



CL-2020-000383

Neutral Citation Number: [2021] EWHC 1951 (Comm)

Case No: CL-2020-000383

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

**IN AN ARBITRATION CLAIM**  
**AND IN THE MATTER OF AN ARBITRATION**

Released for publication (as anonymised)

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

Date: 16 June 2021

**Before :**

**The Honourable Mr Justice Bryan**

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**Between :**

**PBO**

**Claimant**

**-and-**

**(1) DONPRO**

**(2) 2DON**

**(3) CODON**

**Respondents**

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**Liisa Lahti** (instructed by **Teacher Stern LLP**) for the **Claimant**

**Fiona Whiteside** (instructed by **Walker Morris LLP**) for the **Respondents**

Hearing date 16 June 2021  
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**APPROVED JUDGMENT**

**MR JUSTICE BRYAN:****A. INTRODUCTION**

1. The parties appear before me today on the hearing of the Arbitration Claims of PBO whereby PBO advances challenges under sections 67 and 68 (and if necessary under section 69 of the Arbitration Act 1996 (the “Act”) in respect of appeal proceedings brought before the Federation of Cocoa Commerce (“FCC”) Board of Appeal (the “Board”) which were determined on the basis of the parties’ written submissions and without an oral hearing. More specifically five challenges are brought before me three pursuant to section 68 of the Arbitration Act 1996 and two pursuant to section 67 of the Act, as follows:-
  - (1) Pursuant to section 68, and in relation to the Respondents’ claim (the “Claim”), a refusal of the Board to allow PBO to amend its statement of case on appeal which it is said amounted to serious irregularity that has caused PBO substantial injustice. It is said that such refusal prevented PBO from advancing its full defence to the Claim including arguments that were potentially determinative of the Claim and in circumstances where it is said that (a) there would have been no (or minimal) prejudice to the Defendants and (b) the Tribunal gave no consideration to the balance of prejudice between the parties and misunderstood the requirement of “necessity” in section 33(1)(b) of the Act.
  - (2) Pursuant to section 68, and in relation to PBO’s counterclaim, that there was a serious irregularity that has caused PBO substantial injustice because the Board of Appeal departed from the way in which the case was presented by the parties and did so without warning such that PBO was not afforded a reasonable (or any) opportunity of putting its case in circumstances where the Board found that PBO had displayed an intention not to perform 11 contracts between PBO and CODON within the meaning of Rule 19.5 of the FCC Rules such that CODON was justified in “cancelling” them, in circumstances where the Respondents had not relied upon Rule 19.5, and the parties had not been given any opportunity to address the Board in relation thereto.
  - (3) Pursuant to section 68, and in relation to PBO’s counterclaim, that there was a serious irregularity that has caused PBO substantial injustice because the Board departed from the way in which the case was presented by the parties and did so without warning such that PBO was not afforded a reasonable (or any) opportunity of putting its case in circumstances where the Board found that it did not have jurisdiction to deal with PBO’s claim for “Jute Bag Losses” where there had been no jurisdictional challenge, and the parties had not been given any opportunity to address the Board in relation thereto.
  - (4) Pursuant to section 67, that the Tribunal did not have jurisdiction over the Second Defendant (“2DON”).
  - (5) Pursuant to section 67, that the Tribunal did have jurisdiction to consider the Jute Bag Losses.
2. PBO seeks an order that the entire Appeal Award be set aside and the dispute between PBO and the Defendants be heard by a new tribunal (alternatively that the Appeal Award be remitted to

the Board of Appeal for reconsideration). PBO submits that this is appropriate even if the Court accepts PBO's section 68 arguments in relation to the Counterclaim but not the Claim.

