Case No: CL-2016-000741

Neutral Citation Number: [2017] EWHC 2228 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building, 7 Rolls Buildings
Fetter Lane, London

Date: 05/09/2017

Before :

MR JUSTICE BLAIR

- -

Between :

Autoridad del Canal de Panamá	**Claimant**
- and -	
(1) Sacyr, S.A.	**Defendants**
(2) Salini-Impregilo S.P.A.	
(3) Jan De Nul, N.V.	
(4) Constructora Urbana S.A.	
(5) Sofidra S.A.	

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Graham Dunning QC, Manus McMullan QC and **Damien Walker** (instructed by **Mayer Brown International LLP** and **Vinson & Elkins RLLP**) for the **Claimant**
Rhodri Davies QC and **Nehali Shah** (instructed **by Norton Rose Fulbright LLP**) for the **First Defendant**
David Foxton QC and **James Sheehan** (instructed by **White & Case LLP**) for the **Second, Third and Fifth Defendants.**
Christopher Harris (instructed by **Reynolds Porter Chamberlain LLP)** for the **Fourth Defendant**

Hearing dates: Monday 26th June to Thursday 29th June 2017

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Judgment

Insert Judge title and name here :

1. This is a claim by the claimant employer which is the beneficiary under six advance payment guarantees ("**APGs**"), each subject to English law/exclusive jurisdiction, which were entered into by the defendants, a consortium of construction contractors, in relation to advance payments made by the employer. It is one of a number of disputes between the parties, which are otherwise the subject of ICC arbitration in Miami. The claim is for US$288,275,465.20, which though a substantial number, is a relatively small part of the overall picture.

2. The factual background is the widening of the Panama Canal, a major engineering project which took place (in broad terms) between the commencement of the procurement process in 2007, and the opening of a third set of locks on 26 June 2016. The new locks allow passage through the canal of all but the largest vessels, thereby making an important contribution to global trade.

3. The issues for determination by this court concern:

   (1) An application by the defendants for a stay of the proceedings under s.9 of the Arbitration Act 1996 (which provides for a mandatory stay in respect of a matter which under an arbitration agreement is to be referred to arbitration);

   (2) An application by the claimant for summary judgment under the APGs on the primary basis that the APGs are first demand instruments; and

   (3) An alternative application by the defendants for a stay of the proceedings on case management grounds pending the resolution of the issue by arbitration.

   Further claims by ACP for declaratory relief relating to (among other things) jurisdictional issues were in the event not pursued on these applications.

<u>Factual framework and relevant agreements</u>

4. There is a considerable body of material before the court, and as is to be expected with such a project, the facts are complex. As well as lengthy skeleton arguments, a chronology, and a dramatis personae, there was a considerable volume of factual evidence in the form of witness statements and exhibits (which were helpfully combined and filed chronologically). There was also some expert evidence of Panamanian law. For the purposes of the hearing, there were however few factual disputes, and such disputes are not in any event for resolution on applications of this kind.

The parties

5. The claimant, Autoridad del Canal de Panamá ("**ACP**"), is a Panamanian public corporation. It is the employer under the project. ACP seeks summary judgment under the APGs in respect of advance payments made to the contractor.

6. The contractor is Grupo Unidos por el Canal S.A. ("**GUPC**"), a company incorporated in Panama. GUPC became contractor by a process of assignment in 2010 as outlined below.

7. The first to fourth defendants own GUPC which is their corporate vehicle for the project, and the five defendants are as follows:

   (1) The first defendant, Sacyr, S.A., is a Spanish company.

   (2) The second defendant, Salini-Impregilo S.P.A., is an Italian company.

   (3) The third defendant, Jan de Nul, N.V., is a Belgian company.

   (4) The fourth defendant, Constructora Urbana S.A., is a Panamanian company.

   (5) The fifth defendant, Sofidra S.A., is a Luxembourg company, and the third defendant's parent company.

8. In general, it is unnecessary to distinguish between the defendants, each of which entered into advance payment guarantees with ACP as beneficiary, which now seek a stay of these proceedings in favour of arbitration under various agreements.

The design and construction contract

9. ACP began the procurement process for the project in August 2007. The first to fourth defendants entered into a joint venture agreement in November 2007 so as to participate jointly in the procurement process.

10. On 11 August 2009, ACP and the first to fourth defendants (then acting as an unincorporated consortium), entered into a contract for the design and construction of the third set of locks (referred to below as the "**Main Contract**", or simply the "**Contract**"). The Main Contract incorporated conditions relating to the contractual relationship between the parties (the "**Conditions of the Contract**"). It is subject to Panamanian law, and contains a detailed dispute resolution procedure, ultimately leading to arbitration in Miami under the ICC rules.

The assignment of the Main Contract and the original JSG

11. For reasons related in part to Panamanian labour regulations, it became necessary for the contractor to be a Panamanian-incorporated company. This was already in the parties' contemplation: sub-clause 1.7 of the Conditions of the Contract provides for a mechanism to assign the Main Contract to "a company incorporated and operating under the laws of the Republic of Panama with the sole purpose of carrying out and completing the Contract and all obligations of the contractor thereunder".

12. GUPC was incorporated on 23 November 2009. The Main Contract was novated from the consortium to GUPC by an Assignment and Acceptance Agreement dated 31 May 2010. This agreement, which is governed by Panamanian law, provides that:

> "2. The Assignor hereby irrevocably assigns, to the Assignee, and the Assignee hereby assumes from the Assignor, all of the Assignor's rights and obligations, warranties, duties, liabilities and undertakings under and pursuant to the Contract and according to the terms of the Contract, which assignment and assumption shall be effective from the original date of the Contract, subject to the consent and agreement of the Employer to the assignment hereunder […]; provided that the Assignor

and each of the Members of the Assignor shall remain jointly and severally liable […] pursuant to the Joint and Several Guarantee."

13. In accordance with these arrangements, and so as to maintain their individual liability to ACP as employer, on 31 May 2010 the first to fourth defendants entered into a Joint and Several Guarantee of GUPC's obligations (the "**JSG**"), the fifth defendant entering into a similar guarantee of the third defendant's obligations under the JSG. This has been described as the "original" JSG.

14. Under the JSG:

"1.1 Each of the Guarantors, jointly and severally:

(a) as primary obligor and not as surety, unconditionally, jointly and severally guarantees to the Employer the due and punctual performance by the New Contractor of each and all the obligations, warranties, duties and undertakings of the Contractor under and pursuant to the Contract according to the terms of the Contract; and

(b) if the New Contractor is in breach of any of its obligations, warranties, duties and undertakings as set out in sub-paragraph (a), shall upon demand by the Employer from time to time, forthwith perform the obligations, warranties, duties and undertakings of which the New Contractor is in breach in the same manner that the Contractor is required to perform such obligations, warranties, duties and undertakings according to the terms of the Contract."

"2.3 The obligations of each of the Guarantors hereunder are primary and not by way of surety and none of the Guarantors shall be entitled as against the Employer to any right of set-off or counterclaim…"

"2.5 None of the Guarantors shall have any greater liability to the Employer under the Guarantee than such Guarantor would have had to the Employer had such Guarantor been an original party to the Contract in place of the New Contractor…"

"3.2 Determinations of interest rate and amounts under this Guarantee shall be made by the Employer, which determinations shall be conclusive and binding hereunder in the absence of manifest error."

15. The JSG covers any variations made to the Main Contract:

"Recital (A) The Guarantors […] and the Employer have entered into a contract, on a joint and several basis, for the design and construction of a third set of locks dated August 11th, 2009 (as amended, modified or supplemented, "Contract")…"

> "2.2 Each of the Guarantors authorizes the Contractor and the Employer to make any addendum, variation or amendment to the Contract or the Works without reference to it or any other Guarantor, and agrees that this Guarantee shall apply to such addendum, variation or amendment."
>
> "2.4 Each of the Guarantors' obligations under this Guarantee are continuing and accordingly shall remain in full force and effect […] until all obligations, warranties, duties and undertakings now or hereafter to be carried out or performed by the Contractor under the Contract shall have been satisfied or performed in full…"

16. By paragraph 9, the JSG is governed by Panamanian law, and provides that *"[a]ny dispute arising out of, under or in connection with this Guarantee or out of the subject matter of this Guarantee shall be finally settled"* by ICC arbitration the venue of which is to be Miami, Florida. The arbitration agreement and any related arbitrations are governed by the United States Federal Arbitration Act.

The Panamanian law Advance Payment JSG

17. By mid-2012, it appears that GUPC was facing cash flow difficulties, as a result of which it sought further advance payments from ACP. So far as relevant, a variation order (VO 58) providing for an advance payment (the acronym "AP" in conjunction with identifying letters is used to describe these advance payments) for the payment of "Specified Suppliers" (the "**APSS**") in the maximum amount of US$150m was executed on 24 December 2012 providing for repayment by October 2014.

18. As a precondition, pursuant to sub-clauses 14.2F and 14.2G of the Conditions of the Contract, the first to fourth defendants and ACP entered into an Advance Payment Joint and Several Guarantee in relation to the APSS advance payment for the Specified Suppliers (the "**APJSG**") on 24 December 2012. (A parent company guarantee by the fifth defendant of the obligations of the third defendant under the APJSG was entered into on 26 December 2012.)

19. Under the APJSG:

> "1.1 Each of the Guarantors, jointly and severally:
>
> (a) as primary obligor and not as surety, unconditionally, jointly and severally guarantees to the Employer the due and punctual performance by the Contractor of each and all the obligations, warranties, duties and undertakings of the Contractor under and pursuant to the Contract regarding or in relation to the Advance Payment for Specified Suppliers, including without limitation, the obligation of the Contractor to make full, complete and timely repayment of the Advance Payment for Specified Suppliers, all according to the terms of the Contract; and
>
> (b) if the Contractor is in breach of any of its obligations, warranties, duties and undertakings as set out in sub-paragraph

> (a), shall upon demand by the Employer from time to time, forthwith perform the obligations, warranties, duties and undertakings of which the Contractor is in breach in the same manner that the Contractor is required to perform such obligations, warranties, duties and undertakings according to the terms of the Contract."
>
> "2.3 The obligations of each of the Guarantors hereunder are primary and not by way of surety and none of the Guarantors shall be entitled as against the Employer to any right of set-off or counterclaim …"
>
> "3.2 Determinations of interest rate and amounts under this Guarantee shall be made by the Employer, which determinations shall be conclusive and binding hereunder in the absence of manifest error."

20. By paragraphs 2.2 and 2.4, the APJSG covers any variations to the Contract and contains materially the same clauses as those set out above in the JSG.

21. Like the JSG, by paragraph 9 the APJSG is governed by Panamanian law, and provides that *"[a]ny dispute arising out of, under or in connection with this Guarantee or out of the subject matter of this Guarantee shall be finally settled"* by ICC arbitration the venue of which is to be Miami, Florida. The arbitration agreement and any related arbitrations are likewise governed by the United States Federal Arbitration Act.

Developments during 2013 and 2014

22. In June 2013, GUPC and ACP entered into VO 70, which provided for a further advance payment intended to enable GUPC to make payments to the lock gates fabricator (the "**APLG**"). VO 70 initially provided for final repayments of the APLG to be made by mid-2014.

23. By the end of 2013, the evidence is that the situation had deteriorated to the extent that GUPC gave ACP notice of its intention to suspend the works. ACP rejected the notice, but the works were nonetheless temporarily suspended for a few weeks in February 2014. Negotiations led to a Memorandum of Understanding (the "**MOU**") which brought the injection of a considerable amount of cash through VO 90, namely the advance payment for "Specified Expenditures" (the "**APSE**"). VO 90 was entered into on 13 March 2014, led to the insertion of a sub-clause 14.2 in the Conditions of the Contract, and provided for the APSE to be repaid at the end of 2015.

24. The MOU was implemented through VO 108 and became part of the Contract on 1 August 2014. VO 108 also amended the repayment provisions for "Other Existing Advances", which included the APSS and APLG, (the "**OEA**"), by inserting a sub-clause 14.2J in the Conditions of the Contract.

25. Sub-clause 14.2J initially provided for two levels of deferrals of the OEA repayment:

    (1) until 31 December 2015 upon certain conditions being met; and

(2) potentially until 31 December 2018 upon certain other conditions being met, including the provision of letters of credit with a 31 December 2018 expiry date and issued by Panamanian financial institutions of a specified financial standing. These had to be in place "no later than 45 days prior to January 1, 2016".

26. Further to VO 108, the defendants and ACP entered into a Guarantee Arbitration Agreement on 1 August 2014 (the "**GAA**"), which was governed by Panamanian law and subject to ICC arbitration in Miami, and which provided that:

> "In the event of any Award, the Guarantors agree jointly and severally that […] they will immediately:
>
> (a) pay on first demand any sum ordered in any Award in favour of the Employer […]
>
> (b) give full effect, or cause the Contractor to give full effect, to the terms of any Award."

The first English law/jurisdiction advance payment guarantee

27. On 5 June 2015, GUPC and ACP entered into VO 149 Suppliers, which provided for a further advance payment of US$120m to enable payments to be made to suppliers. For present purposes, this was the last advance payment made. It was also the first advance to be secured by an English law/exclusive jurisdiction APG, indeed (so far as the court has been made aware) the first provision to this effect in any of the many dispute resolution clauses in the documentation to this effect.

28. The evidence does not go into the reasons for this departure. The claimant pleads that it "… and GUPC agreed upon the use of guarantees governed by English law and subject to the exclusive jurisdiction of the English Courts. As the majority of the guarantors were incorporated in European states, this provided the Claimant with an established route for enforcement, should the need arise".

29. In the course of argument, the defendants maintained that enforcement was the key reason, whilst ACP maintained that unless something additional (other than an additional enforcement route) to the existing guarantees (with their arbitration provisions) was intended, there would be no purpose in the English law and exclusive jurisdiction clauses.

30. Sub-clause 14.2L of the Conditions of the Contract incorporated VO 149 Suppliers into the Main Contract. It provided for a final repayment date of 31 December 2016 and envisaged the possibility of an extension until 31 December 2018 upon the provision of a letter of credit:

> "(a) …the Employer shall make a further advance payment of part of the Contract Price up to a maximum of USD 120,000,000.00…
>
> (b) The Contractor shall obtain, at its own cost, and furnish to the Employer:
>
> […]

(ii) the VO No. 149 Guarantee Security no later than 50 Business Days after the date of this Variation Agreement…

(c) If the Contractor fails to comply with any or all of sub-paragraph… (b)(ii)… above within the time periods specified therein, then the whole of the balance of the Advance Payment for VO No. 149 Suppliers shall immediately become due and payable…

(e) Provided that the Contractor has complied and continues to comply with subparagraph (b)(ii) above and subject to sub-paragraphs (h) and (i) below, the Advance Payment for VO No. 149 Suppliers shall be repaid in full by the Contractor to the Employer by way of one lump sum payment on December 31, 2016.

