Neutral Citation Number: [2017] EWHC 1090 (Comm)
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**
**IN THE MATTER OF AN ARBITRATION CLAIM**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12th May 2017

**Before**:

**Sir Jeremy Cooke**
**Sitting as a Judge of the High Court**

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**Between:**

**Claim Nos: CL-2015-000645; CL-2016-000629**

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| **Erdenet Mining Corporation LLC** | **Claimant** |
| **- and -** | |
| **1. ICBC Standard Bank PLC** | |
| **2. Standard Bank of South Africa Limited** | |
| **3. London Forfaiting Company Limited** | **Defendants** |

**AND BETWEEN:**

**Claim No. CL-2016-000630**

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| **Erdenet Mining Corporation LLC** | **Claimant** |
| **- and -** | |
| **1. ICBC Standard Bank PLC** | |
| **2. Standard Bank of South Africa Limited** | |
| **3. Amsterdam Trade Bank N.V.** | **Defendants** |

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**Philip Marshall QC and Shane Sibbel** (instructed by Taylor Wessing) for the Claimants
**David Joseph QC, Edward Brown and Stephen Donnelly** (instructed by Clifford Chance LLP) for the Defendants

Hearing dates: 27th April 2017

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# Judgment

**Sir Jeremy Cooke:**

*Introduction*

1. In two Arbitration Claim Forms, the claimant ("EMC") challenges two arbitration awards under section 67 and 68 of the 1996 Arbitration Act ("the Act"). The two awards were made by two separately constituted LCIA Arbitral Tribunals which heard two claims which arose out of two independent but connected trade finance facilities provided by the defendants ("Standard"):

   (1) Claim CL-2016-000629 is a claim arising out of an LCIA arbitration between the first three named defendants which claimed against EMC and Just Group LLC ("Just") as respondents. The arbitration agreement in dispute was contained in a written Surety and Undertaking Agreement dated 9th July 2009 ("the SUA") purportedly signed by Mr Ganzorig, the General Director of EMC. Under the SUA, EMC guaranteed and agreed to indemnify the Funding Costs and Relevant Obligations of Just in an underlying trade finance facility of the same date ("the 2009 Facility") as subsequently amended. Mr Thomas H. Webster was appointed as presiding arbitrator of the tribunal. Mr Christopher Lau SC and Mr Dominic Underhill were the co-arbitrators.

   (2) Claim CL-2016-0000630 is a claim arising out of an LCIA arbitration between the first, second and fourth named defendants which claimed against EMC and Just as respondents. The relevant arbitration agreement in dispute was contained in a written facility agreement dated 5th August 2010 ("the Original 2010 Facility") pursuant to which EMC guaranteed and agreed to indemnify the obligations of just in an underlying trade finance facility. In that arbitration, Mr Thomas H. Webster was the sole arbitrator.

2. EMC maintained that the SUA and the Original 2010 Facility, which enshrined the arbitration clauses in question were not binding upon it and that each bore a signature of Mr Ganzorig which was forged. Consequently it was said that the Arbitrators lacked any jurisdiction. Issues also arose as to the authority of Mr Ganzorig to sign the agreements in question and the capacity of EMC under its charter and as a matter of Mongolian law to conclude the guarantee of the obligations of Just which was a private company in Mongolia. EMC was, at the relevant time, owned 51% by the Government of Mongolia through a para-statal organisation and 49% was owned by Rosneft, the Russian gas and oil company.

3. EMC sought to have the jurisdictional issue determined by this Court under section 32 of the Act but Standard did not agree and when an application was made to the arbitrators for permission to apply to the court for that purpose, the arbitrators decided that the question of jurisdiction was so tied up with the issues of substantive liability that they should deal with all issues at the same time.

4. The tribunals heard the two arbitrations together because of a number of common issues and issued two awards dated 20th September 2016 with elements of common reasoning in them:

(1) They declared that EMC was bound by the SUA and the Original 2010 Facility and by the arbitration clauses therein.

(2) In the arbitration under the SUA they found EMC liable in the sum of USD $36 million plus interest thereon, the amount of which was to be determined.

(3) The tribunal in the Original 2010 Facility arbitration found EMC liable in the sum of USD $14,988,425.60 plus interest thereon with the amount of such interest to be determined.

(4) The tribunals reserved jurisdiction in respect of Standard's claims in tort against EMC (which came in by late amendment) and the issues of interest and costs.

5. The issue of the claim forms led to the making of an application by Standard under section 70(6) and 70(7) of the Act, seeking security for costs and an order that the amounts found due under the awards should be brought into court pending the determination of EMC's challenges under sections 67 and 68. Although EMC initially opposed both applications, there is now, subject to some questions of detail, agreement on the subject of security for costs and the issue with which this Court is primarily concerned is the question arising under section 70(7), namely whether the court should order that the money payable under the Awards should be paid into court, or other security given.

6. The terms of section 70(7) apply both to applications under section 67 and 68 and read as follows:

> "The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application … and may direct that the application … be dismissed if the order is not complied with."

*The Criteria to be applied under section 70(7) of the Act*

7. The Departmental Advisory Committee Report on the Arbitration Bill in 1996 included the following in reference to the proposed clause 70 which became section 70. In commenting on the power to order security or bring the money payable under the award into court, the report said:

> "This is a tool of great value, since it helps to avoid the risk that while the appeal is pending, the ability of the losing party to honour the award may (by design or otherwise) be diminished."

8. Although there is nothing in the terms of section 70(7) to fetter the discretion of the court in exercising this power, there is now a series of authorities which speak with one voice as to the criteria to be applied. The first of these is a decision by Tomlinson J (as he then was) in Peterson Farms v C&M Farming Ltd [2003] EWHC 2298 (QB) [2004] 1 Lloyd's Law Rep 614 where he discussed the different nature of the applications which arise under sections 67, 68 and 69. An award which is challenged either under section 68 as having been made in the wake of a serious irregularity or an award which is alleged to be wrong in law under section 69, has a presumptive validity unless and until set aside. The same is not true of an award challenged under section 67, as to which it is only possible to say of it either that it was made with jurisdiction or that it was not. Under the terms of section 70, the court approaches the matter de novo, by way of a re-hearing and not in any review capacity of the decision made by the arbitrators.

