Neutral Citation Number: [2019] EWHC 2116 (Ch)

IN THE HIGH COURT OF JUSTICE **Claim No BL-2018-002267**

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

Royal Courts of Justice
Rolls Building,
Fetter Lane,
London, EC4A 1NL.

Date: **31st July 2019**

Before: DEPUTY MASTER HENDERSON

BETWEEN:

(1) EUROPEAN FILM BONDS A/S
(2) ALLIANZ GLOBAL CORPORATE & SPECIALTY SE
(3) ERGO VERSICHERUNG AG
(4) KRAVAG-LOGISTIC VERSICHERUNGS-AG
(5) BASLER SACHVERSICHERUNGS AG
(6) AXA VERSICHERUNG AG
(7) BAYERISCHER VERSICHERUNGSVERBAND VERSICHERUNGSAKTIENGESELLSCHAFT
(8) SV SPARKASSEN-VERSICHERUNG GEBÄUDEVERSICHERUNG AG

Claimants/Respondents

and

(1) LOTUS HOLDINGS LLC
(2) LOTUS MEDIA LLC
(3) LARKHARK FILMS LIMITED
(4) LIP SYNC PRODUCTIONS LLP

Defendants/Applicants

JUDGMENT

Laura John and Alexandra Whelan (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP and Wiggin LLP), counsel for the First, Second and Third Defendants (Applicants), Edmund Cullen QC (instructed by Clintons), leading counsel for the Claimants (Respondents)

Hearing dates: **20th March and 25th July 2019**

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

DEPUTY MASTER HENDERSON

Introduction

1. By a Part 8 Claim Form issued on 19th October 2018 the Claimants sought the following relief:

   "A declaration that, in the circumstances set out in the Witness Statement of Stephen Joelson (dated 19 October 2018) filed in support of this claim, under the Completion Guarantee dated 25 April 2016 (as amended by the Deed of Amendment dated 31 January 2017) ("**the CGA**"), completion and delivery of the Film (as defined in clause 1.12 of the CGA), including Sales Agent Delivery (as defined in clause 1.12(a)), has (and is conclusively presumed to have) been effected and the First and Second Defendants have (and are conclusively presumed to have) issued a notice in writing that completion and delivery of the Film, including Sales Agent Delivery, has been effected."

2. That issue ("**the Substantive Issue**") arises against the background that, if the Claimants are successful on it, then:
   2.1. The Second to Eighth Claimants will avoid or will avoid the risk of being liable to make payments to the Third and Fourth Defendants under clause 2.1(c) of the CGA. However, it does not necessarily follow that, if the Claimants are not successful on the Substantive Issue, that the Second to Eighth Claimants will be liable under clause 2.1(c) of the CGA.
   2.2. If the Second to Eighth Defendant's are otherwise potentially liable to the First and Second Defendants on a claim that they were in breach of contract for failing to complete and deliver the Film; that potential liability might be avoided.

3. By an application notice dated 21st November 2018 the Third Defendant ("**Larkhark**") sought the following order:

   "A stay of these proceedings under section 9 of the Arbitration Act 1996 and/or the Court's inherent jurisdiction on the basis that these proceedings fall within the scope of arbitration agreements between the parties."

4. By an application notice dated 29th November 2018 the First and Second Defendants (together "**the Lotus Entities**") sought the same relief as Larkhark.

5. I heard submissions from Counsel on those two application notices ("**the November 2018 Applications**") on 20th March 2019 and reserved judgment.

6. Before I delivered that reserved judgment Larkhark issued and served an application notice dated 4th April 2019. By this application Larkhark sought the following orders:

   (1) An order that the fourth witness statement of Alan Owens be admitted as late evidence.

(2) An order that this claim, including the November 2018 applications, be stayed pending the decision of the California Superior Court in proceedings issued by the Claimants by way of a "Complaint" filed on 19th March 2019 at 17:41 Pacific Standard Time.

7. The 4th April 2019 application came on for hearing before me on 25th July 2019 when Ms John acting on this occasion only on behalf of Larkhark submitted that I should not hand down judgment on the November 2018 applications, but should stay them and the remainder of these proceedings under the court's inherent jurisdiction or its case management powers.

8. I do not consider it just, appropriate or in accordance with the overriding objective not to give my judgment on the November 2018 applications. In substance I do not consider that the 4th April 2018, its supporting evidence and Mr Joelson's third witness statement in answer do more than (i) update the court as to events in California and (ii) possibly to bear upon how I should the exercise my discretion to order a stay under the inherent jurisdiction or my case management powers, which was a discretion I had under the November applications in any event. Accordingly this is my judgment on the November 2018 applications and on the 4th April 2019 application notice.

9. The relevant subsections of s.9 Arbitration Act 1996 are subsections (1) and (4) which provide:

> (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.

10. Where it applies, s.9 is mandatory. By s.2(2) of the Act, s.9 applies even if, as in the present case, the seat of the arbitration is outside England and Wales or Northern Ireland.

11. The Part 8 Claim Form was supported by a witness statement of Mr Joelson, a partner in the Claimants' solicitors. Larkhark's application was initially supported by a witness statement of Mr Owens, a partner in Larkhark's solicitors. This statement was also relied upon by the Lotus Entities in support of their application notice. Mr Owen made a second statement. This was dated 11th March 2019. Mr Gans, a partner in the Lotus Entities' Californian attorneys made a statement dated 14th March 2019 endorsing Mr Owens' second statement. Mr Joelson made a second statement on behalf of the Claimants. This was dated 15th March 2019. I have read all those statements and parts of the exhibits to them. There was a third statement of Mr Owens to which I was not taken and which I have not read, but which I was told exhibited or gave expert evidence as to Californian or USA law. The Claimant's objected to the admission of any such expert evidence.

12. Near the beginning of the hearing I ruled against the admission of any expert evidence as to Californian or USA law, but without either (i) preventing reference to American authorities as persuasive authorities as to English law or (ii) preventing any party from relying on the actual decision of HH Judge David Cunningham on a motion made to him sitting in the Superior Court of the State of California by the Claimants for a stay of the Californian arbitration proceedings which the Lotus Entities and Larkhark have commenced. Accordingly the third statement of Mr Owens was excluded.

13. The 4th April application was supported by and sought permission to rely upon a fourth statement of Mr Owens. I admit that statement. I also admit the third statement of Mr Joelson which was put in in answer. In parts both these statements, more especially that of Mr Joelson, stray into the territory of expert evidence as to Californian law. No permission has been sought or given for expert evidence as to Californian law and insofar as those statements purport to give such evidence I ignore them.

14. I gave my reasons for ruling that Mr Owens' third statement should be excluded at the hearing on 20th March 2019. I was not asked to re-visit that exclusion in the light of Mr Owens' fourth statement and do not do so. Essentially the reasons were that that there had been no permission for expert evidence; the expert evidence had only been put in by one side; if I gave permission to the Lotus Entities and Larkhark to rely on the expert evidence there would have to be an adjournment of the applications so as to give the Claimants an opportunity to consider the evidence and put in evidence in response. That last could not be done if the Lotus entities and Larkhark who wanted to put in the expert evidence also wanted, as they did, their applications to be heard on 20th March. Ms John indicated that the Lotus Entities and Larkhark would wish me determine the applications on the existing evidence, and possibly re-visit the question of expert evidence as to Californian law after I had ruled on the applications on the basis of the existing evidence. That did not appear to me to be an attractive course. The applications either had to be decided on the existing evidence (or some of it) or be adjourned. If and insofar as foreign law was relevant, generally I could apply the English law rule ("the Default Rule") that generally where foreign law is not pleaded and proved, the court applies English law; though the applicability of that rule was doubtful where the English law relied upon was statutory rather than the common law.

15. If I hold that Californian law is the law applicable to any of the issues before me, then I might apply the Default Rule. This rule is frequently described as a presumption that, in the absence of evidence as to what foreign law is, an English court should presume it to be the same as English law. This general rule or presumption becomes of doubtful application where it would be wholly artificial to apply rules of English law to an issue governed by foreign law. In such circumstances the English court may simply regard a party who has pleaded but who has failed to prove foreign law with sufficient specificity as will allow an English court to apply it, as having failed to establish his case without regard to the corresponding principle of English domestic law. Mr Cullen submitted that this last is the approach which I should adopt in the present case. In order to

contain the hearing within the 4 hour time estimate I imposed guillotines on the lengths of counsels' submissions. The imposition of these guillotines meant that no detailed submissions were made to me as to whether the issues as they arose on the applications before me came within the general rule or one of its exceptions. Ms John invited me to direct written submissions on this point. Mr Cullen submitted that I should not. I declined Ms John's invitation. The need to finish the hearing within the estimated 4 hours also meant that the oral submissions of counsel were necessarily curtailed and did not cover all the issues and sub-issues which arise. The hearing on 25th July 2019 was for two hours and both Counsel were careful to minimise the extent to which they covered old ground.

16. In *Shaker v Al-Bedrawi* [2002] EWCA Civ 1452, [2003] Ch. 350 (CA) one of the issues was whether, in the absence of evidence as to Pennsylvanian law, the court should apply the provisions of Part VIII of the Companies Act 1985 to a Pennsylvanian company to which as a matter of fact and construction of Part VIII Companies Act 1985, Part VIII did not apply. Part VIII Companies Act 1985 implemented the Second EC Directive on Company Law (77/91/EEC). Its effect (if it applied) was to make distributions by a company unlawful unless certain requirements were satisfied, in particular a requirement for relevant accounts. In giving the judgment of the Court of Appeal, Gibson LJ identified a number of exceptions to the general rule. These exceptions included cases where the point of foreign law arose on an interim application; cases where, in certain circumstances, the court was asked to construe a document governed by foreign law; and cases where English statute law applied only to domestic English circumstances.

17. At paragraph 67 Gibson LJ said:

> "67. The starting point must be that not every English statute is to be applied to a transaction because a party has either chosen not to prove or failed to prove the law which is otherwise applicable. On the face of it, Part VIII is inapplicable to a company not registered under the Companies Acts. Thus the judge was correct to seek to satisfy himself that Part VIII did not represent some merely domestic rule of English law. He did so by asking whether the requirements of Part VIII with which he was concerned represented a generally applicable rule of company law. As we have said, Mr Lyndon-Stanford has made his submissions on the basis that this requirement has to be met and we are content also to accept that as the test in the circumstances of this case. However if a rule of English statute law has to be adapted in the way explained above before it can apply, then, although it is not necessary to express a final view on this point on this appeal, it may well be that that factor alone is a sufficient indication that the case falls within the class of case where English statute law creates some special institution and thus cannot be applied simply because a party has failed to prove the relevant foreign law."

18. The Court of Appeal then held (at paragraphs 68 and 69) (i) that there was no evidence to suggest that the provisions of Part VIII represented requirements of company law generally recognised outside the European Community and (ii) that because the court was dealing with a preliminary issue which it considered was analogous to an interim application, and the effect of applying the Default Rule would be wholly to defeat the claimant's claim, that it should not apply the

Default Rule and should proceed on the basis that Pennsylvanian law did not include the equivalent of Part VIII.

19. Towards the end of the argument before me on 20th March 2019 it became apparent that there was an issue as to whether the Default Rule extended so as to enable or require me to treat Californian law as containing the equivalent of ss.30 and 67 of the English Arbitration Act 1996. If and so far as necessary I hold that the Default Rule extends so as to require me to presume that the Californian courts have a supervisory role under a Californian equivalent of the English Arbitration Act 1996 in respect of arbitrations governed by Californian law of the same extent and nature as that enjoyed by the English courts in respect of English arbitrations.

20. The main issues before me boiled down to the following:
    - 20.1. Is the law applicable to the arbitration agreements in the CGA and in an agreement called the Sales Agent Interparty Agreement" ("**the SA IPA**") dated 25th April 2016 the law of England or the law of California?
    - 20.2. Have the parties agreed to submit the issue of whether the Substantive Issue is within the scope of the arbitration agreement in the CGA ("**the Scope Issue**") to arbitration by the arbitrator? If not,
    - 20.3. Is the Substantive Issue as raised by the Claim Form within the scope of the arbitration agreement contained within the CGA? If not,
    - 20.4. Should I stay these proceedings under the inherent jurisdiction or my case management powers pending the decision of the California Superior Court in proceedings issued by the Claimants by way of a "Complaint" filed on 19th March 2019 at 17:41 Pacific Standard Time?

21. The answers to the first three of those questions should determine whether s.9 Arbitration Act 1996 applies so as to require me to order a stay of the whole or part of the Part 8 Claim. If s.9 does not apply, the answers to those questions go a long way, if not the whole way, towards answering the question of whether I should stay the whole or part of the Part 8 Claim under the court's inherent jurisdiction or case management powers.

22. The Lotus Entities and Larkhark contend that the arbitrator has already determined that the Substantive Issue is within the scope of the arbitration agreements. At the hearing on 25th July 2019 Mr Cullen for the Claimants accepted that contention as matter of fact, but maintained his submission that that was done merely pursuant to the arbitrator's competence / competence jurisdiction and not pursuant to an agreement by the parties to submit the Scope Issue to the arbitrator.

23. The issues which I have to decide heavily engage questions of construction of the CGA and the SA IPA. There was a dispute as to whether the law applicable to the construction of the arbitration agreements contained within them, insofar as they dealt with the scopes of the arbitration agreements, was English or Californian law. There was no evidence before me as to the Californian law of construction of documents or arbitration agreements. For the reasons explained below, in my judgment English law is the law applicable to both the CGA arbitration agreement and the SA IPA arbitration agreement; but even if I was wrong as to that, the

Default Rule referred to above would apply on the issues of construction. The "circumstances" of and around those issues of construction are not or would not be within the "certain circumstances" referred to by Gibson LJ in *Shaker* which gave rise to an exception to the Default Rule. Even if they were, I have to construe the agreements. I have no evidence of Californian law, and as a practical matter I could only construe the agreements in accordance with the English principles of construction. Thus, on the question of what law is applicable to points of construction, it does not matter for present purposes whether the applicable law is that of England or that of California.

Procedure

24. CPR 62.8(3) provides that where a question arises as to whether (a) an arbitration agreement has been concluded; or (b) the dispute which is the subject-matter of the proceedings falls within the terms of such an agreement, the court may decide that question or give directions to enable it to be decided and may order the proceedings to be stayed pending its decision. The Scope Issue is within CPR 62.8(3)(b).

25. Except for Ms John's request to rely upon expert evidence as to Californian or U.S. law referred to above, it was not suggested by either set of parties that I was not in a position to decide the Scope Issue on the material before me. Both Ms John and Mr Cullen made submissions as to the Scope Issue on that footing. I consider that they were correct to do so. The evidence filed by the parties does not disclose any relevant dispute of fact on the Scope Issue. The only possible missing evidential element is evidence as to the law of California or the USA (to be treated as evidence of fact as a matter of English law). The Claimants did not seek to rely on any such evidence. The Lotus Entities and Larkhark did; but, as mentioned above, they wished their applications to be dealt with by me and I refused them permission. I consider that I am in a position to determine the Scope Issue on the basis of the evidence before me, and I do not need to give further directions before it is determined. In my judgment it would contrary to the overriding objective to do so.

26. Ms John's primary case was that the arbitrator had already determined the Scope Issue; that the requirements of s.9 Arbitration Act 1996 were complied with so far as the Lotus Entities were concerned, and that I was therefore obliged to order a stay of the Part 8 Claim under s.9 so far as the Lotus Entities were concerned, and should do so under the court's inherent jurisdiction so far as Larkhark was concerned.

27. In my judgment, as explained below by reference to s.9(1) and Aikens LJ in *Aeroflot - Russian Airlines v Berezovsky* [2013] EWCA Civ 784 at paragraphs 72 and 73, for Ms John's primary case to be successful I would have to determine the Scope Issue in favour of the Lotus Entities.

Overarching Principles

28. S.9 Arbitration Act 1996 is contained within Part I of the Arbitration Act 1996. S.1 Arbitration Act 1996 provides:

> "The provisions of this Part are founded on the following principles, and shall be construed accordingly—
>
> > (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
> >
> > (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
> >
> > (c) in matters governed by this Part the court should not intervene except as provided by this Part.