Where this sub-paragraph (e) applies, the Advance Payment for VO No. 149 Suppliers shall become due and payable by the Contractor to the Employer on December 31, 2016.

(f) Subject to sub-paragraphs (h) and (i) below, if no later than 45 days prior to January 1, 2017 the Contractor at its sole cost has provided to the Employer the VO No. 149 LOC providing a December 31, 2018 maturity date then the Advance Payment for VO No. 149 Suppliers shall not become due and payable in accordance with sub-paragraph (e) above and the Employer shall grant the Contractor a temporary deferral of the repayment of the Advance Payment for VO No. 149 Suppliers until December 31, 2018…

(g) Subject to paragraph (h)… the Advance Payment for VO No. 149 Suppliers shall become due and payable… by way of one lump sum payment, on the due date set out in sub-paragraph (e) or (f) above as applicable. …

(h) The Advance Payment for VO No. 149 Suppliers shall immediately become due and payable by the Contractor to the Employer and the Employer shall be able to make a claim for the entire outstanding balance under the VO No. 149 Security, (and for the avoidance of doubt, a claim in respect of the Advance Payment for VO No. 149 Suppliers shall be made, in the first instance, under the VO No. 149 LOC, and, in the second instance, under the VO No. 149 Guarantee Security …), if:

(i) the Advance Payment for Vo No. 149 Suppliers has not been repaid in full on:

(1) December 31, 2016 (pursuant to sub-paragraph (e)); or

(2) December 31, 2018 (pursuant to sub-paragraph (f)), and/or

[…]"

The main terms of the APG

31. In accordance with these provisions, on 8 June 2015 ACP and the first to fourth defendants entered into an APG entitled, "*Joint and Several Guarantee – Advance Payment for VO No 149 Suppliers*". ACP and the fifth defendant entered into a similar parent company APG in the same way as has already been described.

32. The main terms of the APG, and the provisions upon which much of the argument in the case has turned, are as follows:

> "1.1 …wherever used in this Guarantee, "Guaranteed Amount" shall mean the Advance Payment for VO No. 149 Suppliers Outstanding Amount less any amount of the Advance Payment for VO No. 149 Suppliers Outstanding Amount secured by the Advance Payment for VO No. 149 Suppliers LOC, if any."
>
> "2.1 Each of the Guarantors, jointly and severally:
>
> (a) as primary obligor and not as surety, unconditionally and irrevocably, jointly and severally guarantees to the Employer the payment by the Contractor of the Guaranteed Amount as and when due pursuant to the Contract; and
>
> (b) if the Contractor is in breach of any of its obligations as set out in sub-paragraph (a), shall upon demand by the Employer from time to time, forthwith perform the obligations of which the Contractor is in breach in the same manner that the Contractor is required to perform such obligations according to the terms of the Contract."
>
> "3.3 The obligations of each of the Guarantors hereunder are primary and not by way of surety and none of the Guarantors shall be entitled as against the Employer to any right of set-off or counterclaim whatsoever and howsoever arising. The Employer shall not be obliged to take any action in any court or arbitral proceedings against the Contractor or any Guarantor, to make any claim against or any demand of the Contractor or any Guarantor, to enforce any bond, security, insurance, surety or guarantee held by it in respect of the obligations of the Contractor under the Contract or to exercise, levy or enforce any distress, diligence or other process of execution against the Contractor or any Guarantor. Without prejudice to the obligations of any of the Guarantors under this Guarantee, in the event that the Employer brings proceedings (including any counterclaims) against the Contractor, each of the Guarantors will be bound absolutely by any findings of fact, interim or final award or judgment made by an arbitrator or arbitrators or court in such proceedings or counterclaims or any decision of the DAB where such decision has become final and binding under the Contract.

3.4 Each of the Guarantors' obligations under this Guarantee are continuing and accordingly shall remain in full force and effect (notwithstanding any intermediate satisfaction by the Contractor, any of the Guarantors or any other person) until all obligations, warranties, duties and undertakings now or hereafter to be carried out or performed by the Contractor under the Contract shall have been satisfied or performed in full and are not revocable and are in addition to and not in substitution for and shall not merge with, otherwise prejudice or affect or be prejudiced by, any other right, remedy, guarantee, indemnity, insurance, surety or security which the Employer may at any time hold for the performance of such obligations and may be enforced without first having recourse to any such right, remedy, guarantee, indemnity or security. Accordingly this Guarantee may be enforced notwithstanding the existence of all or any of the same and also notwithstanding the Employer at any time releasing or abstaining from perfecting or enforcing or otherwise dealing or omitting to deal with all or any of the same."

"4.2 Determinations of interest rate and amounts under this Guarantee shall be made by the Employer, which determinations shall be conclusive and binding hereunder in the absence of manifest error. For the purposes of this Guarantee, "LIBOR" shall mean a rate per annum (calculated on the basis of a 360 day year and actual days elapsed) equal to (a) the average (rounded upwards, if necessary, to the nearest 1/16 of 1%) of the offered rates which appear on Bloomberg Page BBAM1 (or on any successor or substitute page of such service, or any successor to or substitute for such service, providing rate quotations comparable to those currently provided on such page of such service, for purposes of providing quotations of interest rates of leading reference banks in the London interbank market, as designated from time to time by the Employer) as of 11:00 A.M. (London time) for deposits in U.S. dollars for a period equal to the relevant period for calculation of interest hereunder on the day two (2) Business Days prior to the first day of such period, or (b) if fewer than two (2) such offered rates appear which are relevant to the applicable period, the average (rounded upwards, if necessary, to the nearest 1/16 of 1%) of the rates at which the Employer in its reasonable discretion shall determine at approximately 11:00AM (London time) on the date that is two (2) Business Days preceding such period are the applicable rates offered for U.S. dollar deposits by at least two (2) prime banks in the London interbank market for a period comparable to such period."

"8.1 The Employer's rights under this Guarantee are cumulative and are in addition to and not in substitution for any

rights provided by law or the Contract or any other guarantee, surety, bond, insurance or security that the Employer may have or hold in relation to the Contract, and the Employer may exercise its rights under this Guarantee from time to time without first having recourse to any such right, guarantee, surety, bond, insurance or security."

33. The English governing law and exclusive jurisdiction clauses, together with the so-called "FNC Waiver Clause" (FNC standing for forum non conveniens), are as follows:

> "9.1 This Guarantee, and any non-contractual obligations arising out of or in connection with it, are governed by, and shall be construed in accordance with, English law.
>
> 9.2 Jurisdiction of the English Courts
>
> (a) The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Guarantee (including a dispute regarding the existence, validity or termination of this Guarantee).
>
> (b) The Parties agree that the courts of England are the most appropriate and convenient courts to settle any dispute referred to in paragraph 9.2(a) and accordingly no Party will argue to the contrary."

The two other English law/jurisdiction APGs

34. The evidence is to the effect that by the end of 2015, the date for repayment of the OEA and the APSE was approaching, and GUPC was finding it difficult to obtain a letter of credit (the court was told an obstacle to this was that eligible Panamanian banks were reluctant to open letters of credit at this stage in the contractual works). The parties entered into discussions about deferring the repayment of these advance payments, a deferral being agreed to 31 December 2016, and the date for providing the letters of credit being agreed at "45 days prior to December 31, 2016". In return for the deferral, ACP was to be provided with further English law APGs.

35. Accordingly, on 25 February 2016, ACP and the first to fourth defendants entered into English law APGs in respect of the OEA and the APSE (and the fifth defendant entered into commensurate parent company APGs). This agreement was formalised on 24 February 2016 in VO 150 in respect of the APSE and VO 161 in respect of the OEA.

36. The terms of the four APGs of 25 February 2016, and the repayment terms of the advance payments they guarantee, are materially the same as those of the APG of 8 June 2015 set out above. They contain the same English law/ exclusive jurisdiction clauses.

Summary of relevant obligations

37. In summary of the above, these proceedings are concerned with three sets of advance payments, namely:

    (1) those within sub-clause 14.2I of the Main Contract covering the APSE (Specified Expenditures), which was added to the contract on 13 March 2014; this was later amended by VO 150 on 24 February 2016 extending the repayment date to 31 December 2016;

    (2) those within sub-clause 14.2J of the Main Contract covering repayment of OEA (Other Existing Advances), which was added to the contract on 1 August 2014; this was later amended by VO 161 on 24 February 2016 extending the repayment date to 31 December 2016; and

    (3) those within sub-clause 14.2L of the Main Contract covering the advance payment for VO 149 Suppliers of approximately US$120m, which was added to the Main Contract pursuant to VO 149 on 5 June 2015. The repayment date was also 31 December 2016.

38. The relevant English law/exclusive jurisdiction APGs in respect of these advance payments on which this action is based are as follows:

    (1) In relation to the repayment of the advance payment of approximately US$120m for the VO 149 Suppliers:

        (A) first to fourth defendants' joint and several APG dated 8 June 2015; and

        (B) fifth defendant's parent company APG dated 8 June 2015.

    (2) In relation to the deferred repayment of the APSE:

        (A) first to fourth defendants' joint and several APG dated 25 February 2016; and

        (B) fifth defendant's parent company APG dated 25 February 2016.

    (3) In relation to the deferred repayment of the OEA:

        (A) first to fourth defendants' joint and several APG dated 25 February 2016; and

        (B) fifth defendant's parent company APG dated 25 February 2016.

39. It is common ground (and an important part of the defendants' case) that the JSG (which is subject to Panamanian law/ICC arbitration) was confirmed by four subsequent confirmations (the last of which is the VO 150 Guarantee Confirmation of 25 February 2016) which confirmed the applicability of the JSG to the obligations of GUPC under the Main Contract up to and including VO 150.

40. Similarly, it is common ground (and an important part of the defendants' case) that the APJSG (which was subject to Panamanian law/ICC arbitration) was amended and extended to cover the APSE and the APLG (in addition to the APSS, which it already covered). Further, the VO 150 Guarantee Confirmation of 25 February 2016 also confirmed the applicability of the APJSG to the Main Contract up to and including VO 150.

41. All parties therefore accept that the scope of the JSG includes all the advance payments which are covered by the English law APGs, and that the scope of the APJSG includes all the advance payments which are covered by the English law APGs (except for the advance payment for VO 149 Suppliers of approximately US$120m, which was not included).

42. It is further not in dispute that the letters of credit that were required to defer the repayment of these advance payments until 31 December 2018 were (for reasons which it is understood are in dispute in the arbitral proceedings) not provided.

43. The remaining advance payments (with which this action is not concerned) are all secured by letters of credit in the sum of approximately US$548m.

44. The amounts of the advance payments outstanding are agreed and total US$288,275,465.20. Although ACP says that the defendants accept that these advance payments are ultimately repayable by GUPC to ACP, and the second, third and fifth defendant's evidence states this, this was seemingly not accepted at the hearing.

<u>The arbitrations and the court proceedings</u>

45. There are three sets of proceedings specifically to mention which are relevant to the English law APGs. An emergency application was made by some of the defendants and GUPC in an on-going arbitration on 16 November 2016. These English proceedings were commenced on 30 November 2016. A further arbitration was commenced under various contractual documents including the JSG and the APJSG by, among others, the defendants, on 31 January 2017.

The emergency application to the arbitral tribunal

46. As indicated above, GUPC sought to secure letters of credit to defer repayment of the advance payments beyond 31 December 2016, but maintains that it was unable to do so. In a letter dated 20 October 2016 (a month before ACP asserts that the letters of credit should have been in place), GUPC requested from ACP the "issuance of a Variation to remove the requirement of the submission of the letter of credits for the additional advances due".

47. On 9 November 2016, ACP rejected GUPC's request. This prompted GUPC and the first to third defendants to file an emergency application for interim measures (the "**Emergency Application**") in an on-going ICC arbitration (which has been called the Concrete Arbitration) on 16 November 2016.

48. GUPC requested the tribunal to issue an order directing ACP to i) *"agree to a revised timetable with GUPC S.A. regarding the repayment of any security packages […] that*

defers any repayment until after the conclusion of the pending dispute resolution process, now anticipated to last until 2022"; and ii) *"refrain from executing, enforcing or foreclosing upon any of the letters of credit, or from engaging in any local court proceedings in any way, with respect to the security packages […] or otherwise taking any action against GUPC S.A. that would serve to upset the status quo between the Parties […] until the disputes between them are finally settled."* The first to third defendants asked for similar relief as guarantors.

49. The tribunal, consisting of civil lawyers (Mr Claus von Wobeser and Mr Pierre-Yves Gunter who was President) and a common lawyer (Dr Robert Gaitskell QC), issued its decision in the form of Procedural Order No. 1 on 30 December 2016. Though in the form of a Procedural Order (made on a prima facie basis), the decision of 30 December 2016 is a detailed document.

50. The tribunal dismissed the Emergency Application insofar as made by GUPC, and insofar as made by the first to third defendants save to the extent that those parties made their application under the JSG. Insofar as it was made under the JSG, the tribunal postponed its decision in the light of jurisdictional objections.

51. In relation to the relief sought by GUPC, the tribunal rejected the applications on the basis that the first requirement for granting an interim relief, which is *"not […] to make a full examination of the merits of the claims of the requesting party but to only assess the "substantial likelihood of success on the merits of the underlying case""*, was not met. The tribunal first had to determine the question in relation to which likelihood of success had to be assessed:

> "401. The Tribunal considers that the claim for which the likelihood of success on the merits must be examined is the Claimants' claim that they should not be required to repay the advance payments because such repayment would be subject to the resolution of the Parties' ongoing dispute concerning liability for delays and costs."

