Neutral Citation Number: **[2020] EWHC 927 (QB)**

Case No: CL-20019-00076

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Royal Courts of Justice, Rolls Building

Fetter Lane, London, EC4A 1NL

Date: **16 April 2020**

Before :

Mr Justice Waksman

- -

Between :

Mastermelt Limited	**Claimant**
- and -	
Siegfried Evionnaz SA	**Defendant**

Jonathon Allcock (instructed by **Stephenson Harwood**) for the **Claimant**

James Sheehan (instructed by **Taylor Wessing**) for the **Defendant**

Hearing date: 3 March 2020

APPROVED JUDGMENT

INTRODUCTION

1. The claimant in these proceedings, Mastermelt Limited ("Mastermelt"), is an English company specialising in the reclamation of precious metals. The defendant, Siegfried Evionnaz SA ("Siegfried"), is a Swiss company. It develops and manufactures active pharmaceutical ingredients. One of the processes which this entails is chemical hydrogenation, which involves the use of a catalyst, an example of which would be palladium on alumina 5%. Palladium is a precious metal. When the catalyst is exhausted it can be sent to a reclamation company like Mastermelt to extract the palladium and if necessary convert it into palladium bars which can be sold.

2. Mastermelt performed reclamation services for Siegfried in 2018 and there is a dispute between the parties over the quality of Mastermelt's performance.

3. Siegfried's standard terms and conditions of contract ("STC") included a clause stating that the governing law is Swiss law and that the Swiss courts have exclusive jurisdiction.

4. Very shortly after Siegfried had informed Mastermelt that it was going to issue proceedings against Mastermelt in Switzerland, Mastermelt issued the present claim here on 5 February 2019. It seeks negative declaratory relief against Siegfried. Proceedings were subsequently issued by Siegfried against Mastermelt in the Zurich Commercial Court on 23 July 2019. Meanwhile, on 24 May 2019, Siegfried applied to this court for a declaration that it had no jurisdiction to try Mastermelt's claim and so the Claim Form and service should be set aside, alternatively stayed. These are the applications now before me.

5. Furthermore, on 29 January 2020 Mastermelt applied to the Swiss court (1) for a stay of those proceedings pending my decision here, or (2) for the Swiss proceedings to be limited at that stage to a consideration of the court's own jurisdiction there and nothing else, or (3) an extension of time for service of a response to Siegfried's claim. By an order dated 4 February 2020, the Swiss court rejected all three applications. On 7 February Mastermelt filed an appeal to the Federal Supreme Court of Switzerland which initially suspended enforcement of the Zurich Commercial Court's decision pending the appeal. However, on 13 February Siegfried objected to any such suspension. The Supreme Court directed Mastermelt to file any response to that objection by 9 March. As far as I know, that has been done but at the moment the Supreme Court has not given its decision on the

suspension issue, let alone any substantive appeal, nor has there been any decision yet on the jurisdiction or otherwise of the Swiss court to hear the claim.

THE ISSUES ON SIEGFRIED'S APPLICATION

6. Jurisdiction in this context is governed by Article 23 of the 2007 Lugano Convention, known as Lugano II ("the Convention"). This provides as follows under the heading "Promulgation of jurisdiction":

> "1. If the parties or more of whom is domiciled in a state bound by this Convention have agreed that a court or the courts of the state bound by this Convention are to have jurisdiction to settle any disputes which have arisen or may arise in connection with the particular legal relationship, that court or those courts shall have jurisdiction, such jurisdiction be exclusive unless the courts have agreed otherwise. The agreement conferring jurisdiction shall be either (a) in writing or evidenced in writing, or (b) in a form which accords with practices which the parties have established between them, or (c) in international trade or commerce in a form which accords with the usage which the parties are or ought to have been aware and which in such trade or commerce is widely known to and regularly observed by parties to contracts of the type involved in the particular trade or commerce concerned.
>
> 2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'."

7. Article 27 under the heading "Lis pendens" says this:

> "1. Where proceedings involving the same cause of action and between the same parties are brought in courts of different states bound by this Convention, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
>
> 2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."

8. On the face of Article 27 therefore, since this court was first seised, it should decide the question of its jurisdiction, and the Swiss court should stay its proceedings in the meantime. However, had this been a case governed by the Recast Brussels Regulation, the position would be different. That is because of the amendment to the parallel provision in the previous Brussels Regulation provided by Article 31.2 of the Recast Regulation. This provides that:

> "Where a court of a member state on which an agreement, as referred to in Article 25, confers exclusive jurisdiction is seised, any court of another member state shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement."

9. Siegfried argues here that Article 27 of the Convention must now be read in the light of and to the same effect as Article 31.2 of the recast Regulation. If so, Article 21 would or should also mandate that, regardless of which court was seised first, the court which was the subject of the putative exclusive jurisdiction clause ("EJC"), must decide the question of its jurisdiction first and the other proceedings must be stayed in the meantime. On that footing, the Swiss court should decide jurisdiction first. This is what Siegfried submitted in opposition to Mastermelt's application to stay the

Swiss proceedings, there. The Swiss court agreed with Siegfried and the "harmonising" interpretation of Article 27 which was relied upon. That is why it rejected Mastermelt's application for a stay.

10. In the light of that, Siegfried's two key contentions before me are as follows.

(1) The harmonised version of Article 27 applies and indeed this court is bound by the Swiss court's decision on that question; accordingly I should do nothing except stay the present proceedings until the Swiss court has decided the question of its own jurisdiction. ("Issue 1");

(2) Alternatively I should decide the question of jurisdiction of the English court for myself now, and the result of that will be that the ECJ is valid according to the requirements of Article 23; or, strictly speaking, Siegfried has a good arguable case to that effect. On that footing Siegfried's contends again, these proceedings should be stayed or set aside. ("Issue 2").

11. Mastermelt contests each step of Siegfried's arguments.

ISSUE 1

Introduction

12. This involves a pure question of law, namely the proper interpretation of Article 27. However, the prior point is whether I am in any event bound by the decision of the Swiss court on this issue which was between the same parties and in relation to the same dispute as the claim here. That being so, I should set out the relevant parts of the judgment of the Swiss court. For the record I am referring to page 435 of the bundle. The Swiss court refers to the introduction of Article 31.2 which I have already read. It goes on to say this:

> "This is an EU Regulation and secondly Community legislation. As a non-member country Switzerland is not bound by this regulation, but in the case referred to the federal court stipulated that the Convention here is very closely linked to the Brussels agreement and consequently there was a need for a harmonised interpretation of these coordinated standards."

13. And then it refers to the Recast Regulation and says:

> "Accordingly the principle of a harmonised interpretation also applies to the relationship between the Lugano Convention and the recast Regulation.
> The Lugano Convention stipulates when applying the provisions in the international treaty the courts of the member states must take due account of principles developed in important decisions by the courts in other member states, particularly where ECJ case law is involved. In this regard it is irrelevant which regulation the decisions relate to and whether they were enacted before or after the Lugano Convention came into force. However, the Lugano Convention does not require its signatories to strictly adhere to ECJ case law in contrast to the requirement for EU member states. Convention signatories must address ECJ case law but they may deviate from this if there is reasonable justification to do so.

> As the claimant correctly notes in their statement of claim, the Gasser judgment has been rendered obsolete in the EU area by Article 31.2. The claimant bases the jurisdiction of the Canton of Zurich on the agreed jurisdiction clause:
> Since the claimant in the present case hereby asserts the jurisdiction of that court which was seised second, it is justified by way of derogation from the obsolete ECJ Gasser judgment, applying the principle of a harmonised interpretation of the Lugano Convention and the recast Regulation. Article 31.2 must therefore be referenced when interpreting Article 27 and the current proceedings must be continued to enable the Zurich court to make a ruling regarding its jurisdiction."

