Neutral Citation Number: [2023] EWHC 2940 (Comm)

Case No: CL-2022-000300

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

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

Date: 7TH December 2023

Before :

HIS HONOUR JUDGE PELLING KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

PALMAT NV	**Claimant**
- and -	
BLUEQUEST RESOURCES AG	**Defendant**

- -
- -

Angharad M Parry (instructed by **Edwin Coe LLP**) for the **Claimant**
Duncan Bagshaw (instructed by **Howard Kennedy LLP**) for the **Defendant**

Hearing dates: 18 and 19 October

- -

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.

.....

HIS HONOUR JUDGE PELLING KC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling KC:

Introduction

1. This is the hearing for the claimant's challenges under ss. 67 and 68 of the Arbitration Act 1996 ("**AA**") to an Award dated 14 May 2022 made in LCIA Arbitration Reference 204654 ("**Award**") by which the defendant ("**Bluequest**") sought payment for a quantity of liquid caustic soda ("**LCS**") allegedly due to it from the claimant pursuant to an agreement in writing signed on behalf of each of the parties entitled "*Sales Contract*" and bearing the number ALZ-17.0.00360-S ("**LCS Agreement**").

Relevant Background and facts

2. The claimant is a Curaçao registered company that is sometimes referred to in the contemporaneous documentation as "*Palmat CA*". In these proceedings the parties have referred to the claimant simply as "*Palmat*" and I have adopted that convention in this judgment. There are other companies in the same group as Palmat. As and when it is necessary to refer to any other such companies I do so using their full corporate names to distinguish them from Palmat.

3. Palmat maintains that because of internal instability and restrictions in Venezuela, it was common in 2017, when the relevant contracts were entered into, for Venezuelan businesses to barter products in return for necessary goods rather than enter into standard sale and purchase transactions. It is not in dispute that in December 2016, Palmat Venezuela signed a Tripartite Agreement with CVG Bauxilum CA ("**Bauxilum**") and Industria Venezolana de Aluminio CA ("**Venalum**"), two companies owned by the Venezuelan state, for the exchange of LCS for aluminium. Finally, it is not in dispute that Palmat, acted by Mr Wellisch, the holder at all material times of a power of attorney from Palmat, in relation to the negotiation and execution of the Tripartite Agreement. It is not suggested that Bluequest was a party to the Tripartite Agreement.

4. In 2017, Mr Wellisch initiated negotiations for an arrangement by which Bluequest would agree to deliver LCS to Bauxilum and would receive as payment in kind aluminium to be produced and supplied by Venalum. It is alleged by Palmat that the agreements to which I refer below carried into effect this proposed transaction.

5. The parties entered into two agreements on the same date (31 May 2017) being (i) the LCS Agreement and (ii) an agreement in writing signed by each of the parties entitled "*Purchase Agreement"* and bearing the number ALP-17.0.00361-P ("**Aluminium Agreement**"). Each agreement expressly incorporated Bluequest's standard terms and conditions that it sought to incorporate into contracts to which it was a party respectively as either a buyer or a seller. Each set of standard conditions included an arbitration agreement.

6. The terms of the LCS Agreement defined Palmat as the "*Buyer*" and Bluequest as the "*Seller*". By clause 1.1 of the terms incorporated into the LCS Agreement, "*(t)hese general terms and conditions shall apply to all contracts concluded by [Bluequest] as the Seller and another party as the Buyer, whether concluded orally or in writing."*

7. The terms of the Aluminium Agreement defined Palmat as the "*Seller"* and Bluequest as the *"Buyer"*. By clause 1.1 of the terms incorporated into the Aluminium Agreement, "*(t)hese general terms and conditions shall apply to all contracts concluded by [Bluequest] as Buyer and another party as Seller, whether concluded orally or in writing."*

8. By clause 11.2 of the LCS Agreement, it was agreed that all claims "… *of [Palmat] shall be deemed and treated as waived and absolutely barred unless [Bluequest] receives written notice of the claim within 30 days of the date of the applicable bill of lading or the end of the applicable delivery period, whichever is latest"*. The mirror provision within the terms of the Aluminium Agreement was contained in clause 11.1 of the terms, which provided that all claims "*... of [Palmat] shall be deemed and treated as waived and absolutely barred unless [Bluequest] receives written notification of the claim within 30 days of the date of the bill of lading or the end of the delivery period, whichever is the latest"*.

9. Each of the agreements contained a clause providing that it would be governed by English law and each also included an arbitration agreement in the same terms:

> "Any dispute arising out of or in connection with the contact, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in London … in accordance with the Arbitration Act 1996 …. And under the Arbitration Rules of the London Court of International Arbitration … current at the date of the contract, which are deemed to be incorporated by reference into the parties' arbitration agreement."

10. In so far as is material for present purposes, the commercial terms of the LCS Agreement were as follows:

> "…
>
> **Shipment**
>
> Early June 2017 from U.S. Gulf, for ETA in Matanzas, Venezuela around June 15th/16th, 2017 (AGWWP = all going well, weather permitting).
>
> **lncoterms**
>
> lncoterms 2010 or latest version of lncoterms to govern
>
> **Delivery Terms**
>
> CIF Matanzas/Venezuela.
>
> Charter Party: As per ASBATANKVOY
>
> **Price**

US$ 590.00 / DMT (US-Dollars five hundred ninety per dry metric ton of caustic soda).

Payment Terms

100% against aluminium metal delivery as per contract ALP-17.0.00361-P, which shall be shipped by mid June 2017, but latest B/L date shall be June 30th, 2017.

In case that Buyer and Seller do not come to an agreement on premiums/discounts under the contract ALP-17.0.0036 1-P, then Buyer shall immediately wire transfer to Seller the full value of the caustic soda invoice as per contract ALZ-17.0.00360-S.

…"

The relevant commercial terms of the Aluminium Agreement were as follows:

"**Shipment Period**

Earmarked by mid June 2017, but latest Bill of Lading date shall be June 30th, 2017.

…

Price

Official London Metal Exchange Aluminium High Grade Settlement quotation (cash or 3-Month, whatever is lower) averaged over the quotational period, as published on Reuters' page '0#LM E-OPR' (and subsequently in the London Metal Bulletin), plus/less applicable premium/discount.

Quotational Period

On unknown basis, one day after Bill of Lading date, to be mutually agreed.