29. Mr Cullen submitted that unless the Lotus Entities and Larkhark could prove that (a) they and the present Claimants are parties to an agreement to arbitrate and (b) the Substantive Dispute falls within the scope of the arbitration agreement, there is no jurisdiction to make an order under s.9 Arbitration Act 1996. I agree with and accept this submission. It accords with the plain words of s.9(1) Arbitration Act 1996. It also accords with the approach specified by Aikens LJ in *Aeroflot - Russian Airlines v Berezovsky* [2013] EWCA Civ 784 at paragraphs 72 and 73 where he said:

> "72. It is necessary first to analyse the structure of section 9(1) and (4) of the AA 1996, to see where the burden lies and what standard of proof is required when there is an application for a stay of proceedings because one side asserts that two parties are bound by an arbitration agreement to submit the disputes being litigated to arbitration and the other side asserts that there was no concluded arbitration agreement or it is "null and void". Section 9(1) and (4) are based on Article II of the New York Convention 1958. That stipulates that each Contracting State "shall" recognise arbitration agreements in writing and it further obliges a court of a Contracting State to refer the parties to arbitration if requested to do so by one of the parties in the context of an action in a matter which is the subject of an arbitration agreement, unless the court "finds that the said agreement is null and void, inoperative or incapable of being performed".
>
> 73 That has been translated into the terms of section 9(1) so as to give a party the right to apply for a stay of proceedings "in respect of a matter which under the [arbitration] agreement is to be referred to arbitration". Therefore, it seems to me in principle that there is a burden on the party asserting that there is (a) a concluded arbitration agreement as defined in the 1996 Act, and (b) that it covers the disputes that are the subject of the court proceedings, to prove that this is the case. This is borne out by the authorities. If the party seeking a stay cannot prove both (a) and (b), then there is no jurisdiction to grant a stay under section 9(1) and (4) of the AA 1996. However, if the court considers that it cannot decide those issues for itself in a summary fashion on the written evidence, it has two other options, as this court made clear in *Ahmed Al-Naimi (T/A Buildmaster Construction Services) v Islamic Press Agency Inc*., it can direct an issue to be tried, pursuant to CPR Pt 62.8(3), or it can stay the proceedings (under its inherent jurisdiction) so that the putative arbitral panel can decide the issue of the existence of the arbitration agreement, pursuant to

section 30 of the AA 1996. If the court decides that it will and can determine whether or not there was a concluded arbitration agreement on the written evidence before it, then, in my view, the authorities establish that it is for the party asserting the existence of the concluded arbitration clause to prove it on a balance of probabilities. As I point out below, the position appears to be different if the court decides, on an application for a stay, that it cannot, on the materials before it, determine whether there was a concluded arbitration agreement."

30. It follows that unless I determine the Scope Issue in the Lotus Entities' and Larkhark's favour, s.9 Arbitration Act 1986 simply is not sufficiently engaged as to enable me to make an order under it.

31. I would add that Aikens LJ's reference to s.30 Arbitration Act 1996 must have been made on the basis of an English arbitration (albeit that the case with which he was dealing involved a Swiss arbitration) because s.30 Arbitration Act 1996 does not apply to foreign arbitrations. S.2(1) Arbitration Act 1996 identifies those provisions of Part I of the Act (and s.30 is within Part I) which apply where the seat of the arbitration is outside England and Wales or Northern Ireland. S.30 is not included within those provisions. The point is made clear in a passage of Lord Phillips LCJ's judgment in *Weissfisch v Julius* [2006] EWCA Civ 218 at paragraph 25 where he referred with apparent approval to what the first instance Judge (Steel J) had said:

> "Steel J then observed that it was a well established principle of English law that the courts of the seat of arbitration should have supervisory jurisdiction. For this reason, by virtue of section 2(2) of the 1996 Act, sections 30, 32, 67 and 72 did not apply in respect of an arbitration with a foreign seat. In contrast, section 9 and 44 did apply, giving the English court express jurisdiction to intervene in support of a foreign arbitration."

The underlying agreements and relevant steps taken in relation to them

32. The CGA and the SA IPA are two of several agreements which were entered into in relation to the funding and making of a feature film, provisionally entitled "Starbright" ("the Film").

33. On 17th July 2015, prior to the CGA and the SA IPA which were not executed until 25th April 2016, Starbright S.r.l. ("**Starbright Srl**"), as "Distributor", also sometimes referred to as the "Commissioning Company", entered into a Commissioning and Distribution Agreement ("the **CDA**") with the Third Defendant, Larkhark Films Limited ("**Larkhark**") as "Producer". Under this agreement:
    - 33.1. Starbright Srl commissioned Larkhark to produce, complete and deliver a film, provisionally entitled "Starbright".
    - 33.2. Starbright was to pay Larkhark a purchase price of approximately EUR 18.9 million.
    - 33.3. By clause 2.2(b) Larkhark agreed to deliver or procure delivery to Starbright Srl of the "relevant Delivery Materials, as required under and in accordance with the agreement and "the Distribution Agreements". For the purposes of this agreement the "Distribution

Agreements" were defined as each agreement under which Starbright Srl or its successors in title granted rights in respect of the exploitation of the Film.

33.4. "PSC" was defined as meaning Starbright Corporation, a limited liability company incorporated in Louisiana.

33.5. "Completion Agreement" was defined as meaning the completion agreement relating to the Film between among others, the PSC, the Producer (Larkhark) and the Completion Guarantor (defined for the purposes of this agreement as the First Claimant ("EFB") and Burmester, Duncker the First Claimant and & Joly GmbH & Co. KG, trading under the name DFG Deutsche FilmversicherungsGemeinschaft ("DFG")).

33.6. "Completion Guarantee" was defined as meaning the guarantee of completion and delivery of the Film between, among others, (i) EFB and DFG and (ii) Larkhark.

33.7. Clause 2.6 contained provisions in respect of "Delivery"; but all such provisions were expressed to be subject to the terms of "each of the Notices of Assignment" and "the Completion Guarantee".

33.8. Clause 2.6(d) provided that any dispute as to whether or not Delivery had been effected in accordance with the agreement "shall be resolved in accordance with the provisions detailed in the relevant Distribution Agreement, Notice of Assignment or Interparty Agreement as applicable."

33.9. "Interparty Agreement" was defined as meaning "the sales agent interparty agreement for the Film to be entered into between, among others", Starbright Srl, PSC, Larkhark, the Sales Agent (defined for the purposes of this agreement as "International Film Trust LLC") and the Completion Guarantor (EFB and DFG).

33.10. Clause 24(a) provided that the governing law of the agreement should be English law.

33.11. Clause 24(b) provided that the English courts should have exclusive jurisdiction to settle any dispute in connection with the agreement.

34. On 17th July 2015 Larkhark and Starbright Corporation entered into a Production Service Agreement. Under this agreement Larkhark engaged Starbright Corporation to provide the production services necessary to enable Larkhark to produce and deliver the Film in accordance with the CDA.

35. On 22nd December 2015 Lotus Holdings LLC entered into a Short Form Sales Agency Agreement (the "**SFSAA**") with Starbright Srl (in this agreement called the "Producer"). Clause 8 of the SFSAA provided:

> "Long Form Sales Agency Agreement and Delivery Schedule: All other terms shall be as set forth in Company's [Lotus Holding's] standard long form Sales Agency Agreement and standard theatrical delivery schedule, incorporated by reference herein, subject to: (i) any changes necessary to conform such documentation to the terms and conditions of this Agreement; (ii) any additional changes made by good faith negotiations and mutual agreement; and (iii) any requirements of the Completion Guarantor …"

36. Lotus Holdings LLC's standard long form Sales Agency Agreement and standard theatrical delivery schedule are not in evidence, or at least I was not taken to them.

37. The last clause or sub-clause of the SFSAA contained agreements that:
    37.1. The laws of California should govern the terms, condition, performance and interpretation of the agreement.
    37.2. Any dispute under the agreement would be resolved by binding, final, exclusive and non-appealable arbitration under the Rules of International Arbitration of the Independent Film & Television Alliance in effect as of the date the request for arbitration was filed.
    37.3. The arbitration should be held in Los Angeles County, California.

38. On 25th April 2016 the CGA, the SA IPA and a third agreement, a "Producer's Completion Agreement" (the "**PCA**") were entered into.

39. The PCA was made between: (1) DFG for itself and the 2nd to 8th Claimants; (2) EFB; (3) Starbright Srl; (4) Larkhark; and (5) Starbright Corporation. In the PCA, DFG and EFB were jointly referred to as "Guarantor"; Starlight SRL was referred to as "Commissioning Company"; and Starbright Srl, Larkhark and Starbright Corporation as the "Producer".

40. By clause 8.1 of the PCA the Guarantor (i.e. DFG and EFB) was given the right in certain circumstances (a "Completion Bond Event"), to take over and complete the production of the Film.

41. Clause 16.1 of the PCA provided that the Producer (in this context Starlight Srl, Larkhark and Starbright Corporation) acknowledged that the Completion Guarantee was issued exclusively for the benefit of the beneficiaries thereto (the Fourth Defendant, Lip Sync Productions LLP ("**Lip Sync**") and the Lotus Entities) and that Starbright Srl and Starbright Corporation should have no rights under the Completion Guarantee.

42. The CGA had the title "Completion Guarantee". It was expressed as being made and delivered by (1) Burmester, Duncker & Joly GmbH & Co. KG, trading under the name DFG Deutsche FilmversicherungsGemeinschaft ("**the Agent**") as agent for 7 institutions, collectively referred to in the CGA as the "**Guarantor**" or the "**Underwriters**" and (2) The First Claimant ("**EFB**") to:
    42.1. Larkhark, defined as the "**Producer**".
    42.2. Starbright Srl, defined as the "**Commissioning Company**".
    42.3. Starbright Corporation.
    42.4. Lip Sync.
    42.5. The Lotus Entities, defined as the "**Sales Agent**".

43. Lip Sync and the Lotus Entities were together defined as the "**Beneficiaries**" and each as a "**Beneficiary**".

44. By a deed of variation dated 31st January 2017 two of the original 7 institutions who were parties to the CGA (by DFG as their agent) ceased to be parties and were replaced by the Second and Seventh Claimants, with the Second Claimant becoming the lead insurer.

45. Clause 1.1A of the CGA recited that pursuant to and subject to the terms and conditions of an investment agreement between Lip Sync and Starbright Srl, Lip Sync had advanced £575,000 ("**the Lip Sync Funding**").

46. Clause 1.2 of the CGA recited, amongst other things, that Larkhark would advance the sums of US$11,037,313, EUR 4,255,710 and £600,000 (the "Producer Net Funding") to discharge its obligation under the PSA to advance an amount equal to the Budget Contribution (as defined in the PSA) to Starbright Corporation to enable it to carry out the services necessary to produce, complete and deliver the Film.

47. Clause 1.5 of the CGA recited that DFG (the Agent), EFB, Larkhark, Starbright Corporation, Starbright Srl, Lip Sync, the Private Investors, and the Lotus Entities had entered into a Sales Agency side letter (the "**SAA Side Letter**") dated on or around 25th April 2016 "dealing with certain matters of mutual interest relating to the production, delivery and distribution of the Film." It was common ground that the SAA Side Letter was the SA IPA.

48. Clause 1.10 of the CGA provided that the Film would be based upon a screenplay by Olimpia Lucente and Joseph Bitonti and Francesco Lucente dated 18th December 2015 and that the production of the Film would be in accordance with the Budget and the shooting and post production schedules dated 10th April 2016.

49. Clause 1.11 of the CGA recited that on or about the date of the CGA, the Guarantor and EFB had entered into an agreement with the Commissioning Company (Starbright Srl), the PSC (Starbright Corporation) and the Producer (Larkhark) called the "**Producer's Completion Agreement**", which defined the rights and authorities of the Guarantor and EFB as against the Commissioning Company (Starbright Srl), the Producer (Larkhark) and the PSC (Starbright Corporation).

50. Clause 1.11 of the CGA further recited that the Beneficiaries (Lip Sync and the Lotus Entities) acknowledged that the Producer's Completion Agreement would be entered into and that the Guarantor confirmed that the Beneficiaries need not be concerned with its terms nor whether the Commissioning Company, the Producer or the PSC was in breach or default thereunder.

51. Clause 1.12 of the CGA is the clause, the application of which is raised by the Substantive Issue. With parts which are not directly relevant to the issues which I have to decide omitted, the omissions being indicated and sometimes being summarised by me in square brackets, it provided as follows:

> "As used in this Agreement, "**completion and delivery of the Film**" shall mean all of the following:
>
> (a) tender of delivery to Sales Agent [the Lotus Entities] by 31 December 2017 [provision for extension of date] ("the "**Delivery Date**") of the materials specified in the delivery schedule attached hereto as Schedule 3 and marked with an asterisk (**Sales Agent Delivery Materials**") and thereafter such action, such notices and such remedies as the Guarantor is required to take, provide and/or effect in

accordance with the delivery procedure attached hereto as Schedule 2 (such delivery being defined herein as "**Sales Agency Delivery**"); and

(b) the delivery to each Presale Distributor […]

(c) the Film (i) is photographed in colour; [other technical requirements] (vii) is based on the Screen play; […]; (ix) is directed by Francesco Lucente (the "**Director**"), starring James Earl Jones, and the two lead actors, to be determined, and produced by Olimpia Lucente (the "**Producer**"); and

(d) in the event the Guarantor takes over production of the Film, the payment of all costs which may be necessary in order to effect completion and delivery of the Film in accordance with this Clause 1.12 […]".

52. In the events which happened the Delivery Date was extended to 30th May 2018. The definition of Olimpia Lucente as the "Producer" is confusing in that in the parties' clause Larkhark is defined as the "Producer". Unless the context otherwise indicates I have proceeded on the basis that the "Producer" means Larkhark.

53. Clause 1.15 of the CGA recited that the Lotus Entities were parties to the CGA "solely for the purpose of agreeing to the provisions of Schedules 2 and 3", which they thereby agreed to and that they should have no other right or benefit.

54. Clause 2 of the CGA was the first clause of the operative part of the CGA. Clause 2.1 of the CGA provided that the Guarantor (following the 31st January 2017 amendment, the 2nd to 8th Claimants) agreed, for the benefit of the Beneficiaries (Lip Sync and the Lotus Entities), that subject to certain conditions and amongst other things:

"(a) the Guarantor shall (for the benefit of the Beneficiaries), if necessary, make available to the Commissioning Company and/or the Producer and/or PSC any funds in excess of the Total Production Cost that may be necessary to effect completion and delivery of the Film and/or take over production of the Film from the Commissioning Company and/or the Producer and/or PSC and either assume direct responsibility for completion and delivery of the Film or arrange for completion and delivery of the Film by third parties on the Guarantor's behalf (provided the Guarantor and EFB shall consult in good faith with the Beneficiaries regarding the identity(ies) of any such third party(ies) (but, in the event of disagreement, the view of the Guarantor shall prevail)); and

(b) […]

(c) if the Guarantor fails to effect Sales Agent Delivery or discontinues production of the Film the Guarantor shall reimburse to Lip Sync the Lipsync Funding, to the Producer [Larkhark] the WIP Price (as defined in the Commissioning Agreement) … less in each case the aggregate of any amounts actually and non-refundably received by that Beneficiary prior to the time such payment is to be made …. (such aggregate amount paid to the Beneficiaries by the Guarantor being hereinafter the "**Payment Sum**"); or

(d) notwithstanding completion and delivery of the Film to the Sales Agent, completion and delivery of the Film is not effected to any Presale Distributor (a "**Non-Delivered Distributor**") the Guarantor shall reimburse to Producer an amount equal to the amount that would have been paid by such Non-Delivered Distributor …."

55. "Sales Agent Delivery" was a defined term under clause 1.12 of the CGA as set out above.

56. On 6th March 2018 EFB and DFG exercised their right to take over production of the Film with immediate effect.

57. Clause 9.1 of the CGA contained an agreement by the parties that the CGA included the recitals set forth in clause 1 and the Schedules.

58. Clause 9.2 of the CGA provided:

> "9.2 Any modifications or amendments to this Agreement, including any waiver of the requirement of written form, shall be invalid unless executed in writing and duly signed by all Parties. The Parties have not entered into any collateral agreements with respect to the subject matter hereof other than the SAA Side Letter, the Collection Agreement and the Presale NOAs. The provisions of this Agreement are subject to the provisions of the SAA Side Letter, the Collection Agreement and the Presale NOAs and if there is a conflict between this Agreement and any provisions of the SAA Side Letter or a Presale NOA, the provisions of the SAA Side Letter or applicable Presale NOA shall prevail."

