Neutral Citation Number: [2019] EWHC 3292 (Comm)

Case No: CL 2019 000666

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

IN THE MATTER OF AN ARBITRATION CLAIM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/12/2019

Before :

MR. JUSTICE TEARE

- -

Between :

VTB COMMODITIES TRADING DAC	**Claimant**
- and -	
JSC ANTIPINSKY REFINERY	**Defendant**

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- -

Stephen Cogley QC, Alexander Wright and Christopher Jay (instructed by **Fieldfisher LLP**) for the **Claimant**
Muhammed Haque QC and Alexander Cook (instructed by **Candey Limited**) for the **Defendant**

Hearing dates: 27-28 November 2019

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Approved Judgment

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.

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THE HONOURABLE MR JUSTICE TEARE

Mr. Justice Teare :

1. On 25 October 2019 the Claimant, VTB Commodities (VTB), issued an application for an order pursuant to section 32 of the Arbitration Act 1996 determining whether an arbitral tribunal had jurisdiction to determine the disputes which have been referred to it. The application was made with the permission of the arbitral tribunal.

2. The court was also asked, by an application notice dated 25 October 2019 and the accompanying draft order, to permit service out of the jurisdiction on the Defendant, JSC Antipinsky Refinery (Refinery), to permit alternative service on the Refinery's solicitor in the arbitration, Candey Limited (Candey), and to order an expedited hearing and to give directions. Section 32 expressly requires that notice of an application under section 32 is given to the other parties to the arbitration. CPR 62.6(3) provides that where such notice is required to be given to another party to the arbitration it is given by making the other party a defendant to the arbitration application. That was done and in addition notice of the application was given to the Refinery by providing its solicitors in the arbitration, Candey, with copies of the application by email on 25 October 2019.

3. By letter dated 31 October 2019 Candey informed the court that it acted for the Refinery in the proceedings commenced by VTB by way of an arbitration claim. At the same time Candey said that it did not accept that there had been valid service. Without prejudice to that position it made a submission that the one day requested by VTB for the hearing of the section 32 application was insufficient and that two days should be allowed for the hearing.

4. On 1 November 2019 I made an order, without a hearing, permitting service out of the jurisdiction and alternative service on Candey and ordering an expedited hearing (with directions) in the "window" of 25-29 November 2019. CPR 62 PD provides that the court may exercise its powers under rule 6.15 (alternative service) to permit service on a party's solicitor in the arbitration. The application has variously been described as "ex parte", "without notice", "ex parte" on notice and on notice. It was certainly without a hearing but notice of it had been given to the solicitor acting for the Refinery in the arbitration.

5. The Refinery acknowledged service on 12 November 2019 and indicated that it intended to contest the claim and to dispute the court's jurisdiction. On the same day a witness statement of some 24 pages was made in support of an application to set aside the order of 1 November 2019 on several grounds. There was an exchange of correspondence as to how and when the court should deal with the application to set aside and whether the arbitration application should be listed for hearing. By this time the court had identified 27 and 28 November 2019 as being the date when the arbitration application could be heard on an expedited basis. The court called the parties into court on 19 November 2019 to discuss these matters. Since all parties were present (though the Refinery was represented by junior counsel only) the court offered to consider the application to set aside at that time or on the next day, 20 November 2019. That was not acceptable to the Refinery who wished their leading counsel to be present. It was therefore decided, with the reluctant consent of the Refinery, that the application to set aside be heard on the morning of 27 November 2019 with the arbitration application to be heard thereafter if the application to set aside was dismissed.

6. The application to set aside the order of 1 November 2019 was therefore heard on the morning of 27 November 2019. It was dismissed by me for the reasons given on that day after the short adjournment. The section 32 application was then heard in the afternoon of 27 November 2019 and on the morning of 28 November 2019. There is a need for a prompt determination of the section 32 application and so this judgment will be shorter than it might otherwise have been.

The chronology

7. Before dealing with the issues which arose for determination on the section 32 application it is necessary to give a short summary of the dispute between the parties, the proceedings in this court, the proceedings in arbitration and further proceedings in Russia.

8. The Claimant, VTB, agreed to buy quantities of gasoil from the Defendant, Antipinsky, a refinery in Russia. The agreement between the parties is in three pairs of contracts, the Offtake Contract and the Prepayment Agreement, dated 19 October 2018, 15 March 2019 and 8 April 2019. VTB pre-paid for the gas up to 120 days in advance. The Refinery was to deliver the products to VTB FOB Murmansk (ex a floating storage facility, MT POLAR ROCK). In the event that the Refinery made insufficient deliveries to amortise the pre-payments it was to pay the difference in cash. The contracts were all subject to English law and provided for London arbitration.