The Binding effect or otherwise of the Swiss court's decision.

14. The principal authority relied upon by Siegfried in support of the proposition that I am bound is *Gothaer v Samskip* [2013] QB548, a decision of the Court of Justice of the European Union. Here four German companies brought proceedings in Belgium against a German subsidiary of an Icelandic company. The case concerned damage to goods being transported from Belgium to Mexico. The Belgian court declined jurisdiction on the basis that there was an EJC in favour of Iceland in the bill of lading. The German companies then brought proceedings in Germany. The German court referred the question to the CJEU as to whether it was bound to recognise the Belgian court's "procedural" judgment in the effect that there was an EJC in favour of Iceland.

15. The CJEU held that the German court was so bound. Between paragraphs 38 and 41 of the judgment that court stated:

> "To allow a court of a member state to disregard the jurisdiction clause which a court of the member state of origin has held to be valid would run counter to the prohibition of a review as to the merits, particularly in circumstances where the latter might well have ruled, but for that clause, that it had jurisdiction. In the latter situation such a finding on the court as the member state in which recognition is sought would call into question not only the intermediate finding made by the court of the member state of origin as to the validity of the jurisdiction clause, but also in the very decision of that court to decline its own jurisdiction…
> The requirement of the uniform application of the EU law means the specific scope of that restriction must be defined at European Union level rather than vary according to different national laws on res judicata.
> Moreover the concept of res judicata does not attach only to the operative part of the judgment in question but also to the ratio decidendi of that judgment which provides the necessary underpinning for the operative part and is inseparable from it.
> Thus a judgment by which a court of a member state has declined jurisdiction on the basis of a jurisdiction clause, on the ground that the clause is valid, offends the court of the other member state both as regards that court's decision to decline jurisdiction contained in the operative part of the judgment and as regards the finding on the validity of that clause contained in the ratio decidendi which provides the necessary underpinning for that operative part."

16. I follow all of that, but there is a difference between that case and this. The Swiss court did not and has not yet ruled on the validity of the putative EJC. What it has done is to say that Article 27, properly interpreted, means that it must go first in deciding that question. It was one thing to say that there is a form of res judicata in relation to a foundation, or not, for the venue of the substantive claim; it is quite another to say that the same binding consequences must flow where the two courts differ or may differ on the proper interpretation of a relevant provision of the Convention.

17. The particular context of the issue in *Gothaer* is illustrated by paragraph 78 of the Advocate General's opinion on which Siegfried relies which stated as follows:

> "To accept that the court of the member state addressed could regard as varied the term conferring jurisdiction which the court of the member state of origin had accepted as valid would run directly counter to the principle of the prohibition of review of the foreign judgment as to substance which prohibits the former from refusing recognition or enforcement of the judgment given by the latter on the ground it would have come to a different decision."

18. But here the actual and only decision of the Swiss court thus far is simply to refuse to stay its own proceedings, although I accept that its reasoning includes an expanded interpretation of Article 27. In my judgment, the nature of the decision of the Swiss court is too remote, albeit involving the same dispute and the same parties, to suggest that it can found a binding decision within the ambit of a case like *Gothaer*. I therefore consider that I can and should decide the question of the proper interpretation of Article 27 for myself.

The proper interpretation of Article 27

19. Equally, Siegfried adopts as part of its case here the reasoning of the Swiss court referred to above. It contends that the need for a harmonised system of jurisdictional rules within the EU and the Lugano Convention member states entails that where there are amendments to the Regulation, the Convention should be taken to be amended too. I see that as a general point, but the Convention has its own procedure for making amendments to its text; I note what has been stated in footnote 35 of Mastermelt's skeleton argument which refers to the Standing Committee formed under Protocol 2 of Article 4 to the Convention; at a meeting on 25 September 2013, it discussed the possible modification of Lugano to bring it in line with recast but made no recommendation on possible amendments and did not decide any further steps.

20. That footnote also refers to the case of *JSC Bank v Kolomoisky* [2019] EWCA Civ 1708. There, the judge at first instance stayed proceedings here on the basis that there were already pending proceedings between the same parties in the Ukraine. The defendants invoking a *lis alibi pendens* argument relied on Article 28.1 of the Convention which provides that where related actions are pending in the courts of different states bound by this Convention any court other than the court first seised may stay its proceedings.

21. While the proceedings here were in a state which was a party to the Convention, the proceedings in Ukraine were not. Accordingly Article 28.1 could not apply directly. However, the judge applied

Article 28.1 "reflexively" or by analogy to the case where the "other" court was in a third state. In so doing he relied on a decision of Mr Justice Andrew Smith in *Ferrexpo v Gilson* [2012] EWHC 721. The Court of Appeal in *JSC* upheld the judge's decision. In so doing they rejected an argument against extending the scope of Article 28.1 which said that the Recast Brussels Regulation had now specifically dealt with pending proceedings in third states while Article 28.1 had not been so amended. Therefore, the argument ran, it should be considered that objectively Article 28.1 could not apply by analogy; there needed to be an express amendment.

22. The court said this at paragraph 180:

> "We do not consider there is any significance in the fact that Article 34 of the recast Regulation, while specifically addresses pending proceedings in a third state, whereas the Lugano Convention continues not to do so. Not only is there nothing to indicate why the amendments in what is now Article 34 were made, but it simply does not follow that prior to the amendment there could not have been a reflexive application of what was then Article 28 to proceedings in a third state. Amendments to the wording of the European Convention so often are clarifications of matters previously addressed in the case law. We would also not read anything into the fact that the Standing Committee did not make any recommendations as to the amendment of the Lugano Convention as there is no material from which we could deduce what the rationale was for its position."

23. I note the reference there to not reading anything into the lack of recommendations by the Standing Committee. However, the key point as far as the Court of Appeal was concerned was that the argument from analogy (so as to read Article 21 expansively to apply to third states) was a free-standing one and would apply in any event. That is different from this case. Here, at least on one iteration of the argument, it is Siegfried which is positively relying on the later amendments in the Recast Regulation to say that Article 20 should be regarded as similarly amended. That is different from <u>rejecting</u> an analogy argument, because of later EU legislation.

24. Moreover, for my part I cannot see how Article 27 can be said to be expanded into the particular way set out in Article 32.1 simply by analogy. There is no analogy of the kind that was relevant in *JSC* by reference to third states being treated as if they were states bound by the Convention. However, a second version of Siegfried's argument here is this: part of the underlying problem which Article 32.1 of the Recast Regulation sought to solve was the fact that by reason of Article 27, there was the potential for abuse because, provided the proceedings were timeously started first in the court which was not the subject of any putative EJC, the party relying on the EJC clause would have to wait, sometimes for an extended period, until the court first seised concluded that indeed it had no jurisdiction. This ability to delay claims from proceeding in the "correct" court became known as the "Italian torpedo". The decision of the CJEU in *Gasser v MISAT* [2005] 2B1 entrenched the problem

because it held that the Article 17 of the Brussels Convention (in materially the same form as Article 27), applied so as to give priority to the court first seised. This was so even where there was an EJC clause purportedly in favour of the court second seised. In other words, Article 27 was of general application and there was no carve-out for EJC disputes.

25. What Siegfried contends here is that the *Gasser* decision has now effectively been reversed and made obsolete by the new Article 32.1. Since it is now obsolete, there is no reason why an appropriate carve-out from Article 27 should be made in favour of Article 23 and to the same effect as Article 31.2 of the Recast Regulation.