9. The judge also drew attention to the difference between the provisions of section 32 and section 72 of the Act where the jurisdiction of the arbitrators could come before the court without any power in the court to require security. I do not find this in any way surprising however, since section 32 is a provision which enables the court to determine a question as to the substantive jurisdiction of the tribunal as a preliminary point and section 72 makes provision for the situation where an entity who is alleged to be party to arbitral proceedings but has taken no part in them then challenges the jurisdiction of the arbitrators after the event. The essential difference in the position under section 70, where a section 67 application is made is that, ex hypothesi, because the other sections do not apply, the applicant has already taken the opportunity to argue the jurisdiction point before the arbitrators themselves and is thus having "a second bite at the cherry" in making an application to the Court. Since the Act appears to envisage that the normal course will be for arbitrators to determine their own jurisdiction under sections 30 and 31 of the Act and provides for the court to determine a preliminary point of jurisdiction only if the parties agree or the permission of the Tribunal is obtained, the result is that there is the inherent possibility under s 67 of a re-run of the same jurisdictional issues before the court that have been determined by the arbitrators. The potential price to be paid for the "second bite at the cherry" is however the possibility of an order that the amount awarded be brought into court or otherwise secured.

10. The criteria for the exercise of the power under section 70(7), as set out in *Peterson*, in *A* v B [2011] 1 Lloyd's Law Rep 363, in X v Y [2013] 1 Lloyd's Law Rep 230 and in *Konkola Copper Mines PLC v U&M Mining Zambia Ltd* [2014] 2 Lloyd's Law Rep 507, as approved by the Supreme Court in the judgment of Lord Mance in *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2017] 1 WLR 970 at paragraph 43 can be expressed as follows:

    (1) In most cases there will be a threshold requirement that the party making the section 70(7) application demonstrates that the challenge to the jurisdiction is flimsy or otherwise lacks substance.

(2) As a general principle the court should not order security unless the applicant can demonstrate that the challenge to the award will prejudice its ability to enforce the award. Often this will entail the applicant demonstrating some risk of dissipation of assets, although there may be other ways in which enforcement could be prejudiced.

11. There was debate before me as to whether or not the first limb referred to above amounted to a decision by the court akin to the granting of summary judgment or whether it reflects the situation where what used to be referred to as "conditional leave" might be given on such an application. It appears to me that what is required is for the court to take a view, not that the s67 application will necessarily fail (i.e. that there are no realistic prospects of success) but that the points at issue, whilst capable of being put forward as an argument are, to use expressions used in other contexts, "unlikely to succeed" or "shadowy". This appears to me to enshrine the same concept as "flimsy" or "otherwise lacking in substance". If it were otherwise, the section 67 application would be capable of being summarily struck out or dismissed.

12. The second limb has been the subject of different forms of expression also. "Such an order can only be justified … if the existence of the section 67 challenge … in some way prejudices the ability of Y to enforce the award or diminishes X's ability to honour the award". It has been accepted that simple delay in enforcement does not amount to the prejudicing of the winner's ability to enforce the award so that the exercise of the power given to a court in a country which is party to the New York Convention to adjourn enforcement proceedings (pending the determination of the validity of the arbitration agreement in the court of the seat of arbitration, with the concurrent power to order security to be given) could not in itself constitute what is required under that limb. Whilst the courts have not limited this aspect to the issue of dissipation of assets, that appears to be the only basis upon which any court has so far proceeded. In order to show that the ability to enforce the award has been prejudiced or the ability of the applicant to honour it has been diminished, it is therefore effectively necessary to satisfy a similar requirement to that of a freezing injunction, namely the risk of dissipation of assets between the time of the section 67 application and its final disposal.

13. Whilst the first limb of the criteria does not apply to the section 68 challenge, that challenge is of minor significance in the context of Standard's application and no time was spent by the parties upon it in the course of oral argument. The focus has entirely been upon section 67 and the section 70 application in respect thereof. I am bound to say that I could see nothing in the section 68 application in any event, since the serious irregularity was said to be the failure to deal with some accounting points raised by EMC and the point was comprehensively dealt with in later Memoranda incorporated in the Awards under an application made to them seeking correction of the Awards. For present purposes, therefore the section 68 application can be ignored.

14. EMC submitted that:

(1) Standard's applications for security were premised upon the Tribunal's findings being presumed, by the court, to be valid but that this approach

was wrong in law on a challenge under section 67, where the court must come to the matter afresh and without assuming that the arbitral award is right or wrong. In this submission as to the approach of the Court, EMC is undoubtedly correct.

(2) As was obvious from the lengthy nature of the arbitration proceedings involving three or four weeks of lengthy days' hearings with extensive written submissions, the underlying dispute is large and complex, raising a plethora of issues of fact, law and construction, a number of which turned on oral evidence. It was said that the court was not in a position, in advance of trial and full argument to conclude that the challenge lacked substance. It was said that this was particularly the case where there was a possibility of further evidence being made available to the court which was not available to the arbitrators.

(3) Additional evidence and the difference in the court's approach to such evidence, as compared with the arbitrators, could make all the difference between the decision of the court and the decision of the arbitrators. Additional evidence could be forthcoming in respect of production of documents from MNIA, or its successor investigator which could substantially affect the issues.

(4) Further, expert evidence on Mongolian law would be available in the shape of oral testimony with cross-examination whereas before the arbitrators it was in the form of reports only.

(5) Since the arbitrators adopted the IBA rules of evidence and the court would adopt the more stringent requirements of the English rules of procedure requiring any witness to be cross-examined whose witness statement was challenged and for a party's case to be fully put to witnesses, particularly where there were serious allegations of fraud or otherwise, no conclusions could be drawn from the findings of the arbitrators.

