Neutral Citation Number: [2015] EWHC 508 (Comm)

Case No: 2014 Folio 1163

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

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

Date: 6 March 2015

Before :

MR JUSTICE EDER

- -

Between :

UNION MARINE CLASSIFICATION SERVICES LLC — **Applicant**

- and -

THE GOVERNMENT OF THE UNION OF COMOROS — **Defendant**

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- -

MR JAMES CUTRESS and MR VARUN ZAIWALLA (instructed by **Zaiwalla & Co**) for the **Applicant**
MR RICHARD JACOBS QC and MR JOHN ROBB (instructed by **Clyde & Co**) for the **Defendant**

Hearing dates: 26 February 2015

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Approved Judgment

Mr Justice Eder:

Introduction

1. On 25 February 2015, I heard an application by the claimant ("UM") under s67(1)(a) and/or (b) of the Arbitration Act 1996 (the "1996 Act") for an order setting aside and/or declaring to be of no effect a "Correction and Addition to Award" of Mr Bruce Harris as sole arbitrator (the "Arbitrator") dated 31 August 2014 (the "Amended Award"). Following that hearing, I informed the parties of my decision dismissing the application. These are my reasons for that decision.

2. The arbitration proceedings concerned disputes arising under a commercial outsourcing contract (the "Agreement") between UM and the defendant (the "Government") dated 15 February 2007, under which UM was authorised to act and accomplish on the Government's behalf all acts and functions relating to the maritime administration of Comoros (Article 1), including the registration of vessels under the Comoros flag. By Articles 4 and 5, UM agreed monthly to pay Comoros 50% of the taxes and other income generated by registration of each vessel, subject to a guaranteed minimum of $11,000 per month. Article 6 specified the term of the Agreement. However, there was apparently a dispute as to the effect of Article 6. In summary, UM's case was that the Agreement was for a fixed 25-year term, with a guaranteed minimum of 10 years. The Government's case was that the effect of Article 6 was that, after 25 years, the Agreement would renew automatically unless it had previously been "denounced" by either party; and that denunciation could only take place 10 years after the commencement of the Agreement. This dispute remains unresolved and is irrelevant for present purposes.

3. On 17 April 2012, the Government purported to terminate the Agreement. UM contended that it was not entitled to do so. That dispute was referred to arbitration and, after certain procedural wrangling, Mr Harris was appointed as sole arbitrator. It is common ground that the arbitration was subject to and conducted on the terms of the London Maritime Arbitrators Association (the "LMAA").

4. By the arbitration proceedings, UM sought a declaration that the termination notice was invalid and damages. The Government alleged that it was entitled to terminate for various breaches by UM, including in particular alleged breaches of UM's payment obligations. It counterclaimed for damages for those breaches, including for breach of UM's payment obligations. It also claimed (i) what it said was the minimum monthly payment of US$11,000 per month for a certain period; (ii) an order for an account; and (iii) damages for the sums found to be due on the taking of the account.

5. During the course of the arbitration proceedings, it was ordered and/or agreed that liability on the counterclaim was to be determined at the substantive hearing on 2-4 July 2014, "*leaving over (if it be relevant) quantum*". This three day hearing duly took place during which there were extensive submissions (by way of opening, closing and post hearing submissions) and extensive cross examination.

The (original) Award

6. Following the hearing, the Arbitrator published his award dated 22 July 2014 (the "original Award" or, for short, the "Award"). The Award (including Reasons) extends to 35 pages. In order to understand it properly, it needs to be read in full. However, for present purposes, it is sufficient to note the following:

i) Paragraphs 1-34 contain certain introductory material and set out the background.

ii) Under the heading "The issues", paragraphs 34-35 state as follows:

> *"34. Counsel for Union Marine said that (leaving on one side the question of the validity of the arbitration agreement) the following issues arose, and it seems to me that the summary is a fair one:*
>
> *1. Did the Government validly terminate the Agreement on 17th April 2012?*
>
> 2. *Did the government breach the Agreement? If the termination notice was invalid, the Government plainly did so, but there was a separate question whether it had also done so by its conduct from January 2011.*
>
> 3. *If the government breached the Agreement, what damages is Union Marine entitled to as a result? If Union Marine breached the agreement, what damages is the Government entitled to as a result?*
>
> *35. I directed that the quantum of the Government's counterclaim should be deferred until after the question of liability had been determined. The claim by Union Marine, for some $3.9 million by way of alleged losses over the life of the agreement, was however for determination at the hearing.*"

iii) Following certain general comments which are not directly relevant and under the heading "The claims and counterclaims", paragraphs 52-53 state as follows:

> *"52. Union Marine claimed damages for what they said was the wrongful termination by the government in April 2012 of the Agreement. They also claimed damages for breach by the government of the arbitration clause in relation to the commencement and pursuit of the proceedings in Ajman. They further claimed damages on the basis that the government was in breach by appointing Mr Fahim and setting up the NTA, the argument being that by so doing the Government appointed someone else to perform the acts and functions of the Maritime Administration which were granted exclusively to Union Marine under the Agreement, and that there was an implied term that the Government would not interfere with or prevent them from exercising their powers or performing their obligations under the Agreement.*

> *53. For its part, the government denied liability and counterclaimed damages for what it said were repudiatory breaches of contract by Union Marine.*"

iv) Following two further paragraphs dealing with matters which are not directly relevant, there is a long section in the Award under the heading "Was termination justified?" This starts with paragraph 58 which states:

> "*58. I examine here the grounds on which the Government said it was entitled to terminate the Agreement.*"

This is then followed by a number of sub-sections, the first of which is headed "*Shortfall in payments*". At the beginning of this sub-section, paragraph 59 states:

> "*59. The essence of the Government's case in this respect was, as Counsel for Union Marine pointed out, the question whether the latter had fraudulently declared its income from the Registry business. I accept very cogent evidence to support the Government's case would be needed if I were to be satisfied as to this, given the seriousness of the allegation.*"

After a number of paragraphs where the Arbitrator considers the facts and makes certain findings, his overall conclusion in this sub-section is set out in paragraph 72 as follows:

> "*72. Against this background, and particularly bearing in mind again that very cogent evidence would be required to justify me in accepting a serious allegation such as was made against [UM], I am unable to find that, on the balance of probabilities, [UM] did not meet their payment obligations under the Agreement. This does not mean that my conclusion is that they did fulfil those obligations: as the parties' lawyers at least will appreciate, I would have had to be persuaded that it was more likely than not that [UM] were in breach ("the balance of probabilities"), and the evidence is not sufficiently weighty to enable me to come to that conclusion. Moreover, I am far from persuaded that there was here any case of bribery.*"

v) Following further sub-sections which are not directly relevant for present purposes, there is a section under the heading "Conclusion on breaches by Union Marine" which states in material part as follows:

> "*92. For the above reasons I have come to the conclusion that the Government has failed to show a sufficiently serious breach or breaches by Union Marine of the Agreement to justify it in terminating as it did in April 2010 ...*

> *94 … In the result … my conclusion is clearly that the Government was not entitled to terminate the Agreement, and accordingly that it was in fact the Government which was in repudiatory breach itself ...*"

vi) There is then a section under the heading "*Damages*" which is not directly relevant save that I note in passing the following comments and conclusion of the Arbitrator in paragraphs 97 and 99:

> "*97 ... Further, just as there was no sufficiently solid evidence to shown that [UM] had not paid all that was due to the Government (see paragraphs 60-68 above), there was no adequate evidence to show what they had in fact earned …*
>
> *99 … All in all, and always on a balance of probabilities, I am not able safely to conclude that [UM] suffered any loss as a result of the Government's wrongful termination of the Agreement. Accordingly, their claim has to fail.*"

vii) The Award concludes as follows:

> "*I THEREFORE AWARD, DECLARE AND ADJUDGE that Union Marine's claims and the Government's counterclaims referred to me all fail and I reserve to myself jurisdiction to determine liability for the costs of the reference, including the costs of this award as separately notified to the parties, and to make a further award or award in respect thereof.*"

Subsequent events

7. Following publication of the Award, the Government then applied to the Arbitrator by letter dated 20 August 2014 for correction or clarification of two matters.

8. That application was made pursuant to paragraph 25(a) of the LMAA terms and/or s57(3) of the 1996 Act. Paragraph 25(a) of the LMAA Terms (2012) provides:

> "*(a) In addition to the powers set out in section 57 of the Act, the tribunal shall have the following powers to correct an award or to make an additional award:*
>
> *(i) The tribunal may on its own initiative or on the application of a party correct any accidental mistake, omission or error of calculation in its award.*
>
> *(ii) The tribunal may on the application of a party give an explanation of a specific point or part of the award.*"

S57(3) of the 1996 Act provides:

> "*(3) The tribunal may on its own initiative or on the application of a party—*

(a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or

(b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award."

