IN THE HIGH COURT OF JUSTICE 2004/826

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

[2005] EWHC 156 (QB)

Royal Courts of Justice

Friday, 14th January 2005

Before:

MR. JUSTICE CRESSWELL

B E T W E E N:

METAL DISTRIBUTORS (UK) LIMITED Claimant

- and -

ZCCM INVESTMENT HOLDINGS PLC
(A COMPANY INCORPORATED IN THE REPUBLIC OF Zambia) Defendant

IN THE MATTER OF AN ARBITRATION BETWEEN:

ZCCM INVESTMENT HOLDINGS PLC
(A COMPANY INCORPORATED IN THE REPUBLIC OF Zambia) Claimant

- and -

METAL DISTRIBUTORS (UK) LIMITED Respondent

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MR. ANDREW THOMAS (instructed by Seddons) appeared on behalf of the Claimant.

MR. STEWART SHACKLETON (Solicitor Advocate of Eversheds) appeared on behalf of the Defendant.

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JUDGMENT

(As approved by the Judge)

MR. JUSTICE CRESSWELL:

1 This application raises important issues as to the extent of the jurisdiction of arbitrators and the legal principles to be applied in determining whether a particular dispute falls within the jurisdiction of an arbitral tribunal. This is an application by Metal Distributors (UK) Limited ("MDL") pursuant to s.67 of the Arbitration Act 1996 for an order setting aside a preliminary decision on jurisdiction by a London Metal Exchange Arbitral Tribunal comprising two arbitrators, Mr. KC Davies and Mr. EC Betelheim ("the tribunal") dated 9 September 2004, and for a declaration that the tribunal had jurisdiction in respect of MDL's counterclaim as identified below.

2 The evidence before the court consists of witness statements from Subir Karmakar (2) and Anil Beriwal on behalf of MDL and a witness statement of Carolyn Jones on behalf of ZCCM Investment Holdings Plc ("ZCCM").

3 The parties have helpfully agreed a statement of background facts, and these are set out below.

> "ZCCM (formerly Zambia Consolidated Copper Mines Limited) was until its privatisation in March of 2000 a company owned by the government of Zambia, which supplied metals, in particular copper and cobalt.
>
> MDL is a company incorporated in England and Wales which at all material times traded in metals and was a customer of ZCCM.
>
> The dispute from which these proceedings arise has its origins in various contracts for the sale of copper and cobalt dated between January 1996 and December 1998 ("the Sales Contracts"). There was disagreement concerning the payment under the Sales Contracts, which was settled by an agreement dated 26 May 2000 ("the Compromise Agreement"). Under that agreement, MDL agreed to pay $3,036,396.79 in full and final settlement of the sums due to ZCCM.
>
> The arbitration between the parties is based on the agreements to arbitrate contained in the Sales Contracts, and is being conducted under the regulations of the London Metal Exchange. The arbitration was commenced by way of ZCCM's Notice to Arbitrate dated 13 March 2003.
>
> It is not in dispute in the arbitration that, apart from an amount of USD 200,000, MDL has not made payments under the Compromise Agreement. There are two principal issues - MDL argues that it is not obliged to make further payments to ZCCM on the basis that:

(a) the obligation to pay the balance has been novated to a company named Roan Antelope Mining Corporation of Zambia Plc ("Ramcoz"). Ramcoz is a company in the same group as MDL. MDL alleges that this novation was agreed between ZCCM, Ramcoz and MDL in May and June 2000. ZCCM denies that the alleged novation was agreed or even discussed.

(b) MDL alleges that it has a counterclaim against ZCCM, the value of which exceeds the debt owed to ZCCM under the Compromise Agreement.

It is MDL's counterclaim that is the focus of the present hearing. The counterclaim is for damages that MDL claims to have suffered in relation to monies advanced by MDL "pursuant to and placing reliance upon [a] representation made by ZCCM or alternatively on the basis of a collateral agreement made between MD and ZCCM to the effect that ZCCM will ... fully comply with the terms of [a] Debt Rescheduling Agreement ..." (Points of Defence, para 28). MDL claims that it lent funds to Ramcoz in reliance on the alleged representations by ZCCM, alternatively the alleged collateral agreement, and that ZCCM's failure to honour it caused Ramcoz to become insolvent, thereby causing MDL loss and damage.