Premium/ Discounts

Buyer and Seller shall mutually agree on final premium/discount once final material breakdown is known, and shall be based on prevailing market conditions as that time.

In case that Buyer and Seller do not come to an agreement on premiums/discounts, then this contract shall be considered null and void and Seller shall immediately and without delay wire transfer to Buyer for the full value of the caustic soda invoice as per contract ALZ-17.0.00360-5

Payment Terms

> 100% Net cash in US Dollars against all original documents, by international wire transfer, against presentation of documents as follows:
>
> - Seller's Commercial Invoice.
>
> - 3/3 Original "Shipped on board" ocean Bills of Lading issued as per Buyer's request, marked "Freight-Prepaid".
>
> - Certificate of Quality & Weight.
>
> - Packing List.
>
> - Certificate of Origin, issued by official authorized entity, i.e. Chamber of Commerce.
>
> All above documents, in original, shall be sent to Buyer in accordance with Buyer's instructions.
>
> **PAYMENT SPECIAL CLAUSE**:
>
> Buyer shall deduct the full material value of the Caustic Soda invoice, as per contract ALZ-17.0.00360-S, and effect payment under this contract only for the remaining difference/balance.
>
> …"

11. On 10 June 2017, Bluequest shipped the LCS in accordance with the terms set out in the LCS Agreement. The documents relevant to the shipment were apparently supplied by or on the orders of Palmat to Bauxilum on or around 16 June. On 21 June 2017, Bluequest raised an invoice in respect of the shipment. It was addressed to "*Palmat International*" at Palmat Venezuela's address in Caracas. It claimed the "(*n*)*et due in favour of Bluequest* .. " of US$ 3,214,827.40. The LCS shipment was received by Bauxilum on or about 23 June 2017.

12. On 23 June 2017, it was suggested on behalf of Palmat that shipment of the aluminium could be delayed and 30 June 2017 came and went without shipment of the aluminium or production of a bill of lading relating to such a shipment. No aluminium had been ascertained by Palmat as being the aluminium that was to be supplied and no quality certificates were provided concerning the chemical composition of the aluminium to be supplied. No certificates could be provided unless the aluminium to be supplied had been ascertained and without the certificates the discounts and premiums sought could not be identified much less agreed.

13. Bluequest continued to press for delivery of the aluminium thereafter, but without success and on 21 September 2017, Palmat advised Bluequest that the Venalum plant had ceased manufacturing aluminium due to a power issue and that all shipments of aluminium had been suspended. This resulted ultimately in an email demand for payment by Bluequest in these terms:

> "…Our US office found out last night by coincidence via some people at discharge port, that on the vessel which loaded from POZ last weekend, there are about 5000 MT of Venalum ingots destined for Glencore. So, they are getting metal and we are not!
>
> It is clear that Palmat is not getting the metal (against our caustic shipment) and we just do not see any immediate solution to this matter any longer. Hence, we now firmly ask you/Palmat (as our contractual party) to repay us immediately and without fail and without any further delay.
>
> We are still extremely interested to do lots of biz out of Venezuela when new opportunities come up. But the payment of the outstanding invoice needs to be settled now. …."

No part of that sum was ever paid, nor was any part of the aluminium the subject of the Aluminium Agreement ever offered to Bluequest. No agreement was sought or made concerning the applicable premiums and discounts referred to in the Aluminium Agreement.

14. Bluequest purportedly referred a claim against Palmat Venezuela for payment to arbitration by reference to the arbitration agreement contained in the LCS Agreement. The tribunal appointed in accordance with the relevant LCIA Rules to determine that reference decided that it had no jurisdiction because Bluequest's counterparty under the LCS Agreement was Palmat. Thereafter, on 13 March 2020, Bluequest referred its claim against Palmat for payment to arbitration under the arbitration agreement contained in the LCS Agreement. The final hearing of the reference took place on 13 September 2021. The award determining that reference was published on 14 May 2022 ("Award") and a Memorandum of Corrections was published on 8 July 2022. Bluequest's claim succeeded but with one of the three arbitrators dissenting.

15. At Paragraph 41 of the Award, the majority found that *"(t)he Respondent took delivery of the product and re-sold it to CVG Venalum*." Ms Parry submits that that at no stage was the LCS that had been shipped by Bluequest received physically by Palmat. It has not been suggested by anyone that it was and, on any fair analysis, the majority do not (or did not intend to) find that it was but, even if that is wrong, it is immaterial. As I have described, Palmat received the documents including the relevant bills of lading from Bluequest and passed them or caused them to be passed to Bauxilum, which enabled Bauxilum to demand delivery of the caustic soda on its arrival. This is entirely typical of international sales of commodities delivered by ship and is facilitated by original bills of lading being negotiable or at any rate the evidence of title against which the carrier will release the cargo on its arrival at the discharge port. It would have been better if the tribunal had maintained the distinction between the documents relating to the shipment and physical possession and receipt of the LCS, but, as I have said, nothing material turns on this failure. I return to this issue below to the extent that it is material to the various s.68 challenges.

The Jurisdictional Challenge

16. It was argued by Palmat before the tribunal that the LCS and Aluminium Agreements should be read together as a single barter agreement with the result that Palmat's only

obligation was to deliver or procure the delivery of aluminium to Bluequest and that it was precluded from so doing by a Force Majeure being the power failure referred to earlier – see paragraph 42-43 and 69 of the Award. Palmat argued that since the arrangement between the parties was a single barter agreement, in law it could not be a contract of sale and thus Bluequest could not be a "Seller" under the LCS Agreement or a "Buyer" under the Aluminium Agreement with the result that the standard terms incorporated into the LCS Agreement were of no application and in consequence the Arbitration Agreement incorporated into it did not apply either. The majority correctly summarise this issue at Paragraph 77 of the Award.

17. Having summarised the parties' arguments on this issue at Paragraphs 77-79, the majority rejected the jurisdictional challenge at Paragraphs 80 – 85. It did so essentially because (i) it characterised the arrangement between the parties " … *as comprising of two contracts for the sale and purchase of goods rather than a single barter agreement* …" and (ii) Bluequest was defined as being the "*Seller*" and Palmat as the "*Buyer*" in the body of the LCS Agreement and thus came within the ambit of the general conditions incorporated into that agreement because clause 1.1 of the general conditions applies to any contract "… *concluded by Bluequest Resources AG, as the Seller" and another party as the "Buyer*"" see Paragraphs 83 – 84 of the Award. Palmat challenges these conclusions under AA, s.67.