26. I do not accept this line of reasoning. *Gasser* has certainly been reversed as far as the Regulation is concerned, but on the face of it still has a limited application outside it. Protocol 2 to the Convention states that a court dealing with a particular provision in the Convention should pay "due account to the principles laid down by any relevant decision concerning the provisions concerned or any similar provisions of the 1988 Lugano Convention and the instruments referred to in Article 64" (which would include, for example, the Brussels Regulations and amendments thereof among others). The Swiss court held that it could depart from *Gasser* since it was not obsolete. But I do not think it was and anyway there is still no relevant decision <u>in favour of</u> reading Article 27 in the required expansive sense. While dealing with the obligation under Protocol 2, I have taken account of the decision of the Swiss court but I do not agree with it and I am not bound to follow it.

27. It is also worth noting that Joseph on *Jurisdiction and Arbitration Agreements and their Enforcement*, (Third edition, 2015), takes the same view as I do, at paragraph 10.83, where he says that:

> "…there is no equivalent provision in the… Convention to Article 31.2... Therefore as regards the enforcement of jurisdiction agreements, the court first seised will examine the enforcement of such an agreement, irrespective of whether it is the chosen court In other words the position that prevailed as a result of the CJEU decision in *Gasser*."

28. Briggs takes the same view in the sixth edition of Civil Jurisdiction and Judgments, page 375:

> "The innovation created by 31.2.. does not apply to proceedings within the scope of Lugano II which remain regulated by the original rule of strict temporal priority. If, for example, the Swiss courts are seised of proceedings in respect of the claim but further proceedings between the same parties are instituted in England in accordance with an exclusive jurisdiction clause for the English courts, the English court will be required to consider itself to be second seised and to wait for and abide by the decision of the Swiss court. To put the point another way, proceedings which have and bring about the effect which was exemplified in *Gasser* will have the effect which they have in that case when deployed within the framework much Lugano II. It is possible, one supposes, that the European Court might overrule Gasser or the courts in the contracting state refuse to apply it but there is no rational basis to suppose that either of those things may happen."

29. I accept that the last part of that passage must stand to be qualified because the Swiss Commercial Court at least has refused to give effect to *Gasser*, but I do not consider, as I have said, it was correct in so doing.

30. What the Swiss court did was to say: (a) that the harmonised regime means that one should now interpret Article 27 like 31.2 and (b) it has a good justification for ignoring the case of *Gasser* because it has now been rendered obsolete. But (a) I do not agree that the harmonised regime objective can go this far; and (b) I do not consider that Gasser is obsolete for all purposes.

Conclusion on Issue 1

31. For all of those reasons I do not accede to Siegfried's initial application which is that I should stay this claim without further ado and await the Swiss court's decision on the EJC.

ISSUE 2: WHETHER THE EJC CONFORMS TO ARTICLE 23 OF THE CONVENTION

Introduction:

32. If the EJC claimed here is valid in the sense of Article 23, then it is common ground that these proceedings must be stayed in favour of the Swiss proceedings. If it is not, it is equally common ground that Siegfried's substantive claim would fall to be litigated here. This is because England was the place of performance of the underlying contract: see Article 5.1(a) of the Convention.

33. It is further common ground that as it is Siegfried which is asserting the EJC in favour of Switzerland, it bears the burden of showing a good arguable case that EJC is indeed valid for these purposes. In my view, this is essentially a question of objective analysis of the relevant contemporaneous documents. It is not therefore necessary for me to rehearse the recent case law on the question of what good arguable case generally entails (and see in particular the decision of the Court of Appeal in *Kaefer v AMS Drilling* [2019] 1WR 3514 at paragraphs 73 to 80 of the decision of Green LJ). Rather, this is a case where I can apply the prima facie "relational" test on deciding on the available materials whether Siegfried has the better of the argument on the point. I do however make specific reference to paragraph 83 of the judgment which says:

> "I consider that in a case such as the present where the background and the context is Article 25 some regard must be paid to the fact as was held in Bols that the clear and precise test must be taken into account as an component of the domestic case and the melding of the two is necessary to ensure that domestic law remains consistent with the Regulation. As with so much of the language used in this context, that which is clear and precise is not easy to define with precision but I would rely upon it as providing at least an indication of the quality of the evidence required. It supports the conclusion that the prima facie test in limbs 1 and 2 is a relative one and insofar as the court cannot resolve outstanding material disputes, limb 3, it affords an indication as to the sort of evidence the court will seek. I would not go much beyond this though."

34. I bear those words in mind here.

35. I will deal with the law on the wider question of what Article 23 requires after setting out the material facts.

The material facts

36. There had been an initial contract between Mastermelt and the sister company of Siegfried called Siegfried St Vulbas SAS. That contract is not the subject of the present proceedings but it is worth noting some features about it.

37. Following a quotation from Mastermelt which set out pricing and weight but no general terms or STC, Siegfried sent a purchase order dated 5 July 1917. As with the later purchase orders it stated on the first page, before getting down to the detail of what was to be consigned, in bold type the order number. Then, in smaller type underneath:

> "Please note our PO number on all documents! Indicate goods origin on invoice!"

38. Then after setting out the particular items and the delivery address, it then stated this under "Remarks" at page 3:

> "This order is subject to our attached standard terms and conditions. All documents attaching to our purchase order are an integral part of it."

39. And then underneath that and in bold:

> "Please return us the order confirmation duly stamped, dated and signed within 48 hours."

40. The purchase order was sent under cover of an email dated 17 July to Mr Gaylor of Mastermelt which said:

> "Could you please confirm you have now received the spent catalysts from St Vulbas and that refining is ongoing. For your reference please find our PO it will be amended with your final refining results."

41. The email in response from Mr Gaylor was:

> "Everything is good thank you. Hoping the same for you….Thanks for the PO. We have indeed received all spent catalyst and we are starting treatment."

42. The terms and conditions attached to that purchase order, which I will call PO 1, are the same as those attached to the later purchase orders, albeit from Siegfried itself. Let me refer at this point to clauses 14.1 and 14.2.:

> "Applicable law on jurisdiction
> 14.1: These terms and conditions and/or the business relationship by the parties shall be exclusively governed by and construed in accordance with substantive laws of Switzerland.
> 14.2: Exclusive place of jurisdiction shall be Zurich whereby the Commercial Court of the Canton of Zurich will have subject matter jurisdiction."

43. There is some disputed evidence that Mr Gaylor of Mastermelt had previously sent to St Vulbas by post a copy of Mastermelt's standard terms and conditions along with its quotes. I say disputed because Siegfried denies ever receiving any terms and conditions from Mastermelt. The point is academic now because Mastermelt now does not suggest that its terms and conditions were incorporated into the relevant contract; but even if it does, it does not suggest that there was an EJC in favour of the courts here pursuant to those terms and conditions that satisfies Article 23 - hence its reliance now only on Article 5.1(a) of the Convention.

44. It is however common ground that Mastermelt did send a copy of its terms and conditions to Siegfried on 1 February 2019. However, this was after the dispute had arisen and Siegfried had informed Mastermelt of its decision to bring proceedings in Switzerland. The letter enclosing them asserted that a copy "Had been provided to you" although at that stage it did not say how or when.

45. I now turn to the purchase orders in question. On 14 December 2017 Ms Schlickmann of Siegfried emailed Mr Gaylor as follows:

> "Dear Steve,
> We want to organise a new shipment to mastermelt for the refining of catalysts from Evionnaz. Can you please update your offer previously submitted to Aurelie? What do you need additionally from us? Shipment will be managed by Chiresa .."