ZCCM denies that the proposed Debt Rescheduling Agreement ever matured into a concluded agreement, or was treated by any of the parties as such, and otherwise denies liability to MDL under the counterclaim. ZCCM denies that it was a party to the Debt Rescheduling Agreement. It is not being contended that MDL was itself a party to the Debt Rescheduling Agreement.

MDL sought to have the merits of its counterclaim determined by the tribunal appointed under arbitration provisions contained in the Sales Contracts. ZCCM argued that the tribunal had no jurisdiction to hear the counterclaim.

The parties agreed that the tribunal should deal with the matter of its jurisdiction over the counterclaim as a preliminary issue. The tribunal did so, and on 9 September 2004 the tribunal held that it did not have jurisdiction to consider the counterclaim. It is this decision that MDL challenges in these proceedings.

4 The tribunal's ruling as to jurisdiction

The tribunal's ruling and order dated 9 September 2004 was in the following terms:

> "The parties, having agreed to submit the matter of the Panel's jurisdiction over the Respondents Counterclaim for ruling by the Panel prior to dealing with the merits of the Claim and having further agreed to the Panel determining this preliminary matter on the basis of the documents submitted, the Panel, having considered the extensive evidence and arguments submitted by the parties has determined that it does not have jurisdiction over the Counterclaim.
>
> As the issue has been thoroughly briefed by both parties, it is not necessary here to restate the facts on which the Counterclaim relies nor the arguments submitted to the Panel. Suffice to say here that it is common ground that there is and was no agreement between the parties to arbitrate disputes arising out of the efforts at debt restructuring which are the foundation of the Counterclaim. Similarly, it is not disputed that the parties did agree to arbitrate matters, under LME Rules, arising out of six sales contracts for copper and cobalt on which the claim is premised. Finally, it is evident from the submissions of both parties, that the issue of the Panel's jurisdiction turns on the scope of "counterclaims" as used in the LME Arbitration Rules (see Rule 6). The Rules themselves do not provide any guidance in this respect.
>
> The Claimant has argued and we think persuasively, that the scope of appropriate counterclaims under the LME Arbitration Rules is not the same as the scope of counterclaim subject to determination by a court of general jurisdiction. In the absence of an agreement to arbitrate matters related to the efforts at debt restructuring (whether or not a restructuring agreement was ever reached), the Respondents argues that the Panel, once constituted, has the jurisdiction to hear and determine any matter arising between the parties regardless of the subject-matter or relation to the underlying claim. The Panel does not agree. In the Panel's view, which it believes is supported by the weight of legal authority; arbitration is fundamentally a matter of and is limited by, the mutual consent of the parties. In this it is fundamentally different from both the personal and subject-matter jurisdiction of the courts which is determined by statute.
>
> In this case the scope of consent between these parties is set out in the arbitration provisions of the sales contracts. In the Panel's view the intention of the parties is clearly expressed in those contracts four of which

refer specifically to disputes "under this contract" and two of which refer to "these arrangements" meaning the specific sales of metal. In the Panel's view there is no credible evidence that the Claimant ever consented to arbitrate either the broad commercial matters arising out of debt restructuring efforts or any other disputes between the parties to the sales contracts. It is also the view of the Panel that the arbitration clauses which form the premise of its jurisdiction here do not imply any intention by the parties to submit other matters to arbitration by it and that in the absence of any evidence of such an intention the word "counterclaim" as used in the LME Rules does not further extend its jurisdiction to such matters".

5 The claimant's submissions

Mr. Thomas on behalf of MDL submitted as follows:

Where a party has brought a claim in an English court in general, that person (as a matter of English law) gives the court jurisdiction to entertain a counterclaim against him (even if the court would not have jurisdiction to entertain the relevant counterclaim if it had been brought as a claim in separate proceedings).

