



Neutral Citation Number: [2020] EWHC 1643 (Comm)

Case No: CL-2019-000214

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**

**IN AN ARBITRATION CLAIM**

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

Date: 24/06/2020

**Before :**

**Mr Justice Butcher**

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**Between :**

**(1) OBRASCON HUARTE LAIN S.A. (trading as OHL Internacional)**  
**(2) CONTRACK (CYPRUS) LIMITED**

**Claimants**

**-and-**

**QATAR FOUNDATION FOR EDUCATION, SCIENCE AND COMMUNITY  
DEVELOPMENT**

**Defendant**

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**Roger Ter Haar QC and Siddharth Dhar** (instructed by **Shearman & Sterling LLP**) for the  
**Claimant**  
**Simon Lofthouse QC and Zulfikar Khayum** (instructed by **Quinn Emanuel Urquhart & Sullivan LLP**) for the **Defendant**

Hearing dates: 3 and 4 June 2020

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**Approved Judgment**

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

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**MR JUSTICE BUTCHER**

## **Mr Justice Butcher :**

### Introduction

1. The underlying dispute between the parties relates to the construction of a very substantial hospital complex in Doha, Qatar. The Claimants, to whom I will refer as ‘the JV’ were the contractors on behalf of the Defendant, which I will call ‘the Foundation’.
2. There are for determination applications by the JV under ss. 67 and 68(2)(b) of the Arbitration Act 1996 (‘the Arbitration Act’). These seek the setting aside of paragraphs of an Addendum dated 5 March 2019 (‘the Addendum’) issued by an ICC tribunal consisting of Sir Stanley Burnton, Richard Fernyhough QC and Richard Wilmot-Smith QC (‘the Tribunal’) in respect of its Fourth Partial Award dated 21 November 2018 (‘the Fourth Partial Award’).

### The Disputes and the Award

3. The contract for the construction of the hospital complex was signed in 2009, and the original Contract Price was approximately £1.8 billion. A large number of disputes have arisen between the parties. On 22 July 2014, the Foundation served a Notice of Termination, by which it terminated, or purported to terminate, the contract. The Foundation commenced ICC arbitration the next day. Amongst the numerous disputes that emerged during the project, the JV sought an extension of time for the completion of the works, and associated prolongation costs. This was of potential significance in at least two respects. First, for such periods of delay for which the JV was entitled to extensions of time, it would have a corresponding entitlement to the costs of having its attendance on the project prolonged. Secondly, the grant of extensions of time would operate to reduce its potential liability for liquidated damages under the contract.
4. The parties disagreed as to the extent, causes and consequences of delays in the construction of three aspects of the construction of the complex, namely (1) the Hospital Building, (2) an Outpatient Clinic and Underground Car Park, and (3) a Multi-Storey Car Park, At Grade Parking and External Works. The claims were analysed by the parties by reference to defined periods of time, referred to as ‘Windows’.
5. There was a hearing in relation to the JV’s claims for extensions of time and prolongation costs in April and May 2018, over a period of some five weeks. There were further closing arguments in June 2018. The Fourth Partial Award was issued on 21 November 2018. In the Fourth Partial Award, the Tribunal:
  - (1) Declared that the JV was entitled to extensions of time in relation to the Hospital Building in respect of Window 1 (of 225 days) and 2 (of 121 days), with recovery of prolongation costs, but not in respect of Windows 3 or 4.
  - (2) Declared that the JV was entitled to extensions of time in relation to the Outpatients’ Clinic in respect of Windows 1 and 2 (369 days), with recovery of prolongation costs, but not in respect of Windows 3 or 4.
  - (3) Declared that the JV was entitled to an extension of time of 371 days in relation to the Multi-Storey Car Park, with recovery of prolongation costs.

- (4) Declared that the Foundation had lawfully terminated the contract for default, and was entitled to make calls on a Performance Guarantee and an Advance Payment Guarantee.
- (5) Declared that the total progress value of the claims for variations in respect of which the JV was entitled to payment was QAR 181,956,723.60.