46. Mr Gaylor replied on 8 December:

> "This looks almost identical to the material as originally advised by Aurelie. Please see attached Mastermelt's offer sent to Aurelie which I confirm is still valid for the materials listed in your email below. We understand Chiresa has now received original documentation authorising shipment from both UK and Swiss Environment Agencies and Chiresa have advised they will be contacting Siegfried to arrange this shipment."

47. The quotation said still to be valid appears to be the one given to Siegfried on 20 March 2017 which set out rates and fixed charges. Four lots were referred to there. I should add that the third and fourth lots involve not palladium but platinum, but nothing turns on that.

48. That email then elicited this response from Siegfried on 21 December:

> "Dear Steve,
> Following the confirmation of your offer on 8 December for the recovery of PD and PT catalyst please find our PO4500175402. The catalysts will be sent at the beginning of January. Please inform us as soon as some lots have been recovered."

49. There were attachments there which included the purchase order again with the terms and conditions attached to it, bearing the same general wording as I have already referred to in relation to PO1. I refer to this new purchase order as PO2.

50. However, PO2 did not refer to Lot 3. The company shipping the catalyst to Mastermelt, Chiresa, later emailed Mr Gaylor also on 21 December, saying that it planned to deliver the cargo on 10 January, asking whether the date was acceptable to it.

51. On the 22nd Mr Gaylor replied confirming the delivery date of the 10th was "okay" and "the delivery address below" was the correct address.

52. Then came a change of date by an email dated 27 December 2017. Chiresa wrote to say that the carrier could not deliver on 10th because it was going to be at a weekend and there was a public holiday, so the next available date would be Monday the 15th or the 16th.

53. Ms Edgar of Mastermelt replied on 3 January to say that those dates were acceptable. She also questioned whether the lots she referred to below were correct.

54. In the meantime on 2 January Ms Schlickmann emailed Mr Gaylor, this email read as follows:

> "In order to better understand the requirements on your side for the refining of used catalyst we would appreciate to have a call. Would it be suitable for you this Thursday 4 January, if not submit another timeframe."

55. That was to Mr Gaylor but it was Mr Couzens who replied later on the same day to say that Mr Gaylor was on holiday and:

> "... not back until the week commencing 15 January. He asked if I could speak to you on Thursday 4 January regarding our requirements for the shipping of catalyst residues. I will ask my colleague Stephanie Edgar to join in the call as she assists in the preparation of documents of the customs when shipping notifiable materials to the UK."

56. In the morning of 4 January, when the parties were to speak later that day, Ms Edgar forwarded to Mr Couzens the email trail with Chiresa over the delivery of the catalyst to Mastermelt and that email included, among other things, the purchase order 2 and the attached terms and conditions. She said this:

> "Please see below and attached. Lot 2 does not show the article number and there is no lot 3. Also I have not received the TFS movement document."

57. It is common ground that there was the planned telephone call between Mr Couzens and Ms Schlickmann in the afternoon of 4 January. Ms Edgar also joined in the call and she assisted in the preparation of the catalyst shipping documents. Mr Couzens in his witness statement says:

> "There was no discussion of Siegfried's terms and conditions or a reference to the purchase order as such."

58. There is no witness statement from Schlickmann, or evidence otherwise from Siegfried, to suggest that terms and conditions were discussed.

59. Following the telephone conversation, Mr Couzens wrote follows to Ms Schlickmann:

> "It was very good to speak to you this afternoon regarding the first shipment of catalyst to come from your operation in Switzerland. We have a packing list for the three lots, 1, 2 and 4. We understand there is no lot 3. It would be very helpful if Chiresa or yourselves could supply a packing list inclusive of the drum and pallet weights for each lot. We do have a total gross weight but we would like to be able to check/weigh each one against advised weights. On receipt of the material we will book each lot in and send you a confirmation receipt by email. This will have our received weights, the MM reference number for each lot and confirmation of the assays requested. We would ask that you confirm by return your instruction to proceed with the weights obtained. Once the jobs have been treated we will send you by email our statements which will show the received net weight, after treatments weight, assays, total and payable content. The charges according to the terms of supply will also be shown. We ask you confirm your acceptance of the statement.

60. "We understand you wish the recovered metal to be transferred to your account at Johnson Matthey which is not a problem. All we require is you make payment for the charges itemised on the statement before we actually transfer the metal."

61. And then it refers to seeking:

> " ... a typical breakdown of the composition of residues not for every delivery if they are going to be similar. If there is a different mix they should send a revised breakdown."

It then continues:

> "I have emailed Chiresa this afternoon to enquire if the notification they have applied for allows for more than one shipment, open shipment, at any time."

62. He says he will let them know of the reply and then says:

> "This will allow the second shipment to commence."

63. And then finally:

> "We are very pleased to commence this business with you and both Steve and Stephanie will be in contact with you regarding the receipt and processing of this initial lot."

64. Shortly after that, Ms Schlickmann responded thanking him for the telephone call:

> "To summarise, we have indeed only three lots and I quote 'In order to be in line with the offer we kept designation of lots 1, 2 and 4 and no lot 3'. Copy of the movement document will be sent by Chiresa when the shipment leaves. We will send a breakdown of gross weight per 1, 2 and 4."

65. And then after she gave some further details about the shipments, she ended with:

> "Do not hesitate to comment. Best regards ..."

66. I need to mention here that the reference to "offer" is probably to the March quotation which dealt with four lots, then reduced to three in PO2, missing out lot 3.

67. On 22 January 2018 and after the consignment of catalyst had arrived, Mastermelt emailed Siegfried with the received weights and they were set out in a document headed "Mastermelt". Under "Customer reference" was given the number of the purchase order, though it did not refer to PO as such, and against each of them lot 1, lot 2 and lot 4 and the relative weights.

68. Before the processing of lot 4, Mastermelt sent this email on 27 February:

> "Please see attached statement for your approval."

69. It attached another document on Mastermelt headed paper and on the right-hand side, against "Your ref", was again the number of the purchase order and the final charges. As I understand it, what actually happened with the extracted metal is that it was not returned to Siegfried, it was sold on and the value transferred to Siegfried's nominated account, or it was itself transferred to Siegfried's nominated account. See, for example, the emails of 27 February and 1 March at pages 248 and 247.

70. On 7 March Mr Gaylor then sends the statement through on lot 1, similar to that pertaining to lot 4 again making reference to the number of the purchase order.

71. Subsequently, Siegfried emailed Mastermelt about sending a further shipment of catalyst and this was on 21 March. The email said:

> "For a second shipment we decided to send the following three lots."

72. The reference here was not to numerical but to alphabetical descriptions, in other words Lots A, B and C. And then the response came from Mr Gaylor on 23 March, giving dates when the refining could be completed.

73. That then led to an email from Siegfried sent on 26 March, which said:

> "Further to your email below, we placed the PO for the refining of the three lots. Please find enclosed our PO ref 4500180647. Delivery date mentioned on the PO is not firm as it depends on the date when you receive the goods in the UK. Please start refining as soon as possible."

74. And then again, in the by now familiar form, the further purchase order which I will refer to as PO3, in exactly the same format as PO1 and PO2.

75. However, as originally sent, PO3 was incomplete because only alternative pages had been scanned in, ie pages 1 and 3 of the PO itself and only page 2 of the terms and conditions.

76. On 27 March Mr Gaylor responded saying:

> "Many thanks for the PO. The PO only confirms lot A. Are you still planning to ship lots B and C also?"