59. Getting slightly ahead of the analysis, it is noteworthy that although the parties to the SA IPA (the SAA Side Letter) included DFG; in the SA IPA DFG was not expressed to be a party in its capacity as agent for the 2nd to 8th Claimants, with the consequence that the 2nd to 8th Claimants were not parties to the SA IPA. But, the effect of the third sentence of clause 9.2 quoted above was that the 2nd to 8th Claimants (who were or, by reason of the 31st January 2017 variation of the CGA, became parties to the CGA by DFG as their agent) agreed that:
    59.1. The provisions of the CGA were subject to the provisions of the SAA Side Letter (the SA IPA) and
    59.2. If there was a conflict between the CGA and any provisions of the SAA Side Letter (the SA IPA), the provisions of the SAA Side Letter (the SA IPA) should prevail.

60. Clause 9.3 of the CGA provided:

> "This Agreement (and any and all non-contractual claims and/or disputes arising in connection with it) shall be governed by and construed in accordance with the laws of England and the parties hereby submit to the exclusive jurisdiction of the courts of England."

61. Schedule 2 to the CGA is headed "DELIVERY PROCEDURE".

62. Paragraph 1 of Schedule 2 to the CGA provided (with my comments in square brackets):

> "1.1 The Sales Agent [the Lotus Entities] and EFB and the Guarantor [following the 31st January 2017 amendment, the 2nd to 8th Claimants], hereby agree that in the event any dispute arises between any of the parties hereto as to whether completion and delivery of the Film (as defined in the Completion Guarantee) has been effected they will agree to submit such dispute to binding arbitration in accordance with the provisions hereof, which arbitration shall result in a finding that such completion and delivery of the Film either has or has not been effected, and shall result in issue of a final award to such effect. In connection with any such arbitration, the following procedure shall apply and all notices to be sent by the Guarantor or EFB under this procedure shall be copied to the Beneficiaries [Lip Sync and the Lotus Entities]."

63. Completion and delivery of the Film is defined in the Completion Guarantee (the CGA) in clause 1.12 of the CGA as set out above, which itself refers to the requirements of Schedule 2.

64. Although paragraph 1 of Schedule 2 refers to "any dispute" between "any of the parties" as to whether completion and delivery of the Film has been effected, that paragraph does not make either Larkhark or Lip Sync parties to the CGA agreement to arbitrate.

65. Paragraph 1.1 of Schedule 2 to the CGA provides that the Sales Agent (the Lotus Entities) shall have 30 days from and after its receipt of a written "Delivery Notice" from EFB or the Producer confirming delivery to the Sales Agent of all those materials specified in Part I of Schedule 4 to the CGA and marked with an asterisk (the "**Lotus Delivery Materials**") within which to verify that the Lotus Delivery Materials have been delivered and to notify the Producer, the Beneficiaries, EFB and the Guarantor in writing either (i) by an "Acceptance Notice" under paragraph 1.1.1 that completion and delivery of the Film has been effected or (ii) by an Objection Notice under paragraph 1.1.2 to object to what has been delivered on various grounds and within specified timescales.

66. Before moving on, I comment and hold that the reference in paragraph 1.1 to Schedule 4 must be intended to be a reference to Schedule 3. That is because Schedule 4 does not contain a list of materials, asterisked or otherwise, but is a list of presale distributors. Schedule 3 on the other hand does contain a list of materials with various items asterisked. Also clause 1.12(a) refers to the "Sales Agent Delivery Materials" as those marked with an asterisk in Schedule 3.

67. Paragraphs 1.1.2 to 8 set out a detailed and iterative process for objections and for returns of materials. Although the Claimants do not accept that down to 15th September 2018 all the steps taken were compliant with the requirements of that process, for the purposes of the resolution of the Substantive Issue under the Part 8 Claim and of the applications before me they have proceeded on the basis that those prior steps were properly taken and have focussed on whether an alleged failure by the Lotus entities to comply with a requirement of paragraph 5.2 of Schedule 2 to the CGA resulted in completion and delivery of the Film having been conclusively presumed to have been effected and the Lotus Entities having been conclusively presumed to have issued a notice in writing that completion and delivery of the Film have been effected.

68. Under paragraph 5 of Schedule 2 to the CGA, following the giving of a "Cure Notice" by EFB or the Guarantor, the Sales Agent (the Lotus Entities) had 15 Business Days from and after receipt of the Cure Notice and the relevant Lotus Delivery Materials either (i) to notify EFB or the Guarantor and the Beneficiaries that completion of the Film has been effected (with such notice constituting an Acceptance Notice) or (ii) to notify EFB or the Guarantor and the Beneficiaries that completion of the Film has not been effected (an "**Additional Objection Notice**"). The most relevant parts of paragraph 5.2 provided:

> "… which notice shall specify (with particularity and in reasonable detail and which notice shall be in the form of a QC Report, at the Producer's or EFB's or the Guarantor's expense and copied to the Beneficiaries) (i) which Lotus Delivery Materials the Sales Agent contends are not suitable for the making of commercially acceptable prints or broadcast materials (with such notice including the factual basis for such assertion); (ii) which Lotus Delivery Materials, as appropriate (if any) were not delivered as required herein; and (iii) which Lotus Delivery Materials, as appropriate (if any) are not in accordance with the Approved Picture Specifications.
>
> …. If [ ] gives an Additional Objection Notice and in such notice the Sales Agent contends that some or all of the Lotus Delivery Materials are not suitable for the making of commercially acceptable release prints or broadcast materials, to the extent that the Lotus Delivery Materials which the Sales Agent contends are not of technical quality suitable for the making of commercially acceptable release prints or broadcast materials (as appropriate) have been physically delivered to the Sales Agent within three (3) days after the Sales Agent's receipt of the Producer's of EFB's or the Guarantor's written request (which request the Producer or EFB or the Guarantor shall make (if at all) within five (5) Business Days after receiving the Additional Objection Notice), the Sales Agent shall return those Lotus Delivery Materials requested by EFB or the Guarantor to EFB or the Guarantor, at the Guarantor's expense, in order to allow EFB or the Guarantor to cure the defects in such Lotus Delivery Materials as appropriate."

69. The "Approved Picture Specifications" were defined in paragraph 1.1.2 of Schedule 2 to the CGA as meaning the specifications set forth in clause 1.10 and clause 1.12(c) of the CGA.

70. On Wednesday 5th September 2018, at approximately 5:41 a.m., Copenhagen time, the Lotus Entities or one or other of them sent EFB, DFG and others what was stated to have been an Additional Objection Notice for the purposes of clause 5.2 of Schedule 2. The Additional Objection Notice, alleged, amongst other things, that in various respects certain of the Lotus Delivery Materials were not suitable for the making of commercially acceptable prints or broadcast materials.

71. On Wednesday 12th September 2018 at approximately 9:10 a.m., Los Angeles time, EFB sent the Lotus Entities an email, amongst other things, requesting the return of those Lotus Delivery Materials, which Lotus contended in the Additional Objection Notice were not of technical quality suitable for the making of commercially acceptable release prints or broadcast materials.

72. The effect of the 12th September 2018 request was, so the Claimants contend, that under the part of paragraph 5.2 of Schedule 2 to the CGA quoted above, the Lotus Entities had three days after receipt of the request, that is to say until the end of Saturday 15th September 2018 in which to return the requested Lotus Delivery Materials to EFB.

73. The Lotus Entities arranged for a carrier to pick up the requested Lotus Delivery Materials from their premises on Friday 14th September 2018, with instructions to "Deliver Weekday" on the basis of "Standard Transit", for delivery on 17th September 2018.

74. On Monday 17th September 2018, at approximately 11:24 a.m., London time (at the address nominated by it, which happened to be Lip Sync's London office), EFB received some of the requested Lotus Delivery Materials.

75. On Tuesday 18th September 2018, at approximately 09:06 a.m., London time, EFB received the remainder of the requested Lotus Delivery Materials.

76. Paragraph 9 of Schedule 2 to the CGA provided:

> "9. **Failure to Respond – Acceptance Notice Deemed Given.** If (i) the Sales Agent fails to give any of the notices described in paragraphs 5.1, 5.2, 8.1 or 8.2 above, or (ii) the Sales Agent fails to return to EFB or the Guarantor the Lotus Delivery Materials within the time period specified in paragraph 5.2 above, then completion and delivery of the Film shall be conclusively presumed to have been effected and the Sales Agent shall be conclusively presumed to have issued an Acceptance Notice. EFB or the Guarantor shall thereupon give notice to the Beneficiaries that completion and delivery of the Film shall be conclusively presumed to have been effected and that the Sales Agent shall be conclusively presumed to have issued an Acceptance Notice, but failure to give such notice by EFB or the Guarantor to the Beneficiaries shall not affect the fact that completion and delivery of the Film shall be conclusively presumed to have been effected and that the Sales Agent shall be conclusively presumed to have issued an Acceptance Notice."

77. Without prejudice to other claims they might make as to delivery having occurred or having been deemed to have occurred in some other way, the Claimants allege that the Sales Agent failed to return to EFB or the Guarantor the Lotus Delivery Materials within the time specified in paragraph 5.2 so that "completion and delivery of the Film shall be conclusively presumed to have been effected and the Sales Agent shall be conclusively presumed to have issued an Acceptance Notice."

78. The facts as to what occurred in September 2018 and the Claimants' consequent allegation as mentioned in the immediately foregoing paragraph are the relevant circumstances set out in the witness statement of Mr Joelson filed in support of this claim. Thus, the Substantive Issue can, for present purposes, be re-phrased so as to ask whether, by reason of the requested Lotus Delivery Materials not being received by EFB or the Guarantor on or before 15th September 2018, under the CGA as amended, completion and delivery of the Film (as defined in clause 1.12 of the CGA), including Sales Agent Delivery (as defined in clause 1.12(a)), has

(and is conclusively presumed to have) been effected and the First and Second Defendants have (and are conclusively presumed to have) issued a notice in writing that completion and delivery of the Film, including Sales Agent Delivery, has been effected?

79. The Lotus Entities and Larkhark have been circumspect in putting forward in these proceedings any arguments as to the merits of the last-mentioned allegation. That is no doubt because they are challenging jurisdiction and do not wish it to be suggested that by dealing with the merits they have accepted the jurisdiction of the court.

80. Paragraph 11 of Schedule 2 to the CGA provided:

> "11. **Arbitration Procedure**. If either EFB or the Guarantor or the Sales Agent (or any Beneficiary on behalf of the Sales Agent (and in such event all references to the Sales Agent in this paragraph 11 and paragraph 12 shall be deemed to refer to such Beneficiary in place of the Sales Agent) elects to submit the issue of whether completion and delivery of the Film has been effected to binding arbitration, the following procedure shall apply: …"

81. Paragraph 11.1 of Schedule 2 to the CGA contained provisions as to the selection of an arbitrator.

82. Paragraph 11.2 of Schedule 2 to the CGA provided:

> "11.2 The arbitration shall commence at a location in Los Angeles County, California to be chosen by the Arbitrator within seven (7) Business Days after the date of appointment of the Arbitrator (or at such reasonable later time as may be determined by the Arbitrator for good cause) and be conducted under the auspices of the Independent Film & Television Alliance ("IFTA") in effect as of the effective date of this Agreement, and its rules, as modified (as modified, the "Rules"), which are deemed incorporated herein by this reference, to the extent not otherwise covered above, the arbitration shall be conducted in accordance with California law except to the extent contrary to the Rules."

83. Paragraph 11.3.1 of Schedule 2 to the CGA is the foundation of the Claimants' case before me to the effect that the arbitration agreement does not extend to the Substantive Issue. Paragraph 11.3.1 contained a number of sentences. For ease of later analysis I set it out here with the individual sentences set out separately and identified as 1st, 2nd etc., although in the original there was a single long paragraph. Broken down in that way paragraph 11.3.1 provided:

> 1st The only issues that may be determined in the arbitration proceeding are (i) whether the Lotus Delivery Materials were originally tendered to the Sales Agent prior to the expiration of the applicable Cure Period; (ii) whether all of the Lotus Delivery Materials are of a technical quality suitable for the making of commercially acceptable release prints or broadcast materials; (iii) whether the Lotus Delivery Materials are in accordance with the Approved Picture Specifications.
>
> 2nd No party to the arbitration may assert in such proceeding any counter-claim or cross-claim.

3rd The arbitration must result in a finding that completion and delivery of the Film either has been effected or that completion and delivery of the Film has not been effected and the Arbitrator shall promptly notify the Sales Agent, the Producer, the Guarantor and EFB in writing of the finding made.

4th In connection with the foregoing, if the Arbitrator finds that (A) not all of the Lotus Delivery Materials were tendered to the Sales Agent prior to the expiration of the applicable Cure Period; or (B) some or all of the Lotus Delivery Materials were not suitable for the making of commercially acceptable release prints or broadcast materials; or (C) the Lotus Delivery Materials are not in accordance with the Approved Picture Specifications, then the Arbitrator must find that completion and delivery of the Film was not effected.

5th The Arbitrator shall issue a final award in accordance with the provisions hereof not later that one (1) day after the conclusion of the arbitration, which award shall be non-appealable.

6th If the Arbitrator finds that completion and delivery of the Film has been effected, the Arbitrator shall issue a final award to such effect.

7th If, on the other hand, the Arbitrator finds that completion and delivery of the Film has not been effected, the Arbitrator shall issue a final award against the Guarantor which award shall direct the Guarantor to make payment in full to the Beneficiaries in accordance with and subject to the terms and conditions of the Completion Guarantee, which payments shall be made within five (5) Business days after the date of issuance of the award.

8th Upon the Guarantor making such payment, any and all rights of the Sales Agent in connection with the Film including, without limitation, all rights of the Sales Agent under the Sales Agency Agreement shall automatically and immediately terminate, and the Sales Agent shall promptly return to EFB or the Guarantor all Lotus Delivery Materials as appropriate previously delivered to the Sales Agent.

9th In such event, the Guarantor shall be subrogated to all of the Beneficiaries' and Sales Agent's interests in and to all the collateral secured under the Beneficiary Security, including, without limitation, the Film until such time as the Guarantor has received an amount equal to such payment.

84. Paragraph 13 of Schedule 2 to the CGA provided:

> "13. **Binding Nature of Arbitration; Confirmation of Award.** The parties agree to be bound by any arbitration brought pursuant to these provisions, and the results thereof shall be final, binding and non-appealable with respect to the subject matter thereof. The award issued by the Arbitrator may be enforced against (i) the Guarantor in the courts of California or in the Courts of Hamburg, Germany; and (ii) EFB in the courts of Denmark or the courts of California, the parties waive any and all objections to personal jurisdiction in such case(s) which they may otherwise have provided."

85. Under paragraph 11.2 of Schedule 2 to the CGA the IFTA Rules were "deemed incorporated herein by this reference". The potentially relevant IFTA Rules in respect of the CGA were the IFTA rules in force at the date of the agreement. Those were contained in the 5th December 2015 edition IFTA rules. Under the SA IPA the potentially relevant rules were those in effect at the time of the arbitration. By the time of the arbitration a new edition of IFTA rules was in force, but it was

common ground that insofar as relevant the later edition contained the same rules in the same terms as the earlier edition. The potentially relevant IFTA rules as per the 5th December 2015 edition are the following:

85.1. 8.1: "The Arbitrator shall have all jurisdiction and powers to make rulings as to procedures for the conduct of the arbitration including, but not limited to, the situs of the arbitration, the governing law and the arbitrability of any claims or cross-claims which the Arbitrator deems necessary or proper to ensure the just, expeditious, economical and final determination of all matters in dispute."

85.2. 8.2: "The Arbitrator shall exercise all powers granted to commercial arbitrators under the laws of the State of California, USA or the laws of the jurisdiction where the arbitration shall take place, if other than the State of California; and the parties shall be entitled to all rights granted to arbitration participants under the laws of such jurisdictions, including, if allowed, the right to seek and obtain a declaration of rights, injunctive or other equitable relief. All arbitrations shall be conducted under, shall be subject to and shall be enforceable by the laws of the State of California, unless the parties agree otherwise in writing and transmit a copy of said written agreement to the Arbitrator and the Arbitral Agent or unless otherwise designated by the Arbitrator pursuant to Rule 13.1. The parties may apply for confirmation and/or enforcement of any arbitration award or order hereunder to the courts of the State of California or of such other state, locality, country or territory as may have jurisdiction over the parties under applicable law, Treaty or Convention."