Applications under Article 35 of the ICC Rules

6. On 21 December 2018 both the JV and the Foundation served applications under Article 35 of the ICC Rules (the 2012 Rules, being the Rules applicable at the beginning of the arbitration) in respect of the Fourth Partial Award.
7. Article 35 of the ICC Rules is, insofar as material, in these terms:
  - ‘1. On its own initiative, the arbitral tribunal may correct a clerical, computational or typographical error, or any errors of similar nature contained in an award, provided such correction is submitted for approval to the Court within 30 days of the date of such award.
  2. Any application of a party for the correction of an error of the kind referred to in Article 35(1), or for the interpretation of an award, must be made to the Secretariat within 30 days of the receipt of the award by such party, in a number of copies as stated in Article 3(1). After transmittal of the application to the arbitral tribunal, the latter shall grant the other party a short time limit, normally not exceeding 30 days, from the receipt of the application by that party, to submit any comments thereon. The arbitral tribunal shall submit its decision on the application in draft form to the Court not later than 30 days following the expiration of the time limit for the receipt of any comments from the other party or within such other period as the Court may decide.
  3. A decision to correct or to interpret the award shall take the form of an addendum and shall constitute part of the award. ...’
8. Part of the Foundation’s application under Article 35 was as follows:

‘[32] The Award does not address [the Foundation’s] submissions as to the proper interpretation of Article 14 of the GCOC [which was a provision in relation to notification of claims for extension/prolongation costs] ...

[33] In particular, the Award does not deal with the submissions that:

[33.1] Any entitlement to prolongation costs pursuant to Article 14.2 of the GCOC is limited to prolongation costs resulting from a change directed by [the Foundation].

[33.2] Any entitlement to prolongation costs pursuant to Article 14.2 is also subject to compliance with all relevant provisions of Article 14 of the GCOC and Appendix D to the Contract.

[34] In its opening submissions for the April 2018 hearing, the [Foundation] noted that notice was a prerequisite to an entitlement to an extension of time.’
9. The Foundation’s Article 35 application continued:

[43] In light of the matters set out above, the [Foundation] respectfully requests corrections to paragraphs 246, 261, 352, 353, 379, 393, 401 and 1003(1), (2), (4) and (5) of the Award. The corrections sought are for those paragraphs of the Award to reflect a dismissal of the Respondents' claim for prolongation costs. Alternatively, the Claimant seeks an interpretation of the Award to make clear that any findings made to date are subject to addressing the arguments set out above which will be considered at a subsequent hearing.

[44] The [Foundation] notes that this division of elements of entitlement is consistent with other aspects of the dispute. In relation to termination, defects were addressed in 3 separate awards, firstly whether the defects could be relied on for termination in that they were properly notified, secondly whether the defect existed and if it existed at the relevant dates and finally whether the defect justified termination.

[45] In the premises where the Tribunal concludes that the claims for prolongation and disruption cannot be dismissed by way of interpretation or correction, the correct approach (indeed the only approach) is to correct or provide interpretation to the statements of entitlement to time and money to make clear that this is subject to addressing the arguments set out above which will be addressed at a subsequent hearing....'

#### The Addendum

10. Following the parties' submissions, the Tribunal issued the Addendum to the Fourth Partial Award on 5 March 2019. In the Addendum, the Tribunal began by considering the principles applicable to applications under Article 35.2 of the ICC Rules. The Tribunal said this:

[11] The provision for correction of the award is not aimed at substantive matters or at dealing with an interpretation of the award. The classic problems are a failure to insert a 'not' before a verb, or where it is evident that the award should read 'claimant' instead of 'respondent', or where the figures in the dispositive either do not add up or do not correspond to those in the discussion part of the award.

[12] The authorities (see *Gannet Shipping Ltd v Eastrade Commodities* [2001] EWHC Comm 483 at paragraph 24) draw distinctions between errors affecting *the expression* of the Tribunal's thought (which can be corrected) and errors in the Tribunal's thought process (which cannot). Corrections to reflect 'second thoughts' are impermissible.

