. That leaves Mr Collett QC's further submission that there can be no presumption that the Tribunal did not also deal with the ambit of the arbitration agreement point in circumstances where the First Award went beyond what was argued and purported to determine the merits of the reasonable remuneration and quantum meruit counterclaims even though Sea Master had not even pleaded out its case on the merits and the only issue before the Tribunal was jurisdiction. I am not entirely sure that I agree that the Tribunal overstepped the mark by saying what they did about the merits of the reasonable remuneration and quantum meruit counterclaims. This is because what the Tribunal did at paragraphs 113 and 114 was address submissions which were made by Sea Master at paragraphs 69 and 70, as follows:

> *"69. The Respondents [Sea Master] summarised their case: the Claimants [Arab Bank] impliedly or expressly requested, by its communications and conduct, that the First Respondents carry the soya bean meal to Algeria and then Tripoli and keep the cargo on board until there was someone willing and able to take delivery. The First Respondents' compliance with that request gave rise to a right to reasonable remuneration, namely the demurrage incurred and additional expenses. The Respondents relied upon The "Bulk Chile" [2012] 2 Lloyd's Rep. 594 at [75] – [78], upheld in the Court of Appeal [2013] 2 Lloyd's Rep. 38 at [331].*
>
> *70. In the alternative, the Respondents submitted that they were entitled to demurrage and the other expenses under a quantum merit (The "Bulk Chile" (supra)).*"

65. Even if that were not the case, however, it does not matter given the view which I have reached concerning the meaning to be attributed to paragraph 115, which does not depend on the application of any presumption of the type which Mr Collett QC apparently had in mind. It is nonetheless appropriate that, in considering the meaning of the First Award, the Court should adopt the approach described by Bingham J (as he then was) in ***Zermalt Holdings v Nu-Life Upholstery Repairs*** [1985] EGLR 14:

> *"As a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it."*

I have had this guidance in mind in arriving at the conclusion which I have, which is that, for the reasons I have sought to give, the Tribunal did not decide at paragraph 115 of the First Award that the reasonable remuneration and quantum meruit counterclaims were not arbitrable because they do not fall within the scope of the arbitration agreement.

Issues (ii) (dispositive part of the First Award) and (iii) (issue estoppel reading the First Award as a whole)

66. In the light of this conclusion, issues (ii) and (iii) do not arise.

67. As to issue (ii) in particular, given that I have decided that the Tribunal did not decide at paragraph 115 that the reasonable remuneration and quantum meruit counterclaims fell outside the scope of the arbitration agreement, it is obvious that the argument that the dispositive part of the First Award declaring that the Tribunal did *"not have jurisdiction to determine [Sea Master's] counterclaims under the additional bills of lading"* cannot succeed.

68. The same applies to issue (iii) since it was rightly accepted by Mr Collett QC that any issue estoppel based on the First Award, reading the First Award as a whole, would nonetheless depend on the Court accepting that [115] has the meaning for which Sea Master contends.

Issue (iv): Popplewell J's decision

69. Issue (iv) has two aspects: the first assumes that Sea Master is right in saying that the First Award gave rise to an issue estoppel that the counterclaims for reasonable remuneration and quantum meruit were not claims *"arising out of or in connection with"* any of the bills; the second assumes the opposite.

70. Both stem from the order which Popplewell J made on the s. 67 challenge to the First Award, specifically the following as set out in that order:

> *"AND UPON the Claimant's application under section 67 of the Arbitration Act 1996 by claim form dated 15 September 2017 challenging the award dated 18 August 2017 ('the Award') by a tribunal comprising Mr Timothy Marshall and Mr Robert Bright QC ('the Tribunal') declaring that the Tribunal did not have jurisdiction to determine the Claimant's counterclaims in the arbitration under (among others) bill of lading no.12 issued in Zurich on 8 November 2016 ('the Bill of Lading')*
>
> *IT IS ORDERED THAT:*
>
> 1. *It is declared that the Tribunal has jurisdiction over the Claimant's counterclaims in the arbitration arising out of or in connection with the contract contained in or evidenced by the Bill of Lading ('the Counterclaims').*
>
> 2. *The dispositive part of the Award at internal page no 26 thereof is set aside, save insofar as paragraphs 1 and 2 of the disposition in the Award relate to counterclaims by the Claimant other than the Counterclaims.*
>
> 3. *The Award and the Counterclaims are remitted to the Tribunal. …".*

71. Mr Collett QC's submission was that, if Sea Master is right that the First Award gave rise to an issue estoppel that the counterclaims for reasonable remuneration and quantum meruit were not claims *"arising out of or in connection with"* any of the bills of lading, then, those counterclaims were not within the definition of *"the Counterclaims"* in Popplewell J's order. In consequence, Mr Collett QC submitted, paragraph 2 of the order did not affect the Tribunal's decision in the First Award that

the counterclaims for reasonable remuneration and quantum meruit were outside the Tribunal's jurisdiction (because they were outside the scope of the arbitration agreement) and there was no remission pursuant to paragraph 3. As such, he went on, the Tribunal were right in stating at footnote 1 to the Fifth Award that, if the first basis applies, then, the order must be approached on the basis that the counterclaims for reasonable remuneration and quantum meruit were not claims *"arising out of or in connection with"* the Switch Bill, and, therefore, were not within the definition of *"Counterclaims"* as used in the order.