6 MDL's case is that in relation to arbitration claims, arbitrators have jurisdiction over counterclaims if

(a) the counterclaim is transactional, ie the counterclaim arises under the same contract or a closely related contract, even if the counterclaim arises under a separate contract which contains an exclusive jurisdiction clause in favour of another court or tribunal, or

(b) the counterclaim is independent (and not transactional) provided the counterclaim does not arise under a contract containing an exclusive jurisdiction clause in favour of another court or tribunal.

7 Mr. Thomas accepts that in the present case MDL seeks to rely on an independent set-off - see the terminology used by Hoffman LJ in Aectra Refining & Marketing Inc v Exmar NV [1994] 1 WLR 1634. Mr. Thomas relied in particular on the obiter observations of Gross J. in Ronly Holdings v JSC Zestafonis Nikoladze Ferroalloy Plant [2004] EWHC 1354 (Comm), in particular at para.33. Mr. Thomas contended that Gross J considered that alleged set-offs were to be taken into account "if not a transaction set-off" provided there was no "procedural bar" of the type discussed in the Alectra (supra) and Glencore v Agros [1999] 2 Lloyd's Rep 410 cases, ie a mandatory stay arising from an exclusive jurisdiction clause applicable to the counterclaim.

8 Mr. Thomas submitted that the authorities as to the jurisdiction of the English court over counterclaims against foreign claimants are relevant to a consideration of whether the parties in the present case impliedly agreed that cross-claims would be within the jurisdiction of the tribunal. MDL say this is not merely a point of academic interest to MDL, nor an attempt to obtain some sort of tactical advantage, and question the ability of MDL to obtain a fair trial of the counterclaim in Zambia within the foreseeable future.

9 The defendant's submissions

Mr. Shackleton on behalf of ZCCM submitted as follows.

ZCCM say that the debt rescheduling proposal referred to in the counterclaim never evolved into a legally binding agreement. It involved nothing more than discussion and a proposal by the government of Zambia which was not subsequently formalised.

The jurisdiction of any arbitral tribunal is derived from the agreement of the parties: without that agreement there can be no arbitration. Any agreement to arbitrate is to be construed narrowly. The jurisdictional powers of the courts and arbitral tribunals are fundamentally different. Case law as to the territorial jurisdiction of the courts is not authority for the jurisdiction of an arbitral tribunal. Submission to the jurisdiction of an arbitral tribunal does not result in the broadening of that jurisdiction beyond the scope of the agreement to arbitrate. A counterclaim is subject to the same formal requirements as any other claim brought before an arbitrator.

Arbitration agreements should be carefully and narrowly construed in order to give effect to the objective intentions of the parties (see National Boat Shows Limited & Anor v Tameside Marine, unreported, 1 August 2001, His Honour Judge Michael Kershaw, QC).

The jurisdiction of courts differs fundamentally from arbitral jurisdiction. Authorities as to the territorial jurisdiction of the courts of England and Wales provide no assistance in the present case. Arbitral tribunals do not have general or territorial jurisdiction.

10 The disputes surrounding the alleged debt rescheduling proposal ("DRP") are not referable to arbitration:

(a) the DRP never evolved into a concluded or legally binding agreement;

(b) there is no evidence that any of the parties to the alleged DRP, including Ramcoz, ever considered that it was legally binding;

(c) the courts have consistently ruled that an arbitration agreement is inoperative where the underlying contract is not concluded;

(d) there is no agreement by any of the parties to the alleged DRP (the Zambian government, Ramcoz, ZCCM, and various Zambian state owned enterprises Zanaco, CEC and Zesko) to submit disputes arising out of the DRP to arbitration;

(e) MDL is not alleged to be a party to the DRP and cannot rely on its subsidiary Ramcoz in this regard;

(f) there is no reasonable relationship between the subject matter of the disputes under the DRP and the subject matter of the sales contracts.

11 The ruling in Ronly Holdings is consistent with ZCCM's position and the award of the tribunal dated 9 September 2004 which decided that the arbitrators had no jurisdiction to determine disputes arising out of the DRP.