[13] The purpose of giving the Tribunal the power to interpret the award under Article 35(2) of the ICC Rules is to permit the clarification of an award so as to allow its correct execution by the parties:

*It is not to be used to require the tribunal to explain, or to reformulate, its reasons. It does not provide an occasion for the reconsideration of the tribunal's decision. Should this be the basis of the parties' application, the tribunal will be quite justified in finding it unnecessary or inappropriate to render the requested interpretation ...*

*Interpretation thus consists of eliminating any ambiguities or uncertainties, if any, and clarifying the genuine meaning of the decision without modifying it. In other*

*words, interpretation consists of restoring the true meaning of the decision where it has been improperly expressed in the operative part, where the latter is at odds with the findings or contains uncertainties or ambiguities. Interpretation does not entail a modification or an addition to the initial decision and thus cannot jeopardise res judicata.*

*(Handbook of ICC Arbitration: Commentary, Precedents, Materials (2<sup>nd</sup> Ed) by Buhler and Webster paragraph 29-13)*

[14] A tribunal stated in an ICC case that ‘there is virtual unanimity that an application for interpretation cannot be used to seek revision, reformulation or additional explanations of a given decision.’ (See Handbook of ICC Arbitration: Commentary, Precedents, Materials (2<sup>nd</sup> Ed) by Butler and Webster at paragraph 36-18.

[15] The Secretariat’s Guide to ICC Arbitration makes it clear that valid applications for interpretation should be rare:

*In practice, applications for interpretation (as opposed to correction) are rarely accepted. Most arbitral tribunals find that, to be admissible, a request for interpretation must seek to clarify the meaning of an operative part of the arbitral tribunal’s decision. Therefore, requests for interpretation should generally target the dispositive section or the parties’ rights and obligations. ...*

*Many applications for interpretation amount to attempted appeals aimed at altering the meaning of an award, raising an additional issue or attempting to have the arbitral tribunal reconsider its decision or the evidence. Article 35(2) does not empower an arbitral tribunal to revise the outcome or reasoning of its award.*

*(The Secretariat’s Guide to ICC Arbitration: A Practical Commentary on the 2012 ICC Rules of Arbitration by Fry and Greenberg and Mazza (2012) at paras 3-1275-1276.)*

[16] Interpretation may eliminate any ambiguities or uncertainties and clarify the meaning of a decision without modifying it. In other words, interpretation consists of restoring the true meaning of the decision where it has been improperly expressed in the operative part, it contains uncertainties or ambiguities.

[17] A party has no right to request that the Tribunal reconsider arguments which it has already submitted and on which it has already lost. Similarly, the Tribunal has no power to reconsider a decision under the guise of interpretation under Article 35.

[18] The emphasis on the clarification of the operative parts of an award mean that the Tribunal must concentrate on paragraph 1003 of the Award. There are eight relevant sub-paragraphs which deal in turn with, for example, the length of extensions of time granted, lawful termination, calls on the Guarantee. Those are specific decisions which are justified, in the great majority of cases, by the text of the remaining parts of the award. But, on the whole, the Parties’ applications for interpretation do not rest upon an argument that any of these operative parts do not accord clearly with the reasoning contained in the Award. Rather, the complaint is that the reasoning contained in the award is, for various reasons defective or incomplete with the result that, were these defects corrected or missing parts completed, the decision would have to be different.

These are classic cases not for the interpretation of the existing award but, rather, of an attempt to appeal the existing award, leading to different conclusions. Such application must fail in principle.’