72. In view of the conclusion which I have reached concerning issue (i), it is clear that the first basis on which issue (iv) is put falls away. I concentrate, therefore, only on the second basis.

73. As to that second basis, Mr Collett QC submitted that, even though the First Award did not give rise to an issue estoppel that the counterclaims for reasonable remuneration and quantum meruit were not claims *"arising out of or in connection with"* any of the bills of lading, nevertheless, given the circumstances in which it was made, the meaning and effect of Popplewell J's order was that: (i) Sea Master's counterclaims for reasonable remuneration and quantum meruit were not within *"the Counterclaims"* as defined in paragraph 1, namely *"counterclaims in the arbitration arising out of or in connection with the contract contained in or evidenced by the Bill of Lading"*; (ii) paragraphs 1 and 2 of the disposition of the First Award were not set aside insofar as they ruled that the Tribunal did not have jurisdiction over Sea Master's counterclaims for reasonable remuneration and quantum meruit; and (iii) Sea Master's counterclaims for reasonable remuneration and quantum meruit were not remitted to the Tribunal by paragraph 3 of the order.

74. Mr Collett QC went on to advance various submissions in support of Sea Master's position that, since the s. 67 challenge to the First Award before Popplewell J was limited to the Switch Bill and, so he suggested, the counterclaims for demurrage and damages for detention (and not also the counterclaims for reasonable remuneration and quantum meruit), Arab Bank is estopped from contending that the meaning and effect of the order made by Popplewell J was otherwise than that Sea Master's counterclaims for reasonable remuneration and quantum meruit were not within *"the Counterclaims"* as defined in paragraph 1 of the order.

75. I see absolutely no merit in these submissions.

The meaning of Popplewell J's order

76. As for the interpretation of Popplewell J's order, and for present purposes leaving to one side Sea Master's reliance on what happened in the lead-up to and at the consequentials hearing before Popplewell J when his order was made, the position seems to me to be straightforward. I say this because nowhere in the order is there anything which spells out that the counterclaims for reasonable remuneration and quantum meruit are excluded from the scope of the declaration contained in paragraph 1. On the contrary, that declaration is expressed in inclusive terms which merely echo the wording of the arbitration agreement, hence the reference to *"counterclaims in the arbitration arising out of or in connection with the contract contained in or evidenced by the Bill of Lading"*. Therefore, there is nothing to indicate that the *"Counterclaims"*, as those counterclaims are defined, do not include the counterclaims for reasonable

remuneration and quantum meruit. True it is that there is, then, a carve-out in paragraph 2 and so as regards the setting aside of paragraphs 1 and 2 of the dispositive part of the First Award. However, paragraph 2 does not itself describe what the excluded counterclaims are; specifically, no reference is made to the excluded counterclaims including the counterclaims for reasonable remuneration and quantum meruit.

77. This is the point, I note, which the Tribunal themselves made in the Fifth Award at paragraph 112, as follows:

"Thus, paragraph 1 declared that the Tribunal had jurisdiction over all counterclaims in the arbitration that were within the rubric 'arising out of or in connection with' the Second Switch Bill of Lading. The effect of paragraph 2 was to set aside the dispositive part of the Award in relation to those counterclaims – i.e., 'the Counterclaims', as defined – but not any other counterclaims (which would include counterclaims under other Additional Bills of Lading). However, neither the Judgment nor the Order sought in terms to decide which counterclaims were 'Counterclaims' within the paragraph 1 definition."

Like the Tribunal, therefore, I agree that Popplewell J's order does not, at least on its face, do as Mr Collett QC would have it do and exclude the counterclaims for reasonable remuneration and quantum meruit.

78. Having made the point which they did at paragraph 112 of the Fifth Award, the Tribunal went on at paragraphs 114 to 116 to record, correctly, that counterclaims for reasonable remuneration/quantum meruit were counterclaims in the arbitration. That was (and remains) common ground, as the Tribunal observed, but it is also obvious given that it was Sea Master itself which introduced the counterclaims through their submissions dated 26 May 2017.