9. As at 29 April 2019 VTB claims that it had paid substantial pre-payments but that the Refinery was behind in its deliveries. VTB alleges that the Refinery sold the gasoil to a third party, Petraco. So on 29 April VTB, on the basis of alleged events of default, accelerated repayment of outstanding prepayments and commenced arbitration in London. At the same time a Worldwide Freezing Order ("WFO") was sought pursuant to section 44 of the Arbitration Act 1996.

10. The WFO was granted by me on 30 April 2019. In addition, an injunction was issued restraining the Refinery from selling oil to third parties. The order permitted VTB to seek injunctive relief in Russia in respect of the sums or assets covered by the WFO.

11. VTB has since learnt and now alleges that the Refinery had agreed to sell the gasoil intended for VTB to MachinoImport who had purported to sell the cargo to Petraco.

12. VTB sought injunctive relief in Murmansk against the Refinery and MachinoImport but on 8 May 2019 that application failed on "territorial" grounds; the court ordered that the claim be brought "before the commercial court for the place where one of the defendants is located".

13. So on 13 May 2019 VTB sought injunctive relief in Moscow. The claim for injunctive relief was based upon a claim which sought to impugn or invalidate the agreement between the Refinery and MachinoImport.

14. On 15 May 2019, the first return date for the WFO, Sir William Blair sitting in this court continued the WFO and ordered the sale of the cargo in the storage facility.

15. On 17 May 2019 the Moscow court listed a preliminary hearing of VTB's claim to impugn or invalidate the agreement between the Refinery and MachinoImport but refused to grant injunctive relief.

16. On 28 May 2019 Knowles J. made a further order facilitating the sale of the cargo ordered by Sir William Blair. A further order to that effect was made on 31 May by Moulder J.

17. On 7 June 2019 most of the cargo in the storage facility was delivered to the order of VTB.

18. On 11 June 2019 the Refinery responded to the request for arbitration. It was said that by reason of the proceedings in Russia VTB had submitted to the jurisdiction of the Russian courts and that the tribunal therefore had no jurisdiction to determine the issues referred to it.

19. On 18 June 2019 VTB applied to withdraw the claim before the Moscow court which sought to impugn or invalidate the agreement between the Refinery and MachinoImport. On 20 June 2019 both the Refinery and MachinoImport filed defences to the claim. But on that day the Moscow court permitted VTB to withdraw its claim.

20. On 1 July 2019 the London arbitral tribunal was constituted.

21. On 16 July 2019 Sir Jeremy Cooke sitting in this court dismissed a challenge by the Refinery to the jurisdiction of the court and adjourned the application to discharge the WFO.

22. On 2 August 2019 VTB served its Statement of Case in the arbitration.

23. On 19 September 2019 the Refinery served its Defence and identified the three grounds on which it challenged the jurisdiction of the arbitral tribunal.

24. On 23 September 2019 the tribunal held its first procedural meeting. VTB raised the question whether, in the light of the risk that on 10 December 2019 the Refinery might be placed into bankruptcy there should be an urgent Partial Final Award ("PFA") dealing with certain of VTB's claims.

25. On 14 October 2019 VTB issued an application for an urgent PFA and for the tribunal to consent to the court determining the jurisdiction of the tribunal pursuant to section 32 of the Arbitration Act.

26. On 20 October 2019 the tribunal agreed that there should be an urgent PFA and consented to a section 32 application. Hence it was that on 25 October 2019 the application was made to this court for an order determining the questions raised as to the jurisdiction of the arbitral tribunal.

<u>The conditions to be satisfied</u>

27. The arbitrators having given their consent, section 32 requires the court to be satisfied, first, that determination of the question is likely to produce substantial

savings in costs, second, that the application was made without delay and, third, that there is good reason why the matter should be decided by the court.

