Neutral Citation Number: [2018] EWHC 1098 (Comm)

Case No: CL-2017-000608

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 May 2018

Before:

THE HON. MR. JUSTICE PICKEN

- -

Between:

UTTAM GALVA STEELS LIMITED **Claimant**

- and -

GUNVOR SINGAPORE PTE LIMITED **Defendant**

- -
- -

Sudhanshu Swaroop QC and **Karishma Vora** (instructed by **Marsans**) for the **Claimant**
David Lewis QC (instructed by **Hill Dickinson LLP**) for the **Defendant**

Hearing date: 23 April 2018

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Judgment Approved

THE HON. MR. JUSTICE PICKEN:

Introduction

1. This is the hearing of an application by Uttam Galva Steels Limited ('Uttam') under section 67 of the Arbitration Act 1996 in relation to what is described as "*Rulings and Orders*" dated 5 September 2017 (the 'Ruling') made by Mr Edward Album (the 'Arbitrator'), sitting as a sole arbitrator in an arbitration between Uttam and Gunvor Singapore Pte Ltd ('Gunvor'). Although there was also at one time a challenge under section 68 of the 1996 Act, this was not ultimately pursued at the hearing which took place before me.

Factual background

2. The underlying claim in the arbitration before the Arbitrator concerns Gunvor's delivery of certain quantities of nickel to Uttam and the non-payment by Uttam for that nickel amounting to some US$34,884,971.80.

3. The claim arises out of two contracts described as *"Master Sales Contracts"* entered into between Gunvor and Uttam (the 'Master Sales Contracts'): (i) *"Master Sales Contract MSC2-UGSL-GSPL-2014 dated 22 December 2014"* (the 'December 2014 Master Sales Contract'); and (ii) *"Master Sales Contract MSC3-UGSL-GSPL-2015 dated 15 June 2015"* (the 'June 2015 Master Sales Contract'). The MSCs incorporated Gunvor's *"General Terms and Conditions for Sale and Purchase of Base Metals"* (the 'General Terms').

4. The Master Sales Contracts each contain a *"Governing Law and Dispute Resolution"* provision which states *"As per the GT&Cs"* and so which refers to the General Terms. Part XXI ("LAW AND JURISDICTION") is in these terms:

> *"12.1 Each Contract and these Terms shall be governed by and construed in accordance with the laws of England and Wales.*
>
> *12.2 All disputes arising out of or in connection with each Contract and/or these Terms shall be finally settled by arbitration in London under the Arbitration Regulations of the LME (the 'Regulations'), which Regulations shall be incorporated by reference into each Contract and these Terms, by a sole arbitrator appointed in accordance with the Regulations (the 'Arbitrator') (the 'Arbitration'). The final award rendered by the Arbitrator shall be subject to appeal only on questions of law and not of fact, and such appeal if any shall be submitted to the High Court of Justice in London, the UK. This Clause 12.2 shall be governed by and construed in accordance with the laws of England and Wales."*

5. The General Terms earlier provide, in Part I (*"GENERAL"*), specifically in clause 1.2, that:

> *"These Terms shall supplement, apply to, and be incorporated into and be regarded as an integral part of each and every sale and purchase agreement entered into between Gunvor and each counterparty (each a 'Contract') (each a 'Party', or 'Buyer' or 'Seller' as the case may be) and collectively the 'Parties'). In the event of any inconsistency between a Contract and these Terms, the terms of the Contract shall prevail."*
>
> They also contain a payment provision, in Part III (*"PAYMENT: CREDIT"*), which states at clause 3.1 as follows:
>
> *"The Buyer shall make full payment of the purchase price of the Cargo in immediately available funds in United States dollars ('USD'), without discount, set-off, objection, deduction, withholding, offset, or counterclaim, and free of all security interests, charges, liens, and other encumbrances, by way of a banker's letter of credit ('L/C') … telegraphic transfer … at the Seller's option."*

6. As for the Master Sales Contracts, these each begin by recording that *"Gunvor Singapore Pte Ltd (hereafter called 'Seller') agrees from time to time to sell to the Buyer and Buyer agrees to purchase Metal on the following terms and conditions"*. Those terms and conditions include the following:

"Confirmation: During the Contract Period, the Buyer and Seller will mutually agree on the details of each delivery of Product to be made. This will be documented in the form of a Confirmation in the format of Appendix II and will form part of this Master Sales Contract. Each Confirmation will stipulate details such as Product, Quantity, Terms and Time of Delivery, Price, Pricing Date, and any other relevant details pertaining to that Delivery."

They also include this provision concerning payment:

"Payment: Unless sold as a Trade Credit under this Master Sales Contract, the Provisional Invoiced Amount without set off or deduction is payable in US Dollars to the Proceeds Account against first presentation of the Delivery Documentation by the Seller or its nominees (such data to be referred to as the 'Delivery Date'). The Buyer shall ensure that its remitting bank shall, no later than three (3) Business Days prior to the due date of such payment and any payment under this Master Sales Contract, send a SWIFT message to the Seller's bank, stating the value of the funds to be paid and the date on which such funds will be valued."

This provision is immediately followed by wording (entitled "*Delivery Documentation*") which states as follows:

"Faxed or scanned copies of the following documents:

(a) Provisional Invoice with a payment amount equal to the Provisional Price multiplied by the Quantity;

(b) Title documents (including original Bills of Lading covering the Product, Weight and quality documents, a Packing List, a Certificate of Origin (if stated to be a requirement in the Confirmation); and

(c) A Bill of Exchange in the form of Appendix IV.

For each Delivery, all of the above Delivery Documentation shall be sent for collection subject to URC 522 to … an authorised dealer - category 1 bank mutually agreed by the Buyer and Seller and held by such bank to the order of the Seller (or the Seller's nominee) and not released until acceptance of the relevant Bill of Exchange and Invoice."

The Master Sales Contracts go on to provide at clause 3.4 ("*Set-off*") as follows:

"The Seller may set off a matured obligation due from the Buyer under this Master Sales Contract against any matured obligation owed by the Seller to the Buyer, regardless of the place of payment, booking branch or currency of either obligation. If the obligations are in different currencies, the seller may convert either obligation at a market rate of exchange in its usual course of business for the purpose of the set-off. The Buyer shall have no right of set-off against any Provisional Invoice Amount and any Provisional Invoice Amount or any amount due pursuant to a Price Settlement Note shall be paid in cash in full on the relevant due date."

7. The relevant Confirmations relied upon by Gunvor in the underlying arbitration are Confirmation No. LS1502608-NI dated 6 August 2015 and described as being "*in*

relation to" the December 2014 Master Sales Contract and Confirmation No. LS1503272-NI dated 20 October and described as being *"in relation to"* the June 2015 Master Sales Contract.

8. The Confirmations (like the Master Sales Contracts) are in materially identical terms, although obviously providing for different quantities of nickel and different periods of delivery. Each provided that the *"Deferred Payment Term"* was *"90 Days from Acceptance Date"* and each contained a *"Payment"* provision which echoed the Payment provision contained in the Master Sales Contracts themselves.

Procedural background

9. On 22 August 2016, Gunvor served a Notice of Arbitration. In the Points of Claim which accompanied the notice the claim was summarised in paragraph 2 as follows:

"In brief, the Claimant's claim in the arbitration is for payment that is due:

a. Under 8 bills of exchange accepted by the Respondent … of which the Claimant is the holder in due course;

b. Alternatively and only in respect of any amounts, if any, for which the Claimant is for any reason not entitled to an award for payment by reason of being the holder of the said bills of exchange, under the sale contracts, called Confirmations, entered into by the Parties… ."

In short, the primary claim was under the bills of exchange (the 'Bills of Exchange') rather than under the Confirmations (or Master Sales Contracts).

10. The Points of Claim went on to refer to the terms of the Master Sales Contracts (including those to which I have referred) as well as the General Terms and, more specifically, the fact that the General Terms contain a London arbitration clause. There was then reference to the two Confirmations which I have described, followed by details of the quantities of nickel delivered by Gunvor to Uttam pursuant to those Confirmations (and, so it was pleaded, *"the respective Master Sales Contracts"*). Then, this was pleaded under the heading *"The Bills of Exchange"*:

"15. Pursuant to the deferred payment provisions in the Confirmations, the Claimant drew on the Respondent and the Respondent accepted bills of exchange in respect of each of the above deliveries (hereinafter 'the Bills of Exchange') … The Claimant is the holder in due course (alternatively the holder for value, alternatively the holder) of the Bills of Exchange.