79. The Tribunal next addressed the question of whether the counterclaims for reasonable remuneration/quantum meruit are properly to be regarded as claims *"arising out of or in connection with"* the Second Switch Bill of Lading. This the Tribunal did at paragraphs 117 to 132, concluding that these counterclaims fell within the ambit of the *"arising out of or in connection with"* wording. I myself deal with that question later when addressing issue (v), reaching the same conclusion as the Tribunal. However, what matters for present purposes is that the Tribunal's ultimate conclusion, before going on to consider Mr Collett QC's submissions concerning the consequentials hearing, was as follows:

"It follows that, taking the terms of Popplewell J's Order at face value, and applying the test of 'arising out of or in connection with' with the assistance of the authorities that we have cited, we would conclude that the effect of paragraph 1 of the Order of 30 July 2018 was to declare that the Tribunal has jurisdiction over the counterclaims for reasonable remuneration/quantum meruit."

Again, I agree with the Tribunal about this since, as will appear, I am very clear that the reasonable remuneration/quantum meruit counterclaims fall within the ambit of the *"arising out of or in connection with"* wording.

80. I am quite clear, in short, that, given that the only issue that Popplewell J decided was the arbitrability issue which entailed Arab Bank being bound by the arbitration

agreement, the order left open the question of whether particular counterclaims do or do not fall within the scope of the arbitration agreement. As Mr Russell QC put it, Sea Master's case demands that the Court find that Popplewell J, despite using neutral language tracking the wording of the arbitration agreement and not purporting to determine any issue of the scope of the agreement, in fact, made a determination that the reasonable remuneration and quantum meruit counterclaims were not within its scope or, put another way, a determination that claims which do arise out of or in connection with the Switch Bill are not within the scope of the reference even though the order says that they are.

81. I come on, then, to deal with Mr Collett QC's submissions based on what happened in the lead-up to and at the consequentials hearing before Popplewell J. I do so on the basis that it is appropriate to look at such materials, whilst nonetheless being cautious in doing so, particularly given that, on any view, this is not a case involving any *"overt and authoritative statement"* by Popplewell J.

82. As the Tribunal observed in the Fifth Award at paragraph 135(1), Sea Master's primary position is that the consequentials hearing has a bearing on the interpretation of the order, so as to mean that it did not affect the First Award at all as regards the counterclaims for reasonable remuneration and quantum meruit. In the alternative, Sea Master contend (through Mr Collett QC) that an estoppel arises, either by convention or by a duty to speak.

83. I wish, in the first instance, to stand back and consider matters in the round. I say this because, even assuming that Mr Collett QC were right that the s. 67 challenge was confined to the Switch Bill and, so he suggested, the counterclaims for demurrage and damages for detention, in view of the conclusion which I have reached in relation to paragraph 115 of the First Award, it simply makes no sense to treat Popplewell J's order as doing something which is the exact opposite of what I have determined the Tribunal themselves decided.

84. Put differently, if (as I have determined) the Tribunal *did not* decide that the counterclaims for reasonable remuneration and quantum meruit fell outside the ambit of the arbitration agreement, then, it cannot be right to approach matters on the basis that, notwithstanding this, in making the order which he did, Popplewell J should be regarded as having decided or ordered that those counterclaims *did* fall outside the ambit of the arbitration agreement. The more so, given that, as had also been the case with the Tribunal, no submission was made before Popplewell J on the ambit issue, as, indeed, Mr Collett QC himself sought to emphasise when advancing his submissions, specifically when explaining, for instance, how the s. 67 claim form was limited to the counterclaims for demurrage and damages for detention under the Switch Bill. Even though the Tribunal, in the Fifth Award at paragraph 139, regarded Mr Collett QC as being wrong about this (a view I tend to share for the reasons which the Tribunal gave), what matters is that quite clearly the ambit issue was not at that stage an issue at all.

85. Given this, it is not merely opportunistic but wholly unrealistic for Sea Master now to suggest that Popplewell J's order is to be taken as preserving a decision made by the Tribunal concerning ambit which, in fact, as I have determined, was not made at all. In these circumstances, I am sceptical that anything really turns on what was said or done at the consequentials hearing. The fact, therefore, that Sea Master's skeleton argument for that consequentials hearing submitted that the Court's jurisdictional declaration

should be subject to two limitations in respect of categories of counterclaim which were not the subject of the s.67 application, namely that (i) it should not cover Sea Master's counterclaims under bills of lading other than the Switch Bill and (ii) it should not cover the counterclaims based on reasonable remuneration and quantum meruit, seems to me to be of little consequence.

86. The same applies, in my view, to the fact that, having received and read Sea Master's written submissions regarding limitations to the order (and the then counsel for Arab Bank not having challenged what Mr Collett QC had had to say), Popplewell J ruled that *"the appropriate course is to set aside the dispositive part of the award, to the extent and within the limitations which Mr Collett has identified"*. As the Tribunal put it in the Fifth Award at paragraph 137(4):

"The Judge's reference to 'the limitations that Mr Collett has identified' must have been a reference to the definition of 'the Counterclaims' in paragraph 1 of Mr Collett QC's draft order, and the saving for counterclaims 'other than the Counterclaims' in paragraph 2."