Palmat's Case Concerning Jurisdiction

18. Palmat maintains that the tribunal did not have substantive jurisdiction because (i) the true nature of the arrangement was barter not sale and (ii) clause 11.1 operates as " … *a preclusive contractual time bar. No claim being brought within the relevant period, the claim was absolutely barred and the Tribunal had no jurisdiction* …" In my judgment both these submissions should be rejected and are unarguable for the following reasons.

Determination of Jurisdictional Challenge

19. It is necessary to start by setting out some basic principles of English law in relation to the interpretation of contracts because both arguments are essentially questions of construction.

20. The framework principles that apply to the construction of a contract governed by English law are now well established. In summary:

    i) The court construes the relevant words of a contract in its documentary, factual and commercial context, assessed in the light of (a) the natural and ordinary meaning of the provision being construed, (b) any other relevant provisions of the contract being construed, (c) the overall purpose of the provision being construed and the contract in which it is contained, (d) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (e) commercial common sense, but (f) disregarding subjective evidence of any party's intentions – see Arnold v Britton [2015] UKSC 36 [2015] AC 1619 per Lord Neuberger PSC at paragraph 15, the earlier cases he refers to in that paragraph and, most recently, Sara & Hossein Holdings Ltd v Blacks Outdoor Retail Ltd [2023] UKSC 2; [2023] 1 WLR 575 *per* Lord Hamblen JSC at [29(1)];

ii) In carrying out this exercise, it is necessary to consider the contract as a whole since it may be apparent from such a reading that the parties intended either a narrower (or, conceivably, a wider) meaning than the literal meaning of the words used might suggest when read in isolation – see Barclays Bank Plc v UniCredit Bank AG [2014] EWCA Civ 302; [2014] 2 All ER (Comm) 115 (CA) *per* Longmore LJ at [14] and Apache North Sea Ltd v INEOS FPS Ltd [2020] EWHC 2081 (Comm) *per* Foxton J at [21];

iii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract was made - see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 21; that which is known to one party alone is immaterial and what is reasonably available generally means what is readily available to all the parties – see Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 *per* Lord Hoffmann at 912–913 and Toth v. Emirates [2012] EWHC 517 (Ch) following Movie Network Channels Pty Ltd v Optus Vision Pty Ltd [2010] NSWCA 111;

iv) In arriving at the true meaning and effect of a contract, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract; and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 17;

v) Where the parties have used unambiguous language, the court must apply it – see Rainy Sky SA v Kookmin Bank [2011] UKSC 50 [2011] 1 WLR 2900 per Lord Clarke JSC at paragraph 23;

vi) Where the language used by the parties is unclear, the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used, but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 18;

vii) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see Rainy Sky SA v Kookmin Bank (ibid.) per Lord Clarke JSC at paragraph 21 - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 19;

viii) Language used by the parties should not generally be treated as surplus but *"(i)t is well established law that the presumption against surplusage is of little value in the interpretation of commercial contracts*…" – see The Eurus [1998] 1 Lloyd's Rep 351 per Staughton LJ (as he then was) at 357, approving Royal Greek Government v. MoT (1949) 83 Ll.L.R 228 per Devlin J (as he then was)

at 235 and Chandris v. Isbrandtsen-Moller Co Inc [1951] 1 KB 240 per Devlin J at 245;

ix) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see Wood v Capita Insurance Services Limited [2017] UKSC 24 per Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent – see Wood v Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 13 and National Bank of Kazakhstan v Bank of New York Mellon [2018] EWCA Civ 1390 per Hamblen LJ at paragraphs 39-40; and

x) A court should not reject the natural meaning of a provision as incorrect simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain - see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 20 and Wood v Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 11.

21. The general terms were incorporated into the LCS Agreement expressly by the final provision in the main body of the LCS Agreement which provides that:

> "The Bluequest Resources AG General Terms and Conditions attached hereto, including but not limited to the arbitration agreement contained therein are expressly incorporated into and form an integral part of this Contract.

and the LCS Agreement was signed by or on behalf of both parties on that basis.

22. Applying basic principles of contractual construction, no reasonable person in possession of all the information known or readily available to the parties down to the date the LCS Agreement and Aluminium Agreement were entered into could have concluded that the general conditions were not intended to apply to the parties' agreement or agreements. That the parties intended their agreement to be governed by the general conditions is readily apparent from the language used in the final paragraph of the main part of the LCS Agreement quoted in paragraph 21 above. It is also readily apparent from the language used in clause 1.1 of the general terms incorporated into the LCS Agreement, which expressly applies the general conditions to all contracts concluded by Bluequest "*…as the Seller …"* and "*… another party as the Buyer …"*. In the main body of the LCS Agreement, Palmat is expressly called "*Buyer*" and Bluequest as "*Seller*". In my judgment, plainly this language in combination with the express incorporation of the general conditions is more than ample to demonstrate the parties' intention to be that the general conditions would apply to the relationship of the parties as contained in or evidenced by the LCS Agreement, whether in law and fact that relationship was that of seller and buyer.

23. Even if that is wrong, I do not accept that on proper analysis the relationship between the parties is one that can be described as being a pure barter arrangement. A significant

amount of time was taken up at the hearing in examining emails passing between the parties in the lead up to the making of the LCS and Aluminium Agreements. In my judgment this is largely mistaken because evidence of subjective intent in the course of negotiations leading to a contract are generally not admissible to construe the agreement that was in the event entered into. Whilst I fully accept that the two agreements need to be read together, reading them together does not lead to the conclusion that the arrangement was a single pure barter transaction.

24. The LCS Agreement specified a price to be paid for the caustic soda supplied (US$590.00/DMT), set out payment terms and provided for the price to be set off against aluminium to be shipped under the Aluminium Agreement, "… *which shall be shipped by mid June 2017, but latest B/L date shall be June 30th, 2017*." It was expressly provided that in the event the "… *Buyer and Seller do not come to an agreement on premiums/discounts under the contract ALP-17.0. 0036 1-P, then Buyer shall immediately wire transfer to Seller the full value of the caustic soda invoice as per contract ALZ-17.0.00360-S*…" Thus that document expressly contemplated that a cash price would be payable in the absence of an agreement as to premiums and discounts in relation to the aluminium and impliedly does so in the event that the aluminium is not shipped by 30 June 2017.