12 The circumstances of MDL's counterclaim are far removed from those in Ronly Holdings:

(a) The sales contracts and the DRP involve a completely different subject matter;

(b) the sales contracts and the DRP involve different parties;

(c) MDL is not a party to the DRP;

(d) there is no evidence that the DRP ever involved into a legally binding agreement, nor has MDL sought to establish its existence, beyond informal discussions, before the arbitrators;

(e) the amount claimed by MDL is unliquidated and

(f) ZCCM was only one of the alleged parties to the DRP and the contribution, if any, by ZCCM to losses allegedly suffered by MDL is altogether uncertain.

13 To the extent that Gross J's comments correctly state the law, there is a clear distinction between the approach to be taken in the case of:

(a) a transaction set-off; and

(b) an independent set-off.

14 The set-off sought to be relied on here by MDL is independent in nature. It concerns different parties, arises in relation to a wholly unconnected alleged contract (if any, which is denied) and could scarcely, in commercial terms, be further removed from the contracts under which the LME arbitration was agreed. As such, it was barred from being considered by the tribunal.

ANALYSIS AND CONCLUSIONS

15 The Arbitration Act 1996

Section 30 of the 1996 Act provides as follows:

"30. – (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to-

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, and

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part".

16 S.67 of the 1996 Act provides as follows:

67. – (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court –

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.

(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order-

(a) confirm the award,

(b) vary the award, or

(c) set aside the award in whole or in part.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

A challenge to jurisdiction under s.67 involves a re-hearing, not a review (see Peterson Farms Inc v C & M Farming Limited [2004] EWHC 121 (Comm) [2004] 1 Lloyd's Rep 603 at 607 Langley J and the cases there cited).

The Rules and Regulations of the London Metal Exchange: Part 8. The Rules and Regulations of the London Metal Exchange so far as material provide as follows:

> "6.4: Within 21 days of receipt of the points of claim, or of the appointment of the Tribunal if later, the Respondent shall send to the Tribunal and to the Claimant written points of defence stating in sufficient detail which of the facts and contentions of law in the points of claim it admits or not, or denies, on what grounds, and on what other facts and contentions of law it relies. Any counterclaims shall be submitted with the points of defence in the same manner as claims are set out in the points of claim".
>
> "10.2: The Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, or of the existence of validity of the contract of which the arbitration clause forms part. For this purpose, an arbitration clause which forms part of a contract and which provides for arbitration under these Arbitration Regulations shall be treated as an agreement independent of the other terms of the contract. A decision by the Tribunal

that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause".

17 Analysis

1 In civil proceedings before the courts of England and Wales a person who begins proceedings in general gives the court jurisdiction to entertain a counterclaim against him or her which may extend to cases in which, if separate proceedings were to be brought, permission to serve process out of the jurisdiction might not be obtainable (Dicey & Morris on the Conflict of Laws 13th Ed, Vol 1 at para.11-108 and the cases there cited).

2 In civil proceedings in England and Wales, it is necessary to distinguish between independent set-off and transaction set-off. In his judgment in Aectra (supra) at p.1648 and following, Hoffman LJ said

> "... it is necessary to distinguish between what Mr. Philip Wood, in his valuable book on 'English and International Set-off' 1989 calls 'independent set-off' and 'transaction set-off'. Independent set-off, as its name suggests, does not require any relationship between the transactions out of which the cross claims arise ... Transaction set-off, on the other hand, is a cross-claim arising out of the same transaction or one so closely related that it operates in law or in equity as a complete or partial defeasance of the plaintiff's claim ... The question of actionability or jurisdiction can arise in different ways, of which the most common will be where, as in this case, the cross-claim is subject to an arbitration clause or where, by reason of a foreign jurisdiction clause, it is subject to the jurisdiction of the courts of another country ... In the case of transaction set-off, the authorities are in favour of allowing the set-off to be pleaded, notwithstanding its submission to arbitration or a different jurisdiction ... In cases of transaction set-off, this obviously makes good sense ... This argument is not nearly so strong in the case of independent set-off, which is not a substantive defence to the claim but a procedure for taking an account of the balance due between the parties ... It entitles the defendant to require that the merits of an unrelated cross-claim be tried in the same action and converts the plaintiff's original cause of action into the right to a balance due on the taking of an account ... it is of the essence of independent set-off in English law that the defendant should be entitled to have the merits of his cross-claim tried by the court in which he has been impleaded. The machinery of the Statutes of Set-off simply cannot operate unless this is possible".