The Tribunal added at paragraphs 137(5) and (6) as follows:

"(5) However, it is important to note that, prior to saying this, the Judge had not heard submissions in relation to those limitations. This is apparent not only from the earlier pages of the transcript but also from his question to Mr Karia QC on page 11 of the transcript at lines 14-15, where he asked: 'Subject to that, [Mr Karia], is there any point on the form of wording that Mr Collett has put forward?' He thereby invited Mr Karia QC to say if he wanted to contend for the wording of the Order to be different from that proposed by Mr Collett. He did not invite Mr Karia QC to say whether or not he agreed with Mr Collett QC's reasons for proposing that wording or his analysis of its meaning.

(6) The only concerns that Mr Karia QC ventilated related to the counterclaims under other Additional Bills of Lading. These concerns were assuaged when it was pointed out to him that they were carved out, by paragraph 2. In the course of that discussion, there was the following exchange between Mr Collett QC and the Judge, on page 12 of the transcript at lines 4-9:

"MR JUSTICE POPPLEWELL: I do not see the problem with paragraph 2 in the form that Mr Collett has drafted.

MR COLLETT: My Lord, there is further advantage in my way of putting it, that there are two jurisdictional aspects which were not challenged.

MR JUSTICE POPPLEWELL: Yes, the quantum meruit.

MR COLLETT: Yes, my Lord."

87. The Tribunal went on at paragraph 138 to say this:

"It is apparent from these exchanges (i) that Mr Collett QC told the Judge both in writing and orally that the Tribunal's decision as regards the claims for reasonable remuneration/quantum meruit had not been challenged by the section 67 proceedings

and (ii) that the Judge had picked up on these statements and proceeded on the basis that they were correct."

However, the Tribunal continued in the next paragraph (paragraph 139) as follows:

"…this is problematic.

(1) While Mr Collett QC was right to say in his skeleton argument that the Claim Form said that the counterclaims were for demurrage and for damages for detention, Mr Russell QC pointed out to us that this was in a part of the Claim Form that merely sought to summarise the Owners' counterclaims in the arbitration, and did so inaccurately: while the Owners' counterclaims had originally been limited to demurrage and damages for detention, they were not so limited following the Owners' submissions of 26 May 2017. From that time onwards, the Owners' counterclaims in the arbitration included the claims for reasonable remuneration/quantum meruit.

(2) Moreover, we agree with Mr Russell QC that, in any case, the critical part of the Claim Form, in terms of identifying what the section 67 challenge sought to do, is not the part that summarised the Owners' counterclaims – that being, essentially, narrative. Rather, the critical part of the Claim Form is the part that set out the order that Inc was seeking. That read as follows: '[Inc]… seeks an order setting aside the Award and/or varying it to declare that the Tribunal does have jurisdiction over the counterclaims asserted by [Inc].'

(3) The phrase used here, 'the counterclaims asserted by [Inc]', is significant because, as we have now pointed out several times, it is common ground before us that the counterclaims asserted by Owners in fact included the counterclaims for reasonable remuneration/quantum meruit; and that is what we would have found in any event.

(4) In short, Mr Collett QC's statement to Popplewell J that the Owners' section 67 challenge appears to have been based on a partial reading of the Claim Form. The part that Mr Collett QC relied on was incorrect, whereas the part that he did not refer to can only be read against him.

(5) Further, in so far as Mr Collett QC's statement to Popplewell J was based on the erroneous summary of the Owners' counterclaims in the Claim Form, it was founded on a text that is contrary to the common ground on this point at the hearing of 28 October 2021. This makes it difficult for us to accept, for the purposes of this Fifth Award. Where both parties have invited us to proceed on a particular factual basis, that is what we should do (quite apart from our view that it is a correct factual basis)."

88. Again, I agree with the Tribunal about this. In any event, the simple fact is that the Tribunal did not make a decision concerning the ambit of the arbitration agreement. In such circumstances, it is simply not right to suggest, as Mr Collett QC put it, that *"the Judge implicitly accepted the rationale (derived from para. 115 of the First Award, reference in fn. 1 of Inc's skeleton) that the counterclaims for reasonable remuneration and quantum meruit were not within the scope of the arbitration agreement in the Switch Bill"*. I am clear that Popplewell J did no such thing, having not been addressed

on the ambit point at all other than in the footnote to Mr Collett QC's skeleton argument prepared for the purposes of the consequentials hearing to which reference is made in brackets above and in which Mr Collett QC merely said this:

"The Tribunal having stated at para. 115 of the reasons for the Award … that it had no jurisdiction over such claims on the grounds that they were 'ex-contractual'."