77. One understands why he referred only to Lot A, because of the incomplete sending of PO3.

78. Later the same day Ms Schlickmann came back to say:

"Dear Steve,
"Here is the PO once again. It seems the scan was only done front side and wish you good receipt."

79. That in turn led to a response from Mr Gaylor the same day saying:

"Dear Mireille,
"Thank you! We will confirm once the shipment is received and update you further on estimated completion dates."

80. On 29 March, Mastermelt then sent its statement for lot 2 on PO2, in the same form as earlier statements. On 27 April it sent an invoice for its charges from lot 2. The invoice made specific reference to the purchase order and its number on the left-hand side when dealing with quantity and service details.

81. On 10 May Mr Gaylor sent details of the PO3 consignment weights. This was by reference to the reference numbers for lots A to C which were on PO3, though not a reference to the PO number itself.

82. Later on, however, when Mastermelt sent its statements for those lots dated 6 July 2018 there is reference to the number of PO3 as there had been for PO2 and the ultimate invoice date of 17 July refers to the PO itself and its number.

The Law

83. The principal way in which Siegfried puts its case on the validity of the EJC is by reference to Article 23.1(a). The law in this respect, both at the level of the CJEU and domestically, is a well-trodden path. It is neither necessary nor appropriate for me to traverse it again, save in certain respects.

84. Both sides referred me to an earlier decision of mine in the case of *R + V Versicherung v Robertson* [2016] EWHC 1243. At paragraph 7 I set out the principles as I saw them and made some further observations at paragraph 8 as follows:

"7. There is a significant body of EC and domestic case-law on this particular provision from which I derive the following general principles:
(1) The sole purpose for requiring the agreement as to jurisdiction to be in, or evidenced in, writing is so that there is clear proof of that agreement; see paragraph 5 of the judgment of the ECJ in *Iveco v Van Hool* [1986] ECR 1851;
(2) The agreement, or consensus, itself must be "clearly and precisely" demonstrated - see paragraph 7 of the decision of the ECJ in *Salotti v Ruwa* [1976] ECR 1832;
(3) The existence or otherwise of such an agreement is to be regarded as an independent concept of EU law - see the decision of the ECJ in *Powell Duffryn v Petereit* [1992] ECJ 1-1745 at paragraphs 13-14, and paragraph 54 of the judgment of Aikens LJ in *Aeroflot v Berezovsky* [2013] EWCA 784;
(4) Accordingly, the fact that as a matter of domestic law, one or other parties argue that the agreement containing the jurisdiction clause is itself void or invalid is irrelevant, save perhaps where it could be said

that as a result, the transaction was entered into by the other party in bad faith - see paragraphs 55-63 of the judgment of Aikens LJ in *Aeroflot*. Otherwise, a doctrine similar to that of "separability" in relation to arbitration agreements applies in this context also - see paragraph 24 of the judgment of Longmore LJ in *Deutsche Bank v Asia Pacific* [2008] 2 Lloyds Rep 619, referring back to the decision of the ECJ in *Benincasa v Dentalkit* [1997] ECR 1-3767 at paragraphs 23-32;
(5) Moreover it is common ground that as with English law, the existence or otherwise of the requisite agreement must be decided objectively regardless of what either or both parties thought they were agreeing to;
(6) The writing which evidences the agreement may often be, but need not be, in a single document; so, for example, in *7E v Vertex* [2007] 1 WLR 2175, the Court of Appeal held that the writing consisted of the seller's quotation and the buyer's purchase order which was held to have accepted it. See in particular, paragraphs 34-36 of the judgment of Sir Anthony Clarke MR;
(7) Finally, the writing relied upon need not emanate from the party now sought to be bound by the jurisdiction clause; so if that party received from the other party a written confirmation of the oral agreement previously made, and failed to object to that confirmation within a reasonable time, this could be sufficient "evidence in writing" of the agreement in question: see *Berghoefer v ASA SA* [1985] ECR 2699 at paragraphs 14-16.

8. It might be thought from all of this that if at the time of the agreement, while there was an express reference to the relevant terms, the other party had not received a copy thereof, the required agreement evidenced in writing could not be made out. But in *Credit Suisse v Societe Generale d'Enterprises* 4th July 1996, the Court of Appeal held that actual provision of a copy of the terms was not required where the party concerned had clearly accepted them by reference – see pages 6 and 7 of the judgment."

85. I was also referred to the summary of the relevant principles set out by Christopher Hancock QC sitting as a judge of the High Court in *Pan Ocean v China-Base Group* [2019] EWHC 982, at paragraph 32. This says:

"32. I turn to set out my conclusions on this issue. In my judgment, the cases show the following. (1) The fundamental issue is clearly whether consent to the EJC has been clearly and precisely demonstrated: see *Estasis*, at paragraph 7, *Galeries Segoura*, at paragraph 6, *Berghoefer*, paragraph 13, *Benincasa*, paragraph 29, *Coreck*, paragraph 13, *BNP Paribas*, paragraph 44, *Antonio Gramsci*, paragraph 37, *Profit*, paragraph 41 of the Attorney General's Opinion and paragraph 27 of the judgment of the Court, and *The Magellan Spirit*, paragraph 7.

(2) The purpose of the formal requirements in Article 25 is to establish such consent, clearly and precisely. The requirement of writing is not satisfied by the fact that the clause itself is in writing; the consent must be in writing or evidenced (or confirmed) in writing: see in particular *BNP Paribas*, a case by which I am bound, but with which I respectfully agree. It is clear from the European authorities that the purpose of the formal requirements in the Article is to establish consent to the necessary degree of certainty.

(3) Whilst it is clear that there is a "degree of flexibility", to adopt the phraseology of Professor Briggs in his helpful exposition of the authorities, then this cannot be taken too far. In my judgment, the authorities show that if there is no written agreement, then there must at least be written confirmation which evidences consent. Those authorities of which *Antonio Gramsci* is perhaps the most recent example, can be explained on one of two bases. The first is, quite simply, on a literal reading of the Regulation, which provides for the case where an agreement which is not itself in writing is then either confirmed or evidenced in writing. The second is on the basis of the doctrine of good faith, whereby the denial of the agreement, when it would otherwise be clearly established, by reliance on the want of compliance with the formal requirements of the Article, would amount to bad faith: see *The Antonio Gramsci* itself and *Berghoefe*r, at paragraph 15.

(4) There is, as Mr Lord QC very fairly accepted, no authority which would go so far as to say that agreement to an EJC which was implied solely from the conduct of the parties suffices for the purposes of compliance with Article 25. In my judgment, this is a telling consideration. On the face of it, then where there is no agreement (in the sense of consent) in writing or evidenced (or confirmed) in writing, then there is no sufficient compliance with Article

> 25(1)(a) (the only provision relied on by the Claimant here). That analysis is also in line with what was said by the Attorney General at paragraph 42 of his opinion in *Profit*.
>
> (5) In addition, I would agree with Mr Collett QC that the Article is indeed concerned with formalities, since otherwise there would be no purpose in including the various limbs in Article 25(1). The fact that the Article is concerned with formalities for a particular purpose – namely to establish consent clearly and precisely – does not detract from the proposition that the Article is indeed concerned that such formalities should be complied with."

86. While the focus of the principles summarised by Mr Hancock and me may be slightly different, their import is the same in my view.

87. Thus it is clear that it is not merely that the EJC relied upon must itself be in or evidenced in writing; the agreement to it must also be such. That follows, in my view, in any event from the words which say "the parties have agreed that" at the beginning of sub-paragraph 1 of Article 23 and the words at the end before "(a)" that "such an agreement shall be ...".