(6) This was a complex case requiring extensive investigation of the facts as could be seen from the length of time taken in arbitration and the number of witnesses who gave evidence before the Tribunal. A range of factual issues arose relating to the prior relationship between the parties, allegedly stretching back to 2000, and, in particular, the structure, purpose and execution of a prior loan facility, extended by Standard in 2007 to Just, with a guarantee from EMC. The negotiation of the relevant facilities took place through the intermediary of Just, including the execution of the relevant documents. There was very little dealing direct between Standard and EMC. The structure and purpose of the facilities was an issue with a particular focus on whether or not EMC was a beneficiary of the overall arrangements and whether there was, as described by the arbitrators, a "symbiotic relationship".

(7) It was clear that Just had misappropriated the loan facilities and these had not in fact devolved to the benefit of EMC in any way. The motivation of Mr Ganzorig, Mr Munkhjargal and Mr Amarbat required exploration in

relation to their part in the execution and operation of the agreements upon which Standard relied.

(8) There were difficult questions of construction which arose as to the nature of EMC's obligations, namely whether they were primary or secondary, and whether any liability fell on EMC in relation to amendments and increases which it had not specifically signed or to which it had not specifically consented.

(9) There were a large number of issues under English and Mongolian law including the definition and effect in law of a forgery, questions of corporate capacity, actual and ostensible authority of EMC's officers, agreements by conduct and the effect of section 4 of the Statute of Frauds Act, estoppel by convention, ratification of a forgery and the rule in *Holme v Brunskill*.

(10) In circumstances where there was handwriting evidence that over 100 questioned signatures were not genuine, questions arose as to why such forgeries existed if EMC had agreed to the Facilities. It was said that this had not been properly explained by Standard and in EMC's written Reply Submissions, it contended that there were 13 unanswered questions. (Many of those questions related to amendments to the facilities which were not held to be binding on EMC, so do not in fact fall to be taken into account).

(11) No inferences should be drawn, it was said, from the absence of disclosure of much internal correspondence of EMC relating to the facilities or the failure to produce the Original SUA. The evidence was that MNIA had seized many documents and had prevented access to EMC's server which meant that historic documents could not be produced.

15. How, it was said, could all these issues be dealt with the court in coming to a view as to the supposed flimsiness of EMC's defences, particularly when proper regard must be had to Mr Batkhuu's admissions of fraud on EMC. In assessing whether the challenge was flimsy or had substance, it was undesirable for the court to have to say too much about the merits, in circumstances where there was to be a full hearing in the future. This submission was common ground between the parties.

*Is the challenge flimsy or lacking in substance?*

16. Whilst both parties accepted therefore that I should not say too much about the merits of the application, it is inevitable that I have to form a judgment thereon on the basis of the material currently before me. For this purpose, I ignore the findings of the arbitrators in their Awards as such but to which I was referred by Standard as a convenient mechanism for reciting the relevant evidence which, in Standard's submission, meant that the challenge had to be characterised as flimsy or lacking in substance. It was submitted by Standard that there were some inescapable facts which were either admitted or beyond argument which meant that the challenge to jurisdiction could not succeed.

17. Per contra, EMC submitted that in circumstances where it was common ground between the parties that there had been extensive forgery or

transposition of signatures on finance facility documentation where Mr Batkhuu (the owner of Just) had admitted forgery and given evidence of it at the arbitration, where Standard had essentially dealt with EMC through the medium of Just, where the money provided under the facilities had been used by Just for its own purposes and where there was an issue as to the nature of the obligations undertaken in the SUA and the Original 2010 Facility agreement, it could not be said that the challenge made was not reasonably arguable or sufficiently strong to mean that the first limb of the test was incapable of application.

18. The terms of paragraphs 4 and 5 of the Arbitration Claim Forms are as follows:

(1) The SUA Claim Form

> "4. By the Award, the Tribunal concluded that it had jurisdiction over the Claimant on the basis that: (1) Mr Ganzorig and Mr Munkhjargal signed the Original SUA on or about 7 July 2009, which included the arbitration agreement at Clause 27.2 (Award, paragraphs 212, 236, 276, 307); (2) the Claimant had legal capacity and Mr Ganzorig had legal authority (actual and ostensible) to enter into the Original SUA, and arbitration agreement at Clause 27.2 (Award, paragraphs 332, 264, 371, 412).
>
> 5. Those conclusions were wrong for the reasons set out by the Claimant in the arbitration. In particular, but without prejudice to the generality of the foregoing and the full scope of the issues arising which will (as set out below) require pleading:
>
> (1) The Claimant did not execute the Original SUA and the signatures of Mr Ganzorig and Mr Munkhjargal appearing in the Original SUA had been forged or fraudulently obtained (and therefore non est factum and/or mistake applies);
>
> (2) The Claimant did not intend to be and is not bound by the Original SUA or the arbitration agreement contained in Clause 27.2;
>
> (3) The Claimant did not have legal capacity to enter into the Original SUA including the arbitration agreement (which raises issues of Mongolian law, being foreign law and therefore raising issues of fact);
>
> (4) Mr Ganzorig had no actual or ostensible legal authority to enter into the Original SUA on behalf of the Claimant including the arbitration agreement (which raises, to the extent applicable, Mongolian law, being foreign law and therefore raising issues of fact)."

(5) The 2010 Facility Agreement Claim Form

> "*Grounds*

4. By the Award, the Tribunal concluded that it had jurisdiction over the Claimant on the basis that: (1) the Claimant concluded the Original 2010 Facility Agreement (and ancillary agreements) by conduct (Award paragraphs 349-50); (2) the Claimant had legal capacity and Mr Ganzorig had legal authority (actual and ostensible) to bind the Claimant by conduct to the Original 2010 Facility Agreement and the arbitration agreement at clause 39.2 (Award paragraphs 305, 331, 441, 474-477, 492, 506-507).

5. Those conclusions were wrong for the reasons set out by the Claimant in the arbitration. In particular, but without prejudice to the generality of the foregoing and the full scope of the issues arising which will (as set out below) require pleading:

(1) The Claimant did not by conduct bind itself to the Original 2010 Facility Agreement including the arbitration agreement in Clause 39.2;

(2) Mr Ganzorig had no actual or ostensible legal authority to approve the conduct that was determined to have bound the Claimant to the Original 2010 Facility Agreement including the arbitration agreement at Clause 39.2 (which raises, to the extent applicable, Mongolian law, being foreign law and therefore raising issues of fact);

(3) The Claimant did not have legal capacity to enter into the Original 2010 Facility Agreement including the arbitration agreement (which raises issues of Mongolian law, being foreign law and therefore raising issues of fact)."