85.3. 8.3: "The Arbitrator shall rule on his/her own jurisdiction, including ruling on any objections with respect to the existence or validity of the agreement of the parties to arbitrate; for that purpose, an arbitration provision which forms part of an agreement or alleged agreement of the parties shall be treated as an agreement independent of the other terms of such agreement, so that a decision by the Arbitrator that such agreement is null and void shall not entail the invalidity of such arbitration provision."

85.4. 9.4: "The Arbitrator shall determine the rules of procedure for the arbitration; and shall resolve any disputes as to the jurisdiction of the Arbitrator. …."

85.5. 13.1: "The Arbitrator shall apply the laws of the State of California to all arbitrations conducted under these Rules unless the parties by mutual agreement or by the contract to be enforced provide that the Arbitrator shall apply the law of one other jurisdiction, or the Arbitrator for good cause designates another location to be the site of the arbitration in which case the Arbitrator shall have the discretion to apply for good cause the law of the situs of the arbitration."

85.6. 13.2: "The final award is not subject to appeal. The parties may agree to expanded judicial review of the final award by a court of competent jurisdiction, however, in no event shall any such appeal be

heard by the IFTA Arbitration Tribunal. The parties are responsible for determining whether the governing law of the agreement to arbitrate allows for such review."

86. Turning to the SA IPA: the parties to the SA IPA were
    86.1. Starbright Srl. In this agreement referred to as "Commissioning Distributor".
    86.2. Larkhark. In this agreement again referred to as "Producer".
    86.3. Starbright Corporation. In this agreement referred to as "PSC".
    86.4. Ingenious Broadcasting LLP. In this agreement referred to as "IB".
    86.5. Lotus Holdings LLC.
    86.6. Lotus Media LLC.
    86.7. Lip Sync.
    86.8. EFB.
    86.9. DFG.

87. Lotus Holdings and Lotus Media were again referred to collectively as the "Sales Agent".

88. As already noted above, there was no provision in the SA IPA that DFG was entering into it as agent for any of the insurers, though, as also noted above, the effect of the third sentence of clause 9.2 of the CGA quoted above was that the insurers, the 2nd to 8th Claimants (who were or, by reason of the 31st January 2017 variation of the CGA became parties to the CGA by DFG as their agent) agreed that:
    88.1. The provisions of the CGA were subject to the provisions of the SAA Side Letter (the SA IPA) and
    88.2. If there was a conflict between the CGA and any provisions of the SAA Side Letter (the SA IPA), the provisions of the SAA Side Letter (the SA IPA) should prevail.

89. Recitals A-H of the SA IPA summarised various aspects of various agreements. Recital I was that the parties wished to enter into the SA IPA "to make provision for, *inter alia*, the priority of the Security Interests, the replacement of agreed Elements, non-disturbance and entry into Distribution Agreements."

90. Clause 1.1 of the SA IPA provided that capitalised terms used in it had the meanings set out in Schedule 1 and in the list of parties or otherwise as set out in the agreement. Potentially relevant definitions in Schedule 1 are:
    90.1. "Beneficiaries" has the meaning ascribed to the term in the Collection Agreement. I have not seen a copy of the Collection Agreement and it is unclear whether this definition of Beneficiaries is the same as that in the CGA.
    90.2. "Completion and Delivery" means Completion and Delivery of the Film to the Sales Agent.
    90.3. "Completion and Delivery of the Film" shall have the meaning ascribed to the term in the Completion Guarantee.
    90.4. "Completion Agreement" means the producer completion agreement between the Guarantor, the Commissioning Distributor, the Producer

and the PSC relating to the Film dated on or about the date of this Agreement.

90.5. "Completion Guarantee" means the Completion Guarantee issued by the Guarantor in favour of the Producer, Lip Sync and the Sales Agent relating to the Film dated on or about the date of this Agreement.

90.6. "Delivery Date" has the meaning ascribed to the term in the Completion Guarantee.

90.7. "Disputes Procedure" has the meaning ascribed to the term in Clause 15.1.

90.8. "Elements" means any of the elements specified in Schedule 7. The "elements" specified in Schedule 7 are a list of individuals and their possible replacements to fulfil various roles in the production of the Film. They range from the Director down to the First Assistant Director and the Auditor; but do not include any actors.

90.9. "Parties" means the parties to this Agreement and Party means a party to this Agreement.

90.10. "Relevant Agreements" means any and all agreements mentioned in this Agreement or otherwise concluded by any of the Parties in relation to the Film.

90.11. "Sales Agency Agreement" means the short form sales agency agreement relating to the Film dated 22nd December 2015 between the Commissioning Distributor and the Sales Agent.

90.12. "Sales Agent Bonded Delivery Materials" means the delivery materials due to be delivered to the Sales Agent attached hereto as Exhibit 2 and marked therein as being bonded.

90.13. "Specifications" means the specifications set out in the Completion Guarantee.

91. Clause 1.2.3 of the SA IPA provided that "this Agreement" was a reference to the SA IPA and the Schedules. Clause 1.2.4 provided that a "Schedule" was a reference to any schedule to the Agreement.

92. Clauses 2 to 13 of the operative part of the SA IPA have no relevance to the issues as to delivery and completion of the Film under the CGA. Clause 14 of the SA IPA is concerned with Essential Elements. Having regard to the SA IPA definition of Elements, this does not have any relevance to the CGA requirements as to delivery and completion of the Film.

93. Clause 15.1 of the SA IPA provided:

> "Notwithstanding anything to the contrary contained in the Sales Agency Agreement or any other Relevant Agreement, the Parties hereby agree with each other that if the Sales Agent disputes whether Completion and Delivery under the Sales Agency Agreement has taken place, the dispute shall be resolved in accordance with the procedure set out in Exhibit 1 to this Agreement … If, notwithstanding this Clause 15, the Sales Agent fails to comply with the procedure for disputes concerning Completion and Delivery ("**Disputes Procedure**") …"

94. Clause 23.1 of the SA IPA provided:

"This Agreement and any non-contractual obligations arising out of or in connection with it shall be governed by, and construed in accordance with, the laws of England and Wales, and the parties hereby submit to the non-exclusive jurisdiction of the courts of England and Wales."

95. Clause 23.2 of the SA IPA provided:

"Any dispute about whether Completion and Delivery of the Film has occurred (i) in respect of the Sales Agent will be determined in accordance with Clause 15 of this Agreement; and (ii) in respect of a Distributor will be determined in accordance with the relevant Notice of Assignment."

96. Clause 23.6.2 of the SA IPA provided:

"Except as otherwise stated in this Clause 15, if there is any conflict between this Agreement and any other agreement to which any of the Parties is a party, the provisions of this Agreement shall prevail as between the Parties hereto but without prejudice to any rights the Parties may have against the Chargors pursuant to any Relevant Agreements."

97. The reference in Clause 23.6.2 to Clause 15 does not make sense if construed literally. I construe it as being a typographical error, and as the reference being intended to be made to clause 23.6 of the SA IPA.

98. Exhibit 1 to the SA IPA starts straightforwardly enough with the following:

"Delivery Procedure; Arbitration. In the event any dispute arises between any Sales Agent, Commissioning Distributor or Guarantor as to whether Completion and Delivery of the Sales Agent Bonded Delivery Materials has been effected to Sales Agent, said parties hereby agree to submit such dispute to binding arbitration in accordance with the provisions hereof, which arbitration shall result in a finding that Completion and Delivery either has or has not been effected, and shall result in a finding that Completion and Delivery either has or has not been effected, and shall result in issuance of a final award to such effect. In connection with any such arbitration, the following procedures shall apply:"

99. The remainder of Exhibit 1 is broken down into six paragraphs, each of which is identified by a letter and some of which have sub-paragraphs. The opening words of Exhibit 1 quoted above led me to expect that they would be followed by provisions dealing with the arbitration procedure. Such provisions do follow, but they do not start until paragraph (f). Paragraphs (a) to (e) set out a process which is similar to, but different from the iterative process set out in paragraphs 1.1.2 to 8 of Schedule 2 to the CGA for delivery of the "Sales Agent Bonded Delivery Materials" objections, cure notices and returns of materials.

100. Despite the difference in name the "Sales Agent Bonded Materials" are the same materials as are called the "Lotus Delivery Materials" in the CGA. Indeed, the document at Exhibit 2 to the SA IPA appears to be a photocopy of the document at Schedule 3 to the CGA or vice versa.

101. Some of the similarities and differences between the delivery processes specified in the CGA and in Exhibit 1 to the SA IPA are as follows:

Schedule 2 to the CGA	Exhibit 1 to the SA IPA
"Business Day" (as defined in Clause 2.2 of the CGA) is a day that is not a Saturday, Sunday, or a day on which banks in Germany or England are required to be closed.	"Business Day" is a day that is not a Saturday, Sunday, or a day on which banks in London or Los Angeles are required or permitted to be closed.
Process starts with a Delivery Notice from EFB or Larkhark to the Sales Agent.	Process starts with a Delivery Notice from Starbright Srl or "Guarantor" (DFG) to Sales Agent.
No requirement that Delivery Notice should be received prior to the Delivery Date.	Delivery Notice to be received prior to Delivery Date.
Sales Agent has 30 days from receipt of Delivery Notice in which to give either an Acceptance Notice or an Objection Notice.	Sales Agent has 30 Business Days from receipt of Delivery Notice in which to give either an Acceptance Notice or an Objection Notice.
Objection Notice to be given to Larkhark, the Beneficiaries, EFB and the Guarantor (the 2nd to 8th Claimants)	Objection Notice to be given to Starbright Srl, "Guarantor" (DFG) and Larkhark.
Objection Notice must specify (with particularity and reasonable detail): (i) which of the Materials (if any) the Sales Agent contends are not of technical quality suitable for the making of commercially acceptable release prints or broadcast materials, as applicable (with such Objection Notice including the factual basis for such assertion and which Objection Notice shall in relation to any technical materials be in the form of a quality control report (a "**QC Report**"), at the Producer's or EFB's or the Guarantor's expense); (ii) which Materials (if any) were not delivered as required; and (iii) which Materials (if any) are not in accordance with the Approved Picture Specifications.	Objection Notice must specify (with particularity and reasonable detail) the purported defect in delivery and all items that must be delivered, corrected or otherwise modified in order to complete Completion and Delivery. No specific requirements as per the equivalent in the CGA.
Within 3 Business Days after receiving an Objection Notice, the Producer or EFB or the Guarantor may request additional information.	Within 5 Business Days after receiving an Objection Notice, Starbright Srl or the Guarantor (DFG) may request additional information.
Sales Agent must respond to such a	Sales Agent must respond to such a

request within 3 Business Days after its receipt (a "**Response**").	request within 5 Business Days after its receipt
If in the Objection Notice the Sales Agent contends that some or all of the Materials are not of technical quality suitable for the making of commercially acceptable release prints or broadcast materials, the Producer or EFB or the Guarantor may, within 3 Business Days after receiving the Objection Notice or a Response, make a written request for the return the Material.	No specific process for the return of allegedly defective Material, but "Cure Period" (time within which defects are to be cured) does not begin to run until it is returned.
Within 5 Business Days after receipt of such a request the Sales Agent must return the material at the requesting party's expense.	
If the Sales Agent gives an Objection Notice, the Materials not specified in the Objection Notice as not being of suitable technical quality, not having been delivered or not being in accordance with the Approved Picture Specifications shall be deemed to have either been accepted or waived by the Sales Agent.	Those materials, if any, that are not specified in the Objection Notice as requiring delivery, correction or other modification shall be deemed to be either waived or accepted by the Sales Agent.
If the Sales Agent fails to give either an Acceptance Notice or an Objection Notice within the specified time periods or fails to return the Material as required or fails to give a Response, then the Sales Agent is deemed to have given an Acceptance Notice.	No equivalent deeming provision.
No procedure for additional or second round of objection notices.	Provides for a second round of objection notices and cure notices.
No provision for further corrections after arbitration award.	Possibility of further corrections after arbitration award.

102. Paragraph (f) of Exhibit 1 to the SA IPA dealt with arbitration procedure. The opening words of paragraph (f) were:

> "Arbitration Procedure. In the event that any party elects (or is deemed to have elected) to submit a dispute concerning Completion and Delivery to binding arbitration pursuant to this paragraph 1(h), then Guarantor, Producer

and Sales Agent shall thereafter initiate an arbitration proceedings and the following procedure shall apply:"

103. The reference there to "this paragraph 1(h)" must be a reference to "this paragraph 1(f)". There was no paragraph 1(h).

104. Sub-paragraph (f)(i) provided, amongst other things, that the arbitration should be conducted under the auspices of IFTA and in accordance with IFTA's Rules of International Arbitration then in effect as modified by the terms and provisions of the agreement. It provided for a single arbitrator. The later references to "arbitrators" in paragraph (f) must accordingly be read as references to the single arbitrator.

105. Sub-paragraph (f)(ii) provided, amongst other things, that the arbitration should be held at a location in Los Angeles to be chosen by the Arbitrator.

106. Sub-paragraph (f)(iv) provided that if it was found that Completion and Delivery had been effected, the Arbitrators should issue a written award against the Sales Agent requiring the Sales Agent to accept Completion and Delivery "under the Sales Agency Agreement" (the SSFSA). Sub-paragraph (f)(iv) further provided that if it was found that Completion and Delivery was not duly effected, the arbitrator should issue a written award to that effect against Starbright Srl and the Guarantor (DFG), which award should specify in detail the insufficiencies in Completion and Delivery and all items that must be delivered, corrected or otherwise modified in order to complete Completion and Delivery, and whether or not the arbitrator deemed such defects to be curable within 30 Business Days after the date of the Award. There was then provision for a further "Cure Period".

107. Sub-paragraph (f)(v) made further provision as to the nature and effect of an award.

108. On 18th or 19th October 2018 the Lotus Entities sent an arbitration notice under the CGA and SA IPA to EFB, DFG, Larkhark, Starbright Srl, Starbright Corporation and, Lip Sync. The notice stated that the Sales Agent had "elected to submit the issue of whether completion and delivery of the Film had been effected to arbitration". The notice gave particulars, either directly or by reference, of the ways in which the Lotus Entities alleged that Lotus Delivery Materials had not been delivered, were not in accordance with the Approved Picture Specification and were not suitable for the making of commercially acceptable prints or broadcast materials.

109. On 18th or 19th October 2018 the Lotus Entities and Larkhark sent an arbitration "demand" under rule 2 of the IFTA Rules to EFB, to DFG as "agent for the Guarantor" and to the original seven participating insurers which were parties to the CGA; but not to the two insurers who became parties to the CGA by reason of the deed of variation dated 31st January 2017, namely the Second and Seventh Claimants. The notice was subsequently amended so as to add the two insurers who became parties to the CGA under the deed of variation and remove those that ceased to be parties to the CGA. The demand was stated to be made under the arbitration provisions in both the CGA and the SA IPA. The Notice alleged failures by the respondents to comply with the requirements of the CGA and the SA IPA as to delivery and completion. Pursuant to IFTA Rule 2.4.7 the Lotus Entities and Larkhark sought the following relief:

109.1. 1. For a judicial declaration that Respondents failed to effect completion and delivery of the Film;

109.2. 2. For an order directing Respondents to make payment in full to the beneficiaries under the Completion Guarantee of amounts payable thereto in the event of failure by Respondents to effect completion and delivery of the Film;

109.3. 3. For an award of monetary damages in an amount to be proven at the hearing, but in no event less than the aggregate sum of USD 12,388,643, GBP 656,160, plus EUR 3,786,773, to the extent not otherwise awarded to Larkhark in connection herewith;

109.4. 4. For an award of prejudgment interest in an amount to be proven at the hearing;

109.5. 5. For an award for attorneys' fees and costs; and

109.6. 6. For such other and further relief as the Arbitrator deems just and proper.

110. On 19th October 2018 the Part 8 Claim Form in these proceedings was issued.

111. By a letter dated 24th October 2018 the present Claimants or some of them by their Californian attorney asked IFTA to dismiss one or other or may be both of the notices of arbitration.