Philip Wood, in his admirable and monumental work on 'English and International Set-off' defines a transaction set-off (abatement, equitable set-off and United States recoupment) as follows: at para.1-20

> "Transaction set-off arises where the reciprocal claims flow out of the same transaction or closely connected transactions in circumstances, generally, where the creditor claiming his primary claim has defaulted in performance of the very obligation for which he is seeking payment. Unlike independent set-off, the remedy is self-help and neither claim need be liquidated. The seller who claims the price of goods can be required to bring into account damages for defective goods. A shipowner claiming charter-hire can be required to bring into account losses caused to the charterer by reason of the owner's wrongful withholding of the vessel. A landlord claiming rent can be required to bring into account damages for breaches of the tenancy agreement".

3 Arbitration is a consensual process and this will usually prevent the introduction into the arbitration of claims or parties which were not within the scope of what the contracting parties agreed to (Russell on Arbitration, 22nd Ed, para.3-034 p.91).

4 Whether in any particular case a dispute falls within an agreement to arbitrate depends primarily upon the wording of the agreement (Mustill & Boyd, Commercial Arbitration, 2nd Ed, p.108).

5 Thus the jurisdiction of arbitrators depends upon what matters have been submitted to arbitration in accordance with the particular arbitration agreement (see s.30(1)(c) of the 1996 Act) and the true construction of the particular arbitration agreement.

6 An award should not deal with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contain decisions on matters beyond the scope of the submission to arbitration (see s.103(2)(d) of the 1996 Act in relation to Recognition and Enforcement of New York Convention Awards and Article 34(a)(iii) of the UNCITRAL Model Law).

7 As

(1) the jurisdiction of arbitrators depends upon what matters have been submitted in accordance with the particular arbitration agreement and the true construction of the particular arbitration agreement and

(2) arbitration agreements are found in numerous different and varying terms domestically and internationally,

any attempt at statements of general principle must always be subject to the caveat that regard must be had to the true construction of the particular arbitration agreement in question.

8 Where the claimant has a disputed claim which falls within an arbitration agreement, and the respondent raises a cross-claim which lies outside the clause, the arbitrator does not have jurisdiction to entertain the cross-claim unless it provides a true defence, Mustill & Boyd (supra) at pp.130 and 131 and E.D. & F. Man v Société Anonyme Tripolitaine des Usines [1970] 2 Lloyd's Rep 416 Donaldson J.

9 As Redfern & Hunter, Law and Practice of International Commercial Arbitration**,** 4th Ed, at p.310 observe:-

> "Jurisdiction in relation to a counterclaim is occasionally contested by a claimant on the grounds that the respondent's claims do not fall within the contract that contains the arbitration clause. If this is so, the arbitral tribunal has no option but to exclude it. The arbitral tribunal may not exercise jurisdiction over claims that do not come within the scope of the arbitration clause. The position is similar for claims of set-off, under which a respondent may resist payment of a debt on the basis that the claimant is in arrears with respect to contractual payments owing to the respondent. However, if the set-off is in relation to the same contract, or a contract with a sufficiently close connection to the main contract, then the arbitral tribunal may well have jurisdiction to consider the claim. This is a question of construction of the arbitration clause".

10 In "A Guide to the New ICC Rules of Arbitration", Yves Derains and Eric A. Schwartz when commenting on ICC Article 5(5) ("Any counterclaim (s) made by the Respondent shall be filed with its answer and shall provide: ...) say -

> "the Respondent has the right in the same arbitration proceedings to pursue its own claims against the Claimant, provided, of course, that the arbitration clause covering the Claimant's claims also extends to those of the Respondent".