11. At paragraph 29 of the Addendum the Tribunal turned to the Foundation’s application in relation to paragraphs 246, 261, 352, 353, 379, 393, 401 and 1003(1), (2), (4) and (5) of the Award. The Tribunal said this:

‘QF’s [ie. the Foundation’s] application in respect of paragraphs 246,261,352,353,379,393,401 and 1003(1), (2), (4) and (5) (prolongation costs) contends that the Tribunal failed to address Article 14 of the GCOC and did not rule or intend to rule on the JV’s right to prolongation costs, or on the effect of relevant expert evidence of Mr Barry and Ms McGahey or on the issue of contractual notification. It is correct that the Tribunal did not in the Award address these issues, and it did not intend to do so. Whether there were any applicable contractual preconditions to the JV’s rights to extensions of time and prolongation costs and, if so, whether they were complied with are issues remaining to be determined by the Tribunal. . It follows that those paragraphs do not correctly reflect the Tribunal’s decisions. Accordingly they should be amended as follows:

*246. In the circumstances the Tribunal finds that, during Window 1, **subject to compliance with any contractual preconditions**, the JV became entitled to extensions of time to a total of 225 days in respect of the 4 events identified by Mr Barry in his table in respect of Window 1. This extension **may similarly result** ~~results~~ in the JV’s right to recover prolongation costs over that period, subject to compliance with any contractual preconditions.*

*261. Doing the best it can in these circumstances, the Tribunal decides that, for these reasons, **subject to compliance with any contractual preconditions**, the JV should be awarded an additional 30 days’ extension of time which **would** bring its full entitlement, when added to those assessed by Mr Barry, to 121 days. In light of the assessments made at the time by KEO and DAPO, this award seems to be relatively modest and certainly not excessive. It also follows that ~~the~~ **an** award of an extension of time of 121 days in Window 2 ~~carries~~ **may carry** with it the entitlement to recover prolongation costs over that period, subject to compliance with any contractual preconditions.*

*352. The Tribunal has concluded that, in respect of Window 1, **subject to compliance with any contractual preconditions**, the JV is entitled to an extension of time 225 days and to recovery of prolongation costs.*

*353. In respect of Window 2, the Tribunal has decided that, **subject to compliance with any contractual preconditions**, the JV is entitled to an extension of time 121 days and to recovery of prolongation costs.*

*379. For the reasons set out, the Tribunal has concluded that in relation to the JV’s delay claim concerning the OPC and UGCP (Milestone 15) **subject to compliance with any contractual preconditions**, the Tribunal finds that the JV is entitled to a total extension of time of 369 days in respect of Windows 1 and 2. It also finds that, in respect of Windows 3 and 4, the JV is not entitled to any extension of time. The Tribunal also*

*finds that, in respect of ~~the~~ any extensions of time granted, **subject to compliance with any contractual preconditions**, the JV is entitled to recover its prolongation costs.*

393. *So far as the question of delay to the critical path preferred by Mr Barry and Ms. McGahey, again, the Tribunal finds no reason to doubt the detailed analysis carried out which concludes that, from the beginning of Window 1 up until 27 October 2011 there were delays to the External Works amounting to a total of 1183 days of which the JV were not responsible for a total of 171 days. The Tribunal finds no reason to doubt these figures and accordingly is satisfied that, **subject to compliance with any contractual preconditions**, in respect of the period from 31 March 2009 until 20 October 2011, the JV is entitled to an extension of time of 171 days together with prolongation costs.*

401. *The Tribunal has found that, up until 20 October 2011, **subject to compliance with any contractual preconditions** the JV had become entitled to an EOT of a total of 171 days. After that date, until the end of Window 1 ( 5 January 2013) the Tribunal estimates that there were a further 200 days' delay to these works based on QF's experts' assessment of the total additional delay to the works in this period. This entitles the JV, **subject to compliance with any contractual preconditions**, to a further EOT of 200 days giving a total EOT in Window 1 of 371 days. This period also carries prolongation costs, **subject to the same condition**.*

1003(1) ***Subject to compliance with any contractual preconditions**, ~~The~~ **the** JV was entitled to extensions of time in relation to the Hospital Building totalling 225 days in respect of Window 1 (31 March 2009-16 October 2010), with recovery of prolongation costs.*