112. By an email dated 31st October 2018 the arbitral agent at IFTA provisionally dismissed that request and opened the arbitration proceedings, but stated that she was not empowered to make legal determinations. Those had to be interpreted and ruled upon by an arbitrator.

113. On 7th November 2018 EFB, DFG and the present 2nd to 8th Claimants filed in the Superior Court of California in Los Angeles a summons and a complaint for declaratory relief against the Lotus Entities and Larkhark. The relief sought in those proceedings was:

113.1. 1. A judicial declaration that (1) the Arbitration should be stayed pending the outcome of the English proceeding; (2) IFTA lacks jurisdiction to determine its own jurisdiction; and (3) that IFTA lacks jurisdiction to hear the disputes now submitted to it by [the Lotus Entities and Larkhark];

113.2. 2. Attorney's fees;

113.3. 3. Costs;

113.4. 4. Any other relief that the Court deems just and proper.

114. On 15th November 2018 EFB, DFG and the present 2nd to 8th Claimants filed, entered or made a motion in their Californian proceedings to stay the arbitration.

115. On 4th December 2018, the Lotus Entities and Larkhark filed oppositions to the motion in which they submitted that there was no basis for the California Superior Court to stay the arbitration.

116. On 6th December 2018 Mr Sol Rosenthal was appointed as arbitrator for the arbitration.

117. On 7th December 2018, EFB, DFG and the present 2nd to 8th Claimants filed a reply in support of their motion.

118. On 18th December 2018, HH Judge David S Cunningham sitting in the California Superior Court heard oral arguments on the motion and denied it; thereby refusing to order a stay of the arbitration.

119. By a letter dated 21st December 2018 EFB, DFG and the present 2nd to 8th Claimants, by their Californian attorneys wrote to the arbitrator. They requested a stay of the arbitration pending the resolution of issues of jurisdiction and arbitrability raised by them in these proceedings (this Part 8 Claim).

120. By emails to the arbitrator dated 21st December 2018, Californian counsel for the Lotus Entities and for Larkhark asked the arbitrator to reject the request for a stay of the arbitration.

121. Later on 21st December 2018, the arbitrator informed the parties that he believed he had authority to issue a stay but that the key issue was whether there was good cause to do so, and he requested the Lotus Entities and Larkhark to file a brief on the issue of good cause.

122. On 10th January 2019 the Lotus Entities filed with the arbitrator and/or IFTA an opposition to the 21st December motion. The Lotus Entities noted that DFG and the present Claimants were raising the same arguments as had been raised before, and rejected by, the California Superior Court.

123. Also on 10th January 2019, Larkhark filed a joinder to the Lotus Entities' opposition in which it adopted the Lotus entities' position.

124. By an email dated 11th January 2019, the arbitrator denied the request for a stay of the arbitration. The email was short. The relevant paragraph read:

> "Dear All,
>
> Respondents' Motion to Stay this IFTA arbitration is hereby denied. Based on the reasons stated in the Claimants Lotus Media, LLC and Lotus Holdings, LLC's Opposition to Respondents' Motion to Stay Arbitration dated January 10, 2019, which opposition was joined by Claimant Larkhark Films Limited, and based on the reasons stated in Robert Shore's email dated December 23, 2018 on behalf of Claimant Larkhark, I do not believe that there is good cause to stay this IFTA proceeding."

125. On 22nd January 2019 DFG and the present Claimants requested the dismissal of their Californian proceedings, and they were dismissed "without prejudice".

126. On 31st January 2019, DFG and the present Claimants filed with IFTA and/or the arbitrator a "Preliminary Brief Re Scope of Arbitration". By this they sought the following orders: (1) an order that the only matters at issue in the arbitration were the three specific issues identified in paragraph 11.3.1 of Schedule 2 to the CGA; (2) an order that those three issues did not include the issue of "deemed acceptance", i.e. whether the delivery of the Film was "deemed" accepted by the Lotus Entities due to their failure timeously to meet delivery requirements; (3) an order that the arbitration would not be resolved until the "deemed acceptance" issue had been resolved by the English court; (4) in the alternative, an order that the issue of "deemed acceptance" under both the CGA and the SA IPA be subject to a summary procedure based on undisputed facts, prior to the commencement of discovery and/or a full arbitration.

127. On 8th February 2019, the Lotus Entities and Larkhark filed their response to the present Claimants' Preliminary Brief Re: Scope of Arbitration. Lotus and Larkhark submitted that the arbitrator had jurisdiction over all issues relating to completion and delivery under the operative agreements and, as such, resisted any attempts to stay of the arbitration and/or to narrow the jurisdiction of the arbitrator to the three issues specified in paragraph 11.3.1 of Schedule 2 to the CGA.

128. On 11th February 2019, the present Claimants filed a reply in support of their Preliminary Brief Re Scope of Arbitration.

129. On 13th February 2019, the arbitrator heard oral argument on the present Claimants' motion regarding the scope of the arbitrator's jurisdiction.

130. On 14th February 2019, the arbitrator issued a "Report of Preliminary Hearing and Order No. 2". The arbitrator denied the present Claimants' motion as to the scope of the arbitrator's jurisdiction in its entirety and refused to make any of the orders sought. The arbitrator's denial of the motion was stated in his Report to be: "for the reasons set forth in Claimants' Brief in Response to the Motion and by Claimants' counsel during oral argument at the hearing, including the following reasons" Those "following reasons" were:

> "(a) The Arbitrator has jurisdiction over any dispute as to whether completion and delivery were effected.
> (b) The [SA IPA] and the CGA are both applicable to this arbitration, but in the event of an inconsistency between the two agreements, the provisions of the IPA shall control.
> (c) Even under the CGA, the Arbitrator's jurisdiction is not limited to only three issues.
> (d) The Arbitrator has jurisdiction to award damages under the CGA.
> (e) This arbitration should not be delayed pending the English Court's decision of Respondents' "deemed acceptance" position.
> (f) There is no basis to order a summary procedure to decide the "deemed acceptance" issue, since, among other reasons, there are disputed facts to be determined in connection with Respondents' "deemed acceptance" position.
> (g) The California rules for international arbitration apply to this international arbitration."

131. The arbitrator's detailed reasoning is not apparent without delving into the detail of the written and oral submissions. The oral submissions are not in evidence, so I do not know how they might have added to or amended the written submissions. The arbitrator's point (e) indicates that, despite his denial of a stay of the arbitration, he had in mind at least the possibility that the English Part 8 Claim would continue.

132. On 19th March 2019 at 17:41 Pacific Standard Time the Claimants filed a "Complaint" in the California Superior Court. In the Complaint the Claimants:

132.1. Referred to the arbitrator's ruling of 14th February 2019 as a "Preliminary Ruling".

132.2. Was expressed to be brought "in an abundance of caution" pursuant to a provision of the Californian Civil Code ("CIACA").

132.3. Referred to an assertion by Lotus and Larkhark that under CIACA a challenge to the Preliminary Ruling had to be brought within the 30-day period following a notice of preliminary ruling.

132.4. Sought a declaration upholding their objections to the Preliminary Ruling.

132.5. Did not concede that CIACA applied to the arbitration at all because the parties (i) set forth the rules and procedures governing any arbitration which removed the arbitration from the ambit of the CIACA, and (ii) intended the California Arbitration Act ("CAA") to apply to their arbitration.

133. In his fourth statement Mr Owens on behalf of Larkhark did not accept that the Complaint had been filed in time. What I take from that; from the filing of the Complaint; and from its contents is that there is a possibility that at some time in the future the California Superior Court will rule on whether the arbitrator's decision as to scope was correct. However, there is also a possibility that it will not because of the suggestion that the Complaint was filed out of time and the possibility that CIACA does not apply.

134. A Case Management Conference for the Complaint has been fixed for 16th September 2019. Typically a trial of it would be set approximately 8 – 12 months after the Case Management Conference i.e. in May to September 2020.

135. As at 20th March 2019 the arbitration hearing had been scheduled for 10th to 17th July 2019. That hearing has now been vacated. It will not now start before November 2019 (at the earliest) and is unlikely to start until 2020.

Applicable laws

136. All contracts which provide for arbitration and contain a foreign element may involve three (or at least three) potentially relevant systems of law. (1) The law governing the substantive contract. (2) The law governing the agreement to arbitrate and the performance of that agreement. (3) The law governing the conduct of the arbitration. In the majority of cases all three will be the same. But (1) will often be different from (2) and (3). And occasionally, but rarely, (2) may also differ from (3) (*Naviera Amazonica Peruana S.A. v Compania Internacional de Seguros Del Peru* [1988] 1 Ll Rep 116, per Kerr LJ at p.119).

137. The law governing (3), the conduct of the arbitration, is often referred to as the curial law or the arbitral law.

138. In the present case it was common ground that the law governing the substantive contract is English law for both the CGA and the SA IPA. That is clearly correct. Both the CGA and the SA IPA contain provisions expressly applying English law. Clause 9.3 as set out above does so in the case of the CGA. Clause 23.1 as set out above does so in the case of the SA IPA.

139. It was also common ground that the law governing the conduct of any relevant arbitration was the law of California. Again that is clearly correct. Both the CGA and the SA IPA contain provisions expressly applying the law of California. Paragraph 11.2 of Schedule 2 in the case of the CGA. The SA IPA by clause (f)(i) of Exhibit 1 expressly applied the IFTA Rules. IFTA Rule 8.2 provided that all arbitrations should be conducted under, should be subject to and should be enforceable by the laws of the State of California, unless the parties agreed

otherwise in writing and transmitted a copy of such written agreement to the Arbitrator and the Arbitral Agent or unless otherwise designated by the Arbitrator pursuant to Rule 13.1. There has been no such agreement "otherwise" and there was no suggestion or evidence that the arbitrator had "otherwise designated". Further clause f(ii) of Exhibit 1 provided that the arbitration proceedings should be held in Los Angeles.

140. There was a dispute as to which laws were applicable to the agreements to arbitrate.

141. Dicey & Morris & Collins on the Conflict of Laws, 15th ed states as its Rule 64(1):

> "The material validity, scope and interpretation of an arbitration agreement are governed by its applicable law, namely:
>
> (a) the law expressly or impliedly chosen by the parties; or,
>
> (b) in the absence of such choice, the law which is most closely connected with the arbitration agreement, which will in general be the law of the seat of the arbitration."

142. Questions about the law applicable to arbitration agreements are not covered by the Rome I Regulation (Regulation (EC) 593/2008 on the law applicable to contractual obligations) because by article 1(2)(c) it does not apply to "arbitration agreements". They are determined by reference to the English common law conflict of law rules, and so the court first decides whether the parties expressly or impliedly chose a law applicable to the arbitration agreement; if they did, the court gives effect to the parties' choice; and if they did not, the court identifies the system of law with which the arbitration agreement has its closest and most real connection (*Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm), per Andrew Smith J at paragraph 8).

143. Mr Cullen submitted that the effect of clauses 9.1 and 9.3 of the CGA was that there was an express choice of English law to govern the arbitration agreement in the CGA. Clause 9.1 of the CGA expressly defined "this Agreement" as including the Schedules to the CGA. Clause 9.3 of the CGA provided that the Agreement should be governed by and construed in accordance with the laws of England. The arbitration agreement is included in one of the Schedules. Hence, submitted Mr Cullen, the arbitration forms part of the Agreement, which is expressly to be governed by and construed in accordance with English law. An argument substantially to this effect attracted Andrew Smith J in the *Arsanovia Ltd* case at paragraph 22.

144. Against that argument is the fact that the Second Schedule to the CGA provides for the seat of the arbitration to be in Los Angeles and, by incorporating the IFTA Rules, for the arbitral law to be that of California. However, that is not inconsistent with English law governing the agreement for such an arbitration. In my judgment the plain reading of clauses 9.1 and 9.3 of the CGA is that by expressly agreeing that the "Agreement" should be governed by English law the parties meant that all the clauses and paragraphs in the Agreement, including the arbitration agreement in paragraph 11 of Schedule 2 to the CGA, should be

governed by English law, including the paragraphs in Schedule 2 to the CGA which provided for the reference of disputes to a Los Angeles arbitration.

145. That is not the end of the question as regards the CGA arbitration agreement because Ms John submitted that if and insofar as the provisions of the CGA were in conflict with those of the SA IPA, those of the SA IPA should govern. Hence, it was argued, if the agreement to arbitrate in the SA IPA was governed by Californian law, then that was in conflict with the CGA and the SA IPA should prevail. In my judgment English law governs the arbitration agreement in the SA IPA so the hypothesis on which this argument is based does not exist.

146. As regards the law applicable to the arbitration agreement in the SA IPA: the same reasoning applies as to the arbitration agreement in the CGA. However, there is a difference in the relevant content of the two agreements. Clauses 1.2.3 and 1.2.4 of the SA IPA echo clause 9.1 of the CGA by defining the Agreement as including its Schedules, but unlike in the CGA the arbitration procedure in the SA IPA is not contained in a Schedule, but is contained in "Exhibit 1" which does not expressly form part of the Agreement. In my judgment this difference does not have the effect of preventing there from being an express choice of English law to govern the arbitration agreement in the SA IPA. That is because the arbitration agreement in the SA IPA is contained in clause 15.1 of the SA IPA which is subject to the express English jurisdiction provision. Clause 15.1 incorporates Exhibit 1 which sets out the arbitration procedure.

147. The fact that there is no admissible evidence before me that there were or are any relevant differences between Californian and English law on questions of construction or interpretation of the agreements or the arbitration agreements means that my conclusions on the governing or applicable law as regards the arbitration agreements in the CGA and the SA IPA are largely if not wholly academic. That is because in the absence of any such evidence I can and should apply the English law rule (referred to above as "the Default Rule") that generally where foreign law is not pleaded and proved, the court applies English law. There is no reason not to apply that rule on the issues of interpretation and construction of the arbitration agreements in the CGA and the SA IPA.

The impact of the determination of the Scope Issue by the arbitrator in California

148. The impact of the determination of the Scope Issue by the arbitrator in California depends on whether the arbitration agreement in the CGA gave the arbitrator (i) power to determine his jurisdiction merely as a matter of the general competence / competence principle applicable to arbitrations or (ii) power to arbitrate as to the Scope Issue.

149. I have already accepted Mr Cullen's submission that unless the Lotus Entities and Larkhark could prove that (a) they and the present Claimants are parties to an agreement to arbitrate and (b) the Substantive Dispute falls within the scope of the arbitration agreement, there is no jurisdiction to make an order under s.9 Arbitration Act 1996.

150. It follows from that, that unless I determine the Scope Issue in the Lotus Entities' and Larkhark's favour, s.9 Arbitration Act 1986 simply is not engaged. On the other hand, the determination of the Scope Issue by the arbitrator might

result in my determining the Scope Issue in the Lotus Entities' and Larkhark's favour so as to engage s.9 Arbitration Act 1996. The following possibilities emerge:

150.1. Issue estoppel. At one stage I suggested and I think Ms John submitted that the decisions of the arbitrator and/or the California court gave rise to an issue estoppel on the Scope Issue. However, Mr Cullen produced authority to the effect that unless those decisions were final and conclusive decisions of a court of competent jurisdiction, no issue estoppel could arise. The authority referred to was *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)*,[1967] AC 853, per Lord Reid at p.919B-D and Halsbury's Laws of England 5th ed. Vol.12A at paragraph 1601. It was apparent that the decision of the California Superior court was not final or conclusive and the arbitrator was not a court. Ultimately the possibility of issue estoppel was not pursued.

150.2. Decision of arbitrator itself causing the Substantive Issue to be within the scope of an arbitration agreement. The argument in this regard is that the parties have, by the arbitration agreement or agreements, agreed that the arbitrator should have power to arbitrate as to the Scope Issue. It follows that if the arbitrator decides by way of arbitration that the Substantive Issue is within the scope of one of the arbitration agreements, the Substantive Issue will then become an issue which the parties have agreed is within the scope of the arbitration agreement, whether or not a court might have decided the Scope Issue differently. If this argument is correct, it would be easy for me to apply it and determine that the Substantive Issue was within the scope of one of the arbitration agreements. Whether by the arbitration agreement or agreements, the parties agreed that the arbitrator should have power to arbitrate as to the Scope Issue is a key issue between the parties.