3. The orders sought under sections 67 and 69 of the Act are only required if the Tribunal does not make the aforesaid orders under section 68. There is also a pending application for permission to appeal against the relevant award under section 69 of the Act. However, as contemplated in the order of Mr Justice Waksman dated 23 December 2020, whether or not it will ever be necessary for the Court to rule upon the section 69 application hereafter depends on the outcome of the current applications.
4. The dispute between the parties arose out of a series of agreements for the sale and purchase of cocoa beans. Arbitration proceedings were commenced by the First and Second Defendants ("DONPRO" and "2DON") pursuant to three contracts that DONPRO had with PBO (the "Claim"). A counterclaim was brought by PBO against the Third Defendant ("CODON") pursuant to eleven contracts that it had entered into with CODON (the "Counterclaim").
5. A feature of the arbitration proceedings is that PBO argued that the losses suffered by each party under the claim and the counterclaim should be compared and the difference awarded to the party showing the greater loss. CODON was joined to the arbitration proceedings. There was an initial arbitration (the "Arbitration", the "Tribunal" and the "Award") and a second tier or "appeal" arbitration (that permitted new submissions to be made) (the "Appeal Arbitration", the Board and the "Appeal Award"). Both arbitrations were conducted on written submission and documents alone, as I have already noted. All PBO's applications relate to the Appeal Award. I am told the amount in dispute is approximately €500k on the Claim, and it is said £2.7m on the Counterclaim. I do not know whether or not that is so, and I have not been addressed in relation to such matters.
6. CODON was not in fact represented in the arbitration proceedings. However it was joined to the arbitration and the submissions filed by the lawyers representing DONPRO and 2DON contained arguments that it was apparent were made on behalf of CODON.

## **B: BACKGROUND AND THE DISPUTES BETWEEN THE PARTIES**

7. PBO, a company engaged in the business of trading cocoa beans, purchased cocoa beans from DONPRO, a company engaged in the business of selling cocoa beans. A number of contracts were entered into between PBO and DONPRO in 2017 (the "2017 DONPRO Contracts"). The claim related to three of those contracts (the "Three DONPRO Contracts" and/or the "Three DONPRO Invoices"). 2DON is an entity to which DONPRO said it had assigned these debts to. There were also, certainly as per PBO, eleven contracts entered into between PBO and the Third Defendant (CODON) in 2018 (the "2018 CODON Contracts"). PBO's case is that the eleven 2018 CODON Contracts were replacement contracts entered into to replace the remaining 2017 DONPRO Contracts after DONPRO became unable to contract with PBO due to a tax investigation into DONPRO and frozen bank accounts.
8. Each of these aforesaid contracts were governed by English law and incorporated the Federation of Cocoa Commerce Contract Rules for Cocoa Beans (the "FCC Contract Rules"). The FCC Contract Rules in turn provide (at Rule 20) that any dispute arising out of the Contract Rules for Cocoa Beans must be referred to FCC Arbitration to be settled in accordance with the FCC Arbitration and Appeal Rules ("FCC Arbitration Rules") applicable on the date of the

contract in question. The FCC Contract Rules are standard form contract terms used in the cocoa bean trade.

9. As I have noted, DONPRO and 2DON claimed against PBO pursuant to the Three DONPRO Invoices. PBO successfully applied to have CODON joined as a party to the arbitration and counterclaimed against CODON arguing that CODON was in breach of the eleven 2018 CODON Contracts by wrongfully seeking to cancel those contracts and in failing to perform the contracts. PBO claimed that as a result of these breaches it had suffered pecuniary loss that exceeded the amounts claimed by DONPRO and 2DON. PBO further claimed that there had been a “wash-out” between the DONPRO Contracts and the eleven 2018 CODON Contracts. Per paragraph 18 of Mr Rabinowicz’s first statement in support of the applications a “wash-out” means “*a situation where an old contract (or contracts) are replaced with a new contract (or contracts) between the same or other entities*”. PBO argued that there had been a wash-out and that therefore the losses suffered by each party under the claim and the counterclaim should be compared and the difference awarded to the party showing the greater loss. In the event – and for reasons which will become apparent – the Board did not at that stage have to rule upon that point
10. Turning first to the Award, the Award is dated 12 December 2019. The Tribunal found (in summary) that sums were due under the Three DONPRO Invoices. PBO was ordered to pay two amounts to DONPRO and one amount to 2DON, The Tribunal accepted the validity of the assignment between DONPRO and 2DON, and PBO says it is accordingly unclear why some payments were said to be due to DONPRO and others to 2DON. As to the Counterclaim PBO’s request to join CODON to the proceedings was accepted. The Tribunal found that the eleven 2018 CODON Contracts were a replacement of the relevant 2017 DONPRO Contracts.
11. The Tribunal also found that PBO had “*never declared the Claimants in default*” and therefore pursuant to FCC Rule 19.1.1 the shipment periods of the 2018 CODON Contracts were implicitly extended beyond the original shipment periods such that all of the 2018 CODON Contracts “remain in force”, and PBO’s counterclaim was rejected. Given that finding, following receipt of the Award and in order to comply with the provisions of FCC Rule 19.1.1 referred to in the Award, PBO sent CODON two notices of default, one dated 31 December 2019 and another dated 17 January 2020.
12. In the Appeal Arbitration PBO argued that as CODON had not attempted to make any deliveries since receiving the December 2019 notice of default CODON was officially in default of the 2018 CODON Contracts on 15 January 2020 and the Board should ascertain the relevant compensation for non-performance. PBO relied on Rules 19.2 and 19.2.1 of the FCC Arbitration Rules which set out a procedure for “closing out” a contract in the event of a default and for calculating loss (by reference to the difference between the contract price and the market price). PBO argued that (i) the losses calculated by reference to FCC Rule 19.2.1 totalled GBP 2,652,793, (ii) which far exceeded the amounts payable pursuant to the Three DONPRO Invoices (plus interest) and (iii) therefore the Tribunal should “declare a ‘wash’ of the Invoice amounts plus interest” and order DONPRO, 2DON and CODON to pay (on a joint and several basis) the balance to PBO. PBO also identified further losses of €77,802.30 for jute bags and dry bags. PBO alleged that these losses were recoverable pursuant to Rule 19.2.3 of the FCC Contract Rules (“Additional Loss”). As explained further below, there is a dispute between the parties about the nature of the claim for Jute Bag Losses which is relevant to one of the section 68 challenges.