9. The first matter sought to be corrected or clarified under these provisions was in respect of the Government's counterclaim for US$11,000 minimum monthly payment under the Agreement. In that context, the Government submitted to the Arbitrator as follows:

"*<u>Government's First Application: $11,000pm Minimum Monthly Payments</u>*

The Government submitted (DCC §31; Government's Skeleton §57 and Appendix 1; Transcript Day 3 pp. 124-126) that Union Marine failed to pay the minimum $11,000 per month required by Article 4 of the Contract. It was apparently common ground that there was a falling off in payments during and after 2011: see Transcript Day 1 p.57 and Union Marine supplemental Closing Submissions §8.2.

It appears that the Tribunal has omitted to decide this issue in the Award; although we believe that it follows from the Tribunal's conclusions at §96 and indeed at §§97-99 that Union Marine had no justification for not making payments. Accordingly, the government applies either for correction of an accidental omission under paragraph 25(a)(i) or for an explanation under paragraph 25(a)(ii) of the LMAA Terms as to the Tribunal's conclusions in answer to the following questions:

1. *Did Union Marine cease making payments after August 2011?*

2. *If so, was this a breach by Union Marine of Article 4 of the Contract?*

3. *If so, did Union Marine remain in breach of Article 4 of the Contract until 17 April 2012?*

4. *Was this a failure by Union Marine to carry out its obligations for the purposes of Article 7 of the Contract, thereby justifying termination of the Contract by the Government on 17 April 2012?*

5. *If so, is the Government entitled to damages pursuant to Paragraph 76 of the Counterclaim, for failure to pay the minimum $11,000 per month between September 2011 and April 2012?*"

10. The second matter sought to be corrected or clarified was in respect of the Government's counterclaim for an account. In summary, the Government drew attention to its pleaded counterclaim and then stated in material part as follows:

> "*… The Tribunal found (§72) that the Government failed to establish that [UM] had breached its obligation to pay 50% of its income to the Government pursuant to Article 4 of the Contract. However, it does not appear to have determined the separate question of whether [UM] was liable to account to the Government as pleaded … We therefore request clarification as to whether or not the Tribunal intended to dismiss the Government's claim for an account, and if so why …*"

The Amended Award and Reasons

11. Following further exchanges which are not directly relevant (including an application by UM itself for correction of the Award), the Arbitrator published the Amended Award. In that Amended Award, he set out the various applications he had considered and in paragraphs 6-8 stated as follows:

> "*6. I hold, by way of addition and/or correction to paragraph 72 of my original award, that Union Marine ceased making the minimum $11,000 monthly payments under Article 4 of the contract after August 2011, that this was a breach of that Article and that Union Marine continued to be in breach in this respect until 17 April 2012. I do not, however, consider that this entitled the Government to terminate the contract as it did on that date, but it is entitled to damages for this breach, to be assessed.*
>
> *7. I further hold, again by way of addition and/or correction to my original award, that the Government is entitled to an account as sought in paragraph 77, 77.1 and 77.2 of its Counterclaim, and to damages as claimed in paragraph 77.3 thereof.*
>
> *8. Accordingly the dispositive paragraph following paragraph 100 of my award is to be amended to read:*
>
> *I THEREFORE AWARD, DECLARE AND ADJUDGE that Union Marine's claims fail and that the Government's counterclaims referred to me fail, save that the Government is entitled to:*
>
> *(i) an account of all "taxes charged per vessel for its registration and … other income generated by the registration" received by Union Marine between 15 February 2007 and 17 April 2012, and*
>
> *(ii) an account of all payments transferred by Union Marine to the bank account of the Government in accordance with Article 5 of the contract, and*

(iii) damages being the difference between (a) 50% of the total calculated under (i) above and (b) the total calculated under (ii) above, and

(iv) damages to be assessed for Union Marine's failure to pay the minimum $11,000 monthly payments under Article 4 of the contract after August 2011 …"