52. As to likelihood of success, the tribunal said:

> "410. The repayment terms agreed in Variation Order No.108 and the other Variation Orders are detailed provisions setting out certain repayment dates and providing for deferral of such repayment dates only on very specific and clear conditions. None of the conditions for a further deferral of the repayment dates relates to the resolution of disputes. If the First Claimant [*that is, GUPC*] and the Respondent [*that is ACP*] intended for the repayment of the advance payments to be conditioned upon the resolution of disputes, they could have, and surely would have, made that clear in the MOU or the Variation Orders."
>
> …
>
> "414. Consequently, the Arbitral Tribunal finds that the Claimants have not demonstrated a likelihood of success on the merits of the claim that their repayment obligations should be suspended until the resolution of disputes since the express contractual terms agreed between the First Claimant and the

> Respondent, in the Contract as amended in particular by the MOU and the Variation Orders, do not establish any link between the First Claimant's repayment obligations and the resolution of disputes as alleged by the Claimants. Under the clear terms of the Contract as amended, the First Claimant is required to repay the Advance Payments on certain specified dates despite any ongoing disputes between the Parties. Thus, on a prima facie basis, it has not been demonstrated that the merits of the First Claimant's request, i.e. that it would not have to repay the Advance Payments due to the outstanding disputes between the Parties, have a substantial likelihood of success."

53. The tribunal also considered a number of arguments concerning the defences against repayment of the advance payments available to GUPC under Panamanian law. These defences were rejected:

(1) The Claimants (i.e. GUPC and the first to third defendants in the English proceedings) contended that under Art. 985 of the Panamanian Civil Code GUPC did not have the obligation to repay the advance payments on 31 December 2016 since ACP was in breach of its obligations under the Main Contract as alleged in the underlying arbitration. The tribunal dismissed this argument stating that:

> "417. …the contractual agreements underlying the repayment of the advance payments (namely the MOU and the Variation Orders) are specific agreements and, at the time of their execution, the First Claimant and the Respondent clearly intended for the repayment obligations to be dealt with separately from any ongoing disputes as to other contractual obligations. Therefore, Article 985 of the Panamanian Civil Code which [is] applicable to reciprocal obligations is not applicable here."

(2) The Claimants contended that under Art. 1001 of the Panamanian Civil Code, ACP could not condition the deferral of the guarantees on an obligation which it was impossible for GUPC to perform (i.e. obtaining letters of credit from Panamanian financial institutions of specified financial standing). The tribunal rejected this on the basis that "this provision is only applicable in the context of absolute impossibility, i.e.where the action required would be objectively impossible for any party to achieve, which cannot be considered to be the case here" (paragraph 418).

(3) The Claimants relied on various articles of the Panamanian Civil Code that they submitted required ACP to negotiate with the Claimants and adopt measures to restore the equity of the Main Contract as new and unforeseen circumstances had rendered performance of contractual obligations by GUPC excessively onerous, invoking the difficulties in obtaining the letters of credit. The tribunal also rejected this submission, stating that it was already known when the relevant VOs were entered into that GUPC was having difficulty obtaining further letters of credit and that GUPC nevertheless agreed to the 31 December repayment date (paragraph 419).

54. In relation to the relief sought by the Second to Fourth Claimants (i.e. the first to third defendants in the English proceedings) under the English law APGs, in the light of the exclusive jurisdiction clauses contained in the APGs, the tribunal concluded on a prima facie basis (that being the relevant basis in respect of the claim for interim relief) that it did not have jurisdiction in relation to those agreements (paragraph 437).

55. In relation to the English law APGs, the tribunal said it must defer to the determination by the English courts:

> "440. In light of the exclusive jurisdiction clause in the English Law Guarantees […] as well as the fact that the English Court proceedings [*the present proceeding begun by ACP on 30 November 2016*] do not involve all of the same parties as the present arbitration, the Tribunal considers that it must defer to the determination by the English Courts presently seized with the [ACP's] action under the English Law Guarantees […] As [*ACP*] stated during the Phone Hearing, the [*first to third defendants*] can raise any defenses to the Respondent's action under the English Law Guarantees […] in the English Courts, which is the proper forum for any disputes regarding the parties obligations under those security agreements."

The English proceedings

56. On 30 November 2016 (so after the Emergency Application had been made but before the tribunal's decision on 30 December 2016) ACP commenced the present proceedings in the English court seeking declarations against the defendants regarding, inter alia, the right to demand repayment under the English law APGs after 31 December 2016, the exclusive jurisdiction clauses, and any breaches of these clauses resulting from the Emergency Application.

57. On 6 January 2017, by which time the advance payments (at least on their face) had fallen due, ACP notified GUPC that it was in breach of its obligations to make repayments of the relevant advance payments and that it was withholding payment under Interim Payment Certificate No. 124 dated 22 December 2016. On the same day, ACP sent demands to the first to fourth defendants for payment under the APGs, notifying them of its intention to seek indemnification of expenses etc. connected to the Emergency Application, etc. On 24 January 2017, ACP sent similar letters to the fifth defendant in relation to the parent company guarantees.

58. On 31 January 2017, the defendants filed applications for the proceedings to be stayed, either based on s.9 of the Arbitration Act 1996, or based on CPR r. 3.1(2)(f), CPR r.11(6)(d) and/or under the court's inherent jurisdiction or case management powers.

59. On 1 March 2017, ACP filed an application for summary judgment on its claims for i) payment under the APGs, and ii) various declarations against the defendants on jurisdictional issues. An amended Claim Form and Particulars of Claim were served on the defendants on 9 March 2017 including the contention (foreshadowed in drafts sent to the defendants in February) that the English law APGs are to be construed as first demand bonds.

60. In letters dated 9, 10 and 13 March 2017, the second, third and fifth defendants, the first defendant and the fourth defendant respectively, agreed to the stay and summary judgment applications being listed and heard together based on the following understanding of ACP's case (taken from the first defendant's letter):

> "Given the narrow scope of your client's summary judgment application (which focuses in relation to the primary claim, only on the issue of whether the Advance Payment Guarantees are to be construed as a matter of English law as unconditional demand bonds (the "Construction Issue") and provided your client does not apply at a later stage to expand the scope of its application, we accept that the Defendants' stay applications and your client's summary judgment application may be heard together…"

61. Following the defendants' evidence in response to ACP's summary judgment application which included allegations that the demands were not effective, ACP served new demand letters on the first to fourth defendants on 26 April 2017, and on the fifth defendant on 12 May 2017. This was followed by re-amended Particulars of Claim referring to the second set of demand letters.

The guarantee arbitration

62. On 31 January 2017, GUPC and the defendants filed a request for arbitration under the Main Contract, the Panamanian law guarantees and the GAA (the "**Guarantee Arbitration**"). The Guarantee Arbitration does not extend to the English law APGs.

63. In the Guarantee Arbitration the defendants (as claimants in the arbitration) seek declarations that repayments of the advance payments are not due and/or payable under Panamanian law and the relevant agreements. These are in effect claims for negative declarations in relation to the liability of GUPC to repay the advance payments under the Main Contract and the defendants' liability as guarantors under the Panamanian law guarantees as against ACP as respondent in the arbitration.

64. In the Guarantee Arbitration the claimants are advancing the following arguments among others:

    (1) Under the Main Contract and under Panamanian law, the repayment obligations are not "determinable" until disputes over the contract price are determined and are not payable until disputes over the contract price have been resolved.

    (2) It was objectively impossible within the meaning of Panamanian law for GUPC to obtain letters of credit in time to secure an extension for the repayment of the relevant advance payments.

    (3) Under Panamanian law, no repayment obligation can arise in circumstances where ACP is in breach of its own mutual obligations.

65. It is not in dispute that the issues raised by the defendants in the Guarantee Arbitration commenced on 31 January 2017 are so far as relevant similar to (ACP says the same as) those rejected by the tribunal in the decision on 30 December 2016 on the

Emergency Arbitration. ACP says that commencing the Guarantee Arbitration was "… abusive, done as an artificial attempt to avoid the consequence of its failed application in the First Arbitration and to "outflank" the Exclusive Jurisdiction Clauses by attempting to create an alternative forum in favour of which to seek a stay". The defendants say that this criticism is misplaced, and that they were reluctant to impose another dispute on the first tribunal which was already overburdened, and that in the Request for Arbitration they stated that they were willing to enter into "good faith discussions" with ACP about the matter being determined before an existing tribunal. The court need not enter into this aspect of the dispute, but the consequence is that a second arbitral tribunal is going to be considering much the same points as the first one rejected albeit on a prima facie basis.

66. ACP filed its answer to the Request for Arbitration on 10 May 2017. Amongst other things, ACP is challenging GUPC's right to bring the Guarantee Arbitration, arguing that it has not followed the Main Contract's agreed dispute resolution procedure, and it is asking the tribunal to stay the arbitral proceedings.

67. ACP nominated its arbitrator on 7 April 2017. The defendants nominated an arbitrator, but following objections from ACP his nomination was withdrawn, and a replacement was nominated on 10 May 2017. The process of appointing a third arbitrator is presently underway. The defendants anticipate that the tribunal in the Guarantee Arbitration will be constituted and the related terms of reference produced by October 2017. The Guarantee Arbitration is therefore still at an early stage.

The arbitration proceedings currently in existence

68. Consequent on the wider disputes that have arisen between the parties during and following completion of the project, including the disputes the subject-matter of these proceedings, the following Miami-seated arbitration proceedings are currently on-going:

    (1) ICC No 19962/ASM arbitration commenced in December 2013, under which the first to third defendants and GUPC bring claims against ACP, a final hearing of which took place in January 2017;

    (2) ICC No 20910/ASM and No 20911/ASM arbitrations (which have been merged) commenced on 17 March 2015, under which the first to third defendants and GUPC on one side and ACP on the other side, bring claims against each other under the Main Contract, the JSG and/or the GAA, hearings of which are to take place in January and February 2019; these are the arbitral proceedings in which the Emergency Application was made;

    (3) ICC No 22465/ASM arbitration commenced on 8 December 2016, under which the first to third defendants and GUPC bring claims against ACP under the Main Contract and the JSG, which is active, but at an early stage;

    (4) ICC No 22466/ASM arbitration commenced on 8 December 2016, under which the first to third defendants and GUPC brought claims against ACP under the Main Contract and the JSG, which is active, but at an early stage; and

(5) ICC No 22588/ASM arbitration commenced on 31 January 2017 being the Guarantee Arbitration described above.

The parties' claims

69. ACP seeks summary judgment in respect of its claim that the advance payments became due and payable on 31 December 2016 in the sum of US$ 288,275,465.20, and that ACP is now entitled to payment of these sums plus interest by the defendants under the APGs. (Declarations including that the defendants are in breach of the exclusive jurisdiction clauses are not now pursued in the summary judgment application.)

70. The defendants contend that the provisions of s.9 of the Arbitration Act 1996 are satisfied and that a stay of these proceedings must be imposed because the proceedings are in respect of a matter which under at least one of the arbitration agreements between the parties is to be referred to arbitration. They contend that the issue of whether the advance payments are due and payable by GUPC to ACP under the Main Contract depends on the contract and upon Panamanian law and is subject to arbitration both under the Main Contract and under the arbitration clauses in the JSG and APJSG.

71. Alternatively, the defendants contend that the court should, in its discretion, grant a stay under CPR3.1(2)(f), CPR11(6)(d) and/or its inherent jurisdiction or case management powers on the basis that there are arbitration proceedings concerning the same issues as those arising in the English proceedings currently in existence and that it is more appropriate for these issues to be dealt with by way of arbitration.

72. It is common ground that if ACP is right on its main construction argument to the effect that the APGs are demand bonds, the defendants' contentions that a s.9 or case management stay should be granted do not arise. Similarly, it is common ground that if the conditions for a s.9 stay are met, imposing such a stay is a mandatory requirement. The court will deal first with the claimant's summary judgment application.

ACP's summary judgment application

Introduction

73. There has been no dispute as to the legal principles applicable to a summary judgment application, the question under CPR r.24.2, which provides that the court may give summary judgment if the defendant has no real prospect of successfully defending the claim.

74. The broad factual premises for ACP's summary judgment application are as set out above, and in summary that i) the advance payments were made to GUPC, ii) repayment was deferred until 31 December 2016 with further deferral to 31 December 2018 conditioned on the provision of letters of credit from Panamanian financial institutions of a specified financial standing, and iii) the letters of credit were not provided and the advance payments have not been repaid. These points are not in dispute. ACP accordingly submits that it is entitled to summary judgment against the defendants as guarantors under the APGs, which is in dispute.

75. ACP's case for summary judgment depends on the correct construction of the APGs, the relevant provisions of which are set out above.

76. ACP's case is that the defendants are not guarantors as under a "see to it" guarantee in which they assume a secondary obligation to make good any default by the primary obligor; rather they undertook as "primary obligors" to pay the sums of money themselves if not repaid by the contractual deadline. In this regard, they put their case in two ways:

    (1) As primary obligors, the defendants are liable to make repayment of the advance payments *upon demand*, and ACP itself is entitled conclusively to determine what amounts of principal and interest are due.

    (2) Alternatively, the defendants' primary liability was triggered by the failure of GUPC to make payment "*as and when*" provided for under the Main Contract, construed under English law. The defendants' liability is governed solely by English law and is in no way dependent on establishing that GUPC is also liable as a matter of Panamanian law. This is described below as ACP's "*alternative case*".

77. It is common ground that if ACP is correct on either of these points it is entitled to summary judgment. However, as explained below, the defendants object to ACP being permitted to argue its alternative case at this hearing.

The parties' contentions

78. ACP relies on various points in support of a submission that it is uncommercial to suggest on the present facts and contractual terms that the APGs at issue in these proceedings were anything other than first demand instruments, or at the very least, instruments governed solely and exclusively by English law, such that it cannot have been intended that the defendants should be able to run defences derived from Panamanian law that are nowhere apparent on the face of the contractual terms. They rely on the following contentions:

    (a) When the English law APGs were entered into, the Main Contract and the already comprehensive guarantees in existence were subject to Panamanian law and Miami/ICC arbitration, and Miami arbitrations were already on foot.

    (b) The English law APGs were agreed to be provided in respect of the advance payments that were not yet secured by letters of credit (US$302m out of about US$850m in total).

    (c) At the time the APGs were entered into, it was known that not all of the underlying disputes would be resolved by arbitration by the end of December 2016 when the repayment of the advance payments would fall due.

    (d) The terms of the Main Contract make no reference whatsoever to the repayment obligations being dependent in any way on resolution of the underlying disputes, as the arbitral tribunal found in the Emergency Application.

(e) It was equally clear in the terms of the Main Contract that if GUPC and the defendants wished to defer repayment until the end of 2018, they would have to provide the equivalent of cash for those advance payments not yet secured by letters of credit.