16. The Respondent has failed to honour the Bills of Exchange, at their maturity and to date."

11. Under a sub-heading stating *"The Claimant's claim under the Bills of Exchange"*, paragraph 17 then went on to allege that Uttam *"is indebted to the claimant under the bills of exchange"* in amounts totalling US$34,884,971.80. There then followed a further sub-heading stating *"The Claimant's alternative claim under the sale contracts"* and paragraph 19 in these terms:

"Further or alternatively, the Respondent has breached the Master Sales Contracts and Confirmations referred to above by failing to make payment for the Product delivered by the due date for payment or at all. In the premises, under the respective Master Sales Contracts and Confirmations the Respondent is indebted to the Claimant and the Claimant hereby claims (but in the alternative, i.e. only if and to the extent that the amounts in question have not already been recovered under the Bills of Exchange) payment of the amounts set out under paragraph 17 above."

12. Uttam subsequently served a Defence and Counterclaim on 10 November 2016. No objection was taken to the jurisdiction of the Arbitrator in that document and nor had any such objection been taken by the time that it came to be served. The following month, on 23 December 2016, Uttam served an Amended Defence and Counterclaim. The amendments included, under the heading *"Admission and Denial of Claim"*, the following:

"92. The claim rests on two planks, as stated in paragraph 2 of the points of claim. Namely

a. claim under 8 bills of exchange

b. alternatively, a claim on the basis of the confirmations.

93. The Respondent denies the claim because the two planks paint an incomplete picture. The case should rest on four planks … as follows:

a. The oral Contract

b. the Master Sales Agreements

c. Confirmations

d Bills of Exchange.

94. The order of the four planks in paragraph 93 reverse the order of the two planks in paragraph 92 above. In the reverse order, the oral Contract sets the framework for the remaining planks, including the bills of exchange. The validity of the oral Contract is therefore the overarching agreement that determines the validity of the bills of exchange and confirmations.

95. The Respondent denies the validity of and/or the liability under the bills of exchange and/or confirmations because they

a. cannot be isolated from the underlying financial agreement between the parties, namely the oral Contract … and/or

b. cannot be isolated from the Claimant's breach of the MSC's, arising out of the Claimant's failure to disburse the sanctioned limit under the MSCs … and/or

c. were obtained under a misrepresentation that the Respondent would be provided with a fully utilised sanctioned limit of US$140 million … and/or

d. were intrinsically connected with the Performance Charge that was paid on the basis of the understanding that the sanctioned limit of US$140 million would be fully disbursed … and/or

e. would not have met with a default had it not been for the Claimant's default under the oral Contract … .

96. In the circumstances, the claims under the bills of exchange and confirmations … are denied."

13. It is unnecessary to get into the detail of the defences raised in these paragraphs. Suffice it to say that Uttam denied Gunvor's claims and, indeed, advanced a counterclaim amounting to some US$123,596,029, alleging, amongst other things: that the deliveries never took place; that, properly understood, the arrangements between the parties were in the nature of a financing facility, with the Master Sales Contracts each specifying the credit limit that Gunvor was to provide; and that Gunvor was in breach of an oral agreement whereby it was to increase the credit limit to US$140million. What matters for present purposes is that, first and to repeat, no objection to jurisdiction was raised by Uttam and, secondly, Uttam expressly recognised that the primary claim was under the Bills of Exchange rather than under the Confirmations (and the Master Sales Contracts). I shall come back to this aspect but it was the submission of Mr David Lewis QC on Gunvor's behalf that it was as a result too late for Uttam to raise the jurisdictional objection which it did some not inconsiderable amount of time later and which was not accepted by the Arbitrator, so giving rise to the present application under section 67.

14. Having served its Amended Defence and Counterclaim, Uttam subsequently sought to amend again in early April 2017. It was in doing this that, for the first time, Uttam raised a jurisdictional objection. This was that the Arbitrator lacked jurisdiction to determine the claims asserted by Gunvor since, as it was put in paragraph 4 of the draft Re-Amended Defence and Counterclaim, the *"transactions between the parties were undertaken on the basis that they were financing transactions"* rather than sales transactions. Accordingly, in paragraph 90 this was stated:

"Further or alternatively, if a genuine sale and purchase transaction is disproved, then a tribunal constituted under the LME Rules would be left without jurisdiction to hear this dispute."

15. That objection was dealt with by the Arbitrator in a ruling dated 11 May 2017, in which he dealt with the issue in the following terms under the heading *"Financing Nature of the Overall Transaction"*:

"In the Tribunal's message to the Respondent of 12th April 2017, the Respondent's Counsel was asked what different legal analysis arose depending on whether the transactions were financing transactions implemented by metal transactions or metal transactions with financial benefits or rights. The reply refers to two issues. The first was that, as the metal transactions were not genuine, this affected jurisdiction, by which was meant the right to proceed under LME Arbitration Rules. Secondly, the true nature of the transaction as financial affected its interpretation.

As regards jurisdiction, the key starting point is the underlying contract or contracts which are the basis for the transactions concerned and the disputes about them. The arbitration has proceeded from the outset in accordance with the contract documents accompanying the original Points of Claim. The Master Sales Contracts, which incorporate by reference standard terms and conditions, have been signed by both parties and have, according to the documents, been implemented in accordance with those terms (leaving aside the new defence of non-delivery). Completion is reflected by the signing by the Respondent of eight Bills of Exchange and these are the basis for the monetary claims made by the Claimant. It is relevant to note the attached full list of Bills of Exchange which were issued for the present and previous transactions. Twenty-seven of the Bills have been paid and four have not been paid and are the subject of legal proceedings against the Respondent in India (marked DBS). Eight Bills have not been paid and are the subject of this arbitration.

Although the nature of the transactions is said by the Respondent to be financial, the Respondent has not put forward any alternative or amended contract documentation or specific details of applicable terms, save as they already appear from the Points of Claim. In other words, there is no alternative contract available for consideration, without provisions for implementation, governing law dispute resolution. On the basis of the existing contract terms before the Tribunal, the Tribunal's conclusion is that there are no grounds for any alternative jurisdiction to be referred to, considered or relied upon. Accordingly, it is the Tribunal's finding that there is no basis for asserting an alternative jurisdiction from the one adopted in the existing contract documents and any submission to this effect is rejected.

It is not a matter of expert knowledge to say that many, if not most, transactions on the commodity markets have underlying financial purposes or benefits. The Tribunal must therefore base itself on the present contract documents and proceed in accordance with the agreed arbitration provisions.

Notwithstanding the comments on behalf of the claimant, LME Arbitration Rules and practice do not require full particularisation or evidence of pleaded issues to accompany a claim or defence but the Rules do provide that all pleadings must be accompanied by copies of the documents relied upon. Those provided by the respondent do not support or sufficiently support an additional or alternative defence based on the financial nature of the transaction.

The amendments to the Defence on this subject will be disallowed accordingly."

The Arbitrator went on, however, to state as follows concerning the suggestion by Uttam that "*the true nature of the transaction as financial affected its interpretation*":

"A valid point can be made by the Respondent, or indeed by both parties, on matters of interpretation. In accordance with what is now an established principle of interpretation under English Law, the factual matrix of a transaction can be taken into account. The Respondent is free to rely on arguments on this principle without amendment to the present Defence. From this point of view, the additional documents produced by the Respondent can be relied upon if they assist either party."

16. This ruling was followed by service of Uttam's Reply to the Defence to Counterclaim which had been served by Gunvor earlier in the year, on 3 February 2017. In Uttam's

further pleading, served on 31 May 2017, a jurisdictional objection was made but not the one which ultimately came to be advanced before the Arbitrator and which resulted in the Ruling leading to the present section 67 application. Specifically, an argument was advanced, in paragraph 22, by reference to the Entire Agreement wording in the Master Sales Contracts that, *"If … the Entire Agreement Clause is upheld, then the LME will not have jurisdiction over the bills of exchange, which are outside the purview of the Entire Agreement clause"*.

17. In the meantime, and so prior to service of this further pleading on 31 May 2017, Gunvor had made an application, on 19 May 2017, in a letter from Hill Dickinson LLP (Gunvor's solicitors) to the Arbitrator, seeking *"(1) a final partial award in the amount of the Claimant's claims under the Bills of Exchange, alternatively (2) security in the amount of the Claimant's claims and in either event (2) [sic] security for costs"*. Consistent with how the case had been put in the Points of Claim from the outset, the letter sought summary judgment in relation to the claims under the Bills of Exchange on the basis that a *"bill of exchange is to be treated as cash"* and the *"general rule is that the Court will give summary judgment for a claimant on a bill of exchange save in exceptional circumstances"* with the *"fact that the defendant may have a counterclaim for liquidated damages"* being *"no defence"*. It was clear that the primary claim was in relation to the Bills of Exchange. The letter went on, however, to refer to Gunvor being *"entitled to the equivalent sums under the sale contracts"*, with reliance being placed on the no set-off provisions contained in the Master Sales Contracts and the General Terms as regards the cross-claims asserted by Uttam.