28. Costs. Counsel for VTB submitted that there was likely to be a substantial savings in costs because, if the arbitral tribunal determined jurisdiction, it was likely that there would be a challenge to that determination pursuant to section 67 of the Act. Thus costs would be incurred in having, not one, but two hearings of the jurisdiction issue. This approach was criticised by counsel for the Refinery on the grounds that, if it were legitimate to take a challenge into account, that could be said in every case and yet there is authority for the proposition that recourse to section 32 should be "very much the exception"; see *Vale Do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co. Ltd.* [2000] 2 AER (Comm) 70 at paragraph 45 per Thomas J. However, taking a challenge under section 67 into account when that is a likely event will not lead to recourse to section 32 in every case because of the third requirement that there must be good reason for the court to determine the question of jurisdiction. Further, the availability of a challenge under section 67 has been taken into account by this court in the past; see *Toyota Tsusho Sugar Trading Ltd. v Prolat SRL* [2014] EWHC 3649 (Comm) at paragraph 2 per Cooke J. The present case justifies the description "hard fought litigation" and it is likely that whoever lost the question of jurisdiction before the tribunal would challenge the decision under section 67. Thus there is likely to be a substantial saving in costs albeit that the saving would be reduced by what has been described as the "the bifurcation" of the merits and jurisdiction issues which might lead to additional costs being incurred.

29. Delay. Counsel for VTB submitted that "the application" which had to be made without delay was the application to the court and since that application could only be made once the tribunal had given consent on 20 October 2019 there was obviously no delay in making the application on 25 October 2019. Counsel for the Refinery submitted that VTB had known of the challenge to the jurisdiction since 11 June 2019 and did not take steps to obtain an order under section 32 until 14 October 2019 when the tribunal's consent to such an application was sought. This was said to be a material delay.

30. I accept that "the application" is the application to the court. But it does not follow that delay before the tribunal has given its permission is irrelevant in determining whether "the application" has been made without delay.

31. It is true that notice of an objection to the jurisdiction of the tribunal was given in June 2019. But the first stage in the arbitral process (following the constitution of the tribunal on 1 July 2019) was the service of VTB's Statement of Case. That was a formidable document of some 56 pages (ignoring the exhibits). It would, I think, be premature to address the question of jurisdiction before the claims to be advanced by VTB had been articulated in the Statement of Case. The next step was the Refinery's Defence. That was served on 19 September 2019. It was a slightly less formidable document of 35 pages. Two further objections were taken to the jurisdiction of the arbitral tribunal in the Defence. Less than a month later VTB raised the question of a section 32 application with the tribunal on 14 October 2019. The tribunal gave its consent on 20 October 2019 and "the application" was issued on 25 October 2019. It was submitted that it was only when the Defence had been served that VTB could reasonably have been expected to consider how best to deal with the question of jurisdiction. Since it was necessary to know how the Refinery would respond to the

detailed Statement of Case I accept that submission. I do not consider that there was any material delay between 19 September 2019 (when the Defence was served) and 25 October 2019 (when the application was issued).

32. Good reason. As I said when dismissing the application to set aside the order for an expedited hearing there is a risk that on 10 December 2019 the Refinery will be placed into bankruptcy. It is not certain that that will happen; the bankruptcy proceedings may be adjourned. But if the Refinery were to be placed into bankruptcy and an order of this court were granted recognising that order then, pursuant to the Cross Border Insolvency Regulations, this section 32 application would, or might, be stayed. In circumstances where the arbitral tribunal has now issued its award in favour of VTB that would, at the very least, be a most unsatisfactory situation. There is therefore good reason for the court to decide the question of jurisdiction with expedition. In the light of my ruling when dismissing the application to set aside the order for an expedited hearing counsel for the Refinery accepted that there was good reason.

33. Indeed, the circumstance that the arbitral tribunal has permitted VTB to apply for an order determining the question of jurisdiction "based on efficiency and resulting finality" is itself a good and cogent reason for the court to decide the question of jurisdiction.

The challenge to the jurisdiction

34. The agreements between the Refinery and VTB provided as follows:

> 19.1 This Contract and all non-contractual obligations and all claims and disputes arising out of in relation thereto shall be governed by and construed in accordance with English law.
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> 19.2 Any dispute arising out of in connection with this Contract (including a dispute relating to its existence, validity or termination or any non-contractual obligations arising out of or in connection with it) (a Dispute) shall be referred to and finally resolved by arbitration under the Arbitration Rules (the Rules) of the London Court of International Arbitration (LCIA) (such arbitration to also be administered by the LCIA in accordance with the Rules), which Rules are deemed incorporated by reference into this Contract, as amended herein.

The Russian proceedings

35. The argument advanced on behalf of the Refinery was that by commencing proceedings in Russia which sought relief against the Refinery and MachinoImport on the basis that the allegations being made in the London arbitration were true, VTB had submitted those allegations to the jurisdiction of the Russian courts.