19. At the forefront of Mr David Joseph QC's submissions for Standard was a public statement made on 10th February 2017, at the Legal Standing Committee of the Mongolian Parliament, by Mr Munkhbaatar, the Chairman of the Board of Directors of Mongolia Copper Corporation (MCC) and a Board member of EMC. This statement, it was submitted, amounted to an admission of the lack of substance to any challenge to the jurisdiction in respect of either arbitration. The material before the court was the verbatim words used (in translation) at the Legal Standing Committee meeting which was broadcast by the Mongolian National Broadcasting Association. The context was a discussion in Parliament of the conclusion of the working group which had been set up to investigate the issue of the sale of Rosneft's 49% shareholding in EMC to MCC, a subject to which I shall return later in this judgment. The question was asked as to what sums fell to be paid following the decision of the arbitrators in this matter, where reference was made specifically to payment of at least USD $50 million and additional sums giving rise to a total of USD $75-100 million (which doubtless refers to the question of interest and costs) and to a further hearing scheduled in the arbitrations for 20th March 2017. The Chairman of the Government Agency for Policy Co-ordination on State Property, which had oversight of the Mongolian Government's 51% shareholding in EMC said that there were matters in dispute, that lawyers were instructed and the Government did not

wish to provide information on the subject and give precise numbers as this could give rise to problems in court. However, Mr Munkhbaatar, as a Board member of EMC, said this:

> "EMC has launched a dispute in court regarding this issue and the relevant preparations are being made. In reality, EMC is in the situation of losing [the case]. As of today a final decision to pay USD $51 million was issued. Loan interest, forfeiture, late fees and fees to the law firm may be payable in addition thereto."

20. Standard relies on this as a recognition that the reality of the matter is that the case has been lost and an acceptance that payment has to be made. Standard asks rhetorically what other meaning can be given to the words used where the reality is being described and a decision has been taken to pay the sums owing. Whilst EMC has made applications to the court, it is recognised that the reality is that they are made in a lost cause and payment has to be made. Whilst Mr Philip Marshall QC for EMC argued otherwise, I cannot see how these words are capable of any other meaning. It will be noted that the sums in question relate to both arbitrations since $51 million is the total of the two awards.

*Grounds 1 and 2*

*The SUA*

21. It was EMC's case that, although there were signatures on the original of the SUA by Mr Ganzorig and Mr Munkhjargal (the Head of EMC's legal department), which was produced to the Arbitrators, the signature page was transposed by Mr Batkhuu from a Short Form SUA which is an entirely different document which, by clause 18, expressly excluded the surety and guarantee obligations of EMC in their entirety. The evidence of Mr Batkhuu was that the SUA was sent by Standard's lawyers to Just as an electronic version of 40 pages shortly before a meeting with Mr Ganzorig. Mr Ganzorig was unwilling to sign the SUA and knowing this, Mr Batkhuu amended it to exclude all references to financial liability to EMC and created the Short Form SUA. His evidence was that he printed four or five copies, took the execution page from the SUA, attached it to the back to the Short Form and gave it to Mr Ganzorig to sign, which he duly did. EMC's legal department then stamped the first page and EMC kept one copy, whilst Mr Batkhuu took the other signed copies, removed their cover and signature pages and put them back into the SUA. Mr Batkhuu says that he stamped the SUA using a rubber stamp which he had made in Russia and then presented Standard with the SUA intending it be accepted as a validly executed document when in fact that was not the case. Mr Batkhuu said that EMC knew nothing of what he had done.

22. In cross-examination he explained that Mr Ganzorig would not sign the Original SUA because the charter of EMC prevented it from entering into a guarantee, although it had previously guaranteed the 2007 loan facility made available to Just which this new facility was intended to replace. He instructed Mr Munkhjargal to prepare a contract that EMC would be willing to sign and together they drafted that at a meeting, editing the SUA on a computer on Mr

Munkhjargal's instructions with the help of an assistant. The typing, formatting and printing of the document was done by Mr Munkhjargal's assistant but it was Mr Munkhjargal who directed the editing of the document. It was suggested that the editing took more than a single meeting and that Mr Ganzorig subsequently suggested further editing using a paper version.

23. Mr Ganzorig's evidence was that he refused to sign the original SUA because it was not appropriate for a state-owned entity to provide guarantees or take on liabilities for unrelated parties or private businesses. Mr Munkhjargal relayed the news to Mr Batkhuu that EMC might be able to assist Just by executing another document without any financial liability on EMC. Subsequently Mr Batkhuu presented the Short Form SUA which Mr Ganzorig signed and of which he heard nothing further.

24. Mr Munkhjargal's evidence was that the signatures which appeared to be his at the foot of each page of the original SUA were forgeries but that the signature on the signature page was his. He said he signed three or four copies of the Short Form SUA, after which he requested a colleague in the legal department to register but not seal the document. His evidence was that he did not understand the terms of the Short Form SUA as a matter of English or law.

25. Despite the existence of many forged documents, this version of events is inherently improbable for a number of reasons.

(1) No original copy of the Short Form SUA has been produced by EMC despite the evidence of its witnesses that a copy was retained.

(2) A photocopy of the Short Form SUA was produced by EMC consisting of 27 pages, followed by the signature page which is numbered 40, that being the number of the signature page on the Original SUA. That number appears immediately below Mr Munkhjargal's signature but he states that he did not notice it.

(3) The Short Form SUA included clause 18 which had the heading "Non-Financial Guarantee". It provided that "EMC shall not be obliged to guarantee against any losses for agent or arising from or in connection with any failure by Just under this agreement. EMC does not take any financial responsibilities under this Agreement." The effect of this would of course be to negate a fundamental obligation which Standard required EMC to undertake in replacement of the like obligation that it had undertaken for the previous facilities for Just which were being replaced. Furthermore it remained entitled "Suretyship and Undertaking Agreement", a wholly inappropriate title in the light of its contents.