11 At para.33 of his judgment in Ronly, Gross J observed obiter:

> "i) Questions of some intricacy arise as to the classification of set-offs and the correct approach to be followed when a claim before

> an arbitrator is met by an argument that there is a set-off available arising under some separate transaction over which the tribunal does not have jurisdiction. Provisionally, I would be minded to think that an arbitrator does or should have jurisdiction to allow a 'transaction' set-off, in effect amounting or akin to a defence, to be raised to reduce or extinguish a claim, even though that set-off arises under another contract, outside the tribunal's jurisdiction: see: Aectra Refining, at pp.1648 and following and Glencore v Agros, at pp.416-417 ... As it seems to me, the investigation and determination of the availability and amount of such a set-off do not involve the arbitrator arrogating to himself a jurisdiction over separate contracts which he does not have (albeit that considerations of issue estoppel may well arise); instead, these steps form part of the process of arriving at a conclusion of whether a defence is properly available in respect of the contract as to which the arbitrator alone has jurisdiction. However, all these observations are provisional only, given that ... such questions do not arise for decision in this matter.
>
> ii) Where a decision is called for in respect of a set-off said to arise under a separate contract, then, absent agreement: (1) the point must be properly in issue before the arbitrator; (2) the arbitrator must necessarily investigate the position prevailing in respect of that separate contract; (3) if need be (and unless the arbitrator is proceeding by way of interim award, for example pending a decision on the separate contract by another court or tribunal and with an appropriate reservation of jurisdiction) the arbitrator must make a determination as to the position prevailing in respect of that separate contract; (4) in the light of any such determination, the arbitrator must come to a conclusion as to whether the alleged set-off is indeed available or whether, if not a transaction set-off, it faces a procedural bar, of the nature discussed in the two authorities referred to above".

As to (i) it seems that Gross J was referring to transaction set-off in the sense defined by Lord Hoffman, drawing on the definition set out by Mr. Philip Wood supra. The report does not set out the terms of the arbitration clause in Ronley. It may well be that Gross J intended in paragraph (ii)(4) to include after the words "whether the alleged set-off is indeed available", the words "under the terms of the particular arbitration agreement". In any event, the observations of Gross J are in my view subject to (7) above.

18 I turn to consider the true construction of the arbitration clauses in the present case and the alleged counterclaim. The six contracts for the sale of copper and cobalt were dated between January 1996 and December 1998. In four cases the arbitration provision was in the following terms,

> "Any disputes under this contract to be settled by arbitration according and subject to the rules and regulations of the London Metal Exchange and this contract to be governed by English law".

In two cases the arbitration provision was as follows,

> "Any dispute shall be settled in London by arbitration according and subject to the rules and regulations of the London Metal Exchange and these arrangements will be governed by English law".

19 The counterclaim must be examined with some care.

(i) The counterclaim is concerned with an alleged agreement to reschedule Ramcoz's debts.

(ii) The alleged agreement was made in about September 1999.

(iii) Ramcoz's key creditors were said to be Zesco, CEC, Zanaco and ZCCM.

(iv) It is alleged that ZCCM agreed (orally) with all the proposals approved by the Minister of Finance.

(v) It is alleged that RAMC Trading (Ireland) Limited ("RAMC") the majority shareholder in Ramcoz agreed with ZCCM that it would arrange for the provision of a US $5 million loan to Ramcoz in exchange for and on the basis that ZCCM would (a) not immediately charge Ramcoz for tolling and refining of copper and (b) agree that all current outstandings together with tolling and refining charges for September 1999 to March 2000 would be deferred by a year.

(vi) "On the basis of ZCCM's undertaking to abide by the Debt Re-scheduling agreement and upon placing reliance on ZCCM's representation to abide by the Debt Re-scheduling agreement, Mr. Gokul Binani of RAMC procured [MDL's] agreement to lend US $1.5 million to Ramcoz as its working capital. [MDL] placing reliance upon ZCCM's representation made to [MDL], RAMC and to the Government of the Republic of Zambia that ZCCM itself will fully abide by the terms of the Debt Re-scheduling

agreement, agreed to make an advance of US $1.5 million to Ramcoz" (para.25).