89. This footnote was, in fact, attached to the words *"counterclaims for demurrage and damages for detention"*, rather than any reference to counterclaims based on reasonable remuneration and quantum meruit. However, even putting this oddity to one side, as the Tribunal observed in the Fifth Award at paragraph 141, what is clear is that Popplewell J did not subject Mr Collett QC's characterisation of the scope of the s. 67 challenge to any critical analysis; indeed, it is equally clear that nobody asked him even to look at the relevant claim form.

90. The Tribunal went on at paragraph 142 to say this:

"This question therefore is really about the significance of judicial remarks that are made by the Judge in the course of hearing, but which are comments, rather than a decision. Approaching this as a matter of principle, it seems to us important to distinguish between two different situations.

(1) Sometimes, in the course of a hearing such as the consequentials hearing on 30 July 2018, the Judge has to decide an issue. The issue emerges from Counsels' submissions as a point in dispute, the Judge receives submissions from each of them and he decides it. In such a case, what the Judge says in the course of explaining his decision on the issue is legally significant. It can be taken as his considered opinion, which constitutes a judicial conclusion. He is speaking (as it were) ex cathedra. As between the parties, what he says gives rise to an issue estoppel, within the principles that we have outlined above under the heading of issue (3). It may also bind arbitrators such as this Tribunal for other reasons: in so far as the Judge's decision resolves a question of law, it is a precedent that we are obliged to follow.

(2) However, it sometimes happens that Counsel say things in a hearing such as the consequentials hearing that are not questioned, either by the Judge or by opposing Counsel. In so far as the Judge repeats unquestioningly what he has been told, his words do not represent his own opinion or conclusion, considered or otherwise. They do not represent a judicial decision. The Judge is not speaking ex cathedra and there can be no issue estoppel or binding precedent.

(3) We would add that, where a point arises on the wording of the Order, but the Judge is not required to make a decision, this will often be because a consensus has emerged between the parties and/or their Counsel, prior to or during the consequentials hearing; in which case, a party wishing to rely on the relevant exchanges can do so via estoppel by convention, subject to satisfying the requirements of that doctrine."

Again, I agree with the Tribunal about this, as well as with their conclusion at paragraph 143 that what Popplewell J had to say on the matter at the consequentials hearing falls into the second rather than the first category.

91. The Tribunal stated their conclusion at paragraph 144:

> *"The fact that the Judge unquestioningly accepted something said by Counsel does not seem to us, by itself, to affect the proper interpretation of the Order. We consider that we should interpret the Order by reference to the true factual position. The true factual position is that Mr Collett QC's draft wording, as adopted in the Order, did affect the claims for reasonable remuneration/quantum meruit. As we have concluded under the heading of issue (4):*
>
> *(1) They were 'counterclaims in the arbitration', as is common ground.*
>
> *(2) They were claims 'arising out of or in connection with' the Second Switch Bills of Lading, as we have decided afresh, having first decided that this had not been decided by paragraph 115 of the First Award and that there is no issue estoppel."*

Again, I agree: the Tribunal's reasoning is not merely persuasive but, in my view, obviously correct. I see no basis on which the clear words of Popplewell J's order should be departed from based on the extrinsic materials highlighted by Mr Collett QC, and certainly no justification for arriving at a construction which is wholly inconsistent with the natural and ordinary meaning of the words used in that order.

Estoppel by convention

92. Turning, lastly in this context, to Sea Master's estoppel arguments, and starting with the contention that there is in this case an estoppel by convention, I take account of the principles recently set out in ***Tinkler v HMRC*** [2021] 3 WLR 697 at [45]-[53], specifically the requirements that: (i) there must have been a common assumption of fact or law by the parties; (ii) it must have been made clear, by words or conduct which crossed the line between them, that they shared that common assumption; (iii) the person raising the estoppel ('C') must in fact have relied upon the common assumption to a sufficient extent; (iv) C must know that the person against whom the estoppel is raised ('D') shares the common assumption and must be strengthened, or influenced, in its reliance on that common assumption by that knowledge; (v) D must (objectively) intend, or expect, that that will be the effect on C of its conduct crossing the line so that one can say that D has assumed some element of responsibility for C's reliance on the common assumption; (vi) C's reliance must have occurred in connection with some subsequent mutual dealing between the parties; and (vii) some detriment must thereby have been suffered by C, or benefit thereby have been conferred upon C, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

93. Mr Collett QC's submission was that the assumption which was made by Sea Master was that its proposed wording for the order made by Popplewell J had the meaning and effect that the counterclaims for reasonable remuneration and quantum meruit were not within *"the Counterclaims"* as defined in paragraph 1 because they were not *"counterclaims in the arbitration arising out of or in connection with the contract contained in or evidenced by the [Switch Bill]"*.