18. When Uttam served its response to the application made by Gunvor (through their solicitors) on 19 May 2017, in a document prepared by junior counsel who had drafted the Defence and Counterclaim (and, indeed, the amendments and re-amendments made to that pleading) as well as by leading counsel (David Joseph QC), the following was stated in paragraph 3a:

"The Tribunal has no jurisdiction to determine claims as sought by way of Partial Award under the bills of exchange let alone separately from the MSCs. The Tribunal's jurisdiction is limited to a final determination of the sums owing either to the Respondent or to the Claimant in connection with the arrangements over which the Tribunal has jurisdiction; namely the MSCs."

This objection was then explained under the heading *"No jurisdiction"*, this point being made in paragraph 4:

"… The Claimant's application suffers from a fundamental defect; namely a lack of jurisdiction. The Claimant proceeds on the basis that the Tribunal has jurisdiction over the bills of exchange. It does not. The jurisdiction derives from the arbitration agreement. This is found in the MSCs and not the bills of exchange."

In paragraph 6 the argument was developed in this way:

"The Tribunal does not have jurisdiction to determine disputes under the bills of exchange. The jurisdiction of the Tribunal is to determine the amounts owing either from the Claimant to the Respondent or vice versa under the parties' MSCs/the collateral oral agreement/representation inducing the MSC. The Tribunal does not

have separate and independent jurisdiction under the bills of exchange which do not contain or incorporate any alteration agreement."

In the next paragraph, paragraph 7, this was then stated:

"There has recently been consideration of this in the Court of Appeal in Singapore in Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza Spa [2016] SGCA 53 at [39]-[49] … In that case the Court of Appeal in Singapore declined to find that the arbitration agreement in the supply agreement extended to stand-alone disputes under a promissory note issued as payment pursuant to the supply agreement. This is materially identical to the position in the present case. In that case the supply agreement contained in an arbitration agreement which provided that 'all disputes arising in connection with this agreement …'. This wording is indistinguishable from the MSC clause. It is submitted that the position under English law is identical-see the English House of Lords decision in Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH [1977] 1 WLR 713 in particular at p 731 … ."

19. Hill Dickinson LLP responded to this in a letter dated 28 June 2017, addressed to the Arbitrator, adopting the position (maintained before the Arbitrator and before me on the application under section 67) that it was too late to object to jurisdiction in view of section 73(1)(a) of the 1996 Act and LME Arbitration Regulation 10.3, both matters which I shall come onto address, and that, in any event, the jurisdictional objection was unfounded.

20. A hearing then took place before the Arbitrator on 7 July 2017, during which submissions were advanced by both Mr Lewis QC and Mr Joseph QC. A few days later, on 11 July 2017, the Arbitrator emailed the parties raising a number of points. These included a reference by the Arbitrator to LME Arbitration Regulation 10.1(l), which deals with the power of an LME arbitrator to make an order for an interim payment, and a reference also to section 39 of the 1996 Act, which deals with the power of arbitrators generally to make orders *"on a provisional basis"*. Again, these are aspects to which I shall return, although they do not directly arise in the context of the section 67 challenge which has been made before me since they are concerned not with arbitrable jurisdiction in the sense covered by section 67 but with the powers of an arbitrator.

21. Post-hearing submissions were then exchanged during the course of July and August 2017, leading to the Ruling on 5 September 2017 which I now come on to address.

The Ruling

22. The Ruling (in its corrected form since it was re-issued in early October 2017 in order to take account of certain typographical errors and other corrections) summarised at paragraph 8 the objection raised by Uttam as follows:

"… the respondent has raised an issue regarding the Tribunal's jurisdiction, particularly the right to give orders pursuant to the Bills of Exchange. This is on the basis that they represent separate contracts and are not governed by the arbitration provision in the main underlying contracts. The Claimant does not accept that the Tribunal lacks jurisdiction but primarily opposes this issue being based on the grounds that it is put forward out of time."

The Arbitrator went on in paragraph 12, under the heading *"Jurisdiction"*, to refer to the jurisdictional point concerning the nature of the transactions which he had resolved in Gunvor's favour in his ruling dated 11 May 2017. He observed as to this that:

"There has been no challenge by the Respondent to this Ruling although the Respondent did suggest at the Hearing on 7th July 2017 that the rulings on other matters were incorrect."

He then went on in paragraph 13 to state as follows:

"The present challenge to jurisdiction has been put forward by the Respondent for the first time in its response dated 9th June 2017 to the Claimant's application for a Final Partial Award and other remedies. The Respondent, in summary, says that the Bills of Exchange are documents which are separate from the Master Sales Contracts. There are no references in the governing law or arbitration clauses in the main contracts stating that they extend to the Bills of Exchange and the cases suggest that this is necessary if the same law and arbitration rules are to apply. Mr Joseph, for the Respondent, says that the Bills are subject to Indian jurisdiction. The Claimant says primarily that the challenge to jurisdiction is out of time and no good reason has been given for the delay."

The Arbitrator then referred to section 73(1) of the 1996 Act, as well as to paragraph 10.3 of the LME Arbitration Regulations, before recording Mr Lewis's submissions before him on behalf of Gunvor as being the following:

"Mr Lewis … says that there is no good reason or justification for the delay. It is right to say that the present point on jurisdiction was not put forward in the original Defence and Counterclaim, nor, if it is relevant, in the draft Amended Defence and Counterclaim which the Respondent unsuccessfully submitted. The claim based on the Bills of Exchange was clear from the outset in the Points of Claim. There were accompanying documents which included signed copies of the Bills themselves. It was known at that time that the Claimant sought payment based on and under the Bills of Exchange. Mr Joseph has not provided any real justification for the delay except to point out that it is reasonable in response to the application for a Final Partial Award. …."

After then reviewing the authorities relied upon by Mr Joseph, the Arbitrator concluded in relation to the jurisdictional challenge as follows in paragraph 17:

"… The Tribunal's conclusion is that, for purposes of jurisdiction, the Bills of Exchange are in this case incorporated as an integral part of the underlying contracts, including the provision of arbitration and that the tribunal has jurisdiction. The arbitration clause quoted in paragraph 11 of Section C above is wide enough to cover the present disputes. There is no issue here for example regarding the terms of the Bills or an assignment of rights. Accordingly, in the Tribunal's view, it does at least have jurisdiction to enforce the payment obligations under the Bills, as well as under the contracts. …

In the course of argument, I put the question to Mr Joseph whether his submissions on Bills of Exchange would also apply to payment by cheque. He said they would. This, if

correct, would appear to impose unnecessary complications in the present and similar cases."

23. The Arbitrator went on to make a further observation which is relevant to the last issue I shall come on to address but which is not directly relevant to the application under section 67:

"A final point on jurisdiction is that, although dealt with by the Tribunal as above, the issue does not arise, in the Tribunal's view, if the case is dealt with by an Order for Interim Payment under Regulation 10(1)(l) of the LME Arbitration Regulations."

The Arbitrator explained, when dealing with the application for a final partial award, that he was not persuaded that it would be appropriate to make a partial final award since, as he put it in paragraph 20, the *"problem is that the present application, if granted as put forward, would result in the total loss of the opportunity for the defences originally raised, e.g. based on the oral contract, being considered at a final trial with oral evidence"*. He went on to explain in the same paragraph that the *"opportunity to defend at a final trial should still be available, notwithstanding an order for interim payment"* and it was on that basis that he preferred not to make an order equivalent to summary judgment but, instead, to make an order for an interim payment pursuant to Regulation 10.1(l) of the LME Arbitration Regulations. He dealt with that aspect in the next section of the Ruling, concluding in paragraph 33 as follows:

"The final conclusion of the Tribunal is accordingly that the most appropriate procedure is to make an Order for an Interim Payment under Regulation 10(1)(l) of the LME Arbitration Rules, taking the sum of US$28 million in the Tribunal's discretion as a reasonable proportion of the monetary award which, in the opinion of the Tribunal, is likely to be recovered by the Claimant. The Tribunal has taken into account but has not allowed any reduction for the specific claims of the Respondent referred to above as defences to claims under Bills of Exchange or otherwise in respect of payments due for the purpose of an order for interim payment. The Respondent will be free to put forward at final trial its pleaded defences and counterclaims but must first pay the amount ordered. …".