12. The Arbitrator's Reasons for such Amended Award were set out in a separate document, but stated to form part of the original Award (the "Reasons"). In order to understand these Reasons properly, it is again important to read the whole of that document; but for present purposes, it is sufficient to quote the following extracts:

i) "*2 … the Government was on much firmer ground, because the applications they made were in relation to matters that, I must confess, I had inadvertently not dealt with …*"

ii) "*4 … Even if the matter* [of non-payment of $11,000 per month] *was not pressed forcefully, it was on the table, I omitted to deal with it and it is right that I should do so now.*"

iii) "*5 … this (and the Government's other application) plainly relate to a "claim … which was presented to the tribunal but was not dealt with in the award.*"

iv) "*6 … I failed to deal with either* [sic] *the $11,000 issue just as I failed to deal with the claim for an account.*"

v) "*10 … I am not making a <u>further</u> award or dealing with anything that was not pleaded and addressed at the hearing: I am making corrections and additions to my award to deal with points that were incorrect in the award or which had been raised but not dealt with there.*"

vi) "*13. I turn now to deal with Union Marine's submissions of 29 August 2012 (see paragraph 6 above). They said I have no jurisdiction under s57 to deal with the claim for an account because it was not made at all at the hearing, unsurprisingly (they said) because the issue an account would determine would be the same as that I determined at the hearing, namely whether there was a payment breach by Union Marine. This premise is false: I did not determine that there had been no payment breach at all, though paragraph 72 of the award may read that way. But that was due to an error on my part in overlooking the claim concerning the $11,000 per month minimum, which I am here correcting.*

14. The fact is that, as the skeletons, transcripts, written closings and my award all show, attention was focused almost entirely during the hearing on matters related essentially to the question whether Union Marine were in repudiatory breach or not, and there was little, if any, focus on the matters the subject of the present document. But they remained in issue, and any failure on the part of those representing the Government to highlight them cannot mean that they were given up or that I should not or can not deal with them.

15. The argument that the issue of "payment breach" had been determined in truth lay at the heart of Union Marine's 29 August submissions. It was suggested that an order for an account would appear to result in a number of issues (though it was not clear precisely what those issues are) having to be

> *argued, heard and determined all over again. I am afraid I simply do not see that.*
>
> *16. It was also suggested that an account might lead to inconsistent awards, because if it results in substantial sums being found due, this might be inconsistent with my conclusion that the Government had failed to show a breach or breaches justifying termination. That seems to me an extremely unlikely possibility, but in any event my conclusion has been reached and, subject to any review by the Court, must surely now be immutable.*"

13. I would also refer to paragraph 17 of these Reasons where the Arbitrator deals with the question of costs with regard to the Amended Award, states that he did not intend to charge for that document and explains: "*… Essentially it is necessary because of my own failure to deal with everything originally.*"

UM's submissions

14. As stated above, the application by UM was made pursuant to s67(1) and/or(b) of the 1996 Act which provides in material part as follows:

> "*67(1) A party to arbitral proceedings may … apply to the court (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction or (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.*"

15. In summary, Mr Cutress on behalf of UM submitted that under s58(1) of the 1996 Act, an award is final and binding on both parties; that the Arbitrator was *functus* on making the original Award; that he therefore had no jurisdiction under s.57(3)(b) (or otherwise) to change his Award in the manner that he did; that therefore, the Amended Award is a nullity; and that UM should be entitled to the relief sought. In support of such submissions, he relied upon a number of authorities and textbooks including *Russell on Arbitration* at [6-166]; *Mustill and Boyd, the Law and Practice of Arbitration* at pp404-405 and the *2001 Companion* referring to pp404-414, as cited and approved in *Five Oceans Salvage v Wenzhou Timber* [2011] EWHC 3282 at [24].

16. As to s57(3)(b), Mr Cutress submitted as follows:

    i) The power (and power under the s57(3)(a) slip rule) is not "*intended to enable the arbitrator to change his mind on any matter which has been decided by the award, and attempts to use the section for this purpose should be firmly resisted*": *Mustill and Boyd*, 2001 Companion at p.340-341, approved in *Al-Hadha v Tradigrain* [2002] 2 Lloyd's Rep 512 at [66] and *Torch Offshore v Cable Shipping* [2004] 2 All ER (Comm) 365 at [26] per Cooke J..

    ii) As stated in *Torch Offshore v Cable Shipping* [2004] 2 All ER (Comm) 365 at [27] per Cooke J, where an arbitrator had rejected a claim for rescission for misrepresentation but it was said to be unclear whether he had considered the issue of inducement in relation to one of the alleged misrepresentations:

> *"s.57(3)(b), which uses the word 'claim', only applies to a claim which has been presented to a tribunal but has not been dealt with, as opposed to an issue which remains*

> *undetermined as part of a claim … the terms of s 57(3)(b) are apt to refer to a head of claim for damages or some other remedy (including specifically claims for interest or costs) but not to an issue which is part of the process by which a decision is arrived at on one of those claims. As counsel for Torch pointed out, Torch had claimed rescission and that claim had been rejected by the arbitrator. He could not change his award on that point and there was no room for an application for him to decide that claim, even if he had failed to decide whether there was inducement …*"

iii) Similarly, as stated in *World Trade Corporation v. Czarnikow* [2005] 1 Lloyd's Rep 422 at [14] per Colman J:

> "*An argument that by reason of the tribunal's making no mention of certain evidence relied on by a party as supporting a relevant finding of fact, there has been a failure to deal with a "claim" would be untenable. The word "claim" in that context does not mean a submission in support of a relevant question of fact. It means a claim for relief by way of damages, declaration or otherwise, such as would have to be pleaded.*"

iv) As regards whether a claim has been "dealt with" in an award, as stated in *Cadogan v Turner* [2013] 1 Lloyd's Rep 630 at [43] per Hamblen J:

> "*A claim is "dealt with" in an award if it has been finally determined by it. Although the dispositive part of the award is likely to be the most important part of the award for the purposes of considering that issue, where, as is almost invariably the case, the written reasons form part of the award, the whole of the award needs to be considered, and the dispositive part of the award considered in the context of the written reasons.*"

v) However, the tribunal does not have to set out each step by which it reaches its conclusion or deal with each point made by a party; it may deal with issues in a composite way; and the approach of the court is to read the award in a reasonable and commercial way; which may involve taking into account the parties' submissions, since often awards respond to parties' submissions and are not to be interpreted in a vacuum: *Petrochemical v The Dow Chemical Company* [2012] 2 Lloyd's Rep 691 at [26]).

vi) The fact that a claim may have been dealt with incorrectly or without giving reasons does not mean that it has not been "dealt with"; it is in those cases where the award expresses no conclusions as to a specific claim that it has not been dealt with: *Margulead v Excide* [2004] 2 All ER 727 at [43].

17. Against that background, Mr Cutress submitted that here the claim for US$11,000 per month and the claim for an account were both *"dealt with"* in the Award within the meaning of s57(3)(b) and that this was not a case which fell within s57(3)(a). In that context, Mr Cutress submitted as follows:

i) By order and/or agreement the question whether there was a "payment breach" fell to be determined at the hearing;

ii) The question whether there was a payment breach was therefore the subject of disclosure, extensive cross examination and extensive submissions at and after the substantive hearing by way of opening submissions, oral submissions and post hearing written submissions;

iii) Paragraph 72 of the Award states expressly that the Governnment had, in effect, failed to establish that there had been a payment breach; and the final dispositive paragraph of the Award states expressly: "….*the Government's counterclaims referred to me all fail*".

18. Further, Mr Cutress submitted that (i) the Amended Award gives rise to the real injustice to UM that it seems to permit the Government to re-open and re-litigate the claim for payment breach all over again; (ii) permitting the claim for an account gives rise to the risk of inconsistent awards as the Arbitrator himself acknowledged in paragraph 16 of his Reasons for the Amended Award; and (iii) it is plain from the terms of the Amended Award as quoted above that he was intending to change his decision in his original Award rather than to make an additional award in relation to a claim not dealt with.

19. In addition with regard to the claim for US$11,000 per month, Mr Cutress submitted that as stated in paragraph 13 of his Reasons for the Amended Award, the only qualification the Arbitrator gave for his finding in paragraph 72 of his original Award that there had been no payment breach was that he had made an error in overlooking "*the claim concerning the $11,000 per month minimum*"; that therefore, even on the basis of the Amended Award, the claim for payment breach had already been determined, except for the $11,000 minimum "point"; that this "point" did not fall within s.57(3)(b) because it was not "a claim" (but rather was only an argument or at most issue arising on the claim for payment breach) and in any event had in fact already been "dealt with" in the Award (since the payment breach counterclaim had been dismissed and the Arbitrator had concluded that the Government had failed to make out a payment breach); that the reality is that the Arbitrator was seeking on reflection to change his conclusion that the Government had not established any payment breach, on the basis of a second thought at the time of the Amended Award that he had got his initial conclusion wrong because he had overlooked an argument that was made to him; that seeking to change a conclusion already made is not permissible under s.57(3)(b) which only permits the making of an additional award in relation to a claim not dealt with; that, in any event, the $11,000 per month point is not a good one because that would amount to only $77,000, in the circumstances where the Government itself accepts that payments of over $73,500 were made (albeit late) in 2012; and that the payment shortfall could not therefore be more than $3,500 and even that is disputed by UM.