25. Turning to the Aluminium Agreement, it too fixed a price for what was to be supplied, with an express requirement that it be paid "*100% Net cash in US Dollars…*" subject to the contractual set off set out in the "*Payment Special Clause*" which required the Buyer under the Aluminium Agreement (Bluequest) to " … *deduct the full material value of the Caustic Soda invoice, as per contract ALZ-17.0.00360-S, and effect payment under this contract only for the remaining difference/balance*." Thus this agreement too contemplates that a cash price will be payable wholly or in part for the aluminium that was to be, but in the end was not, supplied. It contemplates in particular the possibility that the value of the aluminium shipped would exceed the value of the caustic soda supplied. In the event that the aluminium had a lower value than the caustic soda supplied then the effect of the agreements when read together was that the balance would be payable in cash. To construe the agreements in any other way would be obviously uncommercial. In my judgment, the tribunal were fully entitled in those circumstances to construe the parties' agreement as being " … *of two contracts for the sale and purchase of goods rather than a single barter agreement*".

26. Returning to the jurisdictional issue that arises, as a matter of construction, the effect of the LCS Agreement, when read as a whole (and to the extent necessary, together with the Aluminium Agreement) was to incorporate into the LCS Agreement by express reference the whole of the general terms including of necessity the arbitration agreement set out in the general terms. That being so it applied to any dispute under the agreements either (a) because the words "*Buyer*" and "*Seller*" refer to the actual relationship created by the contracts and thus apply whether the transaction is barter or sale and/or (b) because the transaction was not a single barter arrangement but two related sales agreements.

27. In any event, the concluding provision within the main body of the LCS Agreement stated in terms that the "… *General Terms and Conditions attached hereto, including but not limited to the arbitration agreement contained therein are expressly incorporated into and form an integral part of this Contract…"*. On any

view, the effect of this provision was to incorporate the arbitration agreement contained in the general terms into the agreement of the parties however the substantive nature of that relationship was properly to be characterised. As Bluequest submits, the parties agreed "… *that the arbitration clause should apply in this instance and to this contract, not that the arbitration clause might apply, depending upon what categorisation was placed upon the contract*."

28. I can resolve the second argument (that the LCS Agreement was subject to a "*preclusive time bar"*) rather more quickly. On its correct construction, the bar contained in clause 11.2 of the LCS Agreement operates as a one way time bar that operates against Palmat, not against Bluequest. Exactly similar considerations apply to that imposed by clause 11.1 of the general terms incorporated into the Aluminium Agreement. That being so, neither can have any application to the claim by Bluequest for payment under the LCS Agreement. In my judgment Palmat's argument to the contrary is entirely mistaken. It is said that the clause "… *must have preclusive effect for both parties as a matter of interpretation/construction*…" However, no English law rule of construction has been identified as leading to that conclusion. The express words used by the parties in a document signed on behalf of each of them are free from ambiguity and in accordance with general principle, summarised earlier, effect must be given to them even if when viewed from the perspective of one of the parties in retrospect the agreement they contain appears unwise. To do otherwise would be to rewrite the bargain of the parties.

29. It is said to be "… *implausible that the parties would have intended that only Bluequest be protected by a time bar, regardless of its role*… but this is entirely circular because the intention of the parties is to be ascertained from the language they have used when read in the relevant context. The economic and commercial conditions applicable in Venezuela at the relevant time do not lead to the conclusion that the parties could have intended the plain words used to mean what Palmat now argue for, nor would that be so if the intended transaction was a single barter transaction. It was not and is not alleged that the LCS Agreement was subject to an implied term that corrected what is characterised as being implausible and on conventional English legal principles such a submission would be unarguable not least because such a term would necessarily contradict the express terms of the agreement. What is being contended for amounts to a rectification by construction of the relevant provisions of the agreement. That requires that Palmat establish " … both (*i) that a mistake has been made, and (ii) what the provision is intended to say*." – see Chartbrook Ltd v Persimmon Homes [2009] AC 1101 per Lord Hoffmann at [22] to [25]. Inevitably the hurdle faced by a party advancing such a case is a high one – see most recently Britvic Plc v. Britvic Pensions Ltd [2021] ICR 1648, where Sir Geoffrey Vos MR held that merely to conclude there may have been a mistake (which to be clear I do not conclude was the case here) is not sufficient and what was generally required was a mistake that was "*… obvious … on the face of the document …"* or as Coulson LJ put it in his concurring judgment, there must be " … *an obvious error… where something has obviously gone wrong in a description, a date, a figure or a calculation, and the correct description, date, figure or calculation is obvious from the material before the court*". The claimant's case on this issue comes nowhere near satisfying any of the requirements identified in Chartbrook (ibid.) or the cases that followed including Britvic (ibid.).

30. It is then said that when the contracts are read " … *as a harmonious whole (even as two contracts of sale/purchase), the time bar provision should apply to the benefit of both*

parties, regardless of their described role in each transaction. This interpretation is most consistent with commercial common sense". I do not agree. Such a construction could be adopted only if the Chartbrook principle applied but it does not for the reasons I have given. The contracts read harmoniously by giving full effect to the plain words used by the parties in each and the interpretation for which Palmat contends is not that which is most consistent with commercial common sense as that concept applies to contractual construction. The relevant principles are summarised above. What is contended for may look like commercial common sense from Palmat's perspective when looked at now, but that is not when or how the issue is to be tested and in any event that point cannot defeat the plain language used by the parties in their agreement.

31. Given these conclusions, it is not necessary for me to comment on whether, had I concluded that a time bar applied to Bluequest's claim, that was something that went to the jurisdiction of the tribunal as opposed to the admissibility of the claim. That is an issue that simply does not arise and no useful purpose would be served by me expressing a view on the issue.