24. Accordingly, on the last two pages of the Ruling the Arbitrator stated as follows under *"RULINGS and ORDERS OF THE TRIBUNAL"*:

"RULINGS ON JURISDICTION

1. *The Respondent's plea that the Tribunal lacks jurisdiction to deal with the claim in respect of amounts due under the Bills of Exchange is not accepted on the grounds that, pursuant to Regulation 10.3 of the LME Arbitration Regulations, it has been raised beyond the time limit specified and the Tribunal does not consider the delay justified. If the delay in timing had been allowed, the Tribunal considers that it does have jurisdiction for the reasons given in paragraph 16 and 17 of Section D.*

2. *It is also ruled that the plea of lack of jurisdiction does not apply to the Tribunal's power in the present case and circumstances to make an order for an Interim Payment under Regulation 10(1)(l) of the LME Arbitration Regulations."*

ORDERS

3. *Pursuant to Regulation 10(1)(l) of the LME Arbitration Regulations, the Tribunal Orders the Respondent to make an interim payment to the Claimant of US$28 million, being an amount not exceeding a reasonable proportion of the monetary award which in the opinion of the Tribunal is likely to be recovered by the Claimant, taking into account any set-off or counterclaim of the Respondent on the basis referred to in Section F above.*

…

6. The Orders referred to in 1 and 2 above are not made as a Final Award and at a final hearing the Respondent is free to put forward its pleaded Defences and Counterclaim. The Claimant will also remain free to put forward its full pleaded claims, subject to allowance for amounts received by way of Interim Payment."

The section 67 application: grounds

25. Uttam's application under section 67 of the 1996 Act is put on the basis that *"the Ruling exceeds the substantive jurisdiction of the Tribunal"* (see paragraph 4 of the document attached to the arbitration claim form). The remedy sought is set out in paragraph 5(1) as follows:

"Setting aside the Ruling (in particular Rulings on Jurisdiction paragraphs 1 and 2) so as to decide that the Tribunal had no jurisdiction either to make an order for interim payment under the bills of exchange or to determine the merits of the claims made under the bills of exchange let alone independently of the disputes under the Master Sales Contracts under which the Tribunal did have jurisdiction;"

As ultimately acknowledged by Mr Sudhanshu Swaroop QC, on Uttam's behalf, the section 67 challenge can, on analysis, only relate to the second part of the relief sought in the paragraph quoted above, namely Uttam's contention that the Arbitrator lacked jurisdiction over Gunvor's claims under the Bills of Exchange. The question of whether the Arbitrator had the ability to make an order for an interim payment, although characterised in the paragraph quoted above as being concerned with jurisdiction, is not actually concerned with jurisdiction but instead with the powers of the Arbitrator. As such, it is not a matter with which section 67 is concerned. The same applies to other aspects of the relief sought, as set out in paragraph 5(2)-(4) which I need not, in the circumstances elaborate upon. That additional relief stems from a complaint not pursued before me, namely that the *"Tribunal … on its own initiative and suggestion, and without any formal application having been previously advanced on the part of the Defendant [Gunvor], went on through a misconceived and indefensible procedural course to order an interim payment to be made to the defendant notwithstanding the claimant's defences, set offs and counterclaim which the tribunal made clear it was not shutting out and on which it was not entitled to comment on the merits prior to the full hearing of the claims"*.

26. It was Mr Swaroop's submission that the Arbitrator's decision to order an interim payment under Regulation 10.1(l) of the LME Arbitration Regulations was a decision which was heavily influenced, in the Arbitrator's thinking, by his view that there was jurisdiction on his part in respect of the claims under the Bills of Exchange. It does

not follow, however, that if the section 67 challenge were successful, then, the order for an interim payment should be set aside. This is because, as I have explained, section 67 has nothing to do with an arbitrator's powers (as opposed to jurisdiction). The position, therefore, must be, as Mr Swaroop accepted, that it would be a matter for the Arbitrator to decide whether to accede to an application that the order for an interim payment be revisited in the light of the Court's conclusion that jurisdiction was lacking - assuming, of course, that that is the Court's decision.

Status of the Ruling and section 67

27. Before coming on to deal with the points which arise on the section 67 application, it is necessary, in the first instance, to say something about the status of the Ruling. This is because the position which has been adopted by Uttam is that the Ruling is not an award for the purposes of the enforcement machinery under the 1996 Act or for the purposes of enforcement under the New York Convention. However, as Mr Lewis pointed out, an application under section 67(1)(a) of the 1996 Act can only be made in respect of an *"award of the arbitral tribunal as to its substantive jurisdiction"*. It is difficult to see how the Ruling can amount to an award for these purposes but not for all purposes. It is equally difficult to see how a party making an application under section 67 can do so on a without prejudice basis since it seems to me that the party needs to adopt a consistent position. For my part, and confining myself, strictly at least, to the point in issue since it will be for others to determine what the position is in the enforcement and New York Convention context, I am in no doubt at all that the Ruling does, indeed, amount to an award for the purposes of section 67(1)(a) (and, indeed, section 30(1)(c) and 31(4)(a)).

28. This conclusion is consistent with the approach described in ***Michael Wilson Partners Ltd v Emmott*** [2009] 1 Lloyd's Rep. 162. In that case, Teare J decided that the relevant decision of the tribunal was not an award for the purposes of section 67(1)(a) but a ruling concerned with procedural matters only. He referred at [16] to a decision of Toulson J (as he then was) in an early section 67 case decided on 12 June 1998, namely ***Ranko Group v Antarctic Maritime SA***, saying this:

"Toulson J had to determine whether a decision of an arbitrator was an award as to his jurisdiction for the purposes of section 67 of the Act. In resolving that question Toulson J asked himself whether the decision would have been understood by its recipients as intended to be the arbitrator's adjudication on the disputed question of his jurisdiction. In that case the parties had requested that the arbitrator rule on his jurisdiction pursuant to section 30 of the Act. He was requested to render 'an award.' In response he wrote a letter in which he stated that he made certain 'rulings' concerning his jurisdiction. Toulson J held that the letter was an award as to the arbitrator's jurisdiction notwithstanding that the letter was not described in terms as an award."

Teare J went on at [19] to say this:

"I therefore ask myself how the reasonable recipient of the tribunal's decision would have viewed it. He would know that the tribunal had been invited to determine two procedural questions, one of which was whether the Defendant was entitled to permission to amend his counterclaim. He would also know that one of the reasons advanced by the Claimant against the application for permission to amend was that

the tribunal had no jurisdiction to determine claims based upon the February 2005 agreement. He would observe that the contents of the decision consisted of the answer to the two procedural questions, that the decision of the tribunal was described as the Sixth Procedural Order and that the part of that order in question was entitled 'The Respondent's Application to Amend his Counterclaim'. He would also observe that the tribunal, after describing the dispute in question, expressed 'the view' that the dispute fell within the arbitration clause. He would note that the language used was not the formal language usually to be found in an award finally determining a dispute as to jurisdiction."

His conclusion at [20] was as follows:

"In my judgment the reasonable recipient of the arbitrator's decision would conclude that the tribunal's decision consisted of an answer to two procedural questions. He would not regard the decision, or any part of it, as an award as to jurisdiction. He would reach that conclusion because of the contents of the order (the resolution of two procedural disputes, namely, amendment and disclosure), because of the tribunal's own description of the decision (the Sixth Procedural Order – emphasis added) and because the language in which the tribunal expressed its view of the jurisdiction issue was not the formal language to be expected of a final and binding decision. He would appreciate that if the tribunal maintained its view as to its jurisdiction which it had expressed in a few words in the Sixth Procedural Order and, after the arbitration hearing, issued an award on the merits concerning the disputed claim the Claimant would have, at that stage, the opportunity to seek an order declaring that part of the award to be of no effect pursuant to section 67(1)(b) of the Act."

29. In the present case, the position is somewhat different. A jurisdictional challenge was made and this resulted in a ruling which was formal in its language in a way which is to be expected of a final and binding decision. As demonstrated by the passages from the Ruling which I have set out above, in the present case there was simply not the informality which persuaded Teare J to reach a different conclusion in the case before him. Indeed, I am bound to observe that the very fact that an application has been made under section 67 at all (by Uttam, of course) demonstrates that the parties (including, therefore, Uttam) regarded the Ruling as being an award. In the ***Michael Wilson*** case, in contrast, the argument that the relevant ruling was not an award was advanced by the party resisting an application under section 67. That is the opposite of the position in the present case, which is somewhat telling.

30. Accordingly, I am satisfied that the application under section 67 is appropriately made.

Delay

31. Although Mr Swaroop addressed his submissions before me on the basis that the first point to be considered is the substantive jurisdiction issue, I propose to adopt the approach of Mr Lewis and so to consider, before coming on to that question, the delay issue since that is the order in which the Arbitrator dealt with things and it is also the more logical approach.