A threshold point

20. Before examining Mr Cutress' submissions with regard to the scope and effect of s57(3) of the 1996 Act, it is necessary to consider a threshold objection made by Mr Jacobs QC on behalf of the Government viz. that UM's complaint here is not one that can properly be made under s67 of the 1996 Act and that therefore this application fails *in limine*. In particular, he submitted as follows:

i) It is wrong to say that the Amended Award is a "nullity". On the contrary, the Amended Award is, on its face, a valid award unless and until it is set aside by the court.

ii) S67 enables a party to apply to the court to challenge an arbitral tribunal's award on the grounds that the tribunal has/had no "*substantive jurisdiction*".

iii) This expression is defined in s82(1) of the 1996 Act by reference back to s30(1)(a)-(c) of the 1996 Act viz:

> ""*substantive jurisdiction", in relation to an arbitral tribunal, refers to the matters specified in section 30(1)(a) to (c), and references to the tribunal exceeding its substantive jurisdiction shall be construed accordingly.*"

iv) The matters specified in S30(1) are:

> "*(a) whether there is a valid arbitration agreement,*
>
> *(b) whether the tribunal is properly constituted, and*
>
> *(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.*"

v) None of these matters is in issue on this application. UM does not challenge the Arbitrator's ability to make an Award finding that it was liable to account and to pay damages to the Government, as per paragraphs 6-8 of the Amended Award. Instead it disputes the Arbitrator's ability to do so by way of a corrected/additional award rather than in his Original Award. This is not a challenge to the Arbitrator's substantive jurisdiction.

vi) That conclusion is supported by two previous decisions of this Court to the effect that a challenge to a tribunal's correction of its award is not a challenge within s67 of the Act; and that erroneous correction of an award under s57 is remediable by a court under s.68(2)(b) (i.e. the tribunal exceeding its powers otherwise than by exceeding its substantive jurisdiction) or not at all. See: *CNH Global v PGN Logistics Ltd* [2009] 1 CLC 807 (Burton J) at [17]-[19]; *Lesotho Highlands Development Authority v Impregilo SpA* [2003] 1 All ER (Comm) 22 (Morrison J) at 25. As to the latter, the House of Lords affirmed (obiter) the correctness of Morison J's conclusion as to the unavailability of s67: see [2006] 1 AC 221, 229A (Lord Steyn).

vii) In particular, this application is covered precisely by Burton J.'s conclusion in *CNH Global* at [19]:

> "*I have no doubt whatever that s. 67 relates to situations in which it is alleged that the arbitral tribunal lacks substantive jurisdiction, i.e. that there was in fact no arbitration clause at all, and no jurisdiction for the arbitrators to act at all at any rate in relation to the relevant dispute, and not to situations in which arbitrators properly appointed were alleged to have exceeded their powers.*"

21. In response, Mr Cutress reiterated his general submission that the Amended Award is a nullity. As to the authorities, he submitted that *Lesotho* was distinguishable because it was not concerned with the present type of case i.e. where, after the tribunal has become *functus*, it purports to correct the award. As for *CNH Global*, Mr Cutress

accepted that it was on all fours with the present case but submitted that Burton J. was simply wrong as a matter of law; and that I should not follow his Judgment in that case. Mr Cutress also sought to rely upon a passage in the leading textbook *Arbitration Act 1996* (5th Edition) Merkin & Flannery (*"Merkin & Flannery")* at p104 which suggests that an "expansive approach" to s30 is the correct one.

22. As to these submissions, the description of the Amended Award as a "nullity" requires, at the very least, some caution – not least because it begs (at least in part) the question to be determined. If the Arbitrator was entitled to correct and/or to clarify the original Award, then there can be no question of describing the Amended Award as a "nullity". On the other hand, if the Arbitrator was not entitled to issue the Amended Award and the Court so determines, then I agree that it might be described as a "nullity"; but unless and until the Court so determines, I would not myself describe the Amended Award as a "nullity". However, I do not consider that this debate is of crucial significance.