88. Further, if one party sends its STC which include an EJC and the other party agrees them orally at a meeting or on the telephone and that was the full extent of the materials available, that would not be sufficient, subject to one point on good faith I refer to below.

89. However, one needs to add some further observations.

90. First, if the oral agreement by the parties sought to be bound is then recorded in a note or other documents, the oral agreement is now evidenced in writing and that is obvious if the "agreeing party", as it were, produces the note, but it would also apply if the note is sent to that party and no objection is made within a reasonable time. I dealt with this in paragraph 7, subparagraph 7 of my judgment in *R + V*.

91. Next the case of *IP Metal v Ruote* [1993] 2 Lloyd's Report 60. This was relied upon by Siegfried to show that an oral order made in respect to a fax offer which contained an EJC was sufficient to comply with Article 23. This was said to show that reliance on the lack of a written assent where the EJC was part of the a set of terms expressly drawn to the intention of the other party and not objected to would be contrary to good faith. Accordingly Article 23 would be deemed to be fulfilled. In fact Siegfried does not allege a lack of good faith on the part of Mastermelt here.

92. Moreover, a close examination of the judgment of Mr Justice Waller at page 66 shows that his actual reasoning was somewhat more nuanced. The sequence was this: (a), a fax offer including reference to the EJC; (b), placing an oral order by the so-called agreeing party, accepted orally and then sending a confirmatory telex consistent with usual practice in the trade setting out all of the terms or making reference to them, including a reference to the EJC, which were purportedly agreed orally, plus the telex purported to evidence the relevant agreement. In those circumstances it behoved the other party to object within a reasonable time to the telex as evidence the agreement, otherwise it would be deemed to be a correct recording thereof. In other words an approach similar to that taken in the CJEU in *Berghoeffer v ASA* [1985] ECR 2699, which case was expressly referred to by Mr Justice Waller. While this perhaps shows the flexible approach of the court in deciding what constitutes the written evidence of the agreement, it did not actually suggest that evidence in writing was not required at all. It also referred in the particular context to the question of an absence of good faith.

93. Third, in *ME Tankers v Abu Dhabi Container Lines* [2002] 2 Lloyds 643 His Honour Judge Dean QC held that Article 17 of the Brussels Convention, then in the same form as Article 23 here, was satisfied by the following sequence: (a) an order was placed on the telephone by the buyer who was aware of the seller's standard terms and conditions, including an EJC from previous dealings; and (b) a pro forma invoice was then forwarded to the buyer from the seller including a reference to the standard terms. As a matter of first impression His Honour Judge Dean QC sitting as a judge of the High Court held that the pro forma invoice was sufficient written evidence of the agreement to the EJC, see page 650. The point was subsequently taken that the oral agreement there did not make any reference to the EJC or it seems the STC. Therefore there was no relevant oral agreement which the invoice could subsequently evidence. Following a detailed consideration of whether what had to be shown was an oral agreement which could be taken to include agreement to the EJC, which is then evidenced in writing, the judge said this at page 652:

> "It seems to me that if a party who was willing to supply goods presents a document which contains either on the face of the document or by reference to documents which the other party already has offering to supply goods on particular terms, including a jurisdiction clause, and the party to whom that document is proffered orders the goods and takes delivery of the goods upon that basis, it is the clearest evidence he has agreed to the written terms and in my judgment that is sufficient to satisfy Article 7(a) as constituting evidence in writing."

94. That part of the judgment does not actually refer to the post-order invoice. If the invoice is taken into account the case in fact becomes quite similar to the earlier case of *IP Metals*, although that was not cited to the judge in *Middle East Tankers*. On that basis the conclusion can be justified.

95. In fact the judge went on to say that if he was wrong about subparagraph (a), sub-paragraph (b) dealing with the parties' course of dealings providing the relevant agreement would apply. I do, however, accept that if one takes the statement at page 652 in isolation, it may have gone too far.

96. Fourth, I do not think that *Claxton Engineering v TXM* [2007] 1WR 2175 takes the matter much further. While Gloster J. said that the defendant's acceptance of the STC, including the EJC, was constituted by subsequent performance of the contract, she also pointed out that the defendant had not sought to argue that if there was an agreement nonetheless the requirements of Article 23 were not satisfied.

97. In *Chester Hall v Service Centres* [2014] EWHC 2529 Mrs Justice Slade found in the course of her judgment that for the purpose of Article 2 3.1(a) the claimant had agreed to accept goods delivered by the defendants on the defendants' standard terms and conditions which were referred to in an order confirmation. So far, it seems as if she was prepared to accept that conduct alone could be sufficient, but in fact she then held that it was not clear which standard terms had been incorporated and on that basis Article 2 3.1(a) was not satisfied anyway. I do not find that decision to be of any real assistance here.

98. Accordingly, to the extent it is argued, I do not accept that it is now clearly established, or even strongly arguable to the standard of a good arguable case, that the necessary agreement to the EJC can be shown simply by conduct of the party concerned in performing the underlying contract without more.

99. All of that said, however, it is clear that the courts will take a relatively flexible approach as to what constitutes evidence in writing. Plainly the written evidence of the agreement to the EJC can be in a document different to that which contains the clause; see paragraph 7 of my judgment in *R + V* which in turn refers to the decision of the Court of Appeal in *7E Communications v Vertex* [2007] 1WLR 2175. Here the defendant, a German company, faxed a quotation to the English claimant which was expressed to be on its standard terms and conditions, but no copy of the terms and conditions were supplied to the claimant. They contained an EJC in favour of Germany. The claimant then faxed a purchase order which referred to the equipment specified in the quotation. The fax said "Ref your quotation".

100. The Court of Appeal held that the fax was a sufficient agreement evidenced in writing, along with the reference to the STC in the quotation. Had both parties simply signed the original quotation, that would have been sufficient. The fact that the claimant's assent came in a separate document did not matter. This was so even though the accepting purchase order made a simple reference to quotation and no more.

101. Further, the assent can be evidenced in writing or made in writing by electronic means. Thus in *El Majdoub v Cars on the Web* [2015] 1WR 3986 it appears to have been common ground that a valid acceptance of the seller's terms and conditions which had been made available electronically was constituted by the buyer "clicking" on the option to proceed. This would therefore amount to an electronic record and in fact would probably fall within the durability requirements set out at Article 23.2.

102. Two further points of law arose in argument before me.

103. First, my attention was drawn to paragraph 2.125 of Briggs on *Civil Jurisdiction and Judgments* at page 162. In this passage he points out that what Article 23.1 requires is an “agreement” to the EJC. This first step, seeing if there is an agreement at all, is not necessarily coterminous with finding the existence of an underlying contract, though the case law often assumed it was. Thus it would be possible that there was a contract which did not include an EJC and yet later on the facts showed that the parties agreed to be bound by one.

104. I follow that, although I do not think as a matter of analysis that this scenario arises here. A more relevant point here would be that in theory the underlying contract or agreement might arise at one point, for example wholly orally, while evidence of it in writing may only emerge later.

105. The second further point which was made on behalf of Mastermelt (in oral argument before me and not really presaged in its skeleton argument) was this. The expression "evidenced in writing" is meant to connote and only connote the situation where the agreement is made orally and then evidenced in writing. If a contract is to be found exclusively in documents, even in more than one document, and even if they do not amount to a written agreement as understood in English law, for the purposes of Article 23 they would have to fall under the expression "agreement in writing".