94. I do not propose to take up too much time on this issue since it is clear to me (as it was to the Tribunal) that there is nothing in this submission. I agree, in particular, with the Tribunal when they said the following at paragraphs 160 and 161:

> *"160. Applying these principles in the context of the materials that we have already reviewed, the fundamental problem for the Owners is that nothing crossed the line from the Bank. Mr Collett QC made it clear at the consequentials hearing that Owners' understanding of the Order was that it did not affect the Tribunal's conclusion in the First Award that it had no jurisdiction in respect of the claims for reasonable remuneration/quantum meruit. However, Mr Karia QC said nothing that should have conveyed to the Owners that the Bank shared this understanding. Following paragraph 16 of his skeleton argument, at the hearing itself Mr Karia QC said nothing at all that had any bearing on the claims for reasonable remuneration/quantum meruit and whether the Order being made did or did not affect them.*
>
> *161. In submissions to us, Mr Collett QC suggested that, even though Mr Karia QC did not say expressly that he agreed with Mr Collett QC that there was no section 67 challenge in respect of the claims for reasonable remuneration/quantum meruit, the Owners were nevertheless entitled to understand that he shared their understanding. We do not accept this, and in any event that could not amount to a communication that crossed the line or that gave rise to some element of responsibility for that Owners' having that understanding and relying on it."*

95. It follows, for this reason, that this estoppel case cannot succeed. In addition, however, again as the Tribunal went on to decide (at paragraphs 162 to 165), Sea Master cannot show sufficient detriment based on any reliance on words or conduct that could give rise to an estoppel, making it unjust or unconscionable for Arab Bank to be able to rely on the true meaning and effect of the arbitration agreement itself and the true meaning and effect of Popplewell J's order.

96. The Tribunal reached this conclusion for the reason given at paragraph 164, as follows:

> *"We consider it very unlikely that Owners would have referred the claims for reasonable remuneration/quantum meruit back to us, if they had understood that the effect of the Order was that the claims were within our jurisdiction. If these claims are within our jurisdiction, then while paragraph 115 of the First Award is no longer significant, paragraphs 113 and 114 are. Neither party has suggested that paragraphs 113 and 114 are displaced by the Order. On the contrary, it gives them new effect, because they now constitute final findings on the merits, made by a Tribunal with jurisdiction to decide the merits. They accordingly give rise to an issue estoppel within the principles that we have set out under the heading of issue (3). The parties would be bound by the findings on the merits in paragraphs 113 and 114 of the First Award, and we would be precluded from making any different findings."*

I am not myself persuaded that the Tribunal were right about this, however, since the evidence before the Tribunal, in the shape of a witness statement from Sea Master's solicitor, Mr Nicholas Parton, was that his clients would have referred the counterclaims for reasonable remuneration and quantum meruit back to the Tribunal if they had understood that the effect of the Order was that the claims were within the Tribunal's jurisdiction. In addition, as Arab Bank itself recognised in the context of the anti-suit injunction application and apparently overlooked by the Tribunal, there would not have been the issue estoppel on the merits which the Tribunal considered there would have been because paragraphs 113 and 114 of the First Award were not in the dispositive part of the First Award and nor did they relate to the disposition.

97. As Mr Russell QC submitted, however, there is another reason why there is not the necessary detriment through the non-pursuit of the reasonable remuneration and quantum meruit counterclaims. This is that the Tribunal did not formally dismiss Sea Master's counterclaims until its Fourth Award in December 2020, by which time Arab Bank had made it clear that the reasonable remuneration and quantum meruit counterclaims which had been brought in the reference, should be dismissed. Specifically, before the September 2020 hearing which resulted in the Fourth Award, Holman Fenwick & Willan LLP (Arab's Bank's solicitors) had referred, in terms, to the reasonable remuneration and quantum meruit counterclaims when seeking dismissal, stating as follows:

> *"The Award should contain a declaration that any and all claims by Sea Master Special Maritime Enterprise, Sea Master Shipping Inc and/or Mega Shipping Line Corp against Arab Bank and/or Freiha arising out of or in connection with the Bills of Lading and/ or the Voyage carrying the Cargo are dismissed, including but not limited to claims for freight, damages, demurrage, damages for detention and/or reasonable remuneration or a quantum meruit."*

In response, Sea Master took the position that the reasonable remuneration and quantum meruit counterclaims were not within the reference because the Tribunal had previously (in the First Award) stated that it had no jurisdiction in respect of them. Accordingly, Sea Master asked for an order that expressly limited the dismissal of the counterclaims to the demurrage/damages for detention, on the basis that the reasonable remuneration and quantum meruit counterclaims were no longer within the reference.