32. In those circumstances, I conclude that the Jurisdiction challenge must fail and be dismissed.

The s.68 Challenge

The Principles Applicable to a s.68 Challenge

33. By AA s.33:

> "(1) The tribunal shall—
>
> (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
>
> (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
>
> (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

By AA S.68:

> "(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
>
> A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—
>
> (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
>
> (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
>
> (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
>
> (d) failure by the tribunal to deal with all the issues that were put to it;
>
> (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
>
> (f) uncertainty or ambiguity as to the effect of the award;
>
> (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
>
> (h) failure to comply with the requirements as to the form of the award; or
>
> i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.
>
> (3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—
>
> (a) remit the award to the tribunal, in whole or in part, for reconsideration,
>
> (b) set the award aside in whole or in part, or
>
> (c) declare the award to be of no effect, in whole or in part.
>
> The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

34. The principles applicable to challenges under AA s.68 were summarised comprehensively by Popplewell J as he then was in Terna Bahrain Holding Company WLL v Al Shamsi [2012] EWHC 3283 (Comm); [2013] 1 Lloyd's Rep 86 at paragraph 85 in these terms:

"(1) In order to make out a case for the court's intervention under section 68(2)(a), the applicant must show:

(a) a breach of section 33 of the Act; ie that the tribunal has failed to act fairly and impartially between the parties, giving each a reasonable opportunity of putting his case and dealing with that of his opponent, adopting procedures so as to provide a fair means for the resolution of the matters falling to be determined;

(b) amounting to a serious irregularity;

(c) giving rise to substantial injustice.

(2) The test of a serious irregularity giving rise to substantial injustice involves a high threshold. The threshold is deliberately high because a major purpose of the 1996 Act was to reduce drastically the extent of intervention by the courts in the arbitral process.

(3) A balance has to be drawn between the need for finality of the award and the need to protect parties against the unfair conduct of the arbitration. In striking this balance, only an extreme case will justify the court's intervention. Relief under section 68 will only be appropriate where the tribunal has gone so wrong in its conduct of the arbitration, and where its conduct is so far removed from what could be reasonably be expected from the arbitral process, that justice calls out for it to be corrected.

(4) There will generally be a breach of section 33 where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. If the tribunal thinks that the parties have missed the real point, which has not been raised as an issue, it must warn the parties and give them an opportunity to address the point.

(5) There is, however, an important distinction between, on the one hand, a party having no opportunity to address a point, or his opponent's case, and, on the other hand, a party failing to recognise or take the opportunity which exists. The latter will not involve a breach of section 33 or a serious irregularity.

(6) The requirement of substantial injustice is additional to that of a serious irregularity, and the applicant must establish both.

(7) In determining whether there has been substantial injustice, the court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. The applicant does not need to show that the result would necessarily or even probably have been different. What the applicant is

> required to show is that had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome."

As Carr J, as she then was, emphasised in Obrascon Huarte Lain SA (t/a OHL International) v Qatar Foundation for Education, Science and Community Development [2019] EWHC 2539; [2019] 2 Lloyd's Rep. 559 at paragraph 44

> "S. 68 imposes a high threshold for a successful challenge… It is not to be used simply because one of the parties is dissatisfied with the result, but rather as a longstop in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice "calls out for it to be corrected". "

35. Whilst almost all defendants to proceedings brought under AA s.68 tend to emphasise points (2), (3) and (5) in Popplewell J's summary of the applicable principles and the point made by Carr J for obvious forensic reasons, this should not be allowed to obscure or reduce the impact of point (4). That said, the *rationale* for the approach identified in points (2), (3) and (5) of Popplewell J's summary is that identified by Carr J further on in paragraph 44 of her judgment in Obrascon Huarte Lain SA v Qatar Foundation for Education, Science and Community Development (ibid.):

> "As a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults. The approach is to read an award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault"

It is for that reason that in relation to an issue said to engage point (4):

> "It is enough if the point is "in play" or "in the arena" in the proceedings, even if it is not precisely articulated… a party will usually have had a sufficient opportunity if the "essential building blocks" of the tribunal's analysis and reasoning were in play in relation to an issue, even where the argument was not articulated in the way adopted by the tribunal. Ultimately the question which arises under s. 33(a), whether there has been a reasonable opportunity to present or meet a case, is one of fairness and will always be one of fact and degree which is sensitive to the specific circumstances of each individual case."

- See Reliance Industries Ltd & Anor v The Union of India [2018] EWHC 822; [2018] 1 Lloyd's Rep. 562 at paragraph 32.

36. The first challenge is by reference to paragraph 39 of the Award, where it is alleged that the comment that *"(f)ollowing a prior arbitration proceeding, it is accepted between the parties that the LCS Contract binds the Claimant and the Respondent*…" engaged point (4) of Popplewell J's summary because neither party " … *made submissions (either orally or in writing) as to the legitimacy of the Tribunal relying on material from an earlier arbitration between Bluequest and Palmat Venezuela (a*

separate company), or as to the impact of any findings from the previous arbitration…" and that the " … *objectionable issue is the Tribunal's reference at Award §39 to the "binding" effect of the Caustic Soda Agreement having been previously established. This is different from the identity of parties to a putative agreement* …" I reject this challenge without hesitation: reading the Award as a whole and " … ***in a reasonable and commercial way…"*** as Carr J describes in the section of her judgment set out above leads inevitably to the conclusion that all the majority were doing in this paragraph was to record that the parties to the reference were, and were agreed to be, the parties to the LCS Agreement. That much had been conceded by the claimant's counsel in the arbitration proceedings – see paragraph 66 of the statement of Mr Annicchiarico where he said:

> "Whilst the prior arbitration proceeding had dealt with the identity of the parties to the Caustic Soda Agreement, it did not address the substantive effects of the Caustic Soda Agreement. Certainly, there was no acceptance by Palmat that the "LCS Contract" bound it in those terms. Palmat argued that the "LCS Contract" could only be read as a package together with the Aluminium Agreement."

In my judgment asserting that Paragraph 39 amounts to a finding that went any further than the identity of the parties to the LCS Agreement is exactly the sort of exercise in picking holes and combing through awards to find inconsistencies and faults that Carr J depreciated.

37. Palmat argues that the paragraph pre-judges the substantive issue concerning whether there was one unitary contract rather than two separate binding agreements or asserts that the issue is to be resolved by what happened in the first arbitral reference. I reject that submission as unarguable. It is plain that paragraph 39 did not even attempt to address this issue, contrary to what the claimant maintains. That is so because the issue was returned to in greater detail in later paragraphs of the Award – see paragraph 42, where the majority summarise the claimant's case as being " … *that the LCS Contract was part of a barter agreement, to be read together with the Aluminium Contract, for the exchange of goods, such that the Respondent's obligation was to deliver aluminium in exchange for the liquid caustic soda* …". As the tribunal added in the next paragraph "*… (d)etermining what obligation the Respondent undertook is crucial in light of the Respondent's allegation that it was prevented from delivering the aluminium by acts of force majeure*…". That is entirely inconsistent with what the claimant maintains should be the correct reading of paragraph 39. This was the issue to which the tribunal turned in paragraph 69 of the Award. This issue was addressed thereafter with comprehensive summaries of each party's case on the issue – see paragraphs 88 – 95 – which the majority then proceeded to resolve in favour of the defendant. They did so without making any reference to the first arbitral reference for the self evident reason that those proceedings (and the jurisdictional award made in those proceedings) were wholly irrelevant to the single contract/two agreements issue. It matters not whether the majority were right or wrong, as long as the issue has been dealt with on its merits – see SSHD v Raytheon Systems Limited [2014] EWHC 4375 (TCC) *per* Akenhead J at paragraph 33(d)(vi). It was and the notion that the substantive issue was resolved by paragraph 39 is wrong and unarguable.