106. In this context I was taken to a number of versions of the Convention in different languages and in particular the French, German Italian, Spanish and Portuguese versions. I am not going to quote them. The point is that in each of those cases language was used to specify the words “Oral agreement evidenced in writing”. Mr Allcock informed me that of the 24 Convention signatories, 16 had spelled out a reference to "oral" in this way, while 8 did not.

107. I was also taken to the original 1968 version of Article 17 of the Brussels Convention which included the words "oral agreement evidenced in writing". These were removed by an amendment following the accession of the UK to the EC in 1978.

108. In *Bols v Superior Yacht Services* [2007] 1WR 12, a case relied upon here by Mastermelt, the Privy Council said this in paragraph 22 of the judgment of Lord Roger, after setting out the original wording which referred to "oral agreement:

> “The wording of Article 17 of the Convention is not exactly the same as the wording of Article 23 of the Regulation, but it was not suggested that for present purposes there was any material difference between the provisions. Article 17 refers specifically to the parties agreeing on adjudication by agreement in writing or oral agreement confirmed in writing. Article 23 simply says the agreement on jurisdiction will be either in writing or evidenced in writing where the latter article does not spell out the agreement which is evidenced in writing as an oral agreement, but plainly that is what is envisaged. Again neither counsel suggested that the guidance which the Court of Justice has given on the interpretation of Article 17 was inapplicable to the interpretation of Article 23.”

109. So the first point to note about that observation is that it does not seem to have been deciding any contested issue. Secondly, on the facts the position of the party seeking to rely upon the EJC was this, as stated at paragraph 19:

> "The position of SYS is that the agreement between the parties on jurisdiction, in writing or evidenced in writing, can be spelled out of the exchange of emails on the basis of which they proceeded to construct the boat."

and then in 24 it was put that:

> "The requirements of 23 were satisfied in one of two ways. Either.. there had been an agreement to the terms of a draft sponsorship and there was an agreement in writing, alternatively in the discussions between the parties there had been an oral agreement which was evidenced in writing in the draft sponsorship to which there was no objection when he replied."

110. So the "only evidenced in writing" argument that was put before the Privy Council was one based on a prior oral agreement.

111. In the light of all that I do not think it is possible to say that the Privy Council's view of the scope of the "evidenced in writing" part of what is now Article 23 is exhaustive.

112. As I understand it, the reason for Mastermelt making this argument was to demonstrate that if the agreement to the EJC was constituted by conduct, which is then evidenced in writing, that will not do. He made the point that the evidence of the agreement has to come after the putative actual agreement, for example a prior oral agreement. I follow all of that but I did not understand Siegfried to be arguing that here there was conduct later evidenced in writing. And to the extent that Siegfried submitted that conduct as a form of acceptance might itself be sufficient without recourse to the "formalities" of writing, I have already rejected it and I do not proceed on that basis. So any issue in this form does not actually arise.

113. But if Mastermelt is contending something different, namely that the only kind of agreement which can be evidenced in writing is an oral agreement (which is not alleged here), then the issue is a different one. Part of the problem is that in English law an agreement in writing is usually interpreted narrowly to mean a written agreement signed by both parties, to which particular rules of interpretation, etc, then apply. A contract which is not in that form but which nonetheless consists, for example, of a series or an exchange of emails or letters is sometimes referred to as a contract evidenced in writing so as to distinguish it from the former. English law would certainly not, in my view, accept that contracts evidenced in writing are limited to those which are made orally, but in any event, Mastermelt's point does not really go anywhere. If the notion of "evidenced in writing" for the purpose of Article 23 is to be confined to evidence of the prior oral agreement, then the reference to a contract "in writing" must be read more widely than in English law terms so as to connote a contract otherwise made or evidenced in documents.

114. As Mr Sheehan put it in paragraph 9.1 of his written reply submissions, made with my permission after the hearing:

> "If it is sufficient for Article 23 that there is a prior oral agreement later evidenced in writing it would be illogical [and in my view commercially absurd] if an agreement made in the course of a number of documents or evidenced therein but not based on a prior oral agreement could not also qualify."

115. In this regard Mr Allcock also suggested that the approach of *Bols*, as he saw it, was followed in *BNP Paribas v Anchorage Capital* [2013] EWHC 3073. I do not see that. There was in that case an express written acceptance of the terms and the question was, rather, on whose behalf it was given. *Bols* is not referred to. Mr Allcock also referred to *Pan Ocean* here, but again that did not refer to *Bols*. Principle (2), as set out by Mr Christopher Hancock QC in his paragraph 32, does refer to the *BNP Paribas* case but only to say that the acceptance of the clause as well as the clause itself must be

in or evidenced in writing. In the event, on the assumption there was a contract created by conduct in his case, Mr Hancock QC said that that was insufficient for Article 23. That is consistent with the position I am adopting, but it is no support for Mr Allcock's submission here.

116. For my own part, I consider that there is a good arguable case that Mr Allcok's argument as to the effect of "evidenced in writing" is not correct, but more importantly, even if Mr Allcock were right, it makes no difference because one must then, in an independent, convention law sense, deal with the expression "in writing" expansively.

117. The real point is surely that the consent to the EJC must be in, or captured by, or manifested or evidenced in some kind of written form. Precisely what kind of written form, by reference to its nature or content, is a question of analysis in each case, as the case law clearly shows and there are a number of different varieties. The courts have already indicated, as I set out above, their tendency to adopt a degree of flexibility here. In the analysis which follows I will use the expression "evidenced in writing" because it seems to me to be convenient, but I do so in the context of the conclusions I have just enunciated.

Analysis: Article 23 (1) (a)

PO2

118. The starting point is whether there is an agreement that the EJC applies. In this context, this means asking whether, in the case of the consignments referred to in PO2 and PO3, the parties contracted on the basis of the STC. If they did, that includes the EJC. There is no dispute between the parties that there was a contract, the question is its terms.

119. For the purpose of this exercise, I have largely disregarded the written evidence of those involved at the time, like Mr Gaylor or Mr Couzens because (a) what they actually read or did not read in terms of the POs or the STC does not matter and (b) the same is true for what they subjectively thought.

120. In terms of offer and acceptance, the sending of PO2 must be regarded, objectively, as a counter-offer because although the rates contained within were the rates offered previously by Mastermelt in its earlier quotations, the PO2 was stated expressly to be subject to the STC which were attached to it and which were said to be an integral part of it.

121. The STC were significant, not merely because of the EJC and governing law clause, but also, for example, because clause 4 specified that all costs and taxes would be borne by the vendor, ie here Mastermelt. Also clause 6 laid down a series of express representations and warranties deemed to have been made.

122. One looks for an acceptance of the counter- offer contained in PO2. There was no immediate response to PO2 from Mastermelt or indeed any specific response to it. Mastermelt makes the point that this is inconsistent with the request at the bottom of page 3 of PO2 that the "order confirmation" should be returned within 48 hours. The order confirmation clearly meant a confirmation or acceptance of PO2. Clause 3.3 of the STC in fact says that the order confirmation should be returned in five days, but it then goes on to say:

> "If the vendor does not confirm a purchase order within five business days the purchase order shall be deemed accepted."

123. I do not consider that the absence of an express confirmation of PO2 is particularly material here, even in the absence of the deeming provision in the second part of clause 3.3. It could not be suggested, for example, that such an absence meant that a contract based on or to include PO2 and its contents could not be made. It all depends on what follows.

124. The email from Siegfried dated 2 January 2018 leading to the telephone conference of 4 January was essentially concerned with the procedure to be adopted by Mastermelt once the catalyst had been received. It was about what Mastermelt needed in order to commence and complete the refining process. It was not essentially about commercial terms and for the most part it did not impinge on the content of the STC.