(vii) "ZCCM however failed to abide by its representation that it will fully comply with the Debt Re-scheduling agreement. In breach of its representation that it will abide by the terms of the Debt Re-scheduling agreement, ZCCM withheld delivering finished copper to Ramcoz from January 2000 and onwards and from April 2000 ZCCM threatened to withhold all copper out-turns "against settlement of debts" which was clearly in breach of its agreement and representation to abide by the Debt Re-scheduling agreement. ... Such delay in the delivery of copper out-turns and the withholding of such delivery caused substantial liquidity problems for the struggling company. As a result of the withholding of delivery and the seizure of the copper out-turns, [Ramcoz] suffered severe cash flow shortage which meant that it became unable to meet its electricity charges in time. The electricity supply was cut off and thereby causing further shortfall in its production and impeding its objective of regenerating income and cash flow for the company. Indeed, ZCCM's refusal to abide by the terms of the Debt Re-scheduling agreement substantially increased Ramcoz's financial liabilities and losses". (para.27)

(viii) "[MDL] suffered loss as a result. It lent US $1.5 million to Ramcoz on the basis of clear representation made by ZCCM that it will fully comply with its obligations under the Debt Re-scheduling agreement which included its representation that it will not insist on payment of the existing liabilities [of Ramcoz] until after the expiry of the first year from the date of the Re-scheduling agreement. [MDL] advanced the monies pursuant to and placing reliance upon representation made by ZCCM or alternatively on the basis of a collateral agreement made between [MDL] and ZCCM to the effect that ZCCM will fully perform its undertaking and abide by its representation that it will fully comply with the terms of the Debt Rescheduling Agreement and therefore not seek the payment of the outstandings until after the expiry of 1 year as said above". (para.28)

(ix) "Although RAMC was subsequently put under pressure to secure further financial support for Ramcoz, and partly it was forced to do so on the basis that a little more investment may help it to recover its previous investments, it is evident that the event which caused damage to Ramcoz's ability to survive as a going concern was the disconnection of electricity which was caused by ZCCM's withholding of the copper out-turns. The news of the disconnection of electricity spread fast and damaged Ramcoz's financial credibility. ZCCM, not only refused to secure agreement from other para-statal companies including the company supplying electricity to Ramcoz to

accept debt re-scheduling, ZCCM itself failed to comply with its own undertaking and representation". (para.30)

(x) As a consequence, [MDL] suffered loss. Ramcoz went into receivership in November 2000. [MDL] has not received the repayment of the sum of US $1.5 million advanced to Ramcoz on the basis of ZCCM's representation. ZCCM is therefore obliged to compensate [MDL] for all losses suffered by [MDL] as a consequence of ZCCM's breach of its collateral agreement with [MDL]. Such loss is quantified by the sum by which [MDL] is out of pocket, ie US $1.5 million plus interest at a commercial rate. Alternatively, [MDL] lost the chance of recovering US $1.5 million from Ramcoz. [MDL] will set off against any sums due to ZCCM its counterclaim for damages and losses caused by ZCCM's breach of its own representation as set out above". (para.31)

20 Thus the counterclaim is for damages for alleged negligent mis-statement (although pleaded as misrepresentation) by ZCCM in about September/October 1999 which (it is alleged) caused MDL to advance US $1.5 million to Ramcoz and/or damages for breach of an alleged collateral contract between ZCCM and MDL made in about September/October 1999 whereby (it is alleged) ZCCM would comply with the terms of an alleged Debt Rescheduling Agreement between Ramcoz, the Government of Zambia, ZCCM, and possibly three other parties. The alleged collateral contract is not alleged to contain any form of arbitration clause. The alleged Debt Rescheduling Agreement is not alleged to contain any form of arbitration clause and it is not alleged that MDL was a party to the Debt Rescheduling Agreement.

21 The terms of the arbitration clause in the present case confer jurisdiction in relation to "any disputes under" the four contracts and "any disputes" in relation to the arrangements comprised in the further two contracts. Thus the terms/scope of the arbitration clauses would extend to claims for damages for defective goods. The terms/scope of the arbitration clauses in the present case did not confer jurisdiction in relation to disputes arising in connection with a wholly unrelated alleged agreement to which MDL was not a party, or in connection with alleged negligent mis-statement concerning a wholly unrelated transaction or in connection with an alleged collateral contract concerning a wholly unrelated transaction.

22 For these reasons, in my judgment the tribunal was correct to rule that it had no jurisdiction in respect of the counterclaim as identified above. This application is accordingly dismissed.