38. The next challenge is that in paragraph 110 of the Award, the tribunal reached a decision based on an argument not advanced by either party. In that paragraph, the tribunal held that:

> "In the majority of the Tribunal's view, both the context and the other clauses of the LCS Contract assist with its interpretation. The first paragraph of the payment terms clause states that the Respondent can "pay" by way of delivering aluminium so long as that aluminium is shipped "by mid June 2017, but latest B/L [bill of lading] date shall be June 30th, 2017". There is a clear obligation on the Respondent's part to ship the aluminium by a specific date. This obligation is also relevant for the interpretation of the second paragraph of the Payment Terms clause. The parties necessarily have failed to reach "agreement" if they fail to agree on the price of an aluminium delivery of the type envisaged by their contract, namely of aluminium shipped by 30 June 2017." [Emphasis supplied]

The words underlined are said by the claimant to be objectionable because neither party had contended that was so..

39. The material words of the LCS Agreement concerning "*Payment Terms*" were:

> "100% against aluminium metal delivery as per contract ALP-17.0.00361-P, which shall be shipped by mid June 2017, but latest B/L date shall be June 30th, 2017.
>
> In case that Buyer and Seller do not come to an agreement on premiums/discounts under the contract ALP-17 O 0036 1-P, then Buyer shall immediately wire transfer to Seller the full value of the caustic soda invoice as per contract ALZ-17.0.00360-S."

The key point argued by the defendant and found by the tribunal was that the cash price became payable if either (a) the aluminium was not shipped by 30 July 2017 or (b) the price payable (which of necessity involves agreement both applicable discounts if any and premiums if any) was not agreed by that date. All that this paragraph does is to accept the defendant's case before the tribunal. The notion that it does so by reference to a point not argued is unmaintainable.

40. The next category of challenge is concerned with various paragraphs of the Award (paragraphs 39, 41 44, 97 and 108) where the majority has described particular facts or matters as being either common ground or not in dispute. If these challenges are to be made good then the claimant must show that by reaching such a conclusion, the tribunal failed to deal with all the issues that were put to it. Even if the claimant shows that, it is also necessary that it shows the serious irregularity for which it contends has caused or will cause it substantial injustice. The defendant maintains that the claimant's approach in this part of its case if no other is that of a scattergun and one that ought to be deplored. Whilst that may all be correct if the premise of that submission is made good, in my judgment it is necessary to look at each allegation made and ask whether (a) it is a serious irregularity that (b) gives rise to serious injustice before such a conclusion can be reached.

41. I have already considered paragraph 39 and need say nothing further about it.

42. I turn next to paragraph 41 of the Award. There are two matters that are said to be common ground in that paragraph. The first is that it was said to be "…*common ground between the parties that the Claimant supplied 5,448.86 metric tonnes of liquid caustic soda to the Respondent*." The defendant has demonstrated that there was no dispute that the LCS was delivered, and that it was delivered on the claimant's instructions. I addressed this issue earlier in this judgment. In the context of an international contract for the sale of goods, it cannot seriously be suggested that delivery of goods to the orders of the purchaser is not a supply to the purchaser at any rate as between the seller and purchaser. I need say no more about this issue.

43. The point made on behalf of the claimant in relation to this paragraph of the Award concerns an invoice that is referred to in that paragraph. It is important to be clear what was being said to be common ground in relation to the invoice. In arriving at a conclusion on that issue, I approach it reading the Award in general and this paragraph in particular in the manner summarised by Carr J in the Qatar Foundation case referred to above. What the Award says is:

> "An invoice for payment was issued on 21 July 2017 in the amounts of USD 3,214,827.40 with demand for payment by 1 August 2017. It was sent to the address of Palmat C.A., a Venezuelan company related to the Respondent insofar as it is under the control of the Respondent's representative, Mr Roberto Wellisch. The calculation of the amount invoiced was not disputed. Nor is it disputed that the Respondent (directly or via Mr Wellisch) became aware of the invoice at the time it was sent on 21 July 2017 or shortly thereafter." (Emphasis supplied)

The parts I have underlined are the only propositions said to be common ground. I do not understand the calculation set out in the invoice to be in dispute. The defendant addresses the facts relevant to this issue in its skeleton but that is beside the point because the complaint does not relate to a finding on the issue made by the tribunal on the evidence but of a conclusion that there was common ground between the parties on the point. However none of that is material for present purposes.

44. Why this issue is said to give rise to substantial injustice is summarised in paragraph 103 of the claimant's skeleton submission as because:

> "… [the claimant] argued for the applicability of the preclusive time bar in Clause 11 GTC, on the grounds that no claim had been raised within the relevant 30 day period. By finding that [the claimant] had conceded receipt of the invoice (when this point was a live dispute), the Tribunal closed off [the claimant]'s argument as to the application of the time bar. "

However, as I have explained it is unarguable that the claimant had the benefit of the contractual time bar for which it contended. It follows that even if, erroneously, the majority concluded that it was common ground that the claimant became aware of the invoice on or shortly after 21 July 2017, it could have no substantive effect on the rights of the parties. It follows that even if the claimant is correct to characterise this as a

failure to deal with all the issues that were put to it, it was not a serious irregularity in the circumstances or, if I am wrong about that, it certainly gave rise to no serious injustice.

45. The final point to be made about this issue is that delivery of the invoice was held by the majority not to be a condition precedent to the obligation to pay – see paragraph 138 of the Award. This challenge is not concerned with the merits of that conclusion. The point that matters is that had there been a relevant limitation issue, it is overwhelmingly probable on the tribunal's findings that the trigger date for payment would have been held to be 30 June regardless of when and to whom the invoice had been sent and no prospect that the Tribunal might have decided otherwise.