(f) It would be inconsistent with this for the defendants to be able to achieve an equivalent deferral of the repayment date simply by raising defences of Panamanian law.

(g) The English law APGs if they were to be subject to Panamanian law defences would add nothing to the security already afforded by the Panamanian law guarantees other than the futile ability to commence a court action, which would then be stayed probably for years, pending the outcome of arbitrations in Miami, in circumstances where there were already Panamanian law guarantees covering the same liability and achieving (on the defendants' case) that same result.

(h) The tribunal dealing with the Emergency Application rejected the defendants' argument that repayment by GUPC of the advance payments was conditioned on resolution of the underlying Panamanian law governed disputes, and its reasoning is compelling and should be adopted.

79. The defendants on the other hand submit that the origins of the guarantees strongly suggest that the instruments are, indeed, guarantees rather than unconditional demand bonds. They rely on the following contentions:

(a) The Main Contract was originally made between ACP and the first to fourth defendants, and their liability to ACP was defined and limited by the extent of their liability as contractor (as an unincorporated consortium) under the Main Contract.

(b) The JSG was required when the Main Contract was assigned by the consortium members to GUPC. The liability of the first to fourth defendants under the JSG then became co-extensive with the liabilities they previously had as direct contracting parties with joint and several liability, the purpose of the JSG being to ensure that, after their substitution by GUPC as contractor, the members of the consortium remained responsible to ACP for the performance of the Main Contract only to the extent that they had been before (clause 2.2).

(c) When it came to the APJSG, the parties used materially identical language for the operative provisions. Clause 2 was not reproduced, but because the terms used are materially identical the inference is that the same language had the same effect.

(d) By the GAA, the 'Guarantors' agreed to pay on first demand any arbitral award in favour of ACP. This is only consistent with the JSG and the APJSG being guarantees rather than unconditional demand bonds, because if they were unconditional demand bonds, ACP would have no need for these terms. Indeed, this appears to be undisputed.

(e) When it came to the APGs in 2015 and 2016 (with the JSG and the APJSG in force and confirmed as in force), the parties used (according to the defendants) the same language as in the JSG and the APJSG, the natural conclusion being that when the parties used the same (or equivalent) terms for the APGs they also intended to create guarantees. Had they intended to create a fundamentally different form of instrument, that would have been clearly signalled by the use of clearly different wording.

(f) It is the case that the JSG and the APJSG are governed by Panamanian law while the APGs are governed by English law. However, all of them are written in English and there is no suggestion that there is any difference between Panamanian and English law which would justify giving the same terms a different meaning.

(g) ACP's case requires the assertion that either the JSG and the APJSG are in fact unconditional demand bonds, or that despite using the same terms, the parties intended the APGs to be radically different in effect. This is not credible.

The legal tests

80. On ACP's primary case, the court must decide whether the APGs are unconditional demand bonds/guarantees, or whether, as the defendants contend, they are guarantees under which the guarantors' liability is coextensive with the liability of the principal debtor. It is agreed that this is a matter of construction of the instruments.

81. It is agreed on all sides that a first demand bond or guarantee (however labelled) is a very different contract from a "see to it" guarantee (as described in *Moschi v Lep Air Services Ltd* [1973] AC 331 at p. 347), though of course particular instruments may have features of both. In approaching the construction question, the following principles appear from the case law:

(1) Unlike a guarantee, a first demand bond is in principle autonomous of the underlying contract—liability may arise simply on a conforming demand within the validity of the instrument. For this reason, it has been likened to a letter of credit (*Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] Q.B. 159 at p. 171, *Meritz Fire and Marine Insurance Co Ltd v Jan de Nul NV* [2011] 1 All ER (Comm) 1049 at [70], *WS Tankship II BV v Kwangju Bank Ltd* [2011] EWHC 3103 (Comm) at [111], *Spleithoff's Bevrachtingskantoor BV v Bank of China Ltd* [2015] 2 Lloyd's Rep. 123 at [69]).

(2) What the instrument is labelled, the incorporation of terms such as a principal debtor clause, or terms imposing primary liability, both of which are very common in guarantees of all kinds, and the use of words such as "on demand", may be of limited value in determining its legal nature. The practical question, as in the present case, is in substance whether the instrument is effectively payable on demand, with or without some supporting documentation: this can only be ascertained by examining its terms (*Marubeni Hong Kong and South China Ltd v Mongolian Government* [2005] 1 WLR 2497 at [30], *IIG Capital LLC v van der Merwe* [2008] 1 All E.R. (Comm)

435 at [25], *Vossloh AG v Alpha Trains (UK) Ltd* [2010] EWHC 2443 (Ch) at [23] and [28], *Carey Value Added SL v Grupo Urvasco SA* [2011] 2 All E.R. (Comm) 140 at [22]).

(3) As was said in *Gold Coast Ltd v Caja de Ahorros Del Mediterraneo* [2002] 1 Lloyd's Rep 231 at [10] and [15], the court approaches the task of construing it by looking at the instrument as a whole "without any preconception as to what it is". To take advance payment guarantees as an example, the issuance of such guarantees securing advance payments made by an employer to a contractor can be in either form—it depends on what the parties agreed (see *Gold Coast* at [11]).

(4) When it comes to construing the instrument, the nature of the party giving the guarantee is relevant. It has been held that there is a presumption against construing an instrument as a demand bond which is not given by a bank or other financial institution (*Marubeni* at [30], *IIG Capital LLC v Van Der Merwe* [2008] EWCA Civ 542 at [9]). It has also been held that an instrument issued by a financial institution which relates to an underlying transaction between parties in different jurisdictions and contains an undertaking to pay "on demand", and does not contain clauses excluding or limiting the defences available to a guarantor, will almost always be construed as a demand guarantee (*Gold Coast* at [16], *Wuhan Guoyu Logistics Group Co v Emporiki Bank of Greece SA (No 1)* [2014] 1 Lloyd's Rep 273 at [27], *Caterpillar Motoren GmbH & Co K.G. v Mutual Benefits Assurance Company* [2015] EWHC 2304 (Comm) at [20]).

(5) The presence of "protective clauses" i.e. clauses excluding or limiting the defences available to a guarantor (such as those arising from variations of the principal contract) have sometimes been treated as indicative of guarantee liability (because they are unnecessary in the case of a first demand instrument), but this is not necessarily a significant factor, since there may be other reasons for including the clauses, (e.g.) out of an abundance of caution (*Gold Coast* at [25]). The absence of any such clauses may be a pointer to the instrument being a first demand instrument (*Meritz*, supra, at [74]).

(6) Whilst "conclusive evidence" clauses may not in themselves point to the nature of the instrument, since they can be found in either kind, a clause which—if effective—requires payment against certification by the beneficiary, is likely to be inconsistent with the need for the beneficiary to establish the liability (other than through such certification) of the principal debtor in order to enforce the guarantee (*North Shore Ventures Ltd v Anstead Holdings Inc* [2012] Ch 31 at [67], *Bitumen Invest AS v Richmond Mercantile Ltd FZC* [2017] 1 Lloyd's Rep 219 at [27]). However, conclusive evidence clauses, which have found support historically through the perceived institutional reliability of the party entrusted with making the relevant calculations, are strictly construed, with any ambiguity being resolved in favour of the guarantor (*Bache & Co (London) Ltd. v Banque Vernes et Commerciale de Paris SA* [1973] 2 Lloyd's Rep. 437 at p. 440, *Bangkok Bank Ltd v Cheng Lip Kwong* [1989] SLR 1154 at p.1159, *North Shore* at [46]).

(7) Although this has not arisen in the present case, where incorporated, the ICC Uniform Rules for Demand Guarantees (URDG) are likely to be determinative (see e.g. *Meritz*, supra, in the Court of Appeal at [2012] 1 All ER (Comm) 182 at [16]).

Discussion and conclusion

82. So far as the parties' arguments on the factual matrix are concerned, there are two points which require particular mention.

83. First, there is much force in ACP's contention that at the time the APGs were entered into, it was known that not all of the underlying disputes would be resolved by arbitration by the end of December 2016 when the repayment of the advance payments would fall due. If the defendants are correct in their interpretation of the instruments, and of the Main Contract, and on the defences they raise to GUPC's liability in relation to the advance payments guaranteed by such instruments, it seems that ACP must wait until the resolution process is complete until it is able to enforce them. However, whilst acknowledging the force of this point, the question remains whether the APGs which ACP received from the defendants were in fact payable on first demand. This part of the factual matrix does not assist in determining this question.

84. Further, as ACP points out, in its decision of 30 December 2016 on the Emergency Application, the arbitral tribunal took the view that the defendants' case was wrong as a matter of Panamanian law so far as GUPC's liability was concerned, finding that the parties "clearly intended for the repayment obligations to be dealt with separately from any ongoing disputes as to other contractual obligations". The tribunal rejected the argument that repayment of the advance payments by GUPC was conditioned on resolution of the underlying Panamanian law governed disputes, and dismissed the Panamanian law defences. ACP submits that whilst the decision is focused on the position of GUPC, and is on a prima facie basis, and does not involve a detailed assessment of the defences, the arbitral tribunal's reasoning is nevertheless both compelling and applicable to the defendants (as they are simply one step removed from GUPC).

85. Again, these are valid points so far as they go, and the arbitral tribunal's reasoning and conclusions are important in certain respects, but not on this point because the tribunal was not considering whether the English law APGs are first demand instruments.

86. Second, the defendants rely on the fact that the APGs use the same language as in the JSG and the APJSG. In fact, the language is not quite identical, and the operative parts of the instruments differ in their references to guaranteed obligations and amount. But the significance of the overall similarity is that there is no suggestion that either the JSG or the APJSG are unconditional demand bonds. As the defendants point out, the language goes back to 2010, when the Main Contract was novated from the defendants' consortium to GUPC, and so as to maintain their individual liability to ACP as employer, the defendants entered into a Joint and Several Guarantee of GUPC's obligations so as to maintain their individual liability to ACP as employer.

87. On this basis the defendants say that, even allowing for the fact that the JSG and APJSG are subject to Panamanian law, it is inherently unlikely that the objective intention of the parties was that the same language should produce a radically different liability in the English law guarantees, in the absence of any evidence that such a change was actually intended. In the court's opinion, this is a cogent point.

88. It is further to be noted that the defendants dispute ACP's contention that the English law APGs would provide no additional benefit if they were to be construed as guarantees, because they have the clear advantage of providing a route to enforceability in the European Union by means of a judgment of the English court. However, whilst this is correct in itself, the awards would also be enforceable under the New York Convention.

89. Turning to the language of the APGs, the relevant provisions are set out in paragraph 32 above. (They are in substance the same for all the APGs.) By paragraph 2.1, each of the guarantors contracts jointly and severally "*as primary obligor and not as surety*". Clause 3.3 is to similar effect. As ACP says, this is a strong indication that the guarantors' liability is not secondary, in the sense of a "see to it" guarantee. The court accepts this—these provisions make it clear that liability under the APGs is primary, not secondary. However, as all parties also recognise, to say that someone is primarily liable begs the question of the content of that primary liability (*Carey Value Added v Grupo Urvasco* [2011] 2 All E.R. (Comm) 140 at [21]). To make good its case, it is not sufficient for ACP to show that the defendants' liability is as primary obligor and not as surety. It has to show that the defendants' liability is triggered by a demand (together with the necessary calculations under the conclusive evidence clause which is an integral part of ACP's case on this point), and this is what the court has to decide.

90. In determining the defendants' liability, the starting point is the "*Guaranteed Amount*". This is a defined term, by paragraph 1.1 meaning (in the case of the APG in respect of the advance payment for the VO No 149 Suppliers) "*the Advance Payment for VO No. 149 Suppliers Outstanding Amount*". Broadly, the definition of *"Guaranteed Amount"* is the amount outstanding of the relevant advance payment less any amount secured by a letter of credit (LOC). ACP says (and this is correct) that this does not refer to guaranteed obligations in general terms (in contrast with clauses 1.1(a) in the JSG and APJSG), but rather refers to the guaranteed amounts of money that were due on 31 December 2016. This is a point in favour of ACP's interpretation, to the extent that the calculation of the sums concerned should not present the kind of difficulties that a more general calculation of loss might present.

91. The crucial provisions are found in paragraph 2.1. ACP relies on the fact that in sub-paragraph (a) the guarantors contract "*unconditionally and irrevocably*", but this language on the whole seems neutral in pointing towards a first demand instrument since it could apply equally to a guarantee.

92. Much more important, in the court's view, are the words which follow by which each guarantor "*jointly and severally guarantees to the Employer the payment by the Contractor of the Guaranteed Amount* <u>*as and when due pursuant to the Contract*</u>" (underlining added). The defendants place much reliance on these words.

93. It is correct, as ACP says, that such words may be construed as a trigger (see e.g. *Gold Coast* at [23]). There is also force in the point that even in a pure demand bond issued by a bank, it is difficult for the instrument to avoid making some reference to performance or default by the principal. However, the words in the APGs go much further than a reference, and there is no reason here not to give them their natural meaning. In fact, according to the defendants (and this has not been contradicted), ACP itself did so in its submissions in the Emergency Application which stated that "the guarantees provided by the Second to Fourth Claimants as security for the Contractor's obligations expressly state that their obligation to cover the Guaranteed Amount falls due as and when due pursuant to the Contract". (The first to third defendants were the claimants in the arbitration.)

94. The next sub-paragraph (b) provides that "*if the Contractor is in breach of any of its obligations as set out in sub-paragraph (a),* [the guarantors] *shall upon demand by the Employer from time to time, forthwith perform the obligations of which the Contractor is in breach in the same manner that the Contractor is required to perform such obligations according to the terms of the Contract*". ACP relies on the fact that the liability arises "*upon demand*", and must be performed "*forthwith*". However, as noted earlier, the use of the word "demand" is a relatively neutral factor, and "forthwith" does not indicate in context that this is a first demand instrument. ACP says that the provision in paragraph 4.1 as to payment within 14 days of demand shows that the obligation to make payment cannot be said to be dependent on or in any way bound up with the concurrent arbitrations. However, this is to read too much into the provision. The fact that (necessarily) the contract specifies a time for paying the demand does not in itself govern the nature of the obligation to pay.