23. Rather, it seems to me that Mr Jacobs' threshold objection is correct for the following reasons. First, it is, in my view, more consistent with the ordinary language of s30(1)(c) i.e. the only question in that context is to identify what matters have been submitted to arbitration. Here, it is common ground that the matters the subject of the Amended Award had been referred to arbitration. Second, I do not consider that the suggested "expansive approach" urged by Mr Cutress is supported by the cases referred to in *Merkin & Flannery*. Moreover, in my view, such suggested "expansive approach" is contrary to the general principle as stated in s1(c) of the 1996 Act ("… *in matters governed by this Part the court should not intervene except as provided in this Part*") as well as the underlying thrust of the decision of the House of Lords in *Lesotho.* Third, I do not accept that this reading of s30(1)(c) is somehow "unfair" or "uncommercial" as Mr Cutress suggested. This would perhaps be so if there were no other remedy available to an applicant in circumstances such as these apart from s67 of the 1996 Act. However, as Mr Jacobs submitted, it seems to me that there is an available remedy under s68(2)(b) of the 1996 Act. Mr Cutress countered by submitting, in effect, that this was not a sufficient or satisfactory remedy in particular because s68 places additional hurdles in way of an applicant – including the requirement of showing "substantial injustice". However, I do not consider that this renders the remedy under s68 insufficient or inadequate. Fourth, as Mr Cutress accepted, his case on this point is inconsistent with the decision of Burton J in *CNH*. Although that decision is, of course, not binding on me, it strongly supports the case in this respect advanced by Mr Jacobs; and I would not be minded to disagree with that decision unless I was persuaded that it was wrong which I am not.

24. For all these reasons, it is my conclusion that the complaint now raised on behalf of UM is not one that properly falls within s67 of the 1996 Act; and for this reason alone, I would reject the application.

25. In the course of the hearing and recognising the writing on the wall, Mr Cutress applied to make a new application under s68(2)(b) of the 1996 Act. However, in my view, it was both too late and inappropriate to permit such application at such late stage. The 1996 Act lays down strict time limits for applications under the 1996 Act including any application under s68. Although I accept, of course, that the court has a jurisdiction to extend time, I do not consider that there is any good or sufficient reason to grant such extension in particular where the applicant has not complied with the

important procedural requirement of providing evidence to show "substantial injustice". For these brief reasons, I would reject that application.

26. In any event, even if I were wrong on Mr Jacobs' threshold point i.e. as to the ambit of s67 of the 1996 Act or even if I had been persuaded to permit Mr Cuttress to make a new application under s68(2)(b) of the 1996 Act, it is my clear conclusion that the application should be rejected on its merits for the following reasons.

27. First, as submitted by Mr Jacobs, the question before the court simply involves, both in relation to s57 of the 1996 Act and the LMAA terms, "applying the words used to the context": see *Gannet v Eastrade* [2002] 1 Lloyds Rep 713, para [23] (predecessor LMAA Terms), and [18] (s57). In considering s57, I also bear in mind that "one of the objectives of the 1996 Act was to limit the rights of parties to arbitration agreements to resort to the Courts and so to ensure greater autonomy for their chosen tribunal": see *Gannet* [17]. Further, as Cooke J. commented in *Torch Offshore LLC v Cable Shipping Inc* [2004] 2 Lloyd's Rep. 446 at [28], "*The policy which underlies the* [1996] *Act is one of enabling the arbitral process to correct itself where possible, without the intervention of the court.*" The decision in *Gannet* also shows that where an arbitrator is entitled to correct an error, he is then entitled to make changes to the dispositive parts of the award in order to reflect the correction: see *Gannet* para [22].

28. Second, in considering what was "dealt with" in the original Award, it is important to look at the Award as a whole. Here, the highpoint of Mr Cutress' case is what the Arbitrator stated in paragraph 72 and also in the dispositive part at the end of his original Award. I agree that viewed in isolation, it appears that the Arbitrator was saying in paragraph 72 that there was no payment breach at all – as the Arbitrator himself recognises very fairly in the Amended Award – and in the dispositive part that he was dismissing <u>all</u> the counterclaims.