151. Rules 8.3 and 9.4 of the IFTA Rules, as incorporated into the arbitration agreements in the CGA and the SA IFA, provided that the arbitrator "shall" rule on his/her own jurisdiction and "shall resolve any disputes as to the jurisdiction of the arbitrator". In my judgment that not only gives the arbitrator power to rule on the scope of his jurisdiction, but the use of the word "shall" means that he is obliged to do so, and that the parties to the arbitration agreement are obliged to allow him to do so. That the arbitrator at least had power to rule on the scope of the arbitration is reinforced by reference to rule 8.1 of the IFTA Rules which provides that the arbitrator shall have all jurisdiction and powers to make rulings as to procedures for the conduct of the arbitration including, but not limited to, the situs of the arbitration, the governing law and the arbitrability of any claims or cross-claims which the arbitrator deems necessary or proper to ensure the just, expeditious, economical and final determination of all matters in dispute. However rule 8.1 is expressly only concerned with procedure.

152. The more difficult question is whether the agreement that the arbitrator should have those powers and duties amounts to an agreement that he should arbitrate the Scope Issue. Ms John submitted that rules 8.3 and 9.4 were mandatory provisions which required issues of scope to be resolved by the arbitrator to the exclusion of (in this case) the English court on her clients' applications under s.9 Arbitration Act 1996. Mr Cullen submitted that they merely reflected the general common law position that an arbitrator could determine the scope of his jurisdiction under

the principle of competence/competence and did not affect my power and duty to resolve the Scope Issue.

153. If Ms John was correct in that submission, the fact that the arbitrator's decision as to scope might be susceptible to reversal by the supervisory court in California would not detract from it. Unless and until such reversal occurred, the arbitrator would, as agreed by the parties, have determined that the Substantive Issue was within the scope of the arbitration agreement or agreements, with the consequence that, as per Ms John's argument, it would be within the scope of either or both of the arbitration agreements.

154. Ms John relied on the approach explained by the Court of Appeal in *Fiona Trust and Holding Corporation v Privalov* [2007] EWCA Civ 20 at paragraph 37 where Longmore LJ, giving the judgment of the court, said:

> "This combination of sections shows, together with the prescriptive section 9(4), that it is contemplated by the Act that it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute. In these circumstances, although it is contemplated also by section 72 that a party who takes no part in arbitration proceedings should be entitled in court to "question whether there is a valid arbitration agreement", the court should, in the light of section 1(1) of the Act, be very cautious about agreeing that its process should be so utilised. If there is a valid arbitration agreement, proceedings cannot be launched under section 72(1)(a) at all."

155. Longmore LJ's view that in general the arbitrator should be the first tribunal to consider whether it has jurisdiction to determine the dispute does in broad terms support Ms John's first submission and my provisional view, but in my judgment it is equally consistent with Mr Cullen's point about arbitrators generally having "competence/competence". Indeed, the reference to s.72, if anything, supports Mr Cullen's submissions because it indicates that despite the arbitrator having determined a scope issue in favour of his having jurisdiction ("competence") that determination might be challenged in court. S.76 Arbitration Act 1996 is not directly relevant to the present case because it only applies to English, Welsh and Northern Irish arbitrations, but in the case of such arbitrations it does permit a person alleged to be a party to arbitral proceedings but who takes no part in the proceedings to question (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, or (c) what matters have been submitted to arbitration in accordance with the arbitration agreement, by proceedings in "the court" for a declaration or injunction or other appropriate relief. "The court" is defined in s.105 Arbitration Act 1996 as meaning in relation to England and Wales the High Court or the county court. It is not expressly limited to the supervisory court. However, in the case of an arbitration in England or Wales the supervisory court would be the courts of England and Wales, so in my view there is little in this point.

156. I find what Lord Hoffman said in *Fiona Trust and Holding Corporation v Privalov* in the House of Lords ([2007] UKHL 40) at paragraph 13 more helpful to Ms John. That indicates that a wide rather than a narrow approach should be

adopted to the construction of provisions of arbitration agreements which go to their scope. What Lord Hoffman said there was:

> "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."

157. The principal authority relied on by Mr Cullen on this isssue was *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46. In *Dallah* there was an issue as to whether the Government of Pakistan was a party to an arbitration agreement. Pursuant to the arbitration agreement there had been an arbitration before an arbitration tribunal in Paris. The arbitration tribunal made an award against the Government of Pakistan to which the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") applied. The claimant applied in England pursuant to s.101(2) Arbitration Act 1996 for leave to enforce the award in the same manner as a judgment of the High Court. Leave was granted and the Government of Pakistan applied for the order granting leave to be set aside on the grounds that the arbitration agreement was not "valid" within the meaning of s.103(2)(b) Arbitration Act 1996. The relevant issue for present purposes was whether as a matter of French law the Government of Pakistan was a party to the arbitration agreement. The arbitral tribunal had held that it was. The Supreme Court held that the arbitral tribunal's decision as to the existence of its own jurisdiction could not bind a party such as the Government of Pakistan which had not submitted the question or arbitrability to the arbitral tribunal. The arbitral tribunal's own view of its jurisdiction had no legal or evidential value on that issue and that the English court would determine the question of jurisdiction anew.

158. At paragraph 22 of his judgment in *Dallah* Lord Mance JSC rejected a submission that the arbitral tribunal's decision on jurisdiction was itself an award which could be enforced under the New York Convention. The first ground which Lord Mance gave for doing so was expressed in the following terms:

> "First, (in the absence of any agreement to submit the question of arbitrability itself to arbitration) I do not regard the New York Convention as concerned with preliminary awards on jurisdiction. As *Fouchard, Gaillard, Goldman , International Commercial Arbitration* , para 654 observes, the Convention "does not cover the competence-competence principle". Dallah could not satisfy even the conditions of article IV(1) of the Convention and section 102(1)(b) of the 1996 Act requiring the production of an agreement under which the parties agreed to submit the question of arbitrability to the tribunal- let alone resist an application under article V(1)(a) and section 103(2)(b) on the ground that the parties had never agreed to submit that question to the binding jurisdiction of the tribunal. Second, Dallah's case quotes extensively from *Fouchard, Gaillard, Goldman*, para 658, pointing out that arbitral

tribunals are free to rule on their own jurisdiction, but ignores the ensuing para 659, which says, pertinently, that:

> "Even today, the competence-competence principle is all too often interpreted as empowering the arbitrators to be the sole judges of their jurisdiction. That would be neither logical nor acceptable. In fact, the real purpose of the rule is in no way to leave the question of the arbitrators' jurisdiction in the hands of the arbitrators alone. Their jurisdiction must instead be reviewed by the courts if an action is brought to set aside or to enforce the award."

159. That "ensuing" paragraph from *Fouchard, Gaillard, Goldman* supports Mr Cullen's approach, but in my judgment has to be read in the context of the words in parentheses at the beginning of paragraph 22 of Lord Mance's judgment. Those words were "in the absence of any agreement to submit the question of arbitrability itself to arbitration". Ms John's submission and my provisional view were that in the present case there was an agreement to submit the question of arbitrability to arbitration.

160. That distinction between (i) what might be termed the "ordinary" or "general" competence/competence principle and (ii) the case where the issue of competence has itself been agreed to be submitted to arbitration, is made clear in paragraph 24 of Lord Mance's judgment in *Dallah*. In the former case the competence/competence principle does not enable an arbitrator to determine the scope of his own jurisdiction in a way which binds a court under s.102 Arbitration Act 1996, nor, in my judgment, under s.9 Arbitration Act 1996. In the latter case, subject to appeal to or review by the supervisory court, the arbitrator's decision as to competence would not be capable of challenge in a court. In my judgment in this context it does not matter whether the arbitration agreement imposes a duty on the arbitrator to decide scope or whether it merely gives him a power to decide scope. In both cases his decision as to scope would be a decision that the parties had agreed that he could make.

161. So, per Lord Mance in *Dallah* at paragraphs 24 - 26:

> "24 …Arbitration of the kind with which this appeal is concerned is consensual-the manifestation of parties' choice to submit present or future issues between them to arbitration. Arbitrators (like many other decision-making bodies) may from time to time find themselves faced with challenges to their role or powers, and have in that event to consider the existence and extent of their authority to decide particular issues involving particular persons. But, absent specific authority to do this, they cannot by their own decision on such matters create or extend the authority conferred upon them. Of course, it is possible for parties to agree to submit to arbitrators (as it is possible for them to agree to submit to a court) the very question of arbitrability-that is a question arising as to whether they had previously agreed to submit to arbitration (before a different or even the same arbitrators) a substantive issue arising between them. But such an agreement is not simply rare, it involves specific agreement (indeed "clear and unmistakable evidence" in the view of the United States Supreme Court in First Options of Chicago Inc v Kaplan (1995) 514 US 938 , 944, per Breyer J), and, absent any agreement to submit the question of arbitrability itself to arbitration, "the court

should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently": p 943."

25. Leaving aside the rare case of an agreement to submit the question of arbitrability itself to arbitration, the concept of competence-competence is "applied in slightly different ways around the world", but it "says nothing about … judicial review" and "it appears that every country adhering to the competence-competence principle allows some form of judicial review of the arbitrator's jurisdictional decision": see China Minmetals Materials Import and Export Co Ltd v Chi Mei Corpn (2003) 334 F 3d 274 , 288, where some of the nuances (principally relating to the time at which courts review arbitrators' jurisdiction) were examined. In China Minmetals it was again held, following *First Options* , that under United States law the court "must make an independent determination of the agreement's validity and therefore of the arbitrability of the dispute, at least in the absence of a waiver precluding the defense": p 289. English law is well-established in the same sense, as Devlin J explained in *Christopher Brown Ltd v Genossenschaft Oesterreicher* [1954] 1 QB 8, 12–13, in a passage quoted in the February 1994 Consultation Paper on Draft Clauses and Schedules of an Arbitration Bill of the DTI's Departmental Advisory Committee ("DAC") (then chaired by Lord Steyn):

> "It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and to determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some court which had power to determine it. They might then be merely wasting their time and everybody else's. They are not obliged to take either of those courses. They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties—because that they cannot do—but for the purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not. If it became abundantly clear to them, on looking into the matter, that they obviously had no jurisdiction as, for example, it would be if the submission which was produced was not signed, or not properly executed, or something of that sort, then they might well take the view that they were not going to go on with the hearing at all. They are entitled, in short, to make their own inquiries in order to determine their own course of action, and the result of that inquiry has no effect whatsoever upon the rights of the parties."

This coincides with the position in French law: see paras 20 and 22 above.

26 An arbitral tribunal's decision as to the existence of its own jurisdiction cannot therefore bind a party who has not submitted the question of arbitrability to the tribunal. This leaves for consideration the nature of the exercise which a court should undertake where there has been no such submission and the court is asked to enforce an award. …"

162. I have quoted those parts of Lord Mance's judgment extensively because they, together with paragraph 30 to similar effect, were heavily relied upon by Mr Cullen. However, except perhaps for disputing how "rare" it was for parties to agree that arbitrability itself should be submitted to arbitration, I do not think that Ms John sought to argue that what Lord Mance said in those parts of his judgment did not represent the law. Ms John's case was simply that the present case was one of those cases, described by Lord Mance as "rare", where the parties had agreed to submit the question of arbitrability to the arbitrator, with the consequence that what Lord Mance said about the other kind of case (i.e. one where only the "ordinary" competence/competence principle applied) was irrelevant to the issues before me. Ms John submitted that rules 8.3 and 9.4 of the IFTA Rules, as incorporated into the arbitration agreements in the CGA and the SA IFA did, to paraphrase Lord Mance, "involve specific agreement" and did provide "clear and unmistakable evidence" that the parties had agreed to submit the question of arbitrability to the arbitrator. The issue for me is whether that submission is correct. Before addressing that issue by reference to the particular agreements in the present case, I complete my review of the judicial pronouncements relating to it.

163. In *Dallah* at paragraphs 79 to 82 Lord Collins of Mapesbury JSC explained the right of courts and tribunal to decide the scope of their jurisdictions under what I have referred to above as "ordinary" competence/competence.

164. In paragraph 83 of his judgment in *Dallah*, Lord Collins makes the point that the principle that a tribunal has jurisdiction to determine its own jurisdiction (what I have referred to as "ordinary" competence/competence) does not deal with or answer the question whether the tribunal's determination of its own jurisdiction is subject to review or, if it is subject to review, what that level of review should be.

165. At paragraph 84 Lord Collins made the point which is relevant to the dispute before me, that it does not follow from the fact that a tribunal has power to consider its own jurisdiction that it has exclusive power to determine its own jurisdiction. He said:

> "So also the principle that a tribunal in an international commercial arbitration has the power to consider its own jurisdiction is no doubt a general principle of law. It is a principle which is connected with, but not dependant upon, the principle that the arbitration agreement is separate from the contract of which it normally forms a part. But it does not follow that the tribunal has the exclusive power to determine its own jurisdiction, nor does it follow that the court of the seat may not determine whether the tribunal has jurisdiction before the tribunal has ruled on it. Nor does it follow that the question of jurisdiction may not be re-examined by the supervisory court of the seat in a challenge to the tribunal's ruling on jurisdiction. Still less does it mean that when the award comes to be enforced in another country, the foreign court may not re-examine the jurisdiction of the tribunal."

166. Ms John pointed out that that statement does not contain any reference to s.9 Arbitration Act. I attach little weight to that. In my judgment Lord Collins was not attempting to set out a complete list of the circumstances in which a foreign court might re-examine the jurisdiction of the arbitrator.

167. At paragraph 85 Lord Collins gave some examples of where a decision of a tribunal as to its own competence was not final:

> "Thus article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. But by article 34(2) an arbitral award may be set aside by the court of the seat if an applicant furnishes proof that the agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the law of the seat (and see also article 36(1)(a)(i)). Articles V and VI of the European Convention on International Commercial Arbitration (1961) (UN Treaty Series, vol 484, p 364, No 7041 (1963–1964)) also preserve the respective rights of the tribunal and of the court to consider the question of the jurisdiction of the arbitrator."

168. At paragraphs 86 to 92 Lord Collins considered the position in jurisdictions other than England. He explained that in most national systems, arbitral tribunals are entitled to consider their own jurisdiction and to do so in the form of an award; but that the last word would lie with a court, either in a challenge brought before the courts of the arbitral seat, or in a challenge to recognition or enforcement abroad. At paragraph 90 Lord Collins considered the position in the U.S. He referred to a U.S. decision which, if it applied in England, would be of some significance to the issue before me because it indicated that even in a case where the parties had agreed to submit the question of arbitrability to arbitration, a court might set the award aside in certain narrow circumstances. Thus, at paragraphs 90 and 91 Lord Collins said:

> "90. *First Options of Chicago Inc v Kaplan* (1995) 514 US 938 was not an international case. It concerned the application of the Federal Arbitration Act to an award of an arbitral panel of the Philadelphia Stock Exchange. The question was whether the federal district court should independently decide whether the arbitral panel had jurisdiction. The United States Supreme Court drew a distinction between the case where the parties had agreed to submit the arbitrability question itself to arbitration, and the case where they had not. In the former case the court should give considerable leeway to the arbitrator, setting aside the award only in certain narrow circumstances, but (at p 943, per Breyer J):
>
> > "If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently."
>
> 91. That flowed inexorably from the fact that arbitration was simply a matter of contract between the parties and was a way to resolve those disputes, but only those disputes, that the parties had agreed to submit to arbitration."

169. Lord Collins then turned to the position in England. At paragraph 96 Lord Collins made the point that where there was an issue as to whether a party had entered into an arbitration agreement, the court could and should determine that issue. That, at least so far as the CGA is concerned, is not the issue before me because there is no doubt but that the arbitration agreement in the CGA was entered into. The issue is as to its scope. The general thrust of what Lord Collins

says is to the effect that English courts will examine or re-examine for themselves issues as to the jurisdiction of arbitrators. However, in my view Lord Collins quotation from Breyer J set out above shows that he recognised the distinction which Lord Mance drew between ordinary competence/competence and cases where the parties had agreed that the arbitrator should arbitrate as to the scope of the arbitration agreement. In my judgment what Lord Collins said at paragraph 96 of his judgment must be read in that context and as not excluding the possibility of a submission by the arbitration agreement of scope to the arbitrator. Lord Collins' paragraph 96 was as follows:

> "96 The consistent practice of the courts in England has been that they will examine or re-examine for themselves the jurisdiction of arbitrators. This can arise in a variety of contexts, including a challenge to the tribunal's jurisdiction under section 67 of the 1996 Act, or in an application to stay judicial proceedings on the ground that the parties have agreed to arbitrate. Thus in *Azov Shipping Co v Baltic Shipping Co* [1999] 1 All E R 476 Rix J decided that where there was a substantial issue of fact as to whether a party had entered into an arbitration agreement, then even if there had already been a full hearing before the arbitrator the court, on a challenge under section 67, should not be in a worse position than the arbitrator for the purpose of determining the challenge. This decision has been consistently applied at first instance (see, e g, *Peterson Farms Inc v C & M Farming Ltd* [2004] 1 Lloyd's Rep 603) and is plainly right."