(4) Mr Ganzorig's evidence that the Short Form SUA was in itself a sham is significant and the contemporary documents render his version of events surrounding its production so improbable as to defy acceptance.

(5) The photocopy of the Short Form SUA was first mentioned by EMC four years after the date of its apparent signature and after the arbitration

proceedings began, in July 2014. In the meantime the replacement facility for the 2007 Facility had been operated.

(6) The Short Form SUA contains a multiplicity of changes from the original SUA of a kind which could only have been drafted by someone with extensive understanding of English and of loan facility documentation. On his own evidence, Mr Munkhjargal does not qualify for this description and nor does Mr Batkhuu.

(7) Additionally, supporting security documentation in the form of a Short Form Security Assignment and the Short Form EMC TRAC was also drafted with detailed changes from the original security assignment. This too would have required detailed understanding of English legal documents of this kind. None of the alleged participants in the redrafting had any real working knowledge of the English language, let alone detailed knowledge of financial documents. The work required for these amendments would have been considerable even for such a qualified person.

(8) Funds were advanced on 9th July 2009 following transmission by Just on 7th July to Standard's lawyers of both the cover and signature pages of the Original SUA bearing Mr Ganzorig's and Mr Munkhjargal's signatures. The Original SUA had not been stamped or sealed at that point. These were then sent by Standard's lawyers to Standard on the same day. The sums advanced to Just were advanced as a replacement facility for the 2007 Facility previously in place.

(9) As reflected in an email of 29th July 2009, Mr Mahoney of Standard's lawyers spoke to Mr Munkhjargal about obtaining a stamped version of the documents and Mr Munkhjargal said that this would only be possible after his return from holiday in August. There was no suggestion that the email was not authentic. A cover page of the Original SUA was dated 8th July 2009 and the stamp on it was dated 20th August 2009.

(10) EMC had no pleaded case as to when the Short Form SUA was signed and, as indicated above, produced no original of it. In cross-examination Mr Munkhjargal stated that it was signed on 20th August 2009 but there is no documentary evidence to support that and it is inconsistent with the contemporaneous documentation which shows genuine signatures on 7th July.

(11) The evidence of EMC's witnesses as to stamping and registration of the document with the legal department was also inconsistent with the contemporaneous documents. If Mr Batkhuu's evidence was accurate, every version of the original SUA should have received a stamp on the first page and a stamp on the signature page since Mr Batkhuu stated that it was only after he stamped both of those pages that he presented the Short Form SUA to Standard. The cover page of the Original SUA, however, has neither the stamp on the first page nor the stamp on the signature page and the history shows the stamp being added later.

(12) Standards's witnesses gave evidence of the meeting on 25th August 2010 where the operation of the original SUA and the Original 2010 Facility were the subject of discussion. Mr Munkhjargal and Mr Amarbat maintained that the meeting did not happen in the face of contemporaneous documents showing that it did and later documents relating to a meeting of 24th May 2013 show that Mr Amarbat at this later meeting confirmed the August 2010 meeting.

(13) On 4th September 2010 Mr Munkhjargal confirmed the execution of the amendment agreement to the original SUA and attached the execution version of it which incorporated all of the material terms of the original SUA and did not incorporate clause 14 of the Short Form SUA.

(14) Standard released the security for the 2007 Facility and in July 2009, security was provided to the 788 account in respect of the new facility.

(15) EMC operated the 788 account with transfer instructions from Mr Amarbat, that account being the security account.

(16) Whilst it was EMC's case that it had been deprived of relevant documents by an investigation by the Mongolian National Investigation Agency, which had seized documents and computers and would not allow EMC access to them in the course of the arbitration and that EMC did not have access to its server in order to produce historic documents, the fact remains that a large number of historic documents were disclosed but no operational Short Form SUA. In a witness statement served two days prior to the hearing of this application, a solicitor acting for EMC stated that the investigation had been taken over by the Independent Authority Against Corruption in September 2016 and in consequence, the confiscated material may become available. The IAAC allowed EMC to review documents in the former's possession and to take copies over a period of two days in March of this year. EMC estimated that it was provided with 42 bundles of materials (approximately 10,500 pages) for review but permission was not being given by the authority for disclosure of any documents to EMC's solicitors. There is however no suggestion that the original Short Form agreement was seen or is available.

26. Although points can be made by EMC and were made by Mr Philip Marshall QC on their behalf, none of them come anywhere near counteracting the effect of this body of evidence. It was said that there was no direct contact between Standard and EMC in relation to the 2007 Facility until well after the execution of the 2009 Facility and that the bank dealt with Just throughout. It was said that the 2009 Facility made no reference to the 2007 Facility but there is no doubt on the facts that the one replaced the other. It is further said that EMC had no debt under the 2007 Facility but the fact is that it guaranteed that Facility in the same way that it was said to guarantee the 2009 Facility under the SUA. It was argued that because Standard had no direct contact with EMC in relation to the 2009 Facility either, it was Mr Batkhuu's fraud on EMC which gave rise to the original SUA in circumstances where EMC had only approved the Short Form SUA with no liability on its behalf. Reliance was placed upon the evidence of Mr Ganzorig, Mr Batkhuu and Mr

Munkhjargal and the submission was made that the court could not come to a view about the insubstantiality of EMC's position without hearing their evidence first hand. The reality is however that their evidence was not only inconsistent with the contemporaneous documents but inconsistent with each other and the whole concept of a Short Form SUA made no sense in circumstances where the 2009 Facility did replace the 2007 Facility and were operated thereafter by Just and EMC under the Security Assignment and TRAC.

*The Original 2010 Facility Agreement*

27. The handwriting experts agreed that the signature of Mr Ganzorig on the Original 2010 Facility Agreement was simulated but Standard maintained that EMC was bound by that Agreement by reason of its conduct in operating the Agreement even if Mr Ganzorig did not authorise others to sign it on his behalf. Both the prior background to that Facility and its operation showed the full acceptance by EMC that it was bound by the terms of the Original 2010 Facility Agreement.