32. As previously noted, the Arbitrator reached the conclusion, his primary conclusion, that the jurisdictional objection had been raised too late having regard to Regulation 10.3 of the LME Arbitration Regulations, which provides as follows:

"A plea that the Tribunal does not have jurisdiction shall be raised not later than in the points of defence. A plea that the Tribunal is exceeding the scope of its authority shall be raised promptly after the Tribunal has indicated its intention to decide on the matter alleged to be beyond the scope of its authority. In either case the Tribunal may nevertheless admit a late plea under this Regulation 10.3 if it considers the delay justified."

33. Also relevant for these purposes is section 73(1) of the 1996 Act which is in these terms:

"If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection –

(a) that the tribunal lacks substantive jurisdiction,

…

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

The reference to "*within such time as is allowed by the arbitration agreement*" is, in this case, to be regarded as being a reference to Regulation 10.3.

34. It was Mr Swaroop's submission that the Arbitrator erroneously proceeded on the basis that the first sentence of Regulation 10.3 applied in this case and so that the relevant objection needed to be raised "*not later than in the points of defence*". Mr Swaroop submitted that it is, instead, the second sentence which is applicable in that the "*plea*" in this case is not that the Arbitrator does not have any jurisdiction at all since it is accepted by Uttam that he has jurisdiction in respect of the (alternative) claims asserted by Gunvor in respect of the Confirmations (and thereby the Master Sales Contracts), but that the Arbitrator was "*exceeding the scope of [his] authority*" by entertaining Gunvor's application for a partial final award or any application based on a claim under the Bills of Exchange. In this respect, Mr Swaroop submitted that, if there is any doubt as to the appropriate construction to be afforded to Regulation 10.3, then that doubt should be resolved in Uttam's favour since, he suggested, Regulation 10.3 is in the nature of an exclusion clause seeking to restrict the right of a party to exercise what is a fundamental right in arbitration, namely the right to challenge jurisdiction.

35. Mr Swaroop's position, therefore, was that Uttam was only required to raise the plea in question "*promptly after the Tribunal has indicated its intention to decide on the matter alleged to be beyond the scope of its authority*". This, Mr Swaroop contended, Uttam did since the jurisdictional objection was raised in response to Gunvor's application dated 19 May 2017 for a partial final award in respect of the sums claimed

under the Bills of Exchange. It was Mr Swaroop's submission that prior to this Gunvor had not made any relevant application and the time to object had not arisen. Furthermore, Mr Swaroop pointed out, after the Arbitrator had sought the parties' observations post-hearing on, amongst other things, Regulation 10.1(l), Uttam's supplemental submissions made specific reference, in paragraph 2, to *"the Respondent's reservations as to the scope of the jurisdiction of the Tribunal, in particular with respect to the claims under the bills of exchange"*. Indeed, later on in the same document, at paragraph 6, when dealing with ***The 'Kostas Melas'*** [1981] 1 Lloyd's Rep. 18, it was reiterated that *"the Tribunal does not have jurisdiction under the bills of exchange"*.

36. In advancing these submissions, Mr Swaroop expressly accepted that if he was wrong about the second sentence of Regulation 10.3 being applicable, and so the Arbitrator was right to approach the matter on the basis that the first sentence is what matters, then, the section 67 challenge must fail. He did not seek to persuade the Court that, if it is the first sentence which is applicable, as the Arbitrator decided, then, the Arbitrator was wrong to have reached the conclusion that the delay was not justified. Specifically, the Arbitrator concluded, in paragraph 15(c) of the Ruling, that *"No reasonable justification for the delay has, in the Tribunal's view, been put forward"*. Mr Swaroop did not, in short, rely upon the third sentence of Regulation, which permits an arbitral tribunal to *"admit a late plea under this Regulation 10.3 if it considers the delay justified"*. It follows, as Mr Swaroop acknowledged, that, if Uttam is wrong as to the applicability of the second sentence of Regulation 10.3, then, for the purposes of section 73(1) the lateness was neither *"allowed by the arbitration agreement"* nor was it *"allowed by… the tribunal"*, and that is an end of the matter.

37. I cannot accept Mr Swaroop's submissions concerning the applicability of the second sentence. I am quite clear that it is the first sentence which is the relevant part of Regulation 10.3 rather than the second sentence. That must, in my view, be the position as a matter of construction and as a matter of commonsense also. Indeed, as Mr Lewis observed, there is something of a paradox concerning Uttam's position in that Uttam's challenge under section 67 is necessarily a challenge to an award (the point previously addressed) which deals with the Arbitrator's "*substantive jurisdiction"*. If that were not the case, there would be no ability to invoke section 67 at all. Despite this and despite the fact that, consistent with its section 67 challenge, what Uttam seeks is an order setting aside the determination that the Arbitration has jurisdiction to determine the claims under the Bills of Exchange, by arguing that it is the second sentence of Regulation 10.3 which is applicable, Uttam disavows any suggestion that the first sentence (*"A plea that the Tribunal does not have jurisdiction …"*) applies in favour of a contention that the second sentence *("A plea that the Tribunal is exceeding the scope of its authority …"*) does so notwithstanding the fact that, unlike the first sentence, the second sentence does not refer to *"jurisdiction"* at all but, instead, refers to excess of authority.

38. The structure of Regulation 10.3 seems obvious to me. The first sentence deals with substantive jurisdiction and is not confined, as Mr Swaroop suggested, to cases where there is no jurisdiction on the part of tribunal at all. If there were such a limitation on the scope of the first sentence, there would need to be additional wording making this clear, such as the insertion of the word *"any"* between *"have"* and *"jurisdiction"*. The second sentence then deals not with jurisdiction (whether in whole or in part) but

with cases where a tribunal has jurisdiction but acts in excess of the authority which is vested in it through the fact that it has jurisdiction. The third sentence then permits a discretion to be exercised in the event that the claimant falls foul of either the first or the second sentence.

39. Aside from the workability of an approach which sees the first and second sentences viewed in this way, treating the first sentence of Regulation 10.3 as applying to all jurisdictional matters, and the second sentence as being confined to excess of authority rather than jurisdictional matters, is consistent also with the definition of *"substantive jurisdiction"* (the phrase used in section 67(1)(a) itself) which is to be found in section 82(1) of the 1996 Act, namely that this:

"refers to the matters specified in section 30(1)(a) to (c) … ."

As for section 30(1), this provides:

"Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to –

(a) whether there is a valid arbitration agreement

(b) whether the tribunal is properly constituted, and

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

As Mr Lewis went on to submit, *"substantive jurisdiction"* covers not only personal jurisdiction but also subject-matter jurisdiction or, in other words, whether the arbitration agreement confers jurisdiction in respect of particular claims made. This was the point which was recently made by Bryan J in ***GPF GP S.a.r.l v The Republic of Poland*** [2018] EWHC 409 (Comm) at [70], as follows:

"I am satisfied that on the current state of the authorities (including not only a wealth of first instance decisions but also dicta at appellate level, including in Dallah) a hearing under section 67 is a re-hearing, and that is so whether the case involves a question of jurisdiction ratione personae or ratione materiae (for a recent example of the latter see the judgment of Carr J in C v D [2015] EWHC 2126 (Comm)). In each case, where it is said the tribunal has no jurisdiction, it is on the basis that either there is no arbitration agreement between the particular parties, or that there is no arbitration agreement that confers jurisdiction in respect of the claim made. In each case if the submission is proved, the Tribunal has no jurisdiction as no jurisdiction has been conferred upon it by the parties in an arbitration agreement. In such circumstances it is for the Court under section 67 to consider whether jurisdiction does or does not exist, unfettered by the reasoning of the arbitrators or indeed the precise manner in which arguments were advanced before the arbitrators. Ultimately jurisdiction either is, or is not, conferred on the true construction of the arbitration agreement, and that ought not to be fettered by how arguments were advanced below, subject always to the discretion of the court as to the admission of evidence before it. Indeed, experience shows that the arguments on challenge can be, and are, often presented in fresh and different ways (see the observations of Carr J in C v D, supra at [72])."

40. Specifically as regards section 30(1)(c) (subject-matter jurisdiction), in ***Gulf Import & Export Co v Bunge SA*** [2008] 1 Lloyd's Rep. 316 at [20] Flaux J (as he then was) explained the distinction between cases concerned with jurisdiction and other cases as follows:

"Mr Stephen Males QC for Gulf submits that 'matters' in section 30(1)(c) is referring to the claims that can be submitted to arbitration, not the way in which discretion is exercised in relation to a claim which has been validly submitted to arbitration. It seems to me that this must be right. The question in the present case is about the scope of the Rules pursuant to which the arbitration is being conducted. Accordingly, it is not the substantive jurisdiction of the Board of Appeal which is in issue, but rather whether the Board has exceeded the powers which it is given under the Rules. It follows that the correct basis for Gulf's challenge to the Appeal Award is section 68(2) (b) of the Act, that there has been serious irregularity because the tribunal exceeded its powers."