46. I turn next to paragraph 44. It is very short. It states that *"(i)t is common ground that [the claimant] has neither delivered aluminium nor paid by cash for the liquid caustic soda it received.*" The point made by the claimant (which is one I have considered already a number of times in this judgment) is that it was Bauxilum, not the claimant, that received the LCS, although it is accepted that Bauxilum received the LCS on the claimant's instructions. This point in my judgment is entirely unarguable. It was common ground that no aluminium had been delivered to the defendant and equally it was common ground that the claimant had not paid for the LCS in cash. It is submitted that the tribunal mischaracterised what had occurred because the claimant did not itself take physical delivery of the LCS. In my judgment this is precisely what Carr J said should not happen when reading awards and fails to take any account at all of the purpose of s.68 challenges namely to provide what Carr J called " … *a longstop in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected*…" There is with respect nothing about this criticism that could be said to trigger such a mechanism. This point ignores entirely that the contractual relationship concerning the LCS is between the claimant and defendant, not the claimant and Bauxilum.

47. The next paragraph of the Award which is challenged is paragraph 97 which states:

> "It is not in dispute that the Respondent could have elected to deliver aluminium prior to 30 June 2017 and that such delivery would have discharged the Respondent's obligation under the LCS Contract subject to the parties agreeing on the premiums/discounts for the aluminium. That is plain on the face of the LCS Contract"

The word I have underlined is the element of this paragraph that is challenged.

48. The basis of this challenge relates back to the claimant's fundamental case before the tribunal that in reality there was one contract not two and that the transaction was a barter transaction in which there were no alternative between providing the aluminium or paying cash. There was (so the claimant contended) a single obligation to provide aluminium. The claimant maintains that the use of the word "*elected*" shows the majority considered it to be common ground that there were two contracts, not one, and an obligation to pay as an alterative to the supply of aluminium rather than a sole obligation to supply aluminium.

49. In my judgment there is no substance in this challenge either. The very issue that the majority of the tribunal was considering in paragraph 96 and following of the Award was the claimant's case that the only consideration for the LCS could be the aluminium – see paragraph 96. The conclusion of the majority was that this did not accurately reflect the parties' agreement – see paragraph 98. The majority's reasons for that conclusion are set out at paragraphs 99 and following. Paragraph 97 must be read firmly in the context set out above and, in particular, the context established by paragraph 96, which referred expressly to the conclusions of the dissenting member of the panel. In that context there is no reason for reading the opening two lines of the paragraph as meaning any thing other than what they say – that if the claimant had supplied aluminium prior to 30 July that would have been a satisfactory compliance with the payment obligation that provided, in so far as is material for present purposes, that the aluminium " … *shall be shipped by mid June 2017, but latest B/L date shall be June 30th, 2017*…" To read it in the way that the claimant had chosen to read the paragraph is a classic example of the approach that Carr J said should not be adopted and, as I have said, ignores the context in which the paragraph appears and that the issue the claimant maintains was being treated as common ground is the issue that the majority then go on to resolve in the following paragraphs.

50. The next paragraph in respect of which complaint is made is paragraph 108. It states:

> "For the majority of the Tribunal, the parties agreed that should they "not come to an agreement on premiums/discounts", the Price of the liquid caustic soda would become due. On the facts of the case, the parties have not agreed premiums or discounts for the aluminium. In fact, the aluminium has not yet been shipped at all. <u>It is common ground that shipping the aluminium is one of the prerequisites for the parties to finalise the agreement as to premiums/discounts, since these would be discussed once the parameters and specification of the loaded cargo can be ascertained.</u> Accordingly, the price of the caustic soda has not been set off against the value of any aluminium shipped. In the circumstances, the parties have definitively failed to "come to an agreement on premiums/discounts", as a result, the Respondent has the obligation to pay the Price. Consequently, in the majority of the Tribunal's view, the cash price of USD 590 per DMT became payable" [Emphasis supplied]

51. The challenge here is to the conclusion that it " … *is common ground that shipping the aluminium is one of the prerequisites for the parties to finalise the agreement as to premiums/discounts, since these would be discussed once the parameters and specification of the loaded cargo can be ascertained*." The point made is that it was the defendant's case that premiums and discounts could be agreed once the parties knew the parameters and specifications of the cargo. Thus the distinction is between the apparent conclusion of the tribunal that discounts and premiums could not be agreed until the cargo had been shipped whereas the claimant contends it was the defendant's case (which it did not dispute) that they could be agreed once the cargo had been ascertained.

52. There are a number of reasons why in my judgment there can be no legitimate criticism of this paragraph of the Award. Firstly, in my judgment a fair reading of the section of the paragraph under challenge is that agreement as to premiums and discounts could not be reached until the cargo had been ascertained and that on any view that occurred when the cargo was shipped. If that was not the case then the section relied on does not make sense. Secondly, even if that is wrong, the conclusion reached on this point is entirely immaterial because it is not alleged that the aluminium to be supplied to the defendant ever became ascertained, whether by loading it onto a ship or otherwise, nor is it alleged that any quality certificates were ever provided. Thus whilst the majority may have been wrong to conclude that shipment was a prerequisite to the agreement of discounts and premiums, when it should have concluded that could have happened before, at the same time or after shipment of the aluminium, that is nothing to the point on the facts of this case. The real point is that no aluminium had been ascertained and therefore no discounts or premiums could be agreed. As is obvious, but in any event as the terms of the Aluminium Agreement make clear, discounts and premiums can be agreed only once what is to be shipped has become ascertained, since the amount will depend on not merely on the chemical qualities of the aluminium allotted but prevailing market conditions at the time an attempt is made to agree them. That is likely to be sensitive to when the product will be shipped since the price achievable for the product will depend on the market price for aluminium of the relevant quality at the date it is shipped.