36. In considering this submission it is necessary to bear in mind the reason for the Russian proceedings, namely, VTB wished to obtain an injunction from the Russian court to the same effect as the injunction granted by this court. It had sought and

obtained permission to commence proceedings in Russia for that purpose. The English proceedings had been brought pursuant to section 44 of the Arbitration Act 1996 in support of the claims to be advanced in the arbitration. The attempt to obtain an injunction in Russia was also in support of the claims to be advanced in the arbitration. That is not a promising background from which to advance an argument that VTB had, by seeking injunctive relief in support of the arbitration, in fact deprived the arbitral tribunal to decide the underlying claim.

37. After the court in Moscow had rejected the claim for injunctive relief on 17 May 2019 the substantive claim which sought to impugn or invalidate the agreement between the Refinery and MachinoImport remained in existence. But on 18 June 2019 VTB applied to withdraw the claim and was permitted to do so on 20 June 2019. That conduct is consistent with the aim of the Russian proceedings being to obtain injunctive relief. Once that had failed there was no purpose in the Russian proceedings continuing.

38. There does not appear to be any doubt that VTB submitted to the jurisdiction of the Russian courts for the purposes of seeking injunctive relief. That submission encompassed the allegations to be made in the London arbitration because it was on the basis of those allegations that it was sought to impugn or invalidate the agreement between the Refinery and MachinoImport. However, an observer of all of the proceedings (the request for arbitration on 29 April 2019, the application for relief from the English court on 30 April 2019 and the commencement of proceedings in Murmansk and Moscow on 8 and 13 May 2019) would not conclude that VTB had any intention, by submitting to the jurisdiction of the Russian courts, to deprive the arbitral tribunal jurisdiction of jurisdiction.

39. The Refinery had intended to contend that by commencing proceedings in Russia VTB had committed a repudiatory breach of the arbitration agreement, which breach had been accepted by the Refinery, with the result that the arbitration agreement had come to an end. However, at the hearing before me counsel for the Refinery accepted that that argument could not be advanced. It is however instructive to see why that argument could not be advanced.

40. In *BEA Hotels v Bellway* [2007] 2 Lloyd's rep. 493 Cooke J. explained what is required to establish a repudiation of an agreement to refer disputes to arbitration.

> "13. In order to show a repudiation of that agreement to refer, it was not disputed that BEA would have to show that Bellway evinced an intention no longer to be bound by that agreement and that Bellway's conduct would have to be such that a reasonable person, in BEA's shoes, would understand Bellway to be saying that it was not prepared to continue with the reference. It was common ground that it was not repudiatory merely to bring proceedings in breach of an arbitration agreement, even if the claims pursued in those proceedings were plainly ones which were subject to the arbitration agreement. It was undisputed that a breach of an arbitration agreement by bringing other proceedings was only repudiatory if it was done in circumstances that showed that the party in question no longer intended to be bound to arbitrate. It was also

> agreed that such an intention could not lightly be inferred and could only be inferred from conduct which was clear and unequivocal. If there was some other reason for the breaching of proceedings it would be hard to infer that the party bringing them intended to renounce its obligation to arbitrate.
>
> 14. Thus, if the conduct of that party in all the surrounding circumstances did not reveal a clear intention not to be bound by the agreement to refer the claims in question to arbitration, it could not be said that the arbitration agreement or reference had been repudiated. If it was clear that the party intended to pursue the arbitration, again there could be no repudiation. Whilst Mr McGrath for BEA contended that, if Bellway was seeking to run the same claims against BEA in both the arbitration and in Tel Aviv 2, this would amount to repudiation, because running the claims in Tel Aviv was inconsistent with arbitrating them, it is clear that this could not amount to renunciation or repudiation of the agreement to refer, since the intention expressed was to continue with the arbitration, albeit, alongside other litigation.
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> 15. Whilst a number of authorities were referred to in the skeleton arguments, in the end I was referred only to the decisions of Lloyd J (as he then was) in *Rederi Kommanditselskaabet MercScandia IV v Couninatis SA (The Mercanaut)* [1980] 2 Lloyd's Rep 183 and *World Pride Shippng Ltd v Daiichi Chuo Kisen Kaisha (The Golden Anne)* [1984] 2 Lloyd's Rep 489 where the arbitration agreements were breached but the court concluded that the breach was not repudiatory because there was some explanation for bringing the court proceedings which in turn meant that the court could not infer an intention to repudiate."