1003(2) ***Subject to compliance with any contractual preconditions**, ~~The~~ **the** JV was entitled to extensions of time in relation to the Hospital Building totalling 121 days in respect of Window 2 (17 October 2010-31 March 2012), with recovery of prolongation costs.*

1003(4) *In relation to the Out Patients' Clinic and the Underground Car Park, **subject to compliance with any contractual preconditions**, the JV was entitled to a total extension of time of 369 days in respect of Windows 1 and 2 with recovery of prolongation costs. In respect of Windows 3 and 4, the JV is not entitled to any extension of time.*

1003(5) *In relation to the Multi-Storey Car Park, Grade Parking and External Works, **subject to compliance with any contractual preconditions**, the JV was entitled to an extension of time of 371 days in respect of Window 1 with recovery of prolongation costs. In respect of Window 2 the JV was not entitled to any extension of time.”*  
(amendments in bold)



12. The JV brings challenges to the Addendum and the changes it made to the Fourth Partial Award under sections 67 and 68 of the Arbitration Act. Those sections provide as follows:

**‘67 Challenging the award: substantive jurisdiction.**

- (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) 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.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

- (2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.
- (3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order-
- a) confirm the award,
  - b) vary the award, or
  - c) set aside the award in whole or in part.
- (4) The leave of the court is required for any appeal from a decision of the court under this section.

**68 Challenging the award: serious irregularity.**

- (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

- (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant-
- a) failure by the tribunal to comply with section 33 (general duty of tribunal);

- b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
  - c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
  - d) failure by the tribunal to deal with all the issues that were put to it;
  - e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
  - f) uncertainty or ambiguity as to the effect of the award;
  - g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
  - h) failure to comply with the requirements as to the form of the award;  
or
  - i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.
- (3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may –
- a) remit the award to the tribunal, in whole or in part, for reconsideration,
  - b) set the award aside in whole or in part, or
  - c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

- (4) The leave of the court is required for any appeal from a decision of the court under this section.’

13. It is also pertinent, given the terms of section 67 of the Arbitration Act to refer to section 82(1), which includes the following:

‘ “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.’

14. Section 30(1) of the Arbitration Act, to which that definition refers back, is as follows:

**‘30 Competence of tribunal to rule on its own jurisdiction.**

- (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to-
  - 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.’

The JV’s application under s. 67

15. The JV contends that the changes to the Fourth Partial Award made in paragraph 29 of the Addendum must be set aside, on the basis that the Tribunal had no jurisdiction to make them.
16. Its argument, in summary, is as follows:
  - (1) Once the Tribunal had issued the Fourth Partial Award then it was *functus officio* as to the matters which were decided by that Award: see Emirates Trading Agency v SFIPL [2015] EWHC 1452 (Comm) at [22], [26].
  - (2) The Tribunal had the powers to correct clerical, computational, typographical or similar errors in the Award, or to interpret it, under Article 35, but these gave no power to alter the award in the way in which it had purported to do.
  - (3) Under the Fourth Partial Award, the Tribunal had granted the JV unqualified entitlements to extensions of time and a right to recover prolongation costs. It was *functus officio* in that respect. The changes which it purported to make were neither (a) clerical, computational, typographical or similar errors, nor (b) were they an ‘interpretation’ of the Fourth Partial Award.
  - (4) It followed that the Tribunal had lacked substantive jurisdiction to make the relevant changes to the Fourth Partial Award, and paragraph 29 of the Addendum should be set aside.
17. To this case, the Foundation had, in outline, two answers. The first was that s. 67 was simply inapplicable because there was no question of the Tribunal having exceeded its substantive jurisdiction. The second was that, even if the complaint was one which went to jurisdiction, the Tribunal did not lack jurisdiction because what it did in paragraph 29 of the Addendum was within the scope of what was permitted by Article 35 of the ICC Rules.
18. In somewhat more detail, the first of these arguments was as follows:
  - (1) For a matter to be one as to the substantive jurisdiction of the Tribunal it must fall within one of the categories in s. 30(1)(a)-(c). None is applicable.
  - (2) In particular, this is clearly not a case in which s. 30(1)(a) or (b) is relevant. Nor is s. 30(1)(c). That sub-section is concerned with questions as to the scope of the arbitration clause, and thus what disputes have been referred to arbitration, not with whether the arbitrators have become *functus* and no longer entitled to act.