98. In the Fourth Award, as noted earlier, the Tribunal dismissed all the counterclaims within the reference, without deciding whether the reasonable remuneration and quantum meruit counterclaims fell within the ambit of the arbitration agreement. However, what is clear is that, by the date of the Fourth Award, Sea Master could have been under no misapprehension that there was a common understanding that the reasonable remuneration and quantum meruit counterclaims were not within the reference, since Arab Bank had made its position entirely clear: that those counterclaims had been brought within the reference and they should be dismissed. Despite this, it was not until even later, in September 2021, that they took any steps to pursue their claims in Connecticut.

Duty to speak estoppel

99. Nor is there anything in the duty to speak estoppel which Sea Master also alleges.

100. In this respect Mr Collett QC drew attention to the guidance given by Rix LJ in ***ING Bank NV v Ros Roca*** [2012] 1 WLR 472 at [92]-[95]. In summary: if one party makes a mistake which has not been caused by the other party, there is no general duty on the other party to point out that mistake; by way of exception to the general rule, a duty to speak may arise where a reasonable man would expect the other party *"acting honestly and responsibly"* either to make something known or face the consequences of not doing so; in those circumstances, the party under the duty to speak may be estopped from saying that the other party's understanding of the situation is incorrect.

101. Mr Collett QC submitted that, given that Arab Bank has not disputed that it was aware of Sea Master's written submissions and oral submissions to the effect that Sea Master's

counterclaims for reasonable remuneration and quantum meruit were not within *"the Counterclaims"* as defined in paragraph 1 of Popplewell J's order, so this is a case in which a duty to speak arose. Specifically, he submitted, in the context of the making of an order dealing with the scope of the jurisdiction, Arab Bank was under a duty to tell Sea Master (and the Court) that it did not accept the correctness of Sea Master's submissions as to the effect of the wording of the order. Accordingly, by failing to do so, Arab Bank represented to Sea Master that the meaning and effect of the order was as Sea Master had submitted and/or that it would not thereafter contend otherwise.

102. The difficulty with this, however, is twofold: first, I agree with Mr Russell QC when he submitted that Sea Master's case requires the words of Arab Bank's then counsel at the consequentials hearing to carry far more weight and significance than they can sensibly bear; and, secondly, Arab Bank made its understanding clear in the lead-up to the Fourth Award (and so before the reasonable remuneration and quantum meruit counterclaims were dismissed), meaning that Sea Master cannot have suffered the detriment relied upon.

Issue (v): whether in the absence of any estoppel, Sea Master's counterclaims for reasonable remuneration/quantum meruit are within the scope of the arbitration clause in the Switch Bill

103. As will already be appreciated, the issue here is whether the reasonable remuneration and quantum meruit counterclaims can properly be characterised as *"arising out of or in connection with"* the Switch Bill.

104. In approaching this issue, it is necessary to apply the 'one-stop' presumption described in ***Fiona Trust***. As Longmore LJ put it in the Court of Appeal in that case at [17]:

> *"… For our part we consider that the time has now come for a line of some sort to be drawn and a fresh start made at any rate for cases arising in an international commercial context. Ordinary businessmen would be surprised at the nice distinctions drawn in the cases and the time taken up by argument in debating whether a particular case falls within one set of words or another very similar set of words. If businessmen go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect (at any rate when they are making the contract in the first place) that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen in their arbitration clause. If any businessman did want to exclude disputes about the validity of a contract, it would be comparatively simple to say so."*

105. He continued at [18]:

> *"As it seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. The words 'arising out of' should cover 'every dispute except a dispute as to whether there was ever a contract at all', see Mustill and Boyd, Commercial Arbitration (2nd ed) page 120 (the debate, to which we were treated, about whether the authorities there cited support the proposition is, since Harbour v Kansa, both technical and sterile). Although in the past the words 'arising under the contract' have sometimes been given a narrower meaning, that should no longer continue to be so. Since both phrases are used in the present case there is, in any event,*

no need here to differentiate between them but the proposition that the phrases 'under' and 'out of' should be widely construed is to my mind strongly supported by Mackender v Feldia. …".

106. Longmore LJ, then, went on at [19]:

"One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration. It is not to be expected that any commercial man would knowingly create a system which required that the court should first decide whether the contract should be rectified or avoided or rescinded (as the case might be) and then, if the contract is held to be valid, required the arbitrator to resolve the issues that have arisen. This is indeed a powerful reason for a liberal construction."

107. In the House of Lords, Lord Hoffmann had this to say at [6]:

"In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction."

108. He added at [7]:

"If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention. … ."