28. Standard pointed out that there were again a number of facts which were incapable of contradiction and where EMC acknowledged that it was bound. First, it was bound by amendments to the Tripartite Agreement pursuant to which EMC issued $27 million in EMC Promissory Notes. Those amendments provided that the Notes were issued in respect of "advance payment of transportation cost" and provided for Just to reimburse EMC in respect of the Notes. There was however no repayment schedule. There was no doubt of these amendments or EMC's issue of the Promissory Notes in March 2010, the object of which was to "keep supplies going from suppliers to Just and Just to EMC".

29. In May 2010 Mr Ganzorig signed amendments to the Copper Contracts with a company related to Just, increasing the amounts of copper to be sold to that company. On 15th June 2010 Standard sent a revised term sheet for the proposed 2010 Facility to Just which, it was acknowledged, was passed on to EMC and translated for Mr Amarbat. The term sheet provided that the Facility was for the purpose of paying off the EMC Promissory Notes.

30. On 8th July 2010 Just sent Standard a copy of the 2010 term sheet which bore the signatures of Mr Ganzorig and Mr Amarbat for EMC as well as signatures on behalf of Just. Attached to that term sheet was a signed delivery schedule for the amounts of copper covered by the amendments to the copper contracts which had earlier been signed by Mr Ganzorig.

31. By that date Standard had circulated draft documentation for the Original 2010 Facility with an Assignment to Standard of the benefit of a sale contract dated 19 February 2008 between EMC and Milliford Global Corporation (Milliford) which had been signed by Mr Ganzorig for EMC. Mr Amarbat, in evidence, said that he selected the Milliford contract for assignment because the 2010 term sheet had been signed and by a letter of 15th July 2010, Mr Amarbat approved the draft documentation for the Original 2010 Facility Agreement.

Although Mr Amarbat contested the authenticity of his signature to that letter, there was no expert handwriting evidence to support that suggestion.

32. Whilst the handwriting experts agreed that the EMC signatures on the Original 2010 Facility Agreement were simulated, the contemporaneous evidence suggests that the execution copies of the documents for the Facility were taken to EMC by Ms Badamsetseg and came back with her in the form now seen and which she passed on to Standard's lawyers. There is no suggestion in the records that Mr Batkhuu was involved in this at all. 5th August 2010 was the date which appeared on the original 2010 Facility Agreement.

33. On that date, EMC gave notice to Milliford of the assignment to Standard of the benefit of the sales contract with Milliford. On the same day EMC transmitted to Just a copy of that notice of assignment with a signature on it which the handwriting experts agreed was a simulated signature for Mr Ganzorig.

34. However Mr Amarbat of EMC acknowledged receipt from Milliford of its acknowledgement of receipt of the notice of assignment of the Milliford contract by EMC to Standard.

35. On 6th August 2010 EMC registered the security account ending with the numbers 148 with the Mongolian Ministry of Finance and Mr Amarbat and Ms Tsolmon of EMC gave instructions for the operation of the 148 account into which the proceeds of the copper sales were to be paid by way of security for the Original 2010 Facility.

36. Sums were drawn down under that Facility and used to pay off EMC's Promissory Notes which were returned to EMC within a matter of 3 or 4 days.

37. The reality of the matter is that the conduct of EMC is incomprehensible in relation to the security given to Standard in the form of the benefit of the sale contract with Milliford and the operation of the 148 account, unless EMC was bound by the original 2010 Facility Agreement. EMC had approved the term sheet and knew that the purpose of the loan was to pay off the Promissory Notes which it had issued and which were returned to it when the monies loaned were drawn down to repay the beneficiaries of those Notes.

38. Once again, as with the original SUA, there is clear contemporaneous evidence of the meeting on 25th August 2010 between Standard and EMC, with discussion of the operation of the facility recorded in the notes, although Mr Munkhjargal and Mr Amarbat maintained that they were not present at this meeting where both of the Facilities were discussed. Moreover, there is documentary evidence showing EMC's operation of the 148 account and giving instructions to Standard in that connection. Between September 2010 and November 2012, Mr Amarbat gave instructions to pay the principal and interest relating to the original 2010 Facility from the 148 account, including instructions which expressly referred to the notice of assignment to Milliford and the Milliford form of acknowledgement of that notice.

39. Furthermore, in letters of 6th May and 23rd June Mr Amarbat wrote to Standard referring expressly to the Original 2010 Facility Agreement and in the letter gave instructions to transfer the monies from the 788 to the 148 account, a process which was repeated subsequently on 3rd August. Mr Amarbat's knowledge and operation of the security accounts on both Facilities is demonstrated by this documentation.

40. The accountancy evidence showed that $136.2 million was paid by Milliford pursuant to the 2010 Security Assignment to the 148 account. EMC received none of the proceeds of the Milliford contract directly in its Mongolian account between 2010 and 2013 and could not have failed to realise that the proceeds were being paid to the 148 account pursuant to the 2010 security assignment. Until at least January 2013 EMC operated both the 788 account and the 148 account and repaid principal and interest on the Original 2010 Facility.

41. As the arbitrators found, EMC's case that it did not authorise or approve the Original 2010 Facility Agreement fails to deal with three fundamental issues:

(1) How EMC paid off the $27 million in EMC Promissory Notes that were returned to EMC in August 2010.

(2) Why the original 2010 Facility Agreement was performed for over 2 years by Mr Amarbat with tens of millions of dollars being paid into the security account numbered 148.

(3) Why no objection was raised to the Facility Agreement at any time prior to May 2013.

42. The arbitrators found at paragraph 344 of their Award that:

> "344. Without repeating the discussion under Issue 1(A):
>
> (1) EMC and in particular Mr Ganzorig assumed primary liability to pay $27 million to the holder of the EMC Promissory Notes to assist Just financially. To ensure that Just had the benefit of the EMC Promissory Notes, it was essential that Just obtain financing for them.
>
> (2) EMC represented by Mr Ganzorig and Mr Amarbat signed the 2010 Term Sheet with the revised delivery schedule to MH to induce Standard to prepare and conclude the Original 2010 Facility Agreement.
>
> (3) EMC assigned the proceeds of the Milliford Contract to Standard as security for the Original 2010 Facility Agreement to be paid to the 148 Account and Milliford actually paid $136 million to the 148 Account.
>
> (4) EMC received the EMC Promissory notes from Savings and Golomt Bank after those banks had received the $27 million

proceeds of the Original 2010 Facility Agreement. Therefore EMC received a direct benefit of the proceeds of the Original 2010 Facility Agreement.