125. I then turn to Mastermelt's email of 4 January, itself taken (at least for present purposes) to be an accurate record of what was discussed and agreed at the telephone conference. Thus, Mastermelt wanted a packing list with weights broken down to pallets and drums, then it would advise on the actual weight of the material received. In argument, Mastermelt submitted that this showed that the purchase order could not be an operative contractual document because it referred to specific weights of the catalysts to be shipped which might and in fact did vary somewhat when weighed on arrival.

126. I do not think much turns on this. There was plainly some implied margin of error and this would appear not to have taken anyone by surprise on 4 January or at any other point. As noted above, I

agree that the references to the charges according to the "terms supplied" could be the earlier quotation, as much as the purchase order, but overall I do not think that this has much impact on the initial question of contract formation. It was obviously important that the actual weight received was confirmed by Siegfried since the charges actually levied would depend on it. Then there were other points about the provision of typical breakdowns of the catalysts and so on.

127. In addition, however, there was the proposal which was obviously agreed from Mastermelt that since the refined metal was not going to come back to Siegfried but transferred to its account at Johnson Matthey, payment should be made after processing but before transfer. Mastermelt points out that this would be inconsistent with clause 4.5 of the STC. This stated that:

> "Vendor shall issue invoices on the date of receipt of the Products or Services by Siegfried on time in full and in accordance with section 6."

128. That, it is said, is another reason why the STC could not have been agreed to. I do not accept that argument. First, on the basis that Mastermelt was not in fact sending anything back to Siegfried, the essence of its contractual performance was the rendering of services. Those services were completed once the metal had been extracted. In which case Siegfried's obligation to pay at that point, as set out in the 4 January email, is consistent with clause 4.5. But even if there was some inconsistency because, for example, Mastermelt still had to transfer the extracted metal or its value to Siegfried's account at Johnson Matthey, this does not mean that the STC could have no contractual role. It is hardly uncommon for particular terms in a commercial contract to deviate in some respect from standard terms and conditions also part of it in which case the formal prevail over the latter. This does not negate the contractual presence of the STC if otherwise incorporated on block, as it were.

129. I was also referred to possible problems with other terms of the STC. Clause 5.5 states that:

> "Time is of the essence. Any delivery dates indicated in the purchase order qualify as expiration dates and the failure of the vendor to meet such delivery dates would be regarded as a material breach."

130. So it is said this would apply to delivery dates here but actually the purchase order just deals with the delivery of the catalyst by Siegfried to Mastermelt, not Mastermelt's delivery of the goods to Siegfried. As already indicated, this is probably inapposite here because of the nature of what Mastermelt was actually doing.

Clause 8.3 was also relied upon, which provided that:

> "On termination of the business relationship between the parties vendor shall return any and all remaining consigned materials."

131. But in this particular case there would not be any. These examples go nowhere in my view to show that the STC generally were inapposite to be incorporated into these contracts.

132. In this context the words at the end of Mr Gaylor's email of 4 January "We are very pleased to commence this business with you and both Steve and Stephanie will be in touch regarding the receipt and process of the initial lots" can only mean objectively that Mastermelt did consider that the contract by then at the latest was in place. It is true that on the facts that I have referred to there was no express reference to the purchase order, or the STC at the telephone conference, or in this email. However, Mastermelt's intention to proceed, as evidenced in the 4 January email, must mean objectively that it was indeed accepting that PO2 formed part of the contract. In circumstances where PO2 objectively and clearly purported to be a significant contractual document and even set out a procedure for its deemed acceptance, and moreover in the same form as Mastermelt had previously had in PO1, an indication that Mastermelt was indeed now ready to proceed must be taken to include its acceptance.

133. That analysis is supported by Mastermelt's later sending out of its own statements and invoices which make express reference to the PO2's numbers and indeed sometimes to the expression "PO" itself. I do not agree that such references should be disregarded as merely being a way to identify the particular lots concerned. PO2 itself said it should be referred to thereafter in communications and in these instances it was.

134. I have made no reference above to Siegfried's email letter of response of 4 January because it is essentially concerned with matters of administration and obviously did not seek to suggest that there was yet no contract in place.

135. In my judgment therefore, and as a matter of contract (or "agreement" as it is put in Article 23) I consider that there was plainly an agreement which included the STC and therefore the EJC. That is so whether one looks at the question of agreement formation as a matter of English law, or as an independent convention law concept for the purpose of Article 23.

136. The next question then is whether that agreement is evidenced in writing. In my judgment it was, because of the 4 January email. If, objectively, that piece of writing amounted to an acceptance of the PO and the STC, as I have considered it does, then it equally evidences that acceptance. The lack of any express reference to the STC or PO does not matter.

137. Again, in this context, the later references to the POs in Mastermelt's statements are significant. It is not an answer to say that they came after the contract was formed by or on 4 January. That is because their role is simply to constitute written evidence of the agreement to the PO and thus the STC. Evidence of what in fact was the agreement may come later than the agreement itself. The classic example, as mentioned earlier on, would be where there is an oral agreement which is made and subsequently recorded in one or more notes from the parties, but that is an example only.

138. Especially in the context of a flexible approach to determine the "formalities" requirements of Article 23, there is no reason at all why Mastermelt's later formal statements and invoices should not constitute evidence of its agreement to the PO. However, I should make it clear that in my view, this further evidence is not necessary for my conclusion here because the 4 January email is itself sufficient “evidence in writing” or “writing”.

PO3

139. As for PO3, contract formation is very straightforward because after Siegfried sent it on 26 March, Mastermelt responded by thanking Siegfried for "the PO". The fact that some pages were missing initially and had to be supplied later on the same day does not alter the position, especially as it so happens that the reference to the EJC within the STC (clause 14, which of course Mastermelt already had), happened to be on one of the pages sent initially.

140. In addition, there is a specific acknowledgement of the completed PO, "thank you", sent later on 27 March.

141. Here it cannot possibly be suggested that the parties did not agree to contract on the basis of the PO and the STC. The conclusion is even more compelling in the light of the prior dealings. Once more, there is written evidence of Mastermelt's agreement to be bound in the form of its emails of 27 March. Yet again, if it were necessary (and in my view it is not), further evidence of the acceptance is

available in the form of the later statements and invoices from Mastermelt making express reference to PO3.

142. Indeed (but again not necessary for my conclusion on PO2), it is very strongly arguable that the very documents which evidence Mastermelt's acceptance of PO3 are themselves evidence of its acceptance of PO2. That is because it would be commercially absurd in this context to suppose that Mastermelt was willing to and did contract on the basis of STC for PO3 but not for PO3.

143. For all of those above reasons, I conclude that the requirements of Article 2 3.1(a) are made out with regard to both PO1 and PO3, at the very least to the good arguable case standard (taking into account the "clear and precisely" requirement). Indeed, in my view, Siegfried has not only the better of the argument but much the better of the argument.

Analysis: Article 23 (1) (b) and (c)

144. In the light of my conclusion on the applicability of Article 23 (1) (a), it is not necessary to decide the alternative ways of establishing the agreement to the EJC under Article 23 (1) (b) or (c). In this particular case I do not think that I should attempt to decide those points in case I was wrong on sub-paragraph (a) because in that scenario there may be some different analysis of the parties' dealings which may affect how sub-paragraphs (b) or (c) might be satisfied or not. Moreover, there was in any event relatively little argument upon them and they were only introduced for the first time in Siegfried's skeleton argument.

OVERALL CONCLUSION

145. On that basis it follows that these proceedings should be dismissed or stayed as to which I will hear argument in due course.