(3) The conclusion that s. 30(1)(c) is not applicable is supported by authority. The Foundation referred to three cases.

a) First, the decision of Burton J in CNH Global N.V. v PGN Logistics Ltd [2009] EWHC 977 (Comm). In that case, the arbitral tribunal had issued an addendum under Article 29, which was the predecessor of the Article 35 of the ICC Rules which is relevant here, in order to correct the fact that the tribunal had not made a provision for pre-award interest. At paragraphs [17]-[18] Burton J said this:

‘[17] ... the challenge ... on behalf of the Claimant was put not only by reference to s. 68 ... but also by reference to s. 67 of the Act....’

[18] S. 68 ... specifically provides in s. 68(2)(b) that one of the grounds of challenge on the basis of serious irregularity is based upon the Tribunal exceeding its powers ‘(otherwise than by exceeding its substantive jurisdiction; see section 67)’. 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.’

b) Second, the decision of Eder J in Union Marine Classification v Government of Comoros [2015] EWHC 508 (Comm), [2015] 2 Lloyd’s Rep 49. In that case there was a challenge under s. 67 to an amendment to an award, made pursuant to para. 25(a) of the LMAA terms and/or s. 57(3) of the Arbitration Act, to award certain amounts to the defendant which had not been specified in the original award. The defendant objected that s. 67 had no application, and that was upheld, ‘as a threshold point’ by Eder J. At paragraph [23] he said this:

‘First, it is, in my view, more consistent with the ordinary language of section 30(1)(c), ie the only question in that context is to identify what matters have been submitted to arbitration. Secondly, I do not consider that the suggested ‘expansive approach’ [to the interpretation of s. 30] is supported by the cases referred to in Merkin and Flannery. Moreover, in my view, such suggested ‘expansive approach’ is contrary to the general principle as stated in section 1(c) of the 1996 Act ... as well as the underlying thrust of the decision of the House of Lords in *Lesotho*. Thirdly, I do not accept that this reading of section 30(1)(c) is somehow ‘unfair’ or ‘uncommercial’ ... This would perhaps be so if there were no other remedy available to an applicant in circumstances such as these apart from section 67 of the 1996 Act. However, ... it seems to me that there is an available remedy under section 68(2)(b) of the 1996 Act. [Counsel for the applicant] countered by submitting, in effect, that this was not a sufficient or satisfactory remedy in particular because section 68 places additional hurdles in the way of an applicant – including the requirement of showing ‘substantial injustice’. However, I do not consider that this renders the remedy under section 68 insufficient or

inadequate. Fourthly, as [counsel for the applicant] 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 [counsel for the respondent]; and I would not be minded to disagree with that decision unless I was persuaded that it was wrong which I am not.’

c) Third, the decision of Sir Michael Burton, sitting as a High Court Judge, in Soletanche Bachy France S.A.S v Aqaba Container Terminal (Pvt.) Co. [2019] EWHC 362 (Comm). In that case, at paragraphs [60]-[61] Sir Michael Burton referred to the two authorities mentioned above, and said:

‘Even if it was a nullity for the Arbitrators to accept corrections out of time in the circumstances to which I have referred, that does not amount to a substantive absence of jurisdiction. It would amount to a plain irregularity by the Arbitrators which, if there had been a substantial injustice, this court could correct....’