(5) On 25 August 2010, Messrs Amarbat and Munkhjargal confirmed that EMC had entered into the Original 2010 Facility Agreement.

(6) EMC by Mr Amarbat performed the Original 2010 Facility Agreement by giving instructions to repay principal and interest under the agreement from September 2010 to November 2012. On 23 June 2011 for example Mr Amarbat sent a letter to Standard stating in relevant part:

> *Ref. Funds Transfer from EMC's account no. 100099788 to EMC's account no. 1001135148*
>
> *We refer to the Facility Agreement of US$27,000,000 dated 05 August 2010.*
>
> *Please be requested to process the following instructions:*
>
> *[…]*
>
> *ii. Debit US$ 1,420,036.96 from account no 1001135148 to settle the principal and interest due on 6 July, 2011 on the above facility.*

(7) Until May 2013, EMC not only performed the Original 2010 Facility Agreement but also never objected to its terms. Mr Amarbat would not have operated a facility without Mr Ganzorig's approval. The only conclusion of an honest sensible businessman would be that there was a contract in the terms of the Original 2010 Facility Agreement.

(8) Unlike in the *Baird* case, there is no sensible explanation for these actions other than that the parties wished to enter into contractual relations on the terms of the Original 2010 Facility Agreement. Moreover, it is obvious that the parties would not have acted as they did if they did not understand that they were bound by the Original 2010 Facility Agreement."

43. In my judgment there is nothing to counteract the weight of the evidence and the inferences which inevitably fall to be drawn from it, which are those which the arbitrators drew.

*Conclusion on Grounds 1 and 2*

44. Whilst I do not rely on the findings of the arbitrators because the court must look at the matter and form its own view, the reality is that the Awards do recite facts based on contemporary documents which militate against EMC's case and render its evidence so improbable that it can rightly be said that its defences lacked substance. The ability to produce some documentation of an historic nature but not others and in particular the inability to produce the Original Short Form SUA and correspondence surrounding it is telling. Whilst it was EMC's case that the absence of correspondence was not surprising, given the fact that Just acted as an intermediary, the reality was that Messrs Ganzorig, Munkhjargal and Amarbat gave evidence of their dealings which must have been supported by documentation and documentation showing the operation of the loan facilities contradicted their own evidence. The Short Form SUA version of events is implausible in the extreme and the way in which the facilities were operated, with EMC's knowledge and action is beyond argument.

45. On the basis of the materials before the Court, whilst I reach no conclusion which could in any way bind another Judge, I can come to no other conclusion that Grounds 1 and 2 are indeed flimsy and lacking in substance within the meaning of the authorities.

*Grounds 3 and 4*

46. These are the grounds which raise the question of the legal capacity of EMC to enter into the original SUA and the Original 2010 Facility Agreement including the arbitration clauses contained therein and the question of Mr Ganzorig's actual or ostensible authority to enter into the original SUA or to approve the conduct that bound EMC to the Original 2010 Facility Agreement.

47. There is a fundamental underlying fallacy in these grounds put forward by EMC because of the separability of an arbitration agreement under the provisions of section 7 of the Act. This section provides:

> "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

48. The questions which arise therefore in relation to the legal capacity of EMC or the authority of Mr Ganzorig are limited to the question of capacity or authority to conclude an arbitration agreement, as opposed to the financial obligations undertaken in the SUA and the Original 2010 Facility Agreement. EMC has failed to grapple with this distinction. Neither of the Mongolian law experts addressed the question of Mr Ganzorig's authority to conclude binding arbitration agreements or the capacity of EMC to do so. On the question of authority it was clear on the evidence that Mr Ganzorig had concluded any number of arbitration agreements in the copper contracts which in themselves involved substantial sums of the order of $10 million or more. There was no

suggestion that he did not have authority to do so nor that EMC acted ultra vires in concluding such agreements through him.

49. Of course, if no agreement had been concluded at all on the terms of the SUA because of the absence of any signature or if no agreement had been concluded at all on the terms of the original 2010 Facility Agreement because there was no acceptance by conduct, there would then be no contract in existence at all which contained an arbitration clause. If however Grounds 1 and 2 are concluded against EMC, there is no separate point about the capacity of EMC or the authority of Mr Ganzorig. The points at issue on capacity and authority related to the financial elements of these facilities, namely the capacity to guarantee the obligations of a private company and the authority of Mr Ganzorig to conclude contracts with a value exceeding $10 million without consultation with the Deputy Director.

50. As Mr David Joseph QC pointed out, the challenge which is made on Grounds 3 and 4 is not, when properly analysed, a challenge under section 67 at all but a challenge on substantive issues. Grounds 3 and 4 do not present grounds for a challenge to the jurisdiction of the arbitrators because of the nature of an arbitration clause in a wider agreement. Contrary to the submission of Mr Philip Marshall QC for EMC, there is nothing in the decision of the Supreme Court in *Fiona Trust v Privalov* [2007] UKHL 40. There, Lord Hoffmann, at paragraph [34] said:

> "Where the arbitration agreement is set out in the same document as the main contract, the issue whether there was an agreement at all may indeed affect all parts of it. Issues as to whether the entire agreement was procured by impersonation or by forgery, for example, are unlikely to be servable from the arbitration clause."

51. This does not mean however that other issues which affect the validity of obligations undertaken affect the validity of the arbitration clause. That is the whole point of section 7 of the Act.

52. Just as other issues raised by EMC relating to the Statute of Frauds, the rule in *Holme v Brunskill*, the ambit of the obligations undertaken in the Original SUA and the Original 2010 Facility Agreement in relation to variations, amendments and further advances and sums drawn down under Amendments which were not signed or authorised, raise substantive and not jurisdictional issues, so also do questions of capacity of EMC and the authority of its officers, since both of these relate to the power to conclude certain types of financial obligation and not to conclude an agreement to arbitrate.

53. I conclude therefore that the grounds put forward by EMC for challenging the jurisdiction of the arbitrators in both references are indeed flimsy and lacking in substance.