29. However, it is important to bear in mind that paragraph 72 appears in a section headed "Was termination justified?" which begins with the Arbitrator stating in paragraph 58 that he was examining "… *the grounds on which the Government said it was entitled to terminate the Agreement*". The opening of the following paragraph is also important because the Arbitrator emphasises that the essence of the Government's case was, as Counsel for UM pointed out, the question whether the latter had fraudulently declared its income from the Registry business. The Arbitrator then states: "*I accept that very cogent evidence to support the Government's case would be needed if I were to be satisfied as to this, given the seriousness of the allegation*". Thus, in my judgment, when read in context and looking at the language of paragraph 72, it is plain that what the Arbitrator was there considering and rejecting was, in effect, the central allegation of <u>*repudiatory*</u> breach of Article 4 (the payment provision of the Contract) i.e. on the evidence before him, he was not prepared to accept that there had been a serious and dishonest breach of Article 4. In effect, that was the central point of "liability" that the Arbitrator had ordered (or it had been agreed) would be determined at that hearing. That interpretation is also consistent with (i) what is stated in paragraphs 92 and 94 of the Award; and (ii) what the Arbitrator himself states in the Amended Award in particular as quoted in paragraph 12 above. For these reasons and although I fully accept that the language of paragraph 72 is perhaps unfortunate, I do not read it as "dealing with" the precise amounts due and payable under the Contract including not only the minimum monthly payment but

also whatever amounts might be found to be due on the taking of an account. In my view, these were matters of "quantum" and not really the focus of that hearing at all.

30. More problematic is the dispositive wording at the end of the original Award. On its face, it does indeed appear to "deal with" the Government's counterclaims by rejecting them all. I also agree that the fact that the Arbitrator states that he is reserving to himself only the question of costs would appear, on its face, to indicate that he had indeed "dealt with" all of the Government's counterclaims including the minimum monthly payment and the claim for an account and that the only matter outstanding was costs. However, as stated by Hamblen J in *Cadogan v Turner* in the passage quoted above, it is always important to read the dispositive part of any award in its proper context in particular in the context of the reasons stated. On this basis, there is perhaps an argument that the dispositive part of the original Award should be read in the light of what I consider to be the true objective intent of the earlier sections including paragraph 72 (as I understand it); and that it should therefore be read in a more limited way. In effect, that would seem to be the approach (at least in part) adopted by the Arbitrator in his Amended Award i.e. he appears to be saying that he is correcting his original Award under s57(3)(b) – although I do not read what the Arbitrator there states as meaning that he was relying solely on his power under that subsection and ignoring s57(3)(a). In that context, there was some debate before me as to the interrelationship between s57(3)(a) and (b) in particular with regard to the correctness or otherwise of what Cooke J. stated in paragraph [25] in *Torch*. There was also some debate in the context of s57(3)(a) as to the distinction between "*… an error affecting the expression of the arbitrator's thought* ..." and "*… an error in the thought process itself* …": see per Lloyd LJ in *The Trade Fortitude* [1987] 1 WLR 134 at p147D citing Rowlatt J in *Sutherland & Co v Hannevig Bros Ltd* [1921] 1 KB 336, 341; and whether such latter debate has survived the 1996 Act.

31. However, in my view, it is unnecessary to engage in either debate. As submitted by Mr Jacobs, this is not a case where the arbitrator subsequently decided to evaluate the evidence differently nor of the arbitrator having "second thoughts". Nor am I persuaded that there is the risk of any inconsistent awards. Here, I am satisfied that the arbitrator was only ever intending to address the issue of whether or not there had been a very serious breach of contract – one that he considered required "cogent evidence" – that would justify termination; and that he was clearly not addressing what Mr Jacobs described as "the more humdrum accounting claims" which had slipped his mind, and which he later addressed in the Amended Award. In my view, what happened here was an accidental slip (mistake) or omission by the Arbitrator which he was entitled to correct under s57(3)(a) or under paragraph 25 of the LMAA terms if not under s57(3)(b).

32. By way of footnote, I should mention that I was initially troubled by Mr Cutress' detailed argument on the figures with regard to the minimum monthly payment and, in particular, his submission in that context that the overall payment shortfall could not be more than US$3,500 and even that is disputed by UM. However, it seems to me that any such outstanding dispute will fall within the terms of the account to be taken pursuant to the Amended Award and any damages that might be awarded thereafter.

Conclusion

33. It is for these reasons that I rejected UM's application. Counsel are accordingly requested to prepare a draft order to reflect the terms of this Judgment (including costs) failing which I will deal with any outstanding issues.