170. *Azov Shipping Co v Baltic Shipping Co* [1999] 1 All E R 476 was a case of an English arbitration where a challenge to the arbitrator's decision that he had jurisdiction was made under s.67 Arbitration Act 1996. It was a "not a party to the agreement" case, not a "scope of agreement" case.

171. In the first sentence of paragraph 97 of his judgment in *Dallah* Lord Collins explained that in considering applications under s.9 Arbitration Act 1996 where there was an issue of whether there was ever an agreement to arbitrate, the court would determine the issue of whether there was ever an agreement to arbitrate. Lord Collins referred to *Al-Naimi (trading as Buildmaster Construction Services) v Islamic Press Agency Inc* [2000] 1 Lloyds Rep 522 (CA) as authority in support of that proposition. That reference is an indication that, in saying what he did, Lord Collins may have had in mind that his proposition extended to issues of scope as well as issues as to the existence of an arbitration agreement. That is because in *Al-Naimi* there was undoubtedly an arbitration agreement in one contract. The issue was whether the underlying dispute between the parties arose under the contract which contained the arbitration agreement. I return to *Al-Naimi* below. What Lord Collins said in paragraph 97 was:

> "Where there is an application to stay proceedings under section 9 of the 1996 Act, both in international and domestic cases, the court will determine the issue of whether there ever was an agreement to arbitrate: see *Al-Naimi (trading as Buildmaster Construction Services) v Islamic Press Agency Inc* [2000] 1 Lloyds Rep 522 (Court of Appeal: English arbitration) and *Albon (trading as NA Carriage Co) v Naza Motor Trading Sdb Bhd (No 4)* [2008] 1 lloyd's Rep 1 (Malaysian arbitration). So also where an injunction was refused restraining an arbitrator from ruling on his own jurisdiction in a Geneva arbitration, the Court of Appeal recognised that the arbitrator could consider

the question of his own jurisdiction, but that would only be a first step in determining that question, whether the subsequent steps took place in Switzerland or in England: see *Weissfisch v Julius* [2006] 1 Lloyds Rep 716, para 32."

172. Reliance was placed on paragraph 98 of Lord Collins's judgment in *Dallah* and I set it out below; but in my judgment it is not of assistance on the issue which I have to address because it is unclear whether Lord Collins was including the exceptional kind of case referred to by Lord Mance where the parties had agreed that the arbitrator should determine the extent of his jurisdiction. Lord Collins's paragraph 98 was as follows:

"98. Consequently, in an international commercial arbitration a party which objects to the jurisdiction of the tribunal has two options. It can challenge the tribunal's jurisdiction in the courts of the arbitral seat; and it can resist enforcement in the court before which the award is brought for recognition and enforcement. These two options are not mutually exclusive, although in some cases a determination by the court of the seat may give rise to an issue estoppel or other preclusive effect in the court in which enforcement is sought. The fact that jurisdiction can no longer be challenged in the courts of the seat does not preclude consideration of the tribunal's jurisdiction by the enforcing court: see, e g, *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2007] QB 886, para 104 and *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39 , 48, per Kaplan J."

173. Lord Saville in *Dallah* at paragraphs 158 to 161 made the point that where, as in the *Dallah* case itself, arbitrators had made a ruling as to their jurisdiction under the competence/competence principle, that ruling might be challenged on an application to enforce the award under s.103 Arbitration Act 1996. In paragraph 159 Lord Saville appears to recognise the same exception as that expressly mentioned by Lord Mance where the parties had agreed that the arbitrator should determine the extent of his jurisdiction. Paragraph 159 reads:

"In these circumstances, I am of the view that to take as the starting point the ruling made by the arbitrators and to give that ruling some special status is to beg the question at issue, for this approach necessarily assumes that the parties have, to some extent at least, agreed that the arbitrators have power to make a binding ruling that affects their rights and obligations; for without some such agreement such a ruling cannot have any status at all. As the Departmental Advisory Committee on Arbitration Law put it in para 138 of its 1996 Report on the Arbitration Bill, an arbitral tribunal may rule on its own jurisdiction but cannot be the final arbiter of jurisdiction, "for this would provide a classic case of pulling oneself up by one's own bootstraps".

174. Lord Saville's statement there that the approach which would make the arbitrator's decision binding "assumes that the parties have, to some extent at least, agreed that the arbitrators have power to make a binding ruling that affects their rights and obligations" implies to me that Lord Saville recognised that where the parties have agreed that the arbitrators should have power to make a binding ruling as to their jurisdiction; they could make such a ruling.

175. In the second part of paragraph 160 of his judgment in *Dallah*, Lord Saville makes a statement which, looked at in isolation, could extend to issues of scope. The relevant passage is as follows:

> "The findings of fact made by the arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question. Whether the arbitrators had jurisdiction is a matter that in enforcement proceedings the court must consider for itself. I accept, as an accurate summary of the legal position, the way it was put in the written case of the Ministry of Religious Affairs:
>
> > "Under section 103(2)(b) of the 1996 Act/ article V(1)(a) of the New York Convention, when the issue is initial consent to arbitration, the court must determine for itself whether or not the objecting party actually consented. The objecting party has the burden of proof, which it may seek to discharge as it sees fit. In making its determination, the court may have regard to the reasoning and findings of the alleged arbitral tribunal, if they are helpful, but it is neither bound nor restricted by them."

176. However that passage cannot be read in isolation. Read in the context of what precedes and follows it, in particular what I take as Lord Saville's recognition in paragraph 159 that where the parties have agreed that the arbitrators have power to make a binding ruling as to their jurisdiction; they could make such a ruling, that passage is dealing with the facts of the *Dallah* case where the issue was whether the Government of Pakistan was a party to the arbitration agreement at all and not with an issue of the kind before me where there is an arbitration agreement and the issue is as to its scope.

177. In my view there is plainly a rational ground for distinguishing on a s.9 application between (i) a case where there is an issue of whether a person was a party to an arbitration agreement at all and (ii) a case where there is an issue as to the scope of an arbitration agreement to which a person is undoubtedly a party. In the former type of case the person concerned has not or may not have agreed to an arbitration at all, and it would plainly be wrong for him to be capable of being sucked into and bound by an arbitration agreement which he was not a party to and had never agreed to. In the latter case the person concerned has agreed to an arbitration and could reasonably be thought to have taken the risk that the arbitrator made a decision as to scope which he disagreed with.

178. In my judgment there is a rational ground on a s.9 application for sub-dividing the cases where there is an issue as to the scope of an arbitration agreement to which a person is undoubtedly a party (the kind of case within (ii) in the immediately foregoing paragraph). That sub-division is between (a) cases where there is no express agreement that the arbitrator should be obliged to or should have power to arbitrate as to the scope of the agreement and his power to determine the scope of his jurisdiction only arises under what I have called above the "ordinary" competence/competence principle or, in the case of an English domestic arbitration, under the power found in s.30(1) Arbitration Act 1996 and (b) cases where the parties have expressly agreed that the arbitrator should have

power to or should be obliged to arbitrate issues of scope (the kind of case described by Lord Mance in *Dallah* as "rare"). In the former kind of case the parties may be taken not to have released their rights to have the issue of jurisdiction determined by the court. In the latter kind of case the persons concerned have expressly agreed, in effect, to take the risk of the arbitrator making a finding as to scope that they disagree with.

179. In my judgment in cases within my sub-division (ii)(a), i.e. cases where scope might be decided by a foreign arbitrator under what I have called the "ordinary" competence/competence principle, an English court on an application under s.9 Arbitration Act 1996 may and generally should itself decide an issue of scope. Although generally where an arbitrator's competence/competence decision as to scope is challenged, the challenge should be in the court of the supervisory jurisdiction (so, in the present case, in California), this general approach does not apply to an application under s.9 or s.44 Arbitration Act 1996. That is made clear by the passage from Steel J's judgment quoted by Lord Phillips LCJ in *Weissfisch v Julius* and set out above. To repeat:

> "it was a well established principle of English law that the courts of the seat of arbitration should have supervisory jurisdiction. For this reason, by virtue of section 2(2) of the 1996 Act, sections 30, 32, 67 and 72 did not apply in respect of an arbitration with a foreign seat. In contrast, section 9 and 44 did apply, giving the English court express jurisdiction to intervene in support of a foreign arbitration."

180. In my judgment the division and sub-division of the classes of case and their consequences as set out by me are supported by the statements made by the Justices of the Supreme Court in *Dallah* discussed above. It is also supported by Waller LJ's analysis in *Al-Naimi (trading as Buildmaster Construction Services) v Islamic Press Agency Inc* [2000] 1 Lloyds Rep 522.

181. *Al-Naimi* was a wholly domestic English case. The parties had entered into a building contract in JCT form for the carrying out of certain works specified in a schedule to the contract. That contract contained an arbitration clause. The claimant carried out further works other than those identified in the schedule as part of what was described as "the second fix". It was the claimant's case that those works were carried out under a separate contract made orally, which did not contain any of the terms of the JCT form including the Arbitration Clause. The claimant sued for what he said was due in respect of the second fix. The defendant applied under s.9 Arbitration Act 1996 for the proceedings to be stayed. The relevant issues on the s.9 application were (i) whether the dispute in respect of the second fix were carried out under a separate contract or under the JCT contract so as to bring the dispute about them within the scope of the JCT contract and (ii) whether that issue should be determined by the court or the arbitrator. It appears not to have been a case in which the arbitration agreement contained an agreement giving the arbitrator power to determine scope. His power to determine scope was that contained in s.30(1) Arbitration Act 1996.

182. In *Al-Naimi* the Court of Appeal held, amongst other things, that:

182.1. The court had an inherent power to stay proceedings and could therefore grant a stay in a situation where the court could not be certain

of whether the requirements of s.9 Arbitration Act 1996 were satisfied, but good sense and litigation management made it desirable for an arbitrator to consider the whole matter first.

182.2. One of the factors against granting a stay so that the arbitrator could consider the scope issue was that the arbitrator's decision in that regard would itself be subject to appeal or review by the court; a stay to permit that course might therefore merely add to the cost and delay, with the scope issue ultimately having to be determined by the court.

182.3. On the facts of *Al-Naimi* it was possible to resolve the scope question on the affidavits and the judge had been wrong not to do so.

183. *Al-Naimi* is of interest in the context of the case before me because, unlike most of the authorities cited to me, it concerned the issue of scope rather than the issue of whether the s.9 applicant or the party in the equivalent position was a party to an arbitration agreement at all or whether an arbitration agreement was void or should be set aside.

184. The relevant part of Waller LJ's judgment in *Al-Naimi* contains an extensive citation from the judgment of HHJ Humphrey Lloyd QC in *Birse Construction Ltd v St David Ltd* [1999] BLR 194, all of which Waller LJ approved except for the one aspect of *Birse* on which the Court of Appeal reversed the Judge. That aspect was that the judge had been wrong to stay the proceedings so as to allow the arbitrator to determine scope rather than determining scope himself on the affidavit evidence.

185. One part of HHJ Humphrey Lloyd QC's judgment approved by Waller LJ appears to contemplate that the issue of scope may itself be something which the parties have agreed should be determined by the arbitrator and, thus, itself, if put before the court, be susceptible to a stay under s.9. The relevant passage reads:

> "The Act does not require a party who maintains that there is no arbitration agreement to have that question decided by an arbitral tribunal. Indeed RSC Order 73, rule 6 in making express provision for a decision as to whether there is an arbitration agreement suggests that normally a court would first have to be satisfied that there is an arbitration agreement before acting under section 9 (and that a dispute about such a matter falls outside section 9)."

186. In the light of Aikens LJ's judgment in *Aeroflot* as quoted by me above, there is no need to rely upon the wording of the RSC or CPR for the suggestion that s.9 requires a court to be satisfied that there is an arbitration agreement before acting under s.9; s.9 itself imposes such a requirement.

187. It is the part in parentheses at the end of the passage from HHJ Humphrey Lloyd QC's judgment quoted by me above that is of particular relevance. In my judgment it indicates that the Judge had in mind that the issue of scope might itself be an issue which was the subject of the arbitration agreement, and hence be susceptible to stay under s.9. In practice a stay of a scope issue under s.9 would be extremely rare. The present case shows why that is so. The Lotus Entities have applied for a stay of the Part 8 Claim on the basis that it is within the scope of either or both of the arbitration agreements. In order to obtain a stay under s.9 the Lotus Entities have to satisfy me as to the Scope Issue. They could not do that

by asking me to stay the Scope Issue under s.9 because, *ex hypothesi*, I would then not be able to determine that the Substantive Issue was within the scope of either or both of the arbitration agreements. The present Claimants are not asking for any sort of stay. Thus no party before me is asking for a s.9 stay of the Scope Issue. However, if the Scope Issue was an issue which the parties had agreed should be arbitrated and it had not already been determined by the arbitrator, a stay of the Scope Issue under s.9 or the inherent jurisdiction coupled with a stay of the Part 8 Claim under the inherent jurisdiction would have been at least a strong possibility.

188. Pulling the various threads together, my conclusions as to the position on an application to stay English proceedings under s.9 Arbitration Act 1996 are that the following principles apply:

188.1. (1) Where an arbitration agreement contains an agreement giving the arbitrator power to or obliging him to arbitrate the scope of his jurisdiction under the agreement, and he exercises that power, then subject to any appeal to or review by the supervisory court, the determination by the arbitrator will itself determine what the parties have agreed is within the scope of the arbitration agreement and will in substance determine the Scope Issue so far as a court dealing with an application under s.9 Arbitration Act 1996 is concerned.

188.2. (2) The position is otherwise if there is no such agreement. In such a case the English court acting under s.9 or s.103 Arbitration Act 1996 must, at the instance of the applicant, itself determine the issue.

189. Ms John's primary case is that the s.9 application comes within the first of those principles. As I have already mentioned, Ms John submitted that rules 8.3 and 9.4 of the IFTA Rules, as incorporated into the arbitration agreements in the CGA and the SA IFA did, to paraphrase Lord Mance, "involve specific agreement" and did provide "clear and unmistakable evidence" that the parties had agreed to submit the question of arbitrability to the arbitrator. I do not agree. That is for the following reasons:

189.1. The agreements to arbitrate are contained in paragraph 11 of Schedule 2 to the CGA and clause 15.1 of the SA IPA. Those agreements specify the issues to be arbitrated, and those specified issues do not include the Scope Issue. The relevant IFTA rules are only incorporated for the purpose of dealing with the procedure of what it is that has been agreed to be arbitrated, not with what is to be arbitrated.

189.2. The relevant provisions of the IFTA rules quoted above, in particular rules 8.3 and 9.4 are consistent with the arbitration agreements merely confirming the ordinary competence / competence principle.

190. Accordingly in order to decide the applicability of s.9 Arbitration Act, I need to decide the Scope Issue independently of the arbitrator's determination of it.

Stay under the inherent jurisdiction or as a matter of case management

191. Having regard to my decision that I need to decide the Scope Issue independently of the arbitrator's determination of it, there is no reason to stay these proceedings pending any further decision that the arbitrator might make in

that regard. There is however an argument which Ms John advanced that it would be in the interests of justice and comity, would save costs and would be good case management to stay these proceedings pending the determination of the Claimants' Complaint by the California Superior Court.

192. If the Scope Issue was decided by the California Superior Court, that would almost certainly give rise to an issue estoppel and prevent the risk of it having to be determined again in England. Conversely, in the absence of any evidence of Californian law as to issue estoppel I can apply the Default Rule referred to above, with the result that, if the Scope Issue is determined in the English proceedings, that should give rise to an issue estoppel in California.