95. The much more substantial point is that the guarantors agree to perform GUPC's obligations of which it is in breach in the same manner that GUPC is required to perform them "according to the terms" of the Main Contract. This is not the language of first demand liability: on the contrary, it expressly refers the guarantors' obligations to performance of the underlying contract by the principal debtor according to its terms.

96. This does however give rise to the question whether the contract nevertheless provides a conclusive means of ascertaining such obligations through the conclusive evidence clause. It is a central part of ACP's case that it does, and this is considered shortly.

97. ACP relies on paragraphs 3.3, 3.4 (which appear under the heading "Protective Clauses"), and 8.1 of the APGs (which appears under the heading "Miscellaneous") to support a contention largely advanced in oral submissions that the guarantors' liability under the APGs is autonomous of the Main Contract. For present purposes, it may be noted that:

    (1) Paragraph 3.3 excludes the right of set off, and makes express that ACP (as employer) is not obliged to take any action against GUPC (the contractor liable to repay the advance payments) in order to enforce the guarantee. (The paragraph also refers to "any Guarantor"—in the 2010 JSG and 2012 APJSG, the term was "any Member", i.e. of the consortium. Otherwise, the language is the same.) It also provides that the guarantors shall be bound by findings made in any proceedings against the GUPC.

(2) Paragraph 3.4 makes it clear (among other things) that the guarantees are continuing and not discharged until repayment in full.

(3) Paragraph 8.1 provides that ACP's rights under the APG are cumulative and may be exercised without first having recourse to any other security.

(4) These provisions are effectively the same as those in the JSG and APJSG. In the court's view, whilst it is correct that these provisions show that ACP as beneficiary can enforce the APGs without having had recourse to the principal debtor or enforcing any other security (and this is important in relation to the s. 9 stay application), it does not support the contention that the guarantors' liability arises on first demand. As the defendants say, if anything, the inclusion of protective clauses points against this contention.

98. ACP places particularly strong reliance on the words in paragraph 4.1 that, "*[t]he Guarantors shall pay interest on any amount due under this Guarantee from the date of demand to the date of full payment …*" read with the opening words of paragraph 4.2. These opening words provide that, "[d]*eterminations of interest rate and amounts under this Guarantee shall be made by the Employer, which determinations shall be conclusive and binding hereunder in the absence of manifest error. … ".* ACP submits that:

(1) Under these provisions, it was entitled to determine both the "amount due under the Guarantee", and the rate and amount of interest thereon.

(2) The plural word "amounts" at the beginning of paragraph 4.2 thus refers both to the "amount due under the Guarantee", i.e. the "amount" already referred to in paragraph 4.1, and the amount of interest thereon. The "s" is fatal to the defendants' case that the conclusive determination is limited to interest. There is no reason to suppose that the claimants would need to make more than one ultimately binding determination of the amount of interest under each guarantee.

(3) This conclusive determination clause is critical to ACP's primary construction; it is a clear indication that the obligation was to pay on demand. It also supports ACP's alternative case, if the primary case is not accepted. It is a clear indication that the defendants' liability was not meant to hinge on defences under Panamanian law: if the payments were not paid when due under the Main Contract, ACP was entitled to demand payment and conclusively to determine the amounts of principal and interest.

(4) It cannot seriously be suggested that this provision relates only to interest; quite apart from the use of the plural word "amounts", it is impossible to determine conclusively the amount of interest without first knowing for sure (conclusively) the amount of principal on which such conclusive determination of interest is to be based. Logically, the one necessarily includes the other. It is hard to see what commercial benefit would be derived from the conclusive determination provision if paragraph 4.2 were to be read as limited to the "amount" of interest.

(5) ACP communicated its demands/determinations on 6 and 24 January 2017. After the defendants had taken some technical points in relation thereto, further demands/determinations were issued on a without prejudice basis.

99. The defendants submit that paragraph 4.2 has a limited function restricted to interest:

(1) One would not expect to find in paragraph 4 ("Payments") a provision which substantively alters paragraph 2, which is the operative provision defining the guarantors' liability.

(2) The clear and ordinary meaning of the phrase "*determinations of interest rate and amounts under this Guarantee"* is that it is referring to rates and amounts of interest. If "*amounts"* were intended to refer to the size of the principal liability, it would naturally be placed before the consequential issue of interest on such amounts.

(3) The reference to amounts in the first sentence of clause 4.2 is at best ambiguous and, since this is a conclusive evidence clause, any ambiguity is to be resolved in favour of the party liable.

(4) Even if "amounts" were to be given a greater part to play, the most it could aspire to would be to enable ACP to certify the quantum outstanding in respect of the relevant advance payments. It cannot enable ACP to determine the validity of substantive defences to liability for payment of those amounts. Clause 4.2 is clearly only concerned with quantum and not liability.

(5) Not much weight can be put on the use of the singular in 4.1 and the plural in 4.2 but, so far as it goes, the plural in 4.2 suggests that the subject is different from the one for which the singular is used in 4.1, and it is common to talk about amounts of interest.

(6) Even if there cannot be a conclusive determination as to the amount of interest which is due and payable without a conclusive determination as to the amount of principal which is due and payable, it does not follow that ACP is being given the power to make conclusive determinations on both rather than simply on interest.

100. In the court's opinion:

(1) Paragraph 4.2 is to do with interest, as appears from a fair reading of the full clause. It entitles ACP to determine the rate and amount of interest on sums due under the APGs. It does not entitle ACP conclusively to determine the "Guaranteed Amount", payment of which the defendants guarantee. The fact that the word "amounts" in paragraph 4.2 is in the plural is a minor point, which does not have the effect of changing the whole nature of the instrument. If there is any ambiguity in that respect, it is to be resolved in favour of the guarantors (see the authorities cited above).

(2) Consistently with this, ACP's original letters of demand of 6 January 2017 only determine interest. As the defendants say, these demand letters do not have the appearance of demands under unconditional demand bonds. It was

only on 26 April 2017 when the letters were amended and resent that ACP purported (by adding words) to determine the principal amount as well.

(3) Alternatively, if paragraph 4.2 does extend to the principal amount, paragraph 4.2 entitles ACP to determine the quantum of such amount, but not the defendants' liability to pay it. There is nothing in the clause that supports an interpretation that ACP can conclusively determine the guarantors' liability to pay. Clear words would be required for such a result. The distinction in this context between liability and quantum is well recognised in the case law (*Vossloh AG v Alpha Trains (UK) Ltd* [2011] 2 All ER (Comm) 307 at [50]-[52], *Carey Value Added SL*, supra, at [40]-[41], *North Shore Ventures*, supra, at [48], to be compared to [68]).

(4) As the defendants say, this conclusion is consistent with the fact that paragraphs 4.1 and 4.2 appear in the same form in the 2010 JSG (see above), including "amounts" in the plural. The JSG covers all of GUPC's obligations under the Main Contract (as already explained the evidence is that it was entered into when the Main Contract was novated from the defendants' consortium to GUPC so as to maintain their individual liability to ACP as employer). It has not been suggested that the JSG is a first demand instrument, or that ACP is entitled conclusively to determine the amounts due under it.

101. As to the last point, ACP emphasises the fact that unlike the JSG (and APJSG) the APGs are governed by English law. There is no hint, it contends, that the parties intended that the liability of the guarantors to repay the advance payments should be subject to establishing that there was no defence to such repayment on the part of GUPC. This factor is all the stronger where the parties have agreed Panamanian law and Miami/ICC arbitration for disputes under the Main Contract and for other guarantee liabilities, and have separately agreed a different English law and jurisdiction for one particular liability secured by separate guarantees, namely the repayment of specific advance payments on contractually fixed dates.

102. These points arise on ACP's alternative case, as well as in relation to the jurisdictional arguments under s. 9 Arbitration Act 1996, and will require further consideration in that context. But on the present question whether the APGs are first demand instruments, they are neutral. The governing law/ jurisdiction provisions do not point one way or the other as to the nature of the instruments as first demand instruments.

103. For these reasons, the court does not accept ACP's case that under the APGs the defendants are liable to make repayment of the advance payments upon demand, and that ACP itself is entitled conclusively to determine what amounts of principal and interest are due. Since the defendants are not financial institutions, this conclusion also accords with the "*Marubeni* presumption" mentioned above. Although this is decided on a summary judgment application, the parties have indicated that they are content for the court to decide it now. ACP's submissions as to conditional leave to defend fall away. A declaration should be drawn up by the parties.

ACP's alternative case

104. As explained above, ACP's alternative case is that the defendants' primary liability is triggered by the failure of GUPC to make repayments "as and when" provided for

under the Main Contract, construed under English law. The defendants' liability, ACP contends, is governed solely by English law and is in no way dependent on establishing that GUPC is also liable as a matter of Panamanian law. If this is correct, it is common ground that the defendants' stay application would fall away.

105. However, it is not in dispute that the defendants agreed to the stay and summary judgment applications being listed and heard together on the basis that the issues on the summary judgment application would be limited to the "first demand" point, i.e. not including ACP's alternative case.

106. In fact, the alternative case was not raised until ACP's skeleton argument was lodged shortly before the hearing. The defendants objected to dealing with it at the hearing without proper notice, also objecting that the case is not pleaded. (Following the hearing, draft amendments have been served, and in principle are not objected to by the defendants.)

107. ACP accepted that the defendants are entitled to proper time to consider the alternative case. It now can consider the position afresh in the light of this judgment. If it wishes to apply for summary judgment on its alternative case, it may restore the application for a hearing. The parties agree that one day is sufficient, and can agree appropriate directions for any further written material that needs to be lodged.

<u>The defendants' stay application under s. 9 Arbitration Act 1996</u>

Introduction

108. The defendants' case as to the stay application is as follows. The primary substantive issue under the APGs is whether the advance payments are due and payable by GUPC to ACP under the Main Contract (the "**GUPC Repayment Issue**"). This depends on Panamanian law and is subject to arbitration both under the Main Contract and under the arbitration clauses in the JSG and the APJSG. Accordingly, the defendants submit, the court is bound to stay these proceedings under s.9 Arbitration Act 1996 on the basis that the proceedings have been brought in respect of a matter which has been agreed to be referred to arbitration.

109. This issue arises because the court has not accepted ACP's case that the APGs are first demand instruments, which would have rendered any consideration of the GUPC Repayment Issue otiose. As explained above, ACP's alternative case in relation to the APGs which would have the same effect has not yet been decided. However, all parties agree that a decision on the defendants' application for a stay under s. 9 Arbitration Act (subject to ACP's alternative case) should be given now, the issue having been fully argued.

110. Section 9 Arbitration Act 1996 provides for a mandatory stay of legal proceedings in the English court in respect of a matter which under the agreement between the parties is to be referred to arbitration:

> "**Stay of legal proceedings.**
>
> (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement

> is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> …
>
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

111. Section 9 gives effect to Article II of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, which provides that:

> "Article II
>
> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

112. Though they differ as to the precise formulation, the parties are in agreement that the issues for determination can be considered under three questions which broadly are as follows. For the purposes of s. 9(1):

> (i) what is the "matter" in respect of which these legal proceedings have been brought?
>
> (ii) does that "matter" fall within the scope of the arbitration agreements in the Panamanian Law guarantees (that is, the JSG and the APJSG and their respective parent company guarantees)?
>
> (iii) are the arbitration agreements in the Panamanian law guarantees inoperative within the meaning of s.9(4)?

Questions (i) and (ii) are linked and arise out of s. 9(1). Question (iii) raises separate issues and arises out of s.9(4). It does not arise if ACP is correct as to either (i) or (ii). The burden of establishing (i) and (ii) falls on the defendants, and (iii) falls on ACP.

113. The defendants accept that the GUPC Repayment Issue falls within the scope of the exclusive jurisdiction clauses in the English law APGs insofar as it arises in relation to claims under the APGs, and contend that it arises as a "matter". Their contention is that it also falls as the same "matter" within the arbitration agreements, and so within the stay provisions. ACP accepts that the GUPC Repayment Issue falls within both the scope of the exclusive jurisdiction clauses in the English law APGs and within the scope of the arbitration agreements. Their contention is that this issue is not the "matter" in these proceedings, and does not arise as the same "matter" in the arbitration agreements.

114. As has been noted above, the arbitration agreements in the Panamanian law guarantees are governed by the United States Federal Arbitration Act, and there was some evidence as to US law in that respect. The defendants object that because the question whether the "matter" falls within the scope of these arbitration agreements was raised late, they have had insufficient time to prepare their evidence as to US law on the issue. However, nothing in the end turned on any differences there may be between English and US law in this regard.

The parties' contentions

115. The defendants contend as follows:

(1) It is common ground that the JSG and the APJSG continue to cover the liabilities of GUPC to repay the advance payments to ACP. ACP does not contend that the liabilities of the guarantors under these instruments have been in any way reduced or relinquished in relation to the advance payments. ACP appears to envisage that, if it fails in these proceedings, it will simply claim the same sums under the JSG and the APJSG. The duplication of coverage is therefore current and continuing. As they put it, there is a perfect overlap.

(2) Although the defendants have commenced the Guarantee Arbitration to determine whether the advance payments are due for repayment under the Main Contract, it was not necessary to commence that arbitration in order to rely on s.9. There is no need for an arbitration to be pending before such an application can be made.

(3) From the defendants' standpoint as guarantors, they raise the same answer under each of the guarantees; the answer being (apart from any other defences that may arise) that repayment is not due from GUPC under the Main Contract.

(4) The effect of s. 9 is that, where the same matter or issue arises under two contracts, one of which contains an arbitration agreement, then, so far as that matter is concerned, the arbitration agreement cannot be bypassed by the expedient of suing on the other contract. Section 9 is mandatory and it represents a policy decision to prefer arbitration agreements over court proceedings.

(5) The defendants do not contend that ACP should not have brought these proceedings, or that the court cannot decide the construction issue on the APGs, or that, ultimately, the court will not be able to give a final judgment.

Their case is simply that the proceedings involve a matter, namely the GUPC Repayment Issue, which is to be referred to arbitration and that the proceedings should be stayed so far as they concern that matter.

(6) The determination whether proceedings are "in respect of" a referred matter within s.9 depends upon the nature of the claim(s) made in the proceedings, and is not dependent upon the formulation in the pleadings or the nature of the relief sought.

(7) The term "matter" encompasses any question that will foreseeably arise for determination in the legal proceedings. So a matter which will foreseeably arise as a defence can be the subject of a stay under s.9. There is no doubt that the GUPC Repayment Issue is a question that will foreseeably arise for determination in this proceedings.