53. It is said that the challenged finding is material to the conclusions at paragraphs 110-111 of the Award that there is a clear obligation to ship the aluminium by a specific date. I do not agree. The point made in paragraph 110 (see the final sentence) is that the obligation was to ship the relevant aluminium by no later than 30 June. It says nothing about when agreement as to premiums and discounts was to be reached. All the majority were doing is to state their conclusion that on a proper construction of the LCS Agreement, aluminium had to be shipped by no later than 30 June if it was to be available for set off against the price of the LCS (and then only if agreement was reached as to discounts and premiums). The issue concerning when agreement of premiums and discounts could be reached had no impact on the conclusion of the majority that the LCS Agreement required the aluminium to be shipped by no later than 30 June. These are unsurprising conclusions. It would be highly uncommercial not to provide a cut off date since otherwise the defendant would be under an obligation to ship the LCS (as in fact it did) whilst at the same time extending to the claimant an unlimited period in which to pay for what had been shipped. It is said that neither party argued for these conclusions. As to that, firstly, on any view the issue was one that was in play in the sense identified in the authorities referred to earlier and in any event the defendant's case was in essence as found by the majority – see paragraphs 4.2-4.3 of its opening submissions to the tribunal and paragraph 1.2 of its closing submissions.

54. I do not accept that paragraph 111 should be read as saying that agreement as to price had to be reached by 30 June 2017. Firstly, that is entirely inconsistent with the conclusion in the final sentence of paragraph 110, which contemplates aluminium having to be shipped by no later than 30 June and it is also inconsistent with the second sentence of paragraph 111. I agree with the defendant's submission that plainly the first sentence of paragraph 111 should be read as if the word "not" appears between the words "*need"* and "*have been*" in the first line. Read in this way, both paragraphs 110 and 111 make clear sense – if the price attributable to the aluminium to be shipped under the Aluminium Agreement was to be set off against the price due for the LCS

supplied pursuant to the LCS Agreement then (a) the cargo had to be shipped by 30 June; and (b) agreement as to the discounts and premiums applicable to the cargo had to be agreed and could be agreed at any time after the aluminium to be supplied had been ascertained (by which in context is meant appropriated to the contract) so that the characteristics relevant to the assessment of discounts and premiums could become known.

55. One final point made on behalf of the claimant was that on a proper reading of the Aluminium Agreement, the failure to ship was something that ought to have triggered a claim under that contract for the price. In my judgment that is mistaken. The key points are that the Aluminium Agreement was a separate contract as the tribunal concluded and it provided for a price to be paid of "*Official London Metal Exchange Aluminium High Grade Settlement quotation (cash or 3-Month, whatever is lower) averaged over the quotational period, … plus/less applicable premium/discount*." If agreement as to the applicable premium or discount was not reached then the Aluminium Agreement provided expressly that "… *then this contract shall be considered null and void and Seller shall immediately and without delay wire transfer to Buyer for the full value of the caustic soda invoice as per contract ALZ-17. =0.00360-S*". No question could arise as to payment of the price because no aluminium was either appropriated or shipped, so agreement was or could be reached as to the applicable premium or discount and the contract was expressly required to be considered "*null and void"*.

56. Since the majority concluded that if the price payable for the aluminium under the Aluminium Agreement was to be set off against the price payable for the LCS under the LCS Agreement, the aluminium was shipped by no later than 30 June, they were fully entitled to conclude that the cash price became payable where such shipment had not taken place, where no aluminium had been appropriated to the Aluminium Agreement and the applicable premiums and discounts had not been agreed. The majority were fully entitled to reach that view given the express requirement set out in the LCS Agreement that the aluminium was to be " …*shipped by mid June 2017, but latest B/L date shall be June 30th, 2017*…" if the price otherwise payable was to be set off "…*100% against aluminium metal delivery as per contract ALP-17.0.00361-P*…"

57. The issue raised by the claimant in relation to paragraph 114 of the Award does not arise because the tribunal rejected the claimant's case that there was on a proper analysis a single barter transaction. Having reached its conclusion that the LCS and Aluminium Agreements were separate but related contracts, it was fully entitled to conclude that the Aluminium Agreement took effect in accordance with its terms in the event that agreement as to a price had not been reached – that is:

> "In case that Buyer and Seller do not come to an agreement on premiums/discounts, then this contract shall be considered null and void and Seller shall immediately and without delay wire transfer to Buyer for the full value of the caustic soda invoice as per contract ALZ-17. 0.00360-S"

58. The next point made by the claimant in its skeleton is that the majority failed to deal properly with its arguments as to why the arrangements should be treated as a single barter contract. At paragraph 126 of the claimant's skeleton it argues that the point was

addressed in relation to jurisdiction but not on the merits. I agree with the submission made on behalf of the defendant that the Tribunal was not required to repeat its analysis and decide the point twice. In any event, the essential point made by the claimant is wrong. The majority did return to the issue again – see paragraph 93, where they refer to the claimant arguing that "…*the Tribunal must recognise the two contracts as parts of a single barter transaction*…" before addressing the point at paragraphs 96-104. In my judgment the notion that the majority failed to address this issue is simply wrong.

59. The final substantive issue that arises concerns interest. In one limited respect the claimant has legitimate grounds for seeking challenge to what has been awarded. The claimant's challenge breaks down to two points being (1) that interest was awarded on arbitration and legal costs when the defendant had not sought interest on either; and (2) the defendant had claimed interest in the sum of US$718,620.11 on the sums claimed but the tribunal awarded interest in the sum of US$764,544.08.

60. So far as (1) is concerned, in the end it was I think common ground that interest on arbitration and legal costs was not in play in the relevant sense at the final hearing. The claimant initially submitted that I should remit the Award back to the tribunal by reference to this point. The defendant submitted that if I came to the conclusion that interest on costs had not been sufficiently in play then I should set aside that part of the Award that awards interest on the legal costs on the pragmatic basis that returning to the tribunal on that issue would not be cost effective. As AA s.68 makes clear, a court has the power to set aside all or part of an award to remit it in whole or part. Given the defendant's position I have no hesitation in setting aside that part of the Award (which in practice involves doing no more than striking out the words "…*and (5)*…" from paragraph 160 (7) of the Award).

61. The balance of the interest assessed by the tribunal was in relation to interest claims that were in play at the hearing within the meaning of the case law set out above. The tribunal has set out in detail its reasoning as to how it came to the figures arrived at – see paragraph 140-147 of the Award. Whilst the maths leading to the figure it arrived at is not set out, it has proceeded on the basis that interest should be compounded annually. The hearing took place on 13 September 2021 and the Award is dated 14 May 2022. Neither party has set out any calculations that would enable me to analyse whether interest in excess of that claimed by the defendant had been awarded. The issue was one that was in play in the way that phrase is to be understood. I conclude therefore that I ought not to interfere with this element of the interest awarded.

62. In the result, save that I set aside that part of the Award that awards interest on the defendant's costs of the arbitration and its legal costs and expenses, this claim is dismissed.