I agree with Mr Lewis when he submitted that this supports the similar distinction which, in my view, is at play between the first and second sentences of Regulation 10.3. At heart, however, I fail to see how the second sentence, with its reference to *"the Tribunal exceeding the scope of its authority"* can be treated as encompassing a lack of jurisdiction in circumstances where the word *"jurisdiction"* is not used in the second sentence but is used in the first sentence. The use of different words in the two sentences cannot have been an accident. As such, it must have been intended that different things were being covered by the two sentences. It cannot have been intended that the second sentence would, in those circumstances, trespass on the province of the first sentence. Not only is it not obvious that the *"exceeding the scope of its authority"* wording should include lack of jurisdiction, but the juxtaposition of the second and first sentences, with their different phraseology, serves to underline an intention that the sentences should be regarded as dealing with quite different topics. Moreover, as I have explained, approaching the first and second sentences as dealing with different things allows the Regulation, as a whole, to be read in a coherent and clear way which, if Mr Swaroop is right and there is an overlap between the first and second sentences in the sense that both deal with jurisdiction (albeit differently), would not be the case.

41. All in all, I consider Mr Swaroop's suggested construction of Regulation 10.3 to be strained and potentially confusing. There is, however, a further reason why I consider that Mr Swaroop cannot be right in what he submitted. This is that the distinction which Mr Lewis submitted exists between the first and second sentences of Regulation 10.3 is consistent with the approach which is adopted in the 1996 Act itself. Thus, section 68(2) provides, in part, as follows:

"Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –

…

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

…".

I am clear that the "*exceeding the scope of its authority"* wording to be found in the second sentence of Regulation 10.3 is to be regarded as being equivalent to "*the tribunal exceeding its powers*" wording contained in section 68(2)(b). Although Mr Swaroop sought to suggest that the fact that there is the bracketed wording supports his submission that acting in excess of authority can include acting in excess of jurisdiction, I cannot agree with him about this. On the contrary, since it contrasts the tribunal exceeding its powers with its exceeding its substantive jurisdiction, the bracketed wording points in the opposite direction, serving to underline the distinction between the two concepts. It also reinforces the view which I have formed as to the overall shape of Regulation 10.3.

42. The conclusion which I have reached on the delay issue, specifically that it is the first sentence of Regulation 10.3 which applies in this case, as the Arbitrator decided, means that Uttam's section 67 challenge cannot succeed. It is appropriate, however, that I should nonetheless now go on to consider the substantive jurisdiction issue, if only out of completeness and in deference to the fact that the issue was fully argued before me.

Jurisdiction

43. I have previously set out the terms of the arbitration clause which appears in the Master Sales Contracts or, more accurately, in the General Terms which are incorporated into the Master Sales Contracts. To repeat, it was Mr Swaroop's submission on Uttam's behalf that, whilst it is accepted that the Arbitrator has jurisdiction under the Confirmations (and the Master Sales Contracts), he has no jurisdiction over Gunvor's claims under the Bills of Exchange since the Bills of Exchange do not themselves contain any arbitration clause. Nor, Mr Swaroop submitted, do the Bills of Exchange incorporate the arbitration clause (clause 12.2) in the General Terms. It makes no difference, in the circumstances, Mr Swaroop went on to submit, that clause 12.2 is in the wide terms which it is (*"All disputes arising out of or in connection with each Contract and/or these Terms …"*) because the claims under the Bills of Exchange do not constitute disputes which arise out of or are in connection with the Confirmations (or the Master Sales Contracts) but are, instead, claims which involve what Mr Swaroop characterised as *"separate and autonomous contracts"*.

44. In support of his submissions, Mr Swaroop placed heavy reliance on two authorities, one recent and from Singapore (***Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza Spa*** [2016] SGCA 53) and the other somewhat older and from the House of Lords (***Nova (Jersey) Knit v Kammgarn Spinnerei*** [1977] 1 WLR 713) – in both cases as cited to the Arbitrator by Uttam's counsel in the response which was served in relation to Gunvor's application dated 19 May 2017. I shall come on to consider those authorities shortly after, first, however, considering the issue which arises as a matter of principle.

45. Mr Swaroop submitted that the expectation of reasonable businessmen, agreeing to an arbitration provision such as clause 12.2 contained in a sale contract which provides for payment by bills of exchange, would be that the arbitration provision would not apply to any claim made under those bills of exchange since such businessmen would

regard bills of exchange as equivalent to cash and so as enabling them, in the event of the bills of exchange not being honoured, to make an application to court rather than having to proceed by way of arbitration and find themselves hampered by an inability to obtain summary judgment as would be possible in court proceedings. Mr Swaroop also submitted that, insofar as any third parties who might become holders of the bills of exchange are concerned, it cannot be right that they would find themselves bound by an arbitration clause contained in a sale contract to which they were not parties - in this case, the Confirmations (and Master Sales Contracts).

46. As to the first of these points, as I see it, the starting point is as described by Lord Hoffmann in ***Fiona Trust & Holding Corp. & Others v Privalov & Others*** [2007] UKHL 40 as follows:

> *"6. In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.*
>
> *7. If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention."*

Lord Hoffmann went on at [13] to say this:

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

47. As Mr Lewis put the point, it ought, in general at least, to be assumed that, when agreeing an arbitration clause, reasonable (or rational) businessmen would not

contemplate fragmentation as regards dispute resolution. Accordingly, Mr Lewis submitted, Uttam and Gunvor, as the parties to the Confirmations (and Master Sales Contracts) should be taken as having agreed, through their agreement of arbitration in clause 12.2, to have any disputes between them concerning the Confirmations (and Master Sales Contracts), and so including any claims under the Bills of Exchange, be resolved in one forum, namely arbitration.

48. I agree with Mr Lewis about this. The unlikelihood that Uttam and Gunvor, as commercial parties, would agree to arbitration yet be content to have claims brought under the Bills of Exchange resolved other than in arbitration, is underlined by the breadth of the wording contained in clause 12.2. *"All disputes arising out of or in connection with each Contract and/or these Terms …"* represents wide wording, even allowing for Lord Hoffmann's deprecation of English law's previous over-concentration on the particular words used in particular arbitration agreements: see the ***Fiona Trust*** case at [11]-[12]. I struggle to see, in short, how Uttam and Gunvor, as rational businessmen, are likely to have intended that a dispute under bills of exchange stipulated in the Confirmations (and the Master Sales Contracts) as the means by which Uttam would pay Gunvor should be resolved in anything other than arbitration at the same time as any dispute under the Confirmations (and the Master Sales Contracts) is also determined - in other words, as in the present case, by the same tribunal. To reiterate, in the present case the Master Sales Contracts expressly contemplated the issue of bills of exchange, with the *"Delivery Documentation"* provision requiring *"Faxed or scanned copies"* of, amongst other things, *"(c) A Bill of Exchange in the form of Appendix IV"*.

49. As for Mr Swaroop's point concerning the availability of summary judgment, or something similar, in arbitration (as opposed to in court), I consider that this has been overstated. First, as Mr Lewis pointed out, section 47(1) of the 1996 Act expressly provides that *"Unless otherwise agreed by the parties, the tribunal may make more than one award different times on different aspects of the matters to be determined"* and section 47(2) spells out that any such award can relate to either *"an issue affecting the whole claim"* or *"a part only of the claims or cross-claim submitted to it for decision"*. Furthermore, Regulation 12.6 of the LME Arbitration Regulations echoes this by providing that *"The Tribunal may make separate final awards on different issues at different times"*. It follows, therefore, that I do not accept that Mr Swaroop was right when he suggested that relief akin to summary judgment would not be available in arbitration in an appropriate case. Indeed, and this is really a second reason why I cannot accept Mr Swaroop's contention, it should not be overlooked that in the present case, although he declined to accede to Gunvor's application for a partial final award, the Arbitrator nonetheless made an order for an interim payment. He did this pursuant to Regulation 10.1(l) which provides as follows:

"Without prejudice to any powers which may be given to the Tribunal elsewhere by law or in these Arbitration Regulations, the Tribunal shall have power either on its own motion or on the application of either party:-

…

(l) to order either party, 'the payer', to make an interim payment to the other party, the 'payee', of such amount as the Tribunal shall in its discretion think just, not

exceeding a reasonable proportion of the monetary award which in the opinion of the Tribunal is likely to be recovered by the payee after taking into account any set-off or counterclaim on which the payer may be entitled to rely;"

Although Mr Swaroop objected to the Arbitrator's exercise of this power in this case, he was plainly in no position to suggest that the power does not exist given that Regulation 10.1(l) is in the terms which it is. For present purposes, this is all that matters since what Regulation 10.1(l) demonstrates is that an LME arbitral tribunal has the ability to grant relief not dissimilar to, and anyway with similar effect to, an award of summary judgment in court proceedings.