(8) "Matter" is a broad word which relates to substantive issues in proceedings. What counts is the nature of the issue, not the origin of the proceedings in which it arises. Thus, the GUPC Repayment Issue is one and the same matter, regardless of which guarantee it is said to arise under. Whilst the word can certainly encompass a claim or cause of action, it is not naturally confined to such concepts. If the fact that a claim has been brought under different contracts is sufficient to avoid a s.9 stay, then that would be the answer to many such cases. If the essential element of s.9 was intended to be the source of the right concerned, it would have been more natural for the draftsman to use language such as "claim" or "cause of action".

(9) A "matter" can represent only a part of the dispute in the court proceedings. Section 9(1) provides for a "stay [of] the proceedings so far as they concern that matter". While the provision can apply to proceedings where there are two separate causes of action, one subject to arbitration and one not, it also allows for a case where one issue is subject to arbitration in a case which is otherwise properly in court. The purpose of s.9 is to ensure that when parties have agreed that things, whether entire claims or particular issues, should be arbitrated then those things should indeed be arbitrated.

(10) The case law demonstrates that a "matter" for these purposes is "any reasonably substantial issue" including a defence, "that is not merely peripherally or tangentially connected to the dispute in the court proceedings" (*Tomolugen Holdings v Silica Investors Ltd* [2015] SGCA 57 at [113]).

(11) Accordingly, the question under s.9(1) is whether the proceedings in court raise a reasonably substantial issue, which may be a defence, and which is subject to an arbitration agreement between the parties. It matters not whether the claim in court is brought upon the contract which contains the arbitration agreement, or a different contract, or in tort, or even for statutory relief under the Companies Acts. The question is whether the issue arises in the court proceedings and whether it falls within the arbitration agreement.

(12) This is consistent with the policy of s.9 to protect arbitration agreements. A narrower approach would enable a party to circumvent an arbitration agreement by bringing an action which raised the issues in tort, or on a

different contract, and then rely on a court judgment as an issue estoppel in any subsequent arbitration.

(13) The JSG is the first and primary guarantee in the contractual structure, and it was the subject of subsequent confirmations. It is a general guarantee which supports all of GUPC's obligations under the Main Contract, including all obligations to repay advance payments, and it includes an arbitration agreement in broad terms. A failure to apply s.9 would enable ACP to have key issues over liabilities for advance payments decided by the English court, even if it only brought a claim for a modest amount under one of the APGs. Such an approach would emasculate the arbitration agreements.

(14) If the question is asked whether, in relation to a claim under the JSG or the APJSG, the GUPC Repayment Issue falls within the scope of the arbitration agreements in the JSG and APJSG, the answer is unavoidably yes. These instruments encompass exactly the same set of issues as the English law APGs. Whether or not the guarantors are presently liable to repay the relevant advance payments is the same issue under both sets of guarantees. Indeed, the true issue that arises depends upon the Main Contract, and the situation between GUPC and ACP, and is whether GUPC is liable to ACP. That is the same issue regardless of whether it is raised under the Main Contract or one or two or three of the guarantees, and the wording of the arbitration agreements clearly encompasses this matter. Further, this point was raised out of time, involves consideration of foreign law and should be left to the arbitral tribunal in the Guarantee Arbitration to decide. The little evidence that was adduced does nonetheless suggest that the US courts take a broad approach to the scope of arbitration agreements.

(15) The term "defined legal relationship" in Article II.1 of the New York Convention should not be read into Article II.3 such that it would only apply when a court is "seized of an action in a legal relationship" or "concerning a defined legal relationship".

(16) So the subject matter of the guarantees is constituted by GUPC's obligations under the Main Contract. Quite apart, therefore, from the wide words of general scope of s.9, it is clear that the GUPC Repayment Issue as to whether GUPC is liable to ACP falls within the scope of the arbitration agreements in the JSG and APJSG, and that accordingly that matter must be stayed so far as it arises in the English proceedings.

(17) ACP cannot assert that the arbitration agreements in the JSG and APJSG are "inoperative" for the purposes of s. 9(4) where it is relying on the arbitration clauses in these instruments itself in ongoing arbitrations, and in circumstances where the instruments were confirmed on various occasions, including at the time when the English law APGs were entered into.

116. ACP contends as follows:

(1) The defendants' case is that, though the parties agreed an exclusive jurisdiction clause in the APGs, when an action is commenced under that clause it must be stayed because a parallel issue arises for a different purpose

under a set of different guarantees governed by a different law and subject to a different jurisdiction, namely arbitration in Miami. If that is right, the protection afforded by the exclusive jurisdiction clauses was illusory. The defendants' approach flies in the face of the commercial context and objective of the transaction.

(2) The defendants misunderstand the relevant "matter" for the purposes of s. 9(1). A common or parallel "issue", arising in a different context, is not sufficient, especially in a case like the present one in which there are express provisions which contradict such an interpretation. More linkage is required by the use of the word "matter" in s. 9(1). The "matter" in respect of which these proceedings have been brought is whether the defendants are liable to ACP under the English law APGs, and this is not a "matter" which is to be (or can be) referred to arbitration under the arbitration agreements in the Panamanian law guarantees.

(3) The defendants' contention that the relevant "matter" is the GUPC Repayment Issue (shorn of its context) is wrong both in principle and on the wording of the English law APGs. But, even if (contrary to its primary submission), the relevant "matter" is the GUPC Repayment Issue, that issue does not fall within the scope of the arbitration agreements insofar as it arises in relation to claims under the APGs as opposed to the Panamanian law guarantees.

(4) It is clear from the terms of the APGs and the Panamanian law guarantees that, if ACP wishes to enforce its rights in relation to the repayment of the advance payments, it has the option of bringing claims under either the APGs or the Panamanian law guarantees or both. If ACP wished to bring claims under the APGs (as it has done), all issues which could arise in relation to those claims and the defendants' defences, including the GUPC Repayment Issue (insofar as it arises at all under the APGs), would fall within the scope of the exclusive jurisdiction clauses.

(5) If ACP wished to bring claims against the defendants under the Panamanian law guarantees (which it has not done and would have no need to do if it succeeds in these proceedings), it would be bound to refer such claims to arbitration pursuant to the arbitration agreements, and all issues which could arise in relation to ACP's claims and the defendants' defences, including the GUPC Repayment Issue insofar as it arises under those guarantees, would fall within the scope of the arbitration agreements.

(6) Accordingly, on ACP's approach there will be one-stop adjudication in the forum which is specified by the dispute resolution provisions in whichever set of guarantees it chooses to enforce.

(7) ACP is not obliged to pursue any other action elsewhere either against GUPC, or under any other security, and the APGs can be enforced under the exclusive jurisdiction clauses without recourse to GUPC or other security. ACP relies on clauses 3.3, 3.4 and 8.1 of the APGs.

(8) Given that having recourse to GUPC or to the providers of other security would necessarily entail going to another forum, the defendants' suggested

construction of the exclusive jurisdiction clauses is inconsistent with those provisions and would deprive them of effect because ACP would have to do the very thing that it contracted not to have to do, namely, to sue elsewhere under other contracts before it can enforce the APGs.

(9) The task of the court in determining whether a dispute falls within potentially overlapping dispute resolution provisions in one or more related agreements depends on the intention of the parties as revealed by the agreements (i.e. objectively ascertained) against the background of general principle. The preferred approach of the English courts is to find that the particular dispute falls within the scope of only one of the competing dispute resolution provisions (i.e. that they are mutually exclusive rather than overlapping), if the language and surrounding circumstances so allow.

(10) The defendants' argument concerning the fact that the Guarantee Confirmations were executed on the same days as the English law APGs is misconceived. The purpose of the confirmations was to ensure that the advance payments would be secured by the earlier set of Panamanian law guarantees as well as the new APGs. This does not detract from the fact that one set of guarantees was entered into in a particular set of circumstances and another set of guarantees was subsequently entered into years later in different circumstances and to cover one particular liability in each case.

(11) The defendants confuse the concept of the "matter" with the concept of an "issue". "Matter" requires something different from the existence of a common issue in a different contract. In identifying the "matter" in respect of which the legal proceedings have been brought, the focus must be on the particular "legal relationship" and the particular agreement under which the claim in the proceedings has been brought.

(12) The "matter" in respect of which these proceedings have been brought is whether the defendants are liable to ACP under the English law APGs. Under the APGs it was agreed that liability was independent of any need to assert liability in another forum.

(13) Nor is the relevant "matter" the "issue" whether the advance payments are currently due under the terms of the Main Contract as construed in accordance with Panamanian law (i.e. the GUPC Repayment Issue). This would have the effect of forcing ACP to go to arbitration when it was expressly agreed in the APGs that it does not have to do so. The "matter" as to whether the defendants are liable to ACP under the APGs is not a matter which is to be referred to arbitration under the arbitration agreements, nor a matter which the defendants have in fact referred to the Guarantee Arbitration.

(14) If the court nevertheless upholds the defendants' case that the "matter" is the GUPC Repayment Issue, the defendants must still prove that the issue falls within the scope of the arbitration agreements. However, these do not apply to disputes "arising out of, under or in connection with" the English law APGs or "out of the subject matter of" those guarantees. The GUPC Repayment Issue does not fall within their scope insofar as the issue arises in relation to a claim under the APGs as opposed to a claim under the Panamanian law guarantees.

There is therefore no common "matter" arising in these proceedings brought in respect of the APGs that falls within the arbitration agreements.

(15) Accordingly, ACP submits that the defendants cannot discharge their burden under s. 9 of proving that these legal proceedings have been brought in respect of a "matter" which under the arbitration agreements must be referred to arbitration, and the stay applications must be dismissed.

(16) In entering into the English law APGs in the terms they did, the parties intended that, if ACP wished to bring claims under the APGs there would be one-stop adjudication in the English courts in respect of those claims and all issues arising in respect of them. The arbitration agreements in the JSG and APJSG are to be regarded as "inoperative" within the meaning of s. 9(4), such that they cannot afford the basis on which the English court could grant a stay, in circumstances in which the GUPC Repayment Issue arises only because defendants wished to obtain a ruling so as to affect claims advanced under the APGs, and ACP has not intimated any claim under the JSG and APJSG.

Discussion and conclusion

(i) Introduction

117. Before turning to the analysis, it is necessary to say something about the commercial context. The history as explained above is complex, but, in brief, following a number of advance payments made by ACP to GUPC secured by Panamanian law guarantees with Miami arbitration clauses, new English law/exclusive jurisdiction APGs were entered into in respect of existing and new advance payments, broadly as a result of further deferrals being granted to GUPC (the earlier security remaining in effect as well). The advance payments covered by these new guarantees were repayable on 31 December 2016, but this was deferrable to 2018 dependent upon GUPC putting in place letters of credit.

118. On 16 November 2016, with the repayment date coming up and the letters of credit not in place, GUPC and the first to third defendants made the Emergency Application to the arbitral tribunal seeking among other things an order restraining ACP from making demands under the APGs. As explained above, this was based on Panamanian law arguments (including as to the construction of the Main Contract) which in the event the tribunal dismissed. One such argument was that GUPC was absolved from repaying the advance payments due on 31 December 2016 on the grounds that ACP was in breach of its obligations under the Main Contract—the tribunal rejected this, stating that the parties "clearly intended for the repayment obligations to be dealt with separately from any ongoing disputes as to other contractual obligations". As for the APGs, the tribunal noted that the English court had exclusive jurisdiction.

119. That tribunal's decision appeared to leave the way open for the English proceedings to continue. But on 31 January 2017, GUPC and the defendants commenced the Guarantee Arbitration against ACP, this time with a differently constituted tribunal. In the arbitration, they seek negative declarations to the effect that the advance payments are not repayable by GUPC—i.e. the GUPC Repayment Issue—and that the defendants are not liable as guarantors. This arbitration is commenced under the

Panamanian law guarantees and the Main Contract. As explained above, the arguments advanced are similar to, or the same as, those rejected by the arbitral tribunal in the earlier arbitration.

120. The claims for negative declarations in the Guarantee Arbitration do not extend to claims made under the English law APGs (because of the exclusive jurisdiction clause).

(ii) The legal principles

121. Section 9 Arbitration Act 1996 is set out above, as are the concomitant provisions of the New York Convention (as to the relationship see *Fulham Football Club (1987) Ltd v Richards* [2012] Ch 333 at [33]). Section 9(1) provides for a stay on the application "of a party to an arbitration agreement against whom legal proceedings are brought … in respect of a matter which under the agreement is to be referred to arbitration ….". It is not in dispute that arbitration agreements are contained in both the JSG and APJSG, and that all relevant parties are party to the agreements.

122. Further, it is not in dispute that under s.9(1), a stay can be granted in respect of part of the legal proceedings, where other parts are not subject to an agreement to arbitrate. This is because proceedings are only to be stayed "… so far as they concern that matter" (i.e. the matter which under the agreement is to be referred to arbitration: *Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP* [2013] 1 WLR 3466 at [30]).

123. The question is as to the test the court applies in determining what is the "matter" in respect of which the legal proceedings are brought, and whether such "matter" is referred to arbitration under the arbitration agreement. In *Lombard North Central plc v GATX Corpn* [2013] Bus. L.R. 68 it was said at [14] that, "There is no judicial authority of which counsel or I know that directly considers the meaning of "in respect of" in section 9(1) or how the court determines whether proceedings are in respect of a referred matter".

124. There is however a considerable body of authority that is relevant to this question in various jurisdictions which have the same or similar provisions. This was surveyed by the Singapore Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57.

125. One such authority is *Tanning Research Laboratories Inc v O'Brien* (1990) 91 ALR 180, in which the High Court of Australia considered the meaning of the word "matter" in s.7(2) of Australian legislation. This provided for a stay of court proceedings where "the proceedings involve the determination of a matter that, in pursuance of the [arbitration] agreement, is capable of settlement by arbitration". At p.193, it was pointed out that "in any context, 'matter' is a word of wide import", and in the context of s.7(2) "may, but does not necessarily, mean the whole matter in controversy in the court proceedings".

126. The issue in *Tanning* was approached by reference to the "substance of the controversy", it being noted at p.194 that:

> "Section 7(2) of the Act is concerned with "proceedings [which] involve the determination of a matter … capable of

> settlement by arbitration". Its operation is thus not confined to proceedings in which the parties seek the same relief as might have been sought in arbitration proceedings. … the question whether a person is claiming through or under a party to the arbitration agreement is necessarily to be answered by reference to the subject matter in controversy rather than the formal nature of the proceedings".