19. In my judgment it is clear that the type of challenge made here is not one which falls within s. 67. Section 67 concerns only challenges to substantive jurisdiction. It is right that those challenges can therefore relate to whether matters ‘have been submitted to arbitration in accordance with the arbitration agreement’. It has been held in the decisions I have mentioned that in the Arbitration Act this phrase applies only to issues as to whether there was a reference to arbitration of the issue in accordance with the terms of the arbitration agreement, ie to identify what matters have been submitted to arbitration. I am not persuaded that those decisions are wrong, and I will follow them. I consider that that construction is the most natural one of the words used in s. 30(1)(c), even if another construction might have been possible. Furthermore, the construction adopted in those authorities, and which I too favour, appears to me, as it appeared to Eder J, to be in accordance with the general principles in s.1 of the Arbitration Act.
20. This approach has the effect, in the present case, that the challenge which the JV wishes to bring must be brought under s. 68, and in particular s. 68(2)(b), and not s. 67. In my judgment this accords with the other provisions and intention of the Act. S. 68(2)(b) envisages that challenges to the exceeding of powers will ordinarily be under that provision. Under s. 57 of the Arbitration Act provision is made for the ‘powers’ of the tribunal to correct an award or make additional awards, unless the parties agree on other ‘powers’ of the tribunal in this respect. A complaint about the exercise of the s. 57 powers, or – as here – their agreed replacements, is thus, in the terms of the Arbitration Act, an allegation of ‘the tribunal exceeding its powers’ within s. 68(2)(b). Furthermore, as Eder J said in Union Marine it is impossible to see that an interpretation of ss. 67 and 68, whereby, though such a challenge is within s. 68(2)(b) it is not within s. 67, is unjust or uncommercial. The parties in such cases have agreed (whether specifically or by virtue of s. 57) that the tribunal should have powers to correct an award. There is no good reason why a complaint that it has gone wrong in exercising that power should be subject to a different challenge regime than the exercise of other powers conferred on the tribunal as regards the progression of the arbitration.
21. While it is said that what makes the difference is that, when arbitrators have made an award, they are, subject to the provisions of the Arbitration Act or agreement allowing

them to take a further step, *functus*, this does not negate the force of the point that in deciding whether to make a correction, they are exercising a power which the parties have conferred on them. For the purposes of the dichotomy in the Act, a challenge to that decision is within the first part, rather than the parentheses, in s. 68(2)(b). Were the position otherwise, it would open the door to nice arguments in court as to whether the tribunal's decision to correct an award were or were not within its powers, and depending on the court's answer to that question, to the setting aside of corrections or amendments without regard to any questions of whether they had caused substantial injustice. That would appear to me inconsistent with the policy of Part 1 of the Arbitration Act.

22. In the present case, the Tribunal had powers to make corrections to, and to interpret, awards that it had made. It was asked to exercise those powers, and purported to do so. The complaint is that it went beyond what it was entitled to do in exercise of those powers. For the reasons I have given such a complaint must be brought under s. 68. There may be room in other cases for some argument as to the precise extent of s. 30(1)(c) as embodied in the definition of 'substantive jurisdiction', but I consider it clear that it does not extend to an issue such as that raised here.
23. On this basis the Foundation's second argument does not need to be considered in the context of section 67.

#### The JV's Application under s. 68

24. The JV's s. 68 challenge is that the making of the changes to the Fourth Partial Award by the relevant parts of the Addendum were an exceeding of the Tribunal's powers within s. 68(2)(b), and that this was an irregularity which caused or will cause substantial injustice to it. Two issues arise. First, was there an excess of the Tribunal's powers at all? Secondly, if there was, has it caused or will it cause substantial injustice? I will consider them in turn.
25. In relation to the first, there would plainly have been no irregularity if the Tribunal had properly exercised the power given it by Article 35 of the ICC Rules. There was accordingly extensive argument before me as to whether what the Tribunal had done constituted the correction of 'clerical, computational or typographical errors' or of 'any errors of a similar nature', or the 'interpretation' of the Fourth Partial Award.
26. The starting point here, in my judgment, must be that the parties have conferred powers on the Tribunal which themselves import the power to make certain evaluative judgments. Thus, the power to correct errors of a 'similar nature' to 'clerical, computational or typographical errors' imports a degree of latitude as to what errors may be corrected. There is room for reasonable disagreement as to whether certain mistakes or omissions constitute errors of a 'similar nature' to 'clerical, computational or typographical errors'. *A fortiori* in the case of decisions on whether there should be any and if any what 'interpretation' of the award. In my judgment, in both cases, the Tribunal is empowered to make decisions within a range, albeit the extent of that range differs between the two, being wider in the second than the first. When the court is asked to consider whether a tribunal has exceeded its powers, I consider that it needs to respect what might by analogy be called the 'margin of appreciation' accorded to the tribunal.