50. Thirdly, there is the further point that what Mr Lewis termed the *"supposed prize"* of summary judgment in court proceedings would be at the expense of other enforcement benefits derived from proceeding by way of arbitration rather than in court. These include the ability to obtain enforcement under the New York Convention regime as well as the ability to have any dispute resolved in a neutral forum as opposed to having to commence proceedings before the court where the non-paying party is resident. I consider that there is very considerable force in this further point and that, as such, it serves as a substantial counter-balance to Mr Swaroop's submissions concerning the availability of summary judgment procedures in court but not in arbitration.

51. I next turn to consider whether either of the two authorities relied upon by Mr Swaroop, the ***Rals*** case and the ***Nova (Jersey) Knit*** case, should be regarded as necessitating a different conclusion. As I shall explain, I do not consider that they do.

52. Dealing, first, with the ***Nova (Jersey) Knit*** case, Mr Swaroop submitted that this is a decision of the House of Lords which provides significant support for Uttam's position. The case concerned an arbitration clause which was governed by German law and which formed part of a partnership agreement between an English company and a German company. Specifically, the relevant provision was in these terms:

"All disputes arising from the partnership relationship or occasioned by (or 'in connection with') the partnership relationship between the partnership and the partners shall be decided by the arbitration tribunal provided for in a separate document."

In 1972 the English company sold certain machinery to the German company receiving in return 24 bills of exchange payable on different dates between March 1973 and December 1975. After six of them had been honoured, the German company refused further payments, alleging that the bills had been obtained by fraud. The partnership and the German company commenced arbitration proceedings in Germany. In 1974 the English company commenced an action in England claiming payment of the bills. The German company having applied to have the action stayed. Bristow J refused a stay but the Court of Appeal reversed his decision. The House of Lords allowed the English company's appeal on the basis that the evidence relating to German law, the law governing the arbitration agreement, was to the effect that the arbitration agreement did not extend to the claims on the bills of exchange.

53. Mr Swaroop relied, in particular, upon the reference by Lord Fraser at pages 730H-731A to the evidence as to German law being that *"a very plain manifestation of*

intention to extend an arbitration clause to claims under bills of exchange is needed to rebut the presumption that businessmen neither wish nor expect bills of exchange to be taken into arbitration". Mr Swaroop made the point that it was through applying this test that the majority (Lord Salmon dissenting) of the House of Lords reached the decision which they did. Mr Swaroop then went on to rely upon the certain observations made by Lord Russell at pages 732D-733B, as follows:

"This, my Lords, brings me to a consideration of English law in relation to such bills of exchange. It is in my opinion well established that a claim for unliquidated damages under a contract for sale is no defence to a claim under a bill of exchange accepted by the purchaser: nor is it available as set-off or counterclaim. This is a deep rooted concept of English commercial law. A vendor and purchaser who agree upon payment by acceptance of bills of exchange do so not simply upon the basis that credit is given to the purchaser so that the vendor must in due course sue for the price under the contract of sale. The bill is itself a contract separate from the contract of sale. Its purpose is not merely to serve as a negotiable instrument, it is also to avoid postponement of the purchaser's liability to the vendor himself, a postponement grounded upon some allegation of failure in some respect by the vendor under the underlying contract, unless it be total or quantified partial failure of consideration. It is conceivable in theory that an arbitration clause in an underlying contract of sale should sufficiently clearly embrace liability under a bill of exchange, though it is not easy to envisage a clause so inconsistent with the nature and function of such a bill. But there is no ground whatever in English law for attributing to clause 18 of the partnership agreement — nor itself even an underlying contract of sale — such potency.

I conclude therefore that in English law (which would be applicable unless the German law were shown to be different) the defendant has not established that the plaintiff's actions on the bills of exchange are 'in respect of a matter agreed to be referred'."

54. The difficulty with Mr Swaroop's reliance upon the ***Nova (Jersey) Knit*** case in this way is, however, that it is not authority which is concerned, at least directly, with any relevant English law principle. The decision was concerned with German law rather than English law. That much is made clear by the passage in Lord Fraser's judgment to which I have referred. The most that Mr Swaroop can derive from the decision is as regards what Lord Russell had to say about it not being *"easy to envisage"* an arbitration clause *"so inconsistent with the nature and function"* of a bill of exchange as to include disputes under such a bill. However, this was something which was stated only by Lord Russell and not by the other members of the House of Lords. His statement also, on any view, amounts only to *obiter dicta*.

55. Furthermore, it should be borne in mind that the ***Nova (Jersey) Knit*** case substantially pre-dates the ***Fiona Trust*** case and so what might be described as the more modern approach to arbitration agreements and specifically to how rational businessmen are nowadays to be treated as regarding arbitration agreements into which they have entered. It is, however, interesting in this respect to note that, even in the ***Nova (Jersey) Knit*** case itself, in giving his dissenting judgment, Lord Salmon had this to say at pages 724D-725D:

"As I have indicated earlier, under the arbitration agreement the matters agreed to be referred are all disputes between the partnership and the partners and among the partners arising from or occasioned by the partnership relationship. In my opinion these matters include claims on the bills of exchange. The language of the arbitration agreement is very wide. The appellants however contend in effect that the arbitration agreement should be read as referring to 'all disputes excepting those relating to claims on bills of exchange'.

…

Two exceptionally learned and experienced German lawyers gave the required evidence about German law, unfortunately only on affidavit. I say unfortunately because it is extremely difficult merely from reading documents without any opportunity of asking questions, to decide which of the two versions (when they conflict) is to be preferred. The Court of Appeal preferred the evidence of the respondents' witness, Professor Heldrich. The learned judge preferred the evidence of the appellants' witness, Dr. Jacques. Nevertheless both the Court of Appeal and the learned judge came to the firm conclusion that this arbitration clause did not exclude disputes relating to claims on bills of exchange. I agree with that view, especially as the contrary view involves writing into the arbitration agreement words which are not there and which have the effect of forcing the partners into court if there is any dispute between them arising from or occasioned by the partnership relationship involving a claim on a bill of exchange. I do not suppose that partners in Germany are, as a rule, any keener than partners in England to have any dispute of any kind between them forced into open court. That no doubt is why the arbitration agreement is formulated in such wide terms."

56. It appears that Lord Salmon would have approved of the approach adopted by the House of Lords some 30 years later in the ***Fiona Trust*** case. As he went on to put it at page 727F-G:

"For the counterclaim to be fought in London would be a great waste of time and money since the issues in this counterclaim would be the same as those which over a long period have been investigated by the German arbitration tribunal whose final award is now being awaited."

The same modern position, with its presumption of what Mr Lewis labelled as 'one-stop shop' dispute resolution, is also evident from the following remarks of Carr J in ***C v D1*** [2015] EWHC 2126 (Comm) at [104] when identifying the relevant principles:

"in general, parties to an arbitration agreement do not intend that disputes under that agreement should be determined by different tribunals ('the Fiona Trust presumption'). This presumption may apply where there are multiple related agreements between the parties. If there are inconsistent arbitration agreements, it may be necessary to identify where the centre of gravity lies and which agreement lies at the commercial centre of the transaction (or is closer to the claim), or under which series of agreements the dispute essentially arises. It is the arbitration agreement in that agreement that will cover all issues. Fragmentation may of course occur if, on its true construction, the clear wording and inherent scheme leads to that conclusion …".

57. Accordingly, I conclude that there is no rule of English law that an arbitration clause cannot extend to a claim under a bill of exchange, certainly anyway as between the immediate parties to the underlying sale contract and in circumstances where those parties remain the parties to the bills of exchange.

58. The next question is whether the ***Rals*** case, relied upon by Mr Swaroop not because it is strictly speaking binding authority but as persuasive authority, justifies a different conclusion. That is a case in which, as Mr Swaroop explained, the Singapore Court of Appeal decided that an arbitration clause in a supply agreement which provided for payment by means of promissory notes did not apply to claims made under those promissory notes. Specifically, under the supply agreement Oltremare sold to Rals certain equipment for the processing of cashew nuts. Oltremare indorsed the promissory notes to a third party. When the third party commenced proceedings to enforce the promissory notes against Rals, Rals applied for a stay in favour of arbitration. Rals argued that the claim under the promissory notes was subject to the arbitration clause in the supply agreement. The arbitration clause in the supply agreement provided (in terms not dissimilar to clause 12.2 in the present case) as follows:

"All disputes arising or in connection with this Agreement shall be settled by a direct conciliation between the parties. Failing this conciliation, the dispute, the dispute will be settled in accordance with the rules of Conciliation and Arbitration Rules of the International Chamber of Commerce in Singapore."