193. The Scope Issue might be decided by the California Superior Court at the trial of the Complaint in May to September 2020. However, there is also a possibility that it will not be decided then or at all under the Complaint because of the suggestion that the Complaint was filed out of time and the possibility that CIACA does not apply. If I decided the Scope Issue, I would decide it today.

194. Once the Scope Issue has been decided the way would be open for a decision on the Substantive Issue. In those circumstances, it is at least possible that the Substantive Issue would never be decided in California. That is because if, as I am going to, I find in the Claimants' favour on the Scope Issue, the California Superior Court (or other relevant Californian court) would probably be bound by an issue estoppel to determine the Scope Issue in the same way, with the consequence that the Substantive Issue would be outside the scope of the arbitration. If I had been going to find against the Claimants' on the Scope Issue, then in due course, probably not before 2020 when the arbitration might take place, the Substantive Issue would be determined in California. If, as I am about to do, I find in favour of the Claimants on the Scope Issue, then the next step in England would be directions leading to a trial of the Substantive Issue. If that trial was not expedited and was listed now for hearing before a Judge (as opposed to a Master) with a time estimate of 2 days, the current window given for such a trial on the Chancery Judge's Listing website is June 2020 to October 2020. If an order for expedition was made or the trial was conducted by a Master, the hearing date would be considerably earlier.

195. I have read and heard the parties' arguments on the Scope Issue. The time and cost spent doing that would be wasted if I stayed these proceedings for the Scope Issue to be determined in California.

196. Ms John submitted that I should allow the Scope Issue to be determined in California because that is what the parties had agreed. I have held that this is not what the parties have agreed, so that argument falls away.

197. Ms John submitted that there was no obvious connection between the arbitration and England. I disagree. Although the arbitration itself is subject to Californian law and the supervisory jurisdiction of the Californian courts, the arbitration agreements (as opposed to the arbitration) are governed by English law, so it would be preferable for issues as to scope to be decided by an English court; though there is no reason to doubt but that a Californian court would be capable of applying English rules of interpretation. Further, two of the Defendants are UK companies.

198. If the Substantive Issue is decided in the Claimants' favour, then in substance, so far as the CGA is concerned, though not necessarily so far as the SA IPA is concerned, the arbitration should fall away with a consequent avoidance of substantial costs liabilities because completion and delivery under the CGA would be deemed to have occurred.

199. Ms John submitted that "comity" required me to let the Californian court or the arbitrator decide the Scope Issue. I consider that that submission is not well founded. Neither the English nor the Californian courts have a monopoly on the determination of the Scope Issue. Both would no doubt strive within the constraints of their laws and procedures to adopt a course which enabled the issue to be determined justly, reasonably promptly and at a proportionate cost, having regard to the impact which any decision would have on the future of the arbitration and litigation between the parties. One factor being the probable creation of an issue estoppel by whichever of the courts decided the issue first. I do not see it as being impolite or demonstrating a lack of comity for the English court to decide the issue first. Nor would I regard the Californian Court as being impolite or demonstrating a lack of comity if it decided the issue first.

200. The probability of issue estoppels arising means that in my judgment there is little or no risk of conflicting judgments if the Scope and Substantive Issues are determined in these proceedings in England. There may be a risk of conflict with decisions of the arbitrator, but in my judgment, given the decision I am about to make on the Scope Issue in the Claimants' favour, that risk is something which the parties bargained for in the arbitration agreements.

201. Ms John submitted that by raising the Scope Issue in California and in England, the Claimants were trying to get the best of both worlds. Mr Cullen said they were merely protecting their positions. However it is described, in my judgment, given the uncertainties as to the procedural and substantive outcomes in both jurisdictions, the Claimants have been entitled to take steps in respect of the Scope Issue in both jurisdictions, and the fact they have done so does not of itself impact on the exercise of my discretion.

202. In the context of the exercise of the inherent jurisdiction or case management power to stay, I was referred to paragraph 24 of Lightman J's judgment in *Albon v Naza Motor Trading SDN BHD* [2007] EWHC 665 (Ch) where he said:

> "I must accordingly turn to the second issue whether it would be right in the present circumstances to exercise the inherent jurisdiction to grant a stay and (in effect) remit the issue whether the JVA was concluded to be decided in the Arbitration Proceedings. The absence of jurisdiction under Section 9(1) to order a stay for this purpose does not preclude the existence and exercise by the court of its inherent jurisdiction to order a stay for this purpose. The court may in exercise of its inherent jurisdiction in its discretion order such a stay both where the issue is as to the conclusion or as to the scope of the arbitration agreement. But the court should only exercise its inherent jurisdiction to order such a stay and decline to decide the issue of the conclusion of the arbitration agreement or of the scope of the arbitration agreement in an exceptional case. The inherent jurisdiction should be exercised with particular caution where the issue is as to the conclusion of the arbitration agreement. The court may very exceptionally order such a stay e.g. if virtually certain that the arbitration agreement was concluded. Exceptional but less compelling circumstances (e.g.

overwhelming considerations of convenience and cost) may justify such a stay where the issue of the scope of the arbitration agreement is in issue e.g. when the issue is closely bound up with the issues in the arbitration: see *Al Naimi* at 525 and *El Nasharty v. J Sainsbury* [2004] 1 Ll Rep 309 at paragraphs 28-9."

203. Weighing up the considerations outlined above, in my judgment the scales come down very heavily in favour of my not staying these proceedings for the Scope Issue to be determined in California. There are nothing like exceptional circumstances justifying such a stay.

204. As regards a stay to enable the Substantive Issue to be determined in California: it should take no more than 2 days to try it in these proceedings. The costs of doing that should not be large. Having regard to that and to the other matters outlined above, in my judgment, in the situations as they currently exist in California and England, it would not be just or in accordance with the overriding objective to stay the further conduct of these proceedings or the determination of the Substantive Issue in these proceedings.

The Scope Issue

205. The starting point on the Scope Issue under the CGA is paragraph 1.1 of Schedule 2 to the CGA. This is the arbitration agreement. To repeat what I have set out above, it provides:

"The Sales Agent [the Lotus Entities] and EFB and the Guarantor [following the 31st January 2017 amendment, the 2nd to 8th Claimants], hereby agree that in the event any dispute arises between any of the parties hereto as to whether completion and delivery of the Film (as defined in the Completion Guarantee) has been effected they will agree to submit such dispute to binding arbitration in accordance with the provisions hereof, which arbitration shall result in a finding that such completion and delivery of the Film either has or has not been effected, and shall result in issue of a final award to such effect. In connection with any such arbitration, the following procedure shall apply …"

206. What the parties have there agreed should be the subject matter of an arbitration is any dispute arising between any of the parties as to whether completion and delivery of the Film (as defined in the Completion Guarantee) has been effected. They have not expressly agreed that a dispute as to whether completion and delivery of the Film is to be conclusively presumed to have been effected under paragraph 9 of Schedule 2 to the CGA.

207. The definition of "completion and delivery of the Film in the Completion Guarantee is defined in clause 1.12 as set out above. The relevant part is clause 1.12(a) which reads:

"As used in this Agreement, "**completion and delivery of the Film**" shall mean all of the following:

(a) tender of delivery to Sales Agent [the Lotus Entities] by 31 December 2017 [provision for extension of date] ("the "**Delivery Date**") of the materials specified in the delivery schedule attached hereto as Schedule 3 and marked with an asterisk (**Sales Agent Delivery Materials**") and thereafter such action, such notices and such

remedies as the Guarantor is required to take, provide and/or effect in accordance with the delivery procedure attached hereto as Schedule 2"

208. After the provision as to tender, this part of the definition refers to "such action, such notices and such remedies as the Guarantor is required to take, provide and/or effect …" It does not refer to such action, notices or remedies as others are required to take, provide or effect. In particular it does not refer to the obligation on the Lotus Entities under paragraph 5.2 of Schedule 2 to the CGA to return the Lotus Delivery Materials requested by EFB or the Guarantor. Thus, prima facie the arbitration agreement in the CGA does not extend to the issue of whether that obligation was satisfied.

209. In my judgment that prima facie position is confirmed by the terms of the arbitration procedure set out in paragraph 11 of Schedule 2 to the CGA. Specifically:

209.1. Paragraph 11.3.1 provides that "the only issues that may be determined in the arbitration proceeding are (i) whether the Lotus Delivery Materials were originally tendered to the Sales Agent prior to the expiration of the applicable Cure Period; (ii) whether all of the Lotus Delivery Materials are of a technical quality suitable for the making of commercially acceptable release prints or broadcast materials; (iii) whether the Lotus Delivery Materials are in accordance with the Approved Picture Specifications.

209.2. Those three specified issues are essentially technical issues and the arbitrator's required specialist knowledge would make it particularly apt for him to consider those issues and not others.

209.3. If an Acceptance Notice is given or deemed to be given the technical issues fall away because completion and delivery is deemed to have taken place and there is no provision enabling an arbitration notice to be given.

210. The following considerations and arguments tend to the opposite conclusion:

210.1. The simple approach that determination of whether "completion and delivery" have taken place should include cases where completion and delivery is deemed to have taken place.

210.2. If an Acceptance Notice has been given or has been deemed to have been given, completion and delivery will be deemed to have taken place with result that the questions raised for determination in respect of the three specified issues should be deemed to have been answered in the positive sense so that completion and delivery had taken place. The problem with this argument is that the agreement does not in terms allow for the arbitrator to make determinations about deemed as opposed to actual tender, technical quality and compliance with the Approved Picture Specifications.

210.3. Construed literally, paragraph 11.3.1 would operate as a binary switch between the 2nd to 8th Claimants having to pay some $11 million and their not having to do so, with no intermediate course being available to the arbitrator. It is possible that the parties intended that effect, but it is more likely and makes commercially better sense for the arbitrator to have a greater range of options. That broader approach to the

construction of clause 11.3.1 would support the case for the Substantive Issue being within the scope of the CGA arbitration agreement.

211. I bear in mind the imperative of taking into account the context and the other matters summarised by Lord Hoffman those principles are as summarised by Lord Neuberger PSC in *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129 at paragraph 19:

> "19. When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions.

212. However, in the present case the parties have chosen to enter into a series of long complicated and in some respects convoluted agreements. In my judgment the natural and ordinary meaning of the words used in the arbitration agreement and clause 11.3.1 are not outweighed by the combination of the countervailing considerations mentioned above and other matters mentioned by Lord Hoffman.

213. That conclusion is not the end of the argument about the Scope Issue because Ms John argued strenuously that the Substantive Issue was within the scope of the SA IPA arbitration agreement and that therefore by reason of clause 9.2 of the CGA providing that the provisions of the CGA were "subject to" the provisions of the SA IPA and that if there was a conflict between the CGA and any provisions of the SA IPA, the provisions of the SA IPA should prevail, the Substantive Issue was within the scope of the CGA. I do not agree with either the hypothesis or the reasoning.

214. The arbitration agreement in clause 15 the SA IPA was an agreement between the parties to the SA IPA that if the Lotus Entities disputed whether Completion and Delivery had taken place under the SAA, that dispute should be resolved by the procedure set out in Exhibit 1, which included the arbitration procedure. The opening paragraph of Exhibit 1 retained the same description, albeit in different words from those used in clause 15, of the substance of the dispute which might be referred to arbitration. The opening paragraph of Exhibit 1 referred to "any dispute between any of the Sales Agent, Commissioning Distributor or Guarantor" as to whether completion and Delivery of the Sales Agent Bonded Materials has been effected to Sales Agent". Such a dispute would only arise if the Sales Agent (i.e. the Lotus Entities) alleged that completion and delivery had not taken place, and hence a dispute as to whether completion and delivery had taken place would be the same thing as a dispute as to whether completion and Delivery of the Sales Agent Bonded Materials has been effected to Sales Agent. By reason of the provisions of Exhibit 1 only coming into operation by reason of clause 15 of the SA IPA, in my judgment the completion and delivery which is subject to the arbitration agreement in paragraph 1 of Exhibit 1 is completion and delivery under the SAA.

215. The present 2nd to 8th Claimants are not parties to the SA IPA.

216. On their face the opening words of Exhibit 1 narrow down the parties to the arbitration agreement in the SA IPA to the Sales Agent (i.e. the Lotus Entities), the Commissioning Distributor (i.e. Starbright Srl) and the Guarantor (i.e. DFG). However, the terms of that apparent narrowing down are inconsistent with the opening words of paragraph (f) of Exhibit 1 which provide that in the event that "any party" (and it is unclear whether that refers to all the parties to the SA IFA or only the parties mentioned in the opening paragraph of Exhibit 1) elects or is deemed to have elected to submit a dispute concerning completion and delivery to binding arbitration then the Guarantor (i.e. DFG), Producer (i.e. Larkhark) and Sales Agent (i.e. the Lotus Entities) should thereafter initiate an arbitration proceeding. For present purposes nothing turns on this inconsistency and I do not pursue it.

217. In my judgment the 2nd to 8th Claimants' agreement that the provisions of the CGA were "subject to" the provisions of the SA IPA does not mean that they became parties to the SA IPA or to the arbitration agreement contained in the SA IPA. Nor does it mean that the 2nd to 8th Claimants agreed to the terms of the SA IPA or the SA IPA arbitration agreement. Nor that the provisions of the CGA were replaced by the provisions of the SA IPA. What it did mean was that where there was a conflict or difference between the terms or requirements of the two agreements, the provisions of the SA IPA should prevail. In my judgment as a matter of construction of the CGA and the SA IPA there remained two agreements, the CGA and the SA IPA and two separate arbitration agreements within them.

218. The present Claimants, the Lotus Entities and Larkhark are all parties to the CGA.

219. Mr Cullen submitted that Larkhark was not a party to the CGA arbitration agreement. I accept that submission. The plain wording of paragraph 1 of Schedule 2 to the CGA identifies the parties to the CGA arbitration agreement. They do not include Larkhark. That is a peculiarity of the CGA because it is to Larkhark and Lip Sync that the 2nd to 8th Claimants would be obliged to make a payment under clause 2.1(c) of the CGA in the event that the arbitrator found that they had failed to effect Sales Agent Delivery. That peculiarity is ameliorated by paragraph 11 of Schedule 2 to the CGA which permits any "Beneficiary" (which includes Larkhark) "on behalf of the Sales Agent" to submit the issue of whether completion and delivery of the Film has been effected to arbitration. The fact that Larkhark can do that on behalf of the Sales Agent (the Lotus Entites) does not make it a party to the arbitration agreement otherwise than as agent. That is insufficient to make it a party to the arbitration agreement for the purposes of s.9 Arbitration Act 1996. It follows that Larkhark cannot rely on s.9 Arbitration Act 1996.

220. In my judgment there was no conflict between the two arbitration agreements. They were made between different sets of parties and covered different disputes. The arbitration agreement in the CGA was an agreement between its parties as to the arbitration of disputes between them as to completion and delivery of the Film

under the provisions of the CGA, possibly as those provisions might be modified by the provisions of the SA IPA. The arbitration agreement in clause 15 of and Exhibit 1 to the SA IPA was an agreement between its parties (not being all the parties to the CGA arbitration agreement) that if the Lotus Entities disputed whether Completion and Delivery had taken place under the SAA, that dispute should be resolved by the procedure set out in Exhibit 1, which included the arbitration agreement.

221. The fact that "completion and delivery" in the SA IPA was defined as having the same meaning as in the CGA does not mean that a dispute between one set of parties as to whether that completion and delivery had taken place under one agreement (the SAA) was the same dispute as a dispute between a different set of parties as to whether the same completion and delivery had taken place under a different agreement (the CGA). There would no doubt be a very substantial if not total overlap between the substance of the two disputes (e.g. as to quality of a particular product), but they would still be disputes between different sets of persons under different agreements.

222. It follows that the 2nd to 8th Claimants have not agreed to be bound by the terms of the SA IPA arbitration agreement.

Conclusion

223. In my judgment the Substantive Issue is not within the scope of the CGA arbitration agreement. It follows that s.9(1) Arbitration Act has no application and I cannot stay these proceedings under that section.

224. For the reasons given above I will not stay the proceedings under the inherent jurisdiction or my case management powers.

225. Accordingly I refuse the relief sought in all three of the Defendants' applications.

Deputy Master Henderson