109. Lord Hoffmann continued at [13]:

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

110. Mr Collett QC accepted that ***Fiona Trust*** represents the modern approach. He submitted, however, that, beyond the presumption in favour of one-stop arbitration, it is a decision which gives no practical guidance as to when a claim can be said to arise *"in connection with"* a contract. A preferable approach, Mr Collett QC submitted, is that of Patricia Robertson QC (sitting as a Deputy High Court Judge) in ***Eastern Pacific Chartering Inc v Polar Maritime Ltd*** [2021] EWHC 1707 (Comm) at [37] and [42], namely to ask whether the claim is *"causatively connected"* with the contract. However, as the Tribunal pointed out at [128] of the Fifth Award in ***Eastern Pacific*** Patricia Robertson QC referred to the test which was adopted by Mustill J (and the Court of Appeal) in ***The Playa Larga*** [1983] 2 Lloyd's Rep. 171, namely whether the dispute is *"closely knitted together on the facts"* with a contractual dispute, observing that, whilst it would be sufficient if the Mustill J test were satisfied, it does not follow *"that nothing less than that will suffice"*. It is not right, therefore, to suggest that she held that it is necessary to ask whether the non-contractual claims are *"causatively connected"* with the contract. On the contrary, what she said at [37] was this:

"Taking a broad and common sense approach to construing the clause, as I am enjoined in Fiona Trust to do, a tort claim may be said to arise 'in connection with' the charter not only where there are parallel claims in tort and contract (as, for example, for breach of a duty of care) but also where the claim arises solely in tort but is in a meaningful sense causatively connected with the relationship created by the charter and the rights and obligations arising therefrom."

111. The Tribunal went on at paragraph 130 to say that *"it seems to us beyond question that this is a case where the Mustill J test is satisfied"*, so as to mean that:

"If the Mustill J test is in fact stricter than is now appropriate (as considered by Patricia Robertson QC), that makes this case a clear one".

I agree with the Tribunal about this. As the Tribunal explained at paragraph 131:

"The reality is that there is a complete factual overlap between the claims for reasonable remuneration/quantum meruit and the claims for demurrage and damages for detention. They all relate to the same periods and locations and the factual evidence would emerge from all the same sources and witnesses."

The truth is that there is nothing in the wording of the arbitration agreement in the present case which would make it appropriate to displace the 'one-stop' presumption. Nor, applying the *"knitted together"* test, the *"parallel claims"* test or the *"causatively connected"* test, can it legitimately be concluded that the reasonable remuneration/quantum meruit counterclaims fall outside the ambit of the wording.

112. As Mr Russell QC demonstrated by reference to the documents filed by Sea Master in the Connecticut proceedings, the claim is in respect of the time during which the soya bean meal cargo remained on board the Vessel, at Casablanca, then Oran, and then finally on the voyage to and during discharge at Tripoli, Lebanon. I agree with him that, in the circumstances, a dispute as to whether or not Arab Bank as the Switch Bill holder owes Sea Master money for use of the Vessel and storage charges whilst Sea Master acted as carrier of the cargo is self-evidently a dispute arising out of or in connection with the Switch Bill contract.

113. The reasonable remuneration/quantum meruit counterclaims are effectively the same as those which failed in the arbitration for damages and/or breach of an implied term. First, they arise out of the same relationship between the parties: Sea Master, as owners of the Vessel and carrier of the cargo, and Arab Bank as the holder of the Switch Bill, having an interest in the cargo. Secondly, the facts giving rise to the counterclaims are the same: the fact that the soya bean meal cargo was not discharged, but instead remained on the Vessel, so that she could not engage in any other business. Thirdly, the period of time covered is materially the same, extending from the discharge of the other cargoes to the final discharge of the soya bean meal cargo. Fourthly, Sea Master counterclaims at the contractual demurrage rate.

114. Mr Collett QC emphasised how the counterclaims for reasonable remuneration relate to the storage and carriage of the soya bean meal from 25 August 2016 to 20 February 2017. He explained that, in consequence, part of the claim relates to the period before the Switch Bill was issued (on 8 November 2016). However, the Switch Bill replaced the first switch bill, which in return replaced the original bills in respect of the original bills in respect of the soya bean meal parcels. The Switch Bill covers (and is the only bill which remains live to cover) the entire period of carriage and thus the entire period in respect of which the counterclaims are made. The contractual claims under the Switch Bill and the counterclaims are parallel claims for the entire period of claim.

115. Mr Collett QC explained also how part of the claim relates to the period after Sea Master became the registered owner of the Vessel, so as to mean that that part of the claim is at least arguably brought by Sea Master in its own right (as the party providing the benefits to Arab Bank) rather than as assignee of Sea Master Special. The fact remains, however, that Sea Master was bound by the arbitration agreement and the Switch Bill, to repeat, covers the entire period of carriage. It would make no sense at all if the non-contractual claims up to the date of the sale of the Vessel to Sea Master were to be treated as falling within the arbitration agreement but not also the claims after that date.

116. It follows that the reasonable remuneration/quantum meruit counterclaims fall within the ambit of the relevant arbitration agreement wording.

Conclusion

117. For the reasons which I have sought to give in this judgment, Sea Master's s. 67 challenge to the jurisdiction of the Tribunal fails.