59. The Court held that the arbitration clause in the supply agreement did not apply to claims under the promissory notes. At [49], this was stated by way of conclusion:

"In our judgment, the fact that the obligations under the Notes were separate and autonomous from those arising out of the Supply Agreement supported a conclusion in Oltremare's and thus [the third party]'s favour. There was no term in the Arbitration Agreement or the Supply Agreement that expressly stated that the Arbitration Agreement was to encompass disputes arising out of the Notes, nor was the Arbitration Agreement expressly incorporated into the Notes. In the circumstances, we were satisfied that a claim under the Notes, even by Oltremare, would not have been subject to the Arbitration Agreement."

Mr Swaroop highlighted, in particular, the reference to the promissory notes being *"separate and autonomous"*, together with the reference in the penultimate line to the conclusion that the arbitration agreement did not extend to claims under the promissory notes applying even where the relevant claim (under the promissory notes) has been asserted by the seller under the supply agreement (Oltremare). He suggested that the latter point demonstrates that the Singapore Court of Appeal's reasoning applies regardless of whether the claim is brought by a third party transferee of the promissory notes (or a bill of exchange as in the present case) or by the seller under the supply agreement.

60. Mr Swaroop also highlighted how, in the course of its reasoning, the Singapore Court of Appeal disapproved of an earlier first instance Singapore decision, namely ***Piallo GmbH v Yafriro International Pte Ltd*** [2014] 1 SLR 1028, saying this at [42]:

"The judge in Piallo (at [36]) held that the modern approach to the construction of arbitration clauses as set out in Fiona Trust meant that there could be no presumption against taking bills of exchange into arbitration. Given that the manufacturer's claim on the dishonoured cheques and the distributor's cross-claim for damages for breach of the distributorship agreement both arose out of the settlement, she held that it was likely the parties had intended for such claims to be resolved by arbitration alone: Piallo at [38]. More generally, she expressed the view that it would have to be expressly stated if a cause of action under a bill of exchange were to be excluded: Piallo at [39]. On the contrary, in our judgment, an arbitration clause in an underlying contract will generally not be treated as covering disputes arising under an accompanying bill of exchange in the absence of express language or express incorporation. This is the clear result of the authorities we discussed below."

Those authorities included the ***Nova (Jersey) Knit*** case as well as ***CA Pacific Forex Ltd v Lei Kuan Leong*** [1999] 1 HKLRD 462, as to which the Singapore Court of Appeal said this at [45]:

*"We endorse the view of the Judge, following Seagroatt J in [the **CA Pacific** case], that as a matter of commercial common sense, it is difficult to see why any right-thinking merchant would choose to give up his rights in respect of bills of exchange. Although arbitration is sufficiently flexible to accommodate summary adjudication, up until the introduction of the Singapore International Arbitration Centre Rules 2016, there was nothing in the rules of most major arbitral institutions and, in particular, those of the International Chamber of Commerce Rules of Arbitration in force as from 1 January 2012 ('the ICC Rules'), that expressly provided for it. Indeed, the availability of summary judgment procedures in international arbitration, and specifically under the ICC Rules, appears to be a matter of controversy in England: see, e.g., Travis Coal Restructuring Holdings LLC v Essar Global Fund Limited (2014) 155 Con LR 61 at [44]. This injects an element of uncertainty that is at odds with the unconditional nature of the obligation to pay under a bill of exchange that is prized by business people. More importantly, as the Judge pointed out at [194] of the HC Decision it restricts a holder's and possibly his indorsee's options as to the mode of dispute resolution that can be adopted."*

61. As I have explained, however, in my view, the advantages of court-based proceedings over arbitration as regards the availability of summary procedures can be overstated. As a result, I am not persuaded by the Singapore Court of Appeal's reasoning. On the contrary, I agree with Mr Lewis when he submitted that the reasoning is flawed, having been overly influenced by the fact that the claimants in the ***Rals*** case were (third party) indorsees of the relevant promissory notes. Mr Lewis suggested, indeed, that the Singapore Court of Appeal's approach entailed, for this reason, something of the 'tail wagging the dog'. Although I would not put matters in quite that way, nonetheless it is clear that it was a matter of concern to the Singapore Court of Appeal that indorsees ought not to be bound by arbitration clauses in underlying sale contracts. Clearly, what was stated at [49] about claims brought under the promissory notes by their original holder (Oltremare) represents *obiter dicta*. In any event, as Mr Lewis pointed out, essentially for the reasons which I have sought to explain, approaching an arbitration agreement in a sales contract as a matter of construction, it seems to me that it is entirely appropriate to conclude that the parties to that sale contract intended that disputes *between them* under a related promissory note or bill of

exchange are to be governed by the arbitration agreement, even if those same parties (to the sales contract) are to be regarded as not having the same intention as regards disputes where a third party indorsee has become involved. I acknowledge that it is possible that the 'one-stop shop' presumption ceases to operate in the same way where such a third party is introduced into the arrangements since that third party will necessarily not also be a party to the underlying dispute under the sale contract given that the only thing to which the third party is a party is the relevant bill of exchange or promissory note. The present case is not, however, a third party case. In his reply submissions, Mr Swaroop drew attention to the fact that, in the Points of Claim, Gunvor described itself as *"the holder in due course (alternatively the holder for value, alternatively the holder) of the Bills of Exchange"*. He highlighted also how the Bills of Exchange bear various stamps which might suggest that they have been indorsed to third parties. Mr Swaroop submitted that this (in particular whether Gunvor has standing to bring its claims under the Bills of Exchange) is something which it will be for the Arbitrator to decide when dealing with the underlying claim brought by Gunvor. Whether Mr Swaroop is right about this will be a matter for the Arbitrator to consider. What matters for present purposes is that Gunvor asserts claims under the Bills of Exchange and does so as a party also to the Confirmations (and the Master Sales Contracts). As such, this is not the type of third party situation which arose in the ***Rals*** case where the parties involved were not both parties to the underlying sales contract.

62. This last point is a point which was made by the Arbitrator himself in the Ruling. Referring to the ***Nova (Jersey) Knit*** and ***Rals*** cases, he observed that neither of those cases *"dealt with a straightforward position, as here, where the Claimant and the Respondent were direct contract parties and the Bills of Exchange were the primary payment mechanism between them"*. As he went on to explain:

> *"In the present case, and in similar cases where there is no confusion or problem about the parties to the various obligations and no question of assignment, I take the view that rights under the Bills of Exchange may well be incorporated as part of the operative contract. In this case, the Bills are specified in the Master Sales Contracts as part of the delivery documentation, the format of the Bill of Exchange is annexed to the Contracts as Appendix IV and payment is to be made without set off or deduction. There is no complication arising from an assignment or change of parties. It could well be that issues based on these latter factors would be subject to local laws."*

63. It will be apparent for the reasons which I have sought to explain, that I agree with the Arbitrator about this. It follows also that I reject Uttam's case that the Arbitrator did not have jurisdiction to determine the merits of Uttam's claims under the Bills of Exchange.

The interim payment

64. The last matter to mention is a submission made by Mr Lewis. This was that, even if the Court were to decide that the Arbitrator lacked jurisdiction in respect of the claims under the Bills of Exchange, there would, in any event, be no basis upon which to reverse the interim payment order since the power under Regulation 10.1(l) was, in any event, available to the Arbitrator in respect of the claims under the Confirmations (and the Master Sales Contracts) as to which there is no issue that he has jurisdiction.

65. Mr Lewis submitted that, reading the Ruling as a whole and in a fair and reasonable way, it is apparent that the Arbitrator was making the interim payment order which he did as much in respect of the claims under the Confirmations (and the Master Sales Contracts) as in respect of the claims under the Bills of Exchange.

66. It is unnecessary, indeed inappropriate, for me to arrive at a concluded view in relation to this since, as I have explained previously, section 67 of the 1996 Act is concerned with matters of jurisdiction rather than a tribunal's powers within the context of an arbitration. In any event, in view of the decision which I have reached in relation to the delay and jurisdiction issues, the point raised by Mr Lewis is academic. It would only have mattered had I reached a different decision. In that event, it would have been open to Uttam to request that the Arbitrator revisit his decision in relation to the interim payment order. Even then, however, it would not have been appropriate for me to have expressed a view as to how the Arbitrator should deal with such a request.

Conclusion

67. In conclusion, therefore, Uttam's section 67 challenge must fail.