*Prejudice in the enforcement of the Award*

54. It was accepted by Standard for the purposes of this application that it was required to show a risk of dissipation of assets by EMC in order to satisfy the second limb of the test put forward in the authorities.

55. The evidence adduced by Standard establishes, with no contradictory evidence from EMC, that:

(1) There is no realistic prospect of enforcing the Awards in Mongolia until the challenges in this Court have been resolved.

(2) EMC has no assets in the UK or in any jurisdiction subject to the Regulation.

(3) The audit reports for EMC's accounts between 2009 and 2013 were qualified in every year on a number of different issues including the provision of insufficient information relating to the value of assets.

(4) The audit firm changed twice between 2009 and 2013.

(5) The carrying amount of certain assets had been revalued upwards in 2009, 2010, 2011 and 2013 in circumstances where there had been a material decline in net assets between 2011 and 2013 and net current liabilities in 2013 of $150 million.

(6) EMC has filed no accounts since 31st December 2013 contrary to Mongolian law and has failed to answer requests for financial information in relation to that period.

(7) It is unlikely that a Mongolian court would order any party to provide any security pending the disposal of the challenge in this Court.

(8) In mid-2016 a 49% shareholding in EMC previously owned by Rosneft/the Government of the Russian Federation was sold to Mongolian Copper Corporation (MCC) for a reported total purchase price of $400 million.

(9) There are at least two official investigations into the legality and/or propriety of EMC's activities, namely a joint investigation by the Ministry of Finance and the State Property Agency under the direction of the Mongolian Parliament's Economic and Legal Standing Committees – commonly referred to as the Joint Standing Committees Investigation; and a further joint investigation by the Bank of Mongolia, the Ministry of Finance and the State Property Agency under the leadership of the National Audit Office.

56. I have already mentioned, earlier in this judgment, the statements made in the Mongolian Parliament by members of the Joint Standing Committee Investigation. The Standing Committee established a working group with the duty of investigating the acquisition by MCC of the 49% share of EMC from the Russian interests. The head of the working group and the head of the Standing Committee made statements to the Press and Parliament. The statements gave the following information:

(1) It had been concluded that the sale of the 49% of EMC to a third party by the previous Government in June 2016 was in violation of the law.

(2) The purchase price of US$400 million approximately was financed by loans obtained by MCC from the Trade and Development Bank to companies formed by the director of that Bank and individuals related to him. MCC used that money to purchase the 49% shareholding.

(3) In so doing, the Trade and Development Bank violated the law in its use of monies deposited with it.

(4) The working group concluded that it was appropriate for the Government to take back the 49% shareholding which had been purchased with these funds and to take EMC entirely into State ownership.

(5) Between 27th June 2016 and 21st November 2016 EMC paid dividends to MCC. These dividends comprised US$47 million for the year 2012 and US$8.6 million in respect of 2013. MCC had no connection whatever with EMC in those years as it was not a shareholder then and has dissipated the money.

(6) Approximately MNT 2 billion has been transferred by EMC to companies associated with its previous management and political connections.

(7) The impact of all of this has been to diminish the tax take of the Mongolian State.

57. A freezing order was granted against EMC in connection with another matter in the sum of approximately $8-9 million but this debt has very recently been discharged. The court that granted that freezing order must have been satisfied, as am I on the evidence available, that there is a serious risk of dissipation of assets by EMC and in consequence the challenge to the arbitrators' jurisdiction does prejudice the ability of Standard to enforce the Awards since it provides the opportunity for further activity of this kind.

58. It is not enough for Mr Marshall to submit that what has happened is past and that there is no evidence that things will be worse in the future. Past conduct is a guide to future conduct in the absence of any evidence of a change in the corporate governance which would resolve the issues which Mr Joseph describes as "financial delinquency". I was told on instructions that the Standing Committee's approval of the working group's conclusion that EMC should be nationalised has led to legal challenge, as might well be expected given the sums of money involved in the purchase price and loans.

59. The power under section 70(7) is to be exercised to avoid the successful party being prejudiced in the enforcement of the Award by the challenge to it. It is right to say that they are not designed to put the successful party into a better position than before. It was suggested that all that Standard's evidence amounted to was to show EMC's generally weak financial position and that this would not suffice. If the evidence showed that EMC was not able to pay now, any further deterioration in its financial circumstances would be of no

significance. Furthermore it was suggested that the effect of making an order would be to stifle the challenges which EMC wished to make.

60. EMC has, however, chosen to produce no evidence as to its financial condition at all. It has produced no evidence to show that an order for security would stifle the claim, whilst asserting that it might well do so and that it would be unjust to make such an order. Regardless of its apparent cash shortage, it is clear since 25th August 2016 it has paid out some $40 million in prepayments and $58 million by way of unlawful dividends.

61. As Mr David Joseph QC submits, there are serious deficiencies in EMC's financial governance and corporate management. As the reports in Parliament and other evidence before the Court makes plain, there has been significant corruption with at least two changes of management since the departure of Mr Ganzorig. There have been wholesale failures to comply with banking law, the law relating to accounting (the Glass Accounts Law) and company/administrative/constitutional law in relation to the sale of the 49% shareholding. Whilst these matters are the subject of inquiry there is no evidence before the Court that there has been a reform of the management structures or that there will in the future be ethical governance or control. What appears to have happened in the period immediately before and after the issue of the two Awards in the references with which I am concerned is a significant dissipation of assets.

62. For these reasons I consider that the second limb of the test set forth in the authorities is also satisfied.

*Conclusion*

63. In the light of the above, I conclude that EMC should be ordered to pay into court or otherwise secure the amounts due under the Awards and that its applications under section 67 and 68 be dismissed if the order is not complied with. It may be that there can be agreement as to the date for such compliance, but if not, I will hear submissions from the parties thereon before making an order to this effect.

64. There remain further directions which fall to be given which may be capable of agreement. If not, I will make any necessary ruling when handing down this judgment.

65. It appears to me inevitable that costs should follow the event unless there are some special factors of which I have no knowledge. As to the form of the costs order, if there is no agreement I will again make any necessary ruling.