27. In the present case, for my part, I would not consider it accurate to describe the changes made as the correction of ‘clerical, computational or typographical errors’. But on the other hand, I would find it difficult to say that they could not be reasonably regarded as the correction of errors ‘of a similar nature’, in circumstances where it is apparent that the Tribunal had not given consideration to the notification arguments and the text of the Fourth Partial Award therefore did not reflect its original intention.
28. Further, I find it even more difficult to say that the Tribunal was not entitled to interpret the Fourth Partial Award by the changes made in the Addendum. I note that the Foundation was inclined, while arguing that it could have done so, to accept that the Tribunal had not made those changes by way of interpretation. I am not sure that that is correct. Paragraph 18 of the Addendum is a reference back to paragraphs 13-17 dealing with interpretation, and in particular the first sentence of paragraph 18 is a reference to the extract from the Secretariat’s Guide to ICC Arbitration which is quoted in paragraph 15. Paragraph 29 is part of the ‘concentration on paragraph 1003 of the Award’ to which paragraph 18 refers. Furthermore, paragraph 25 of the Addendum shows that in the section dealing with ‘QF’s Applications’ the Tribunal was addressing both whether there should be a correction and an interpretation. I consider that paragraph 29 is probably to be interpreted as being the correction of errors and/or as the interpretation of the Fourth Partial Award. As I have said, I find it impossible to say that the Tribunal was not entitled to give the interpretation to the Fourth Partial Award that it did.
29. For these reasons I am not satisfied that there has been any exceeding of the Tribunal’s powers.
30. In case I am wrong about that, I turn to the second issue in relation to the s. 68 application. In my judgment this is another complete answer to the s. 68 complaint. This is because I have reached the clear view that, even if it can be said that there has been an irregularity of the kind specified in s. 68(2)(b) by reason of the making of the changes specified in paragraph 29 of the Addendum, it was not a serious irregularity, because it has not and will not cause substantial injustice to the JV.
31. In this regard, as the Addendum itself makes clear, the Tribunal had not addressed the notification issues, and did not intend to address them in the Fourth Partial Award. The JV itself has accepted that the Fourth Partial Award does not expressly address either party’s submissions on notices. The effect of the changes made to the Fourth Partial Award is that these issues will be heard and determined at a later date. There is no substantial injustice to the JV in these issues being considered on their merits by an impartial tribunal as opposed to being passed over by reason of a mistake.
32. It is not enough, in order for the JV to establish substantial injustice to refer to the fact that under the Fourth Partial Award it was entitled to unqualified declarations as to extensions of time as set out in paras. 1003(1)-(2) and (4)-(5) of the Fourth Partial Award, and that as a result of the changes, its entitlement to such declarations has been put ‘in jeopardy’. In assessing whether there is substantial injustice, the court does not simply compare the position of the applicant before and after the conduct of the arbitrators of which complaint is made: see CGN at paras. [33]-[34]. In the present case, if the JV’s arguments in relation to the issues of contractual notification, once considered, are accepted, then they will be entitled to the extensions of time set out in the Fourth Partial Award; if they are found to be wrong, then the JV may well not be

entitled to those extensions. I do not regard that as substantially unjust. Indeed, I consider that there would have been a substantial injustice if the Fourth Partial Award had not been changed and that there could have been a successful application by the Foundation under s. 68(2)(d) of the Arbitration Act.

### Conclusion

33. For these reasons, the JV's applications under ss. 67 and 68 of the Arbitration Act are dismissed.