127. Similarly, the court in *Tomolugen* said:

> "125 When ascertaining whether a given matter is covered by an arbitration clause, the court must consider the underlying basis and true nature of the issue or claim, and is not limited solely to the manner in which it is pleaded (see, for example, *Larsen Oil v Petroprod* at [7]-[10]). As Andrew Smith J stated in *Lombard North v GATX* at [14]:
>
> "... The question of course depends upon the nature of the claim (or claims) made in the legal proceedings, but not, I think only on the formulation of it (or them) in the claim form and any pleadings. That would allow a claimant to circumvent an arbitration agreement by formulating proceedings in terms that, perhaps artificially, avoid reference to a referred matter, knowing that any application to stay them must be made before a defence is pleaded. ..."
>
> 126 Blair J approached the issue in the same way in *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal, Standard Chartered Bank, Singapore Branch* [2011] Arb LR 26, where he emphasised at [35]:
>
> "... the importance of identifying the "substance of the controversy", rather than the formal nature of the proceedings ... [T]he court must consider the substance of the controversy as it appears from the circumstances in the evidence on the application (and not just the particular terms in which the Claimant has sought to formulate its claim in court). ..."
>
> 127 We agree with both these statements as to the proper approach which a court should take. …"

128. Similarly, it has been "suggested that the court should consider the essential nature of the claim but not necessarily the precise formulation in the claim form otherwise this might allow a party to circumvent the arbitration agreement by its formulation. In an appropriate case this will lead to an examination of the claim and the defences to the claim and the subject of the underlying dispute" (David Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement*, 3rd edn, at ¶11.15, cited with approval in *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal* [2011] Arb LR 26 at [35]), and see *Nomihold Securities Inc v Mobile Telesytems Finance SA* [2012] EWHC 130 (Comm) at [38]; c.f. *T&N Ltd v Royal & Sun Alliance Plc* [2002] CLC 1342 at [18]). The focus on the substance of the controversy is also adopted by

Professor Merkin in *Arbitration Law* at ¶8.20, and in *Deutsche Bank AG v Tongkah Harbour Public Co Ltd* [2012] 1 All ER 194 (Comm) at [26].

129. As the survey in *Tomolugen* shows, the question arises in widely differing circumstances: it was said that "… when the court considers whether any "matter" is covered by an arbitration clause, it should undertake a practical and common-sense inquiry in relation to any reasonably substantial issue that is not merely peripherally or tangentially connected to the dispute in the court proceedings. The court should not characterise the matter(s) in either an overly broad or an unduly narrow and pedantic manner. In most cases, the matter would encompass the claims made in the proceedings. But, that is not an absolute or inflexible rule" ([113]).

130. Where s.9(1) applies, the stay is mandatory, the exception being in s.9(4), which provides that "… the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed". As appears above, this exception also is founded in the equivalent provision of the New York Convention.

(iii) The principles applied to the present dispute

131. The essence of the defendants' case is that once it is ascertained that the APGs are not first demand instruments—as the court has now held—then (subject to ACP's alternative case on the interpretation of the instruments) the English proceedings inevitably require the court to consider the defendants' case to the effect that the advance payments are not presently repayable. This is the GUPC Repayment Issue, and that, the defendants argue, is a "matter" within the meaning of s. 9(1) Arbitration Act 1996. The issue is a substantial one (*Tomolugen* at [113]), in fact it is the primary substantive issue. The issue is referred to arbitration because it is within the arbitration agreements contained both under the Main Contract and in the JSG and the APJSG. In fact, there is a perfect overlap between the English law APGs and the Panamanian law JSG and APJSG in this respect. In those circumstances, the GUPC Repayment Issue must be stayed—the court has no discretion in that regard, since under s.9 a stay is mandatory. A failure to apply s.9 would enable ACP to have key issues over liabilities for advance payments decided by the English court which are more suitably determined by an arbitral tribunal.

132. The essence of ACP's case is that the term "matter" in s.9(1) requires something different from the mere existence of a common issue in a different contract. In identifying the "matter", and following the approach in the New York Convention, the focus must be on the particular "legal relationship" and the particular agreement. In the present case, the "matter" in respect of which these proceedings have been brought is whether the defendants are liable to ACP under the English law APGs. The "matter" is not the issue whether any of the advance payments are currently due to ACP by GUPC under the terms of the Main Contract, as construed in accordance with Panamanian law (i.e. the GUPC Repayment Issue). To construe that as the "matter" would have the effect of forcing ACP to sue in another forum when it was expressly agreed in the contracts in question that it does not have to do so. Nor, and this is a separate contention, is the matter within any of the Panamanian law guarantees.

133. In considering the opposing arguments, the starting point is the principle that on the application of a party, agreements to arbitrate will be enforced by the court, by way of a stay under s. 9 of the Arbitration Act if the legal proceedings are brought in England, and by way of an anti-suit injunction if the legal proceedings are brought outside England. This fundamental principle is based on respect for party autonomy. What marks the present case out is that the defendants seek to apply the principle notwithstanding that under the contracts on which the claimant sues, the parties have agreed that the English courts shall have exclusive jurisdiction—in other words, party autonomy goes the other way. There is no other case that has been cited in which s. 9 has been invoked in such circumstances.

134. As explored in argument, a number of points arise out of this. One is that, contrary to the exclusive jurisdiction clause, if ACP wishes to enforce the APGs it must do so by way of arbitration. The defendants seek to meet that point by arguing that the English proceedings will remain on foot. The defendants, they submit, are "not seeking to say that ACP should not have brought its proceedings, or that the Court cannot decide the Construction Issue or that, ultimately, the Court will not be able to give a final judgment (one way or the other) in these proceedings. The defendants' case on this application is simply that the proceedings involve a matter, namely the Repayment Issue, which is to be referred to arbitration and that the proceedings should be stayed so far as they concern that matter".

135. The reality however is that the case as a whole will be stayed, at least for the time being. ACP must recover the advance payments by claiming under the JSG and/or the APJSG. This effectively bars a claim under the APGs save for the purposes of enforcement. As ACP says, on this basis it is difficult to see what security it obtained when it agreed to defer repayment of the advance payments in addition to what it already had.

136. Further, under the terms of the APGs, ACP is not required to claim under the JSG or APJSG. These terms are set out above. In summary, paragraph 3.3 provides that ACP shall not be obliged to take any action in any arbitral proceedings against GUPC or any guarantor, or to make any claim or demand to enforce any guarantee held by it in respect of the obligations of GUPC under the Main Contract. Paragraph 3.4 provides that the guarantors' obligations under the APG are in addition to any other guarantee which ACP may hold, and may be enforced without first having recourse to any such guarantee. Paragraph 8.1 provides that ACP's rights under the APG are cumulative and are in addition to and not in substitution for any rights provided by any other guarantee, and that ACP may exercise its rights under the APG from time to time without first having recourse to any such guarantee.

137. The court's conclusions on this question are as follows:

(1) As the defendants point out, the GUPC Repayment Issue is likely to be the most substantial (possibly the only) issue arising under the APGs. It is clearly not an issue that is merely peripherally or tangentially connected to the dispute in the court proceedings (see *Tomolugen* at [113]). The court agrees with them on this.

(2) However, as was said in *Tanning* at p. 193, "in any context, 'matter' is a word of wide import", and the context in which it is being considered is important.

The essential nature of the claim here is that it is brought under guarantees (the APGs), which are subject to English law and jurisdiction. The substance of the controversy between the parties is the claim under the APGs, and that is the "matter" for the purposes of s. 9(1). The issue of the liability of the principal debtor to repay the advance payments (i.e. the GUPC Repayment Issue) is necessarily bound up with the nature of the instrument as a guarantee, but it is not the, or a, "matter" for these purposes in itself.

(3) On that basis, the proceedings are not "brought in respect of a matter which under the agreement is to be referred to arbitration". The proceedings are brought in respect of a matter (the claim under the APGs) which is referred to the exclusive jurisdiction of the English court.

(4) Although s. 9 cannot be circumvented by the way the proceedings are framed, that does not apply here. The claim is brought under the APGs because that is the security that ACP chooses to enforce. As the court said in *Tomolugen* at [113], in most cases, the "matter" will encompass the claims made in the proceedings. There is no reason to take a different approach here. To hold otherwise and impose a mandatory stay would run contrary to the substantive provisions of the contract, by which ACP is entitled to enforce the security without enforcing any other security or the principal indebtedness itself.

(5) Contrary to the defendants' submissions in reply, ACPs' Note on Case Management Issues is not inconsistent with its case in this respect, the Note being concerned with potential ways forward, and not this analysis.

(6) Accordingly, ACP is correct that the "matter" in respect of which these proceedings have been brought is whether the defendants are liable to ACP under the English law APGs. This is within the exclusive jurisdiction clause, and is not a matter which the parties have agreed to refer to arbitration, nor in the context of the APGs is the GUPC Repayment Issue a matter which the parties have agreed to refer to arbitration. Section 9(1) does not apply.

138. This is consonant with the commercial sense of the transaction. On the defendants' case, ACP must submit the claim under the APGs to arbitration under different guarantees, in respect of which ACP has made no demand, and has no claim. There is nothing unusual in a party holding more than one security for the same obligation. It is up to that party which security it chooses to enforce. Though there is now an arbitration commenced by the defendants in which they seek a negative declaration, it is common ground that it does not extend to the APGs, and could not result in an award in ACP's favour under the APGs.

139. This conclusion focuses on question (i) above. As regards the linked question (ii), ACP submits that the matter/GUPC Repayment Issue does not fall within the scope of the Panamanian Law guarantees insofar as it arises in relation to claims under the English law guarantees. As well as saying that the point is wrong, the defendants say that they have had insufficient time to put in US law evidence (US law governs the arbitration agreements in the Panamanian law guarantees), and invite the court to decline to deal with this "new point". In view of the conclusions set out above, there is no need for any further decision by the court.

140. On question (iii), that is, whether ACP is correct to assert that the arbitration agreements in the Panamanian law guarantees are "inoperative" within the meaning of s.9(4), as well as contending that the point is wrong, the defendants also say that they have had insufficient time to put in US law evidence on what they also say is a "new point". However, in view of the conclusion reached on question (i), again there is no need for any further decision by the court.

141. The result is that the defendants' application for a stay under s. 9(1) Arbitration Act 1996 is refused.

Case Management Stay

Introduction

142. In cases outside the ambit of s.9 Arbitration Act 1996, as this case has been held to be, it is common ground that in principle the court has an inherent jurisdiction to stay its proceedings by way of a case management stay to allow one or more issues to be determined by way of arbitration. Unlike a s. 9 stay, a case management stay is discretionary. The parties differ as to how the principle is to be applied in this case. Before discussing the legal test, a preliminary point was raised by ACP in respect of the effect of the Recast Brussels Regulation jurisdictional regime.

The point raised by ACP as to the effect of the Owusu case

143. In *Owusu v Jackson* [2005] QB 801, the ECJ was asked (on a reference from the English Court of Appeal) whether a court of a Brussels Convention contracting state (as the United Kingdom is), which has before it a case with connecting factors to a non-contracting state, can exercise a discretionary power available under its national law to decline jurisdiction in favour of the courts of that state. (The Brussels Convention is the precursor of the current Regulation (EU) No 1215/2012, the Recast Brussels Regulation.) Answering the question in the negative, the ECJ said at [46] that the court cannot decline jurisdiction on forum non conveniens grounds:

> " … the Brussels Convention precludes a court of a contracting state from declining the jurisdiction conferred on it by article 2 of that Convention on the ground that a court of a non-contracting state would be a more appropriate forum for the trial of the action, even if the jurisdiction of no other contracting state is in issue or the proceedings have no connecting factors to any other contracting state."

144. In its written submissions, ACP points out that the court is not permitted to exercise its inherent jurisdiction to stay proceedings in a manner which is inconsistent with the Regulation (*Mazur Media Limited v Mazur Media GmbH* [2004] 1 WLR 296 at [69]). So far as concerns a stay in favour of *arbitration*, as opposed to another court, it is correct that Art. 1(2)(d) of the Recast Brussels Regulation provides that the Regulation does not apply to "arbitration". However (ACP says), since the court has held that these proceedings have not been brought in respect of a "matter" which under the arbitration agreements is to be referred to arbitration, so that the defendants are not entitled to a mandatory stay under s. 9, there is no relevant difference between an application for a case management stay in favour of proceedings in the courts and those in arbitral proceedings: the court is not permitted to grant a stay on forum non

conveniens grounds because to do so is inconsistent with the Regulation. While (as ACP concedes) it has been accepted that the English court nevertheless retains its inherent power to stay its proceedings, including on case management grounds, the court must be astute to ensure that forum non conveniens principles are not re-introduced via the back door (*Mazur* at [70]; *Jefferies International Ltd v Landsbanki Islands HF* [2009] EWHC 894 (Comm) at [24]-[29]; *Skype Technologies SA v Joltid* [2011] I.L.Pr 8 at [22]), *Re Zavarco Plc* [2015] EWHC 1898 (Ch) at [45]).

145. On this point of principle, the defendants submit that the *Owusu* principle does not apply at all to stays made in the context of related arbitral proceedings. The authorities, they submit, do not point to the contrary conclusion. In *A v B* [2007] 2 CLC 157, a temporary stay was ordered pending the determination of arbitration claims. In *CNA Insurance Co Ltd v Office Depot International (UK) Ltd* [2012] 1 CLC 283, citing *Owusu*, a stay on case management grounds was refused because, as a matter of substance, the stay sought there went to jurisdiction and not case management. In *Equitas Ltd v Allstate Insurance Co* [2008] EWHC 1671 (Comm), the issue was decided on the absence of a sufficiently compelling case to justify a stay, rather than on a lack of jurisdiction to do so. Although *Lungowe v Vedanta Resources Plc* [2016] EWHC 975 (TCC) is not an arbitration case, the defendants refer to the court's observations at [83]-[84] that, in an appropriate case and notwithstanding *Owusu*, the court must be able to exercise its case management powers to grant a stay.

146. The court accepts the defendants' submissions in this regard. There is nothing in *Owusu* which expressly addresses the issue of a stay which is not in favour of the courts of another state, but is made pending the determination of disputes in arbitration. Arbitration is excluded from the Recast Brussels Regulation, as it was from its predecessors, Art. 1(2)(d) providing simply that it does not apply to "arbitration".