41. Applying that test to the present case it is not possible to infer that VTB evinced an intention to no longer be bound by the agreement to refer disputes to the London arbitral tribunal by seeking injunctive relief in Russia based upon the allegations to be made in the London arbitration. It may well be that the agreement to refer had been breached by seeking relief from the Russian courts on a basis which invited the Russian courts to consider the very allegations to be advanced in the London arbitration. But there was a reason for that; it was the basis upon which the application for injunctive relief had to be based.

42. That this was so was noted by Sir Jeremy Cooke when this case was before him on 16 July 2019; see [2019] EWHC 1936 (Comm). One issue before Sir Jeremy Cooke was whether the Russian proceedings against the Refinery and MachinoImport were a breach of the liberty given to VTB by this court to seek injunctive relief in Russia. Sir Jeremy Cooke noted at paragraph 39 that:

> "Russian proceedings were brought in which the allegation was made under Articles 10 and 168 of the Russian Code that the contract between Antipinsky and MachinoImport was invalid.

> The reason for bringing that cause of action was to establish that it was the misdoings of those parties which had made performance of the obligations to the claimant impossible. Injunctions were sought in support of that in order to "secure" the assets in question, namely, the cargo which was the subject of the order made in this country. …"

43. The question which arose was described in this way at paragraph 40:

> "The question arises as to whether or not that is, in truth, a breach of the court's order. There is no doubt that there was a substantive element to the proceedings because of the allegations in relation to Articles 10 and 168 of the Russian Code. Looking at the wording of the order made by the court, the question is whether or not such proceedings constitute proceedings for injunctive relief against the respondent in respect of the sums or assets set out in the order. Mr. King says that the proceedings go well beyond what was envisaged by Teare J. and, in particular, one can see that from the fact that it is not just the respondent, Antipinsky, that was the subject of the action, but also MachinoImport."

44. Sir Jeremy Cooke answered that question as follows at paragraph 41:

> "I do not think the matter is quite as straightforward as that, because a cause of action was needed in order to seek security in respect of the asset, but I am entirely satisfied that even if there was a breach, it is not a breach of sufficient seriousness in the context for me to be troubled by the prospect of giving retrospective permission for use of the documents in that context. It is true that following dismissal of the injunction application, the proceedings remained in being until withdrawn by VTB, but by then the documents had been used for the collateral purpose in question, whether or not covered by the qualification to the undertaking.

45. Thus, to the extent that the underlying substantive claim was a breach of the agreement to refer disputes to the London arbitration, there was a reason for it, namely, a cause of action was necessary in order to seek the desired injunctive relief. In those circumstances it would have been impossible to suggest, as counsel for the Refinery correctly accepted, that there had been a repudiatory breach of the agreement to refer disputes to the London arbitration. Considered objectively there was no scope for saying that VTB had evinced an intention no longer to be bound by the agreement to refer disputes to the London arbitration. For those very reasons it is equally impossible to suggest that VTB had, by seeking injunctive relief based upon a substantive claim and thereby submitting the allegations to be made in the London arbitration to the jurisdiction of the Russian courts, somehow deprived the London arbitration of jurisdiction to hear the disputes in question. Counsel for the Refinery did not explain how or why the submission to the Russian jurisdiction in the present case, which extended to the allegations to be made in the London arbitration, but for a

limited and identifiable purpose consistent with the arbitral tribunal retaining jurisdiction, had the effect that the London arbitral tribunal had lost its jurisdiction.

46. I therefore dismiss the first jurisdictional challenge.

The Letter of Assurance

47. By a letter of assurance ("the LOA") dated 11 April 2019 the Refinery gave certain assurances to VTB. In particular the Refinery stated that it was in compliance with its obligations under "the Facility", which was defined as being the prepayment agreement and offtake contract, each dated 15 March 2019. The LOA "and any non-contractual obligations arising in connection herewith" were stated to be governed by and construed in accordance with English law.

48. In its Statement of Case in the arbitration, between paragraphs 127 and 131, VTB made reference to certain warranties or representations in the LOA. In so far as they were warranties it was alleged that the Refinery was in breach of them. In so far as they were representations it was alleged that they were false misrepresentations such that the Refinery was liable in deceit.

49. The Refinery says that such claims had not been referred to arbitration. The LOA did not contain an arbitration clause. VTB says that the claims advanced were referred to arbitration by the arbitration clause in the prepayment agreements and offtake contracts.