147. Regard also should be had to recital (12) of the Recast Brussels Regulation, which provides non-exhaustive guidance as to the scope of the arbitration exclusion. It states that:

> "Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed".

148. As ACP points out, the language of the recital closely follows Article II.1 of the New York Convention, which is given effect by ss. 9(1) and (4) of the Arbitration Act 1996. However, the words "in respect of" are wide words, and in this context need not be limited to cases in which the court is required to give a mandatory stay under s.9 of the Arbitration Act 1996, or under national law implementations of Article 8 of the UNCITRAL Model Law on International Commercial Arbitration. As the defendants aptly put it, the recital is sensibly to be read as applying to a case in which a dispute is capable of falling within both an arbitration agreement and a jurisdiction agreement between the parties. Accordingly, the jurisdictional inhibition exemplified by the *Owusu* principle does not apply to case management stays made in the context

of related arbitration proceedings. There is no commercial or policy reason for reaching the contrary conclusion.

149. There is also force in the defendants' broader submission that *Owusu* does not apply at all to a temporary stay which allows for the efficient marshalling of multi-jurisdictional and multi-party proceedings but which does not involve the court declining jurisdiction (c.f. *Equitas*, supra, at [64]). In such cases, the court's concern is with the sequence most appropriately followed, and not with shutting out the claim altogether (*BC Andaman Co Ltd v Xie Ning Yun* [2017] SGHC 64 at [102]). However, in view of the conclusion on the point of principle, it is not necessary to decide this.

150. The point raised by ACP as to the effect of the Recast Brussels Regulation jurisdictional regime can therefore be put on one side, and was not pursued by ACP in oral submissions.

The parties' contentions

151. In the event that the court refuses a s.9 stay—which it has—the defendants seek a case management stay in respect of ACP's monetary claims. It defines these as being those claims which require resolution of the GUPC Repayment Issue. It relies on four factors which they say apply, (1) a stay will avoid duplicative proceedings and the risk of inconsistent decisions, (2) the tribunal in the Guarantee Arbitration will be better placed to adjudicate the GUPC Repayment Issue, (3) priority should be given to the proceedings between the principals, i.e. GUPC and ACP, and (4) the issues could be determined more quickly in the Guarantee Arbitration.

152. ACP responds that the effect of a stay would re-write the parties' contracts, would contradict the commercial objective of the transaction, and deprive ACP of the benefit of the contractual terms which it secured when it obtained the additional security of the APGs. The risk of inconsistent decisions would not be avoided, the defendants are raising what amount to forum non conveniens points which the FNC Waiver Clause precludes, the APGs state that priority should not be given to the proceedings between the principals, and the defendants themselves have created the competing proceedings in the Guarantee Arbitration so as to lay the ground for a stay application. This "second bite at the cherry" comes after their points were roundly dismissed in the Emergency Application.

153. Whichever arguments are the correct ones, there are clearly potential complexities in deciding the dispute under the APGs. For that reason, the court asked the parties to prepare a Note on Case Management to explain (on a non-binding basis) how they saw the case progressing on their respective approaches on the basis that the court does not grant summary judgment or a stay, which they helpfully did.

154. ACP's proposal: ACP proposes a trial in the English court of preliminary issues arising out of the defendants' Panamanian law defences (plus its alternative construction point). These defences are broadly the same as those that were considered by the tribunal in the Emergency Application, and ACP contends that the outcome will be the same in the English proceedings. If ACP succeeds at trial, it will be entitled to money judgment and the proceedings would end. If the defendants succeed, and at that stage there are detailed and complicated issues which are also

being considered in arbitration proceedings, it may well be that there would be an agreed stay to have these issues resolved in such arbitration proceedings.

155. The defendants' proposal: The determination of preliminary issues arising out of the Panamanian law defences will involve some factual evidence. This will increase the time necessary for the hearing and when it can be heard. It is common ground that a case management stay may be needed at that stage if the determination of the preliminary issues of Panamanian law does not finally determine the GUPC Repayment Issue. The defendants' proposal is that the court grants a stay of the English proceedings now in favour of the Guarantee Arbitration. This would involve three stages:

(1) The tribunal would determine ACP's objections as to jurisdiction and admissibility (if ACP maintains them). If successful, the English proceedings would resume to determine the preliminary issues, with a possible case management stay afterwards. If ACP is not successful, the Guarantee Arbitration would proceed to stage 2, which is determining the preliminary issues.

(2) At stage 2, the tribunal would determine the preliminary issues of Panamanian law and associated facts. It should be possible for a partial award to be produced by the summer of 2018—before the English proceedings could produce a judgment. If ACP succeeds, it could return to the English court, ask for the stay to be lifted and for judgment under the APGs with the benefit of an issue estoppel as to the GUPC Repayment Issue. If determination of the preliminary issues leads to the conclusion that there are possible Panamanian law defences, the Guarantee Arbitration would proceed to stage 3.

(3) If stage 3 is reached, further consideration would need to be given to how the underlying disputes between GUPC and ACP should be determined. Given the likely timing of a partial award at stage 2, the parties should know the scope of any remaining disputes in advance of the upcoming merits hearing in the Concrete Arbitration (the arbitration in which the Emergency Application was made) which is due to take place over 4 weeks in January-February 2019. This would allow the parties to conduct the hearing informed by the outstanding issues in the Guarantee Arbitration, which would not be possible on ACP's proposal. If ACP were to be successful on the GUPC Repayment Issue, it could return to the English courts to lift the stay and obtain judgment. If ACP were to be unsuccessful, the determination of the GUPC Repayment Issue would produce an issue estoppel in the defendants' favour, and the defendants could return to the English court to have the stay lifted and the claims dismissed.

Discussion and conclusion as to case management stay

156. The applicable test is not in dispute. In *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173 it was held that the court has jurisdiction to stay proceedings on case management grounds, it being said at p. 186 that "stays are only granted in cases of this kind in rare and compelling circumstances". In that case, the claimant's claim was stayed pending the determination of another claim it had brought by way of arbitration against a third party arising out of the same transaction.

157. The defendants point out that unlike in *Reichhold*, this is not an application to stay proceedings between A and B pending an arbitration between A and C, but pending an arbitration between A and B themselves. The Guarantee Arbitration is brought pursuant to arbitration agreements between the parties to the English proceedings, and the issue of GUPC's liability to repay the advance payments is one which it is common ground is capable of being determined in the arbitration.

158. Nevertheless, whilst drawing attention to the review in *Tomolugen* in this context as well, the defendants do not suggest that the test should not be applied (for a recent example in a case that also involved an exclusive jurisdiction clause, see *Black Diamond Offshore Ltd v Fomento* [2015] 1 CLC 884 at [50]).

159. ACP places great reliance on the exclusive jurisdiction clause, submitting that while the power can in principle be exercised even though the English court has jurisdiction pursuant to such a clause, and even when this is fortified by a forum non conveniens waiver clause (the FNC Waiver Clause), it is extremely unlikely that the court would ever exercise its discretion to grant a stay in such circumstances.

160. However, this states the test too high. In *Amlin Corporate Member Ltd v Oriental Assurance Corp* [2013] 1 All E.R. (Comm) 495 at [22] it was said that the presence of an exclusive jurisdiction clause conferring jurisdiction on the English courts to try a dispute is just one of the relevant circumstances to bear in mind when the court exercises its discretion:

> "Mr MacDonald Eggers submitted that the presence of the exclusive jurisdiction clause (there was no such clause in the *Reichhold* case) meant that the circumstances justifying a stay had to be even more rare and more compelling than in a case where jurisdiction was founded for other reasons and he was even able to cite the judgment of Beatson J in *Equitas Ltd v Allstate Insurance Ltd* [2009] Ll Rep IR 227 in support of that proposition. For myself, however, I doubt if it is useful to talk of degrees of rarity and compellability. It is better just to decide if the circumstances of any particular case are rare and compelling enough. The presence of an exclusive jurisdiction clause conferring jurisdiction on the English courts to try a dispute is just one of the relevant circumstances to bear in mind when a judge exercises his discretion. That is what the judge did and the second ground of appeal is not, in my judgment, made out."

161. In the particular case of guarantees, as in the present case, the question may arise where the issue of the principal indebtedness upon which the guarantors' liability depends is the subject of an arbitration. As the defendants emphasise, the risk of inconsistent judgments is evident in such cases (*Alfred McAlpine Construction Ltd v Unex Corporation* (1994) 70 BLR 26 at p. 32E).

162. A recent authority is *Stemcor UK Ltd v Global Steel Holdings Ltd* [2015] 1 Lloyd's Rep 580, where a stay of a claim against guarantors under guarantees with exclusive jurisdiction clauses was granted pending the outcome of an arbitration as to the underlying debt. The court distinguished *Classic Maritime Inc v Lion Diversified Holdings Bhd* [2010] 1 Lloyd's Rep 59 which went the other way.

163. It is clear that each case depends on its facts. One of the points that weighed with the court in *Stemcor* was that the arbitration proceedings were more advanced than the court proceedings—directions up to and including the final hearing had been made, including a detailed timetable for disclosure and factual and expert evidence, and the hearing date had been fixed (at [50]). In *Classic Maritime* on the other hand, the arbitration had yet to be instituted.

164. ACP rightly draws attention to the FNC Waiver Clause in the APGs, by which the parties agree that the English courts are the most appropriate and convenient courts to settle disputes, and that no that party will argue to the contrary. This rules out forum conveniens type arguments, but it does not preclude the grant of a case management stay in an appropriate case (*Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd* [2016] 2 All ER (Comm) 740 at [43]).

165. These authorities show the approach of the court to an application for a case management stay. It is not for the court to dictate what a party's course of action should be. If a party has contractual rights, it is entitled to enforce them in the contractual jurisdiction. On the other hand, it is not correct, as ACP puts it, that because of the exclusive jurisdiction clause the defendants have "a mountain to climb". In circumstances in which an international commercial dispute involves arbitration as well as court proceedings, it makes good commercial sense for the court to have regard, where appropriate, to the orderly resolution of the dispute as a whole, if necessary by granting a temporary stay in favour of arbitration. A coherent system of commercial dispute resolution has to take into account the fact that various different tribunals may be involved, each of which should aim to minimise the risk of inconsistent decisions, and avoid unnecessary duplication and expense. All this is amply supported in the case law.

166. With those points in mind, and having carefully considered the parties' respective submissions on the application, the court's conclusion is as follows:

(1) The way the arbitration proceedings have come about is of some relevance. This is not a case in which the employer (ACP) has instituted arbitration proceedings against the guarantors in respect of the advance payments. It is common ground that such proceedings could have been commenced under the JSG and APJSG, but ACP chose to enforce the English law APGs, which came later in time. It cannot seriously be suggested that this is not a perfectly reasonable commercial choice. In this case, it is the contractor and the defendant guarantors which have commenced the arbitration proceedings, after the court proceedings had already begun. The history is summarised above, but in brief, after their Emergency Application had been dismissed in the existing arbitration, the defendants began the Guarantee Arbitration seeking negative declarations that they are not liable under the Panamanian law guarantees. But no claim has been made under those guarantees by ACP, nor does it need to make such a claim, in fact it is contractually entitled not to. This certainly does not rule out granting a case management stay in favour of the Guarantee Arbitration at some point, but at least it calls for some hesitation before reaching that conclusion at this stage.

(2) The next point of relevance is the progress of the respective sets of proceedings. The English proceedings are underway, though ACP is still

seeking summary judgment, and the proceedings are not particularly far advanced. Though the arbitration has been commenced, the arbitral tribunal has not yet been constituted. In distinction to *Stemcor*, this is not a case therefore in which the arbitration is more advanced than the court proceedings. The case is more like *Classic Maritime* in that respect. Further, ACP has raised jurisdictional and admissibility objections, and sought an order that the Guarantee Arbitration should be stayed pending the outcome of the English court proceedings, which places a question mark over future timing if ACP maintains this position. Overall, this is a relatively neutral factor, but on balance it tends to weigh against a case management stay at this stage.

(3) The next point of relevance is what the court, or the arbitral tribunal in the Guarantee Arbitration, is going to be asked to decide. For good practical reasons, the case management proposals submitted by both parties envisage the Panamanian law defences on which the defendants rely being subject to decision by way of preliminary issue, either by the court, or by the arbitral tribunal. This is because the position as to a case management stay will be very different if the correct view (contrary to that reached on a prima facie basis by the arbitral tribunal in the Emergency Application) is that GUPC's liability to repay the advance payments depends on the outcome of their other disputes with ACP relating to the performance of the underlying contract. There is force in the defendants' contention that the arbitral tribunal will be better qualified to decide questions of Panamanian law, since it will certainly have civil law expertise among its members. However, the earlier tribunal's decision is of some relevance in this respect, not because it is binding in any way (the defendants may make good some or all of their contentions after full argument), but because it demonstrates that the preliminary issues may turn out to be relatively self-contained, and well within the kind of issues that can be decided by the court with the benefit of expert evidence—some such evidence is already before the court on this application. So although this is a factor tending in favour of a stay, it is a relatively on balance factor at least at present.

(4) But the position could be very different if the GUPC Repayment Issue turns out to depend on disputes relating to the performance of the underlying contract. If it is, then the case for a stay in favour of arbitration may be clear, as indeed ACP accepted in its case management proposals. In at least one version of these proposals, it is fairly stated that, "If the defendants succeed, and at that stage there are detailed and complicated issues which are being considered in arbitration proceedings, it may well be that there would be an agreed stay to have them resolved in the arbitration". If not agreed, the court could order it. But that stage has not yet been reached, and may never be reached.

167. In all the circumstances, and taking into account these and the other points made by the parties, the court's conclusion is that a compelling case for a case management stay is not made out by the defendants at the present time. As has been made clear, the door is not closed on an application being made in the future, to be decided on the position as it is then.

Conclusion

168. In summary, and as set out above, the court's decision is as follows:

(1) The defendants are not liable under the Advance Payment Guarantees to make repayment of the advance payments upon demand, and ACP's application for summary judgment on this ground is refused. If ACP wishes to apply for summary judgment on its alternative case, it may restore the application for a hearing.

(2) The defendants' application for a stay under s. 9(1) Arbitration Act 1996 is refused.

(3) A compelling case for a case management stay is not made out by the defendants at the present time, but the door is not closed on an application being made in the future, to be decided on the position as it is then.

169. The court is grateful to the parties for their assistance, and will hear them on any consequential matters.