50. The question is whether the arbitration clause is sufficiently widely drafted so as to catch claims for breach of the LOA and for deceit based upon the statements made in the LOA. The relevant words are:

> "Any dispute arising out of in connection with this Contract (including a dispute relating to its existence, validity or termination or any non-contractual obligations arising out of or in connection with it) (a Dispute) shall be referred to and finally resolved by arbitration under the Arbitration Rules (the Rules) of the London Court of International Arbitration (LCIA)"

51. Counsel for VTB submitted that disputes based upon the representations or warranties in the LOA arise "in connection with" the March 2019 prepayment agreement or offtake contract. Counsel said there was a very clear connection. Clause 17.5 of the pre-payment agreement provided that the events of default included:

> "Misrepresentation
>
> Any representation or statement made or deemed to be made to or for the benefit of the Buyer by the Seller in any Trade Document or any other document delivered by or on behalf of the Seller, as applicable, under or in connection with any Trade Document is or proves to have been incorrect or misleading in any material respect when made or deemed to be made."

52. In support of its claim for repayment VTB has relied upon misrepresentations in the LOA; see paragraph 116(3) of the Statement of Case. Thus there is a very clear connection between the LOA and claims for repayment under the March pre-payment agreement and offtake contract.

53. However, the question is whether the claims for damages for breach of the LOA or for deceit in relation to representations made in the LOA arise in connection with the March pre-payment agreement or offtake contract. In considering that question the correct approach is that explained by Lord Hoffman in *Fiona Trust v Privalov* [2008] 1 Lloyd's Rep. 254 at paragraph 13:

> "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 the presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction."

54. With that approach in mind it is to be noted that the LOA is said in its title to relate to the pre-payment agreement and the offtake contract each dated 15 March 2019. Moreover the representations made concern the Refinery's compliance with those agreements. Thus there is a very obvious connection between the LOA and those agreements. Given that connection rational businessmen would surely intend that any dispute in connection with the LOA would be determined by the same tribunal which determined disputes under the pre-payment agreement and off-take contract. It would make no sense, would be causative of extra expense and would give rise to the risk of inconsistent decisions were it to be otherwise.

55. Counsel for the Refinery submitted that this was not the right approach. First, it was said that the LOA is a free-standing document. I do not consider that it is. In order to understand the scope of the representations made in the LOA it is necessary to read it with the March pre-payment agreement and off-take contract. Second, it is said that if the disputes in relation to it were referred to arbitration by the arbitration clause in the March pre-payment agreement and off-take contract then there would have been no need for the parties to include an English law clause in the LOA. But surplus terms are often found in commercial contracts and so little can be inferred from that. Third, it was said that there was no commercial reason why claims for misrepresentation should not be dealt with separately from the arbitration clause in the March pre-payment and off-take contract. But there is a good commercial reason for that. It was explained by Lord Hoffman in *Fiona Trust*.

56. I therefore dismiss the second jurisdictional challenge.

<u>The unlawful means conspiracy</u>

57. In the Statement of Case VTB has pleaded that the Refinery, MachinoImport and Sberbank have conspired together with the effect of preventing the Refinery from being able to deliver gasoil to VTB. Although the arbitration clause refers to arbitration "any non-contractual obligation arising out of or in connection with" the

pre-payment agreements and offtake contracts the Refinery suggested that the non-contractual obligation brought against it to pay damages for the loss caused by the alleged unlawful means conspiracy was not referred to arbitration by the clause. It is very difficult to see what the basis of that suggestion was. Counsel referred to the fact that MachinoImport and Sberbank were not party to the arbitration agreement and so any claim against them would have to be advanced elsewhere. That is true but the tortious, non-contractual claim brought against the Refinery for being party to an unlawful means conspiracy clearly arises out of or in connection with the pre-payment agreements and off-take contracts. The claim is therefore very clearly caught by the arbitration clause.

58. A "timing point" was made, suggesting that since the conspiracy was said to be inferred from a meeting on 15 January 2019 (see paragraph 139(1) of the Statement of Case) it could not give rise to a claim in respect of the March or April contracts. I am not sure why that should be the case. Any conspiracy entered into on 15 January 2019 could affect not only the prior contracts dated October 2018 but also the later contracts dated March and April 2019. Further, reliance was placed on events in March, April and May 2019 which would cover the period of the March and April contracts (see paragraphs 136 and 139 of the Statement of Case). In any event this is a point which would appear to go to the merits of the claim rather than to the question of jurisdiction.

59. I therefore dismiss the third jurisdictional challenge.

Conclusion

60. The arbitral tribunal has jurisdiction, pursuant to the arbitration clause in the pre-payment agreements and off-take contracts, to hear and determine the disputes brought before it and particularised in the Statement of Case.