13. The Defendants responded by arguing (in summary) that they had not received the 31 December 2019 Notice of Default, that the Tribunal should have relied on Rule 19.1.2 of the FCC Rules rather than rule 19.1.1 but that in any event the eleven 2018 CODON Contracts had been “cancelled” and therefore no damages were due to PBO. The precise nature of the last of these arguments is at the heart of one of PBO’s section 68 challenges, namely that relating to Rule 19.5.
14. Prior to the close of the Appeal Arbitration proceedings PBO changed legal representatives and its new lawyers submitted an application to amend PBO’s statement of case because they had identified what they considered to be a number of new grounds of appeal, including an argument that the Claim was time barred and that the assignment from DONPRO to 2DON did not bind PBO because (in relation to both arguments) the relevant FCC Rules had not been followed by the Defendants. The Tribunal refused the amendments, and that refusal is the subject of another challenge under section 68 of the Act.
15. The Appeal Award (dated 25 May 2020) found that the CODON Contracts were “rightfully cancelled” by the Respondent/Seller because PBO had displayed an intention not to perform within the meaning of Rule 19.5 of the FCC Rules. In relation to the Jute Bag Losses the Board of Appeal did not consider itself to have jurisdiction over these losses. The Board of Appeal therefore ordered PBO (1) to pay DONPRO €214,059 plus interest in relation to two of the Three DONPRO Invoices, and (2) to pay 2DON €283,085 plus interest in relation to the third DONPRO Invoice.

## **C. APPLICABLE LEGAL PRINCIPLES**

### **C.1 SECTION 68**

16. Section 68 of the Arbitration Act 1996 provides in relevant part:

“(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); ...”

17. It follows from the wording of section 68(2) that a successful appellant under section 68 must show not only that there has been a serious irregularity falling within one of the categories listed at section 62(2), but also that the irregularity has caused or will cause substantial injustice to the appellant.
18. Substantial injustice is not defined in the Act, but the Defendants refer to what is said in paragraph 280 of the DAC Report:

“...The test of substantial injustice is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that *what happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action*. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice. In short, [section] 68 is really designed to be *a long stop*, only available in *extreme cases when the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected*.”

(emphasis from the Judicial Committee of the Privy Council in *RAV Bahamas Ltd v Therapy Beach Club Inc* [2021] UKPC 8 (“*RAV Bahamas*”), per Lord Hamblen and Lord Burrows at paragraphs [30] to [34] as to the statutory purpose of section 68).

19. The words “*what happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the Court to take action*” and “*Section 68 being really designed as a long stop only available in extreme cases where the Tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected*” was emphasised by the Judicial Committee of the Privy Council in *RAV Bahamas*, supra, per Lord Hamblen and Lord Burrows at [30-34], where they set out the statutory purpose of Section 68, in particular Lord Hamblen at [30]
20. The Respondents also refer to what was said by the editors of *Russell on Arbitration* (24<sup>th</sup> ed. 2015) at 8-085 to 8-087, that the “high threshold” of section 68 means that many challenges brought under section 68 fail.
21. In reference to what was said by the DAC, PBO also draws my attention to the decision of *Bandwidth Shipping v Intaari* [2006] EWHC 2532 (Comm), a decision of Christopher Clarke J who at paragraph 61 says this by reference to DAC paragraph 280:
 

“Valuable though that paragraph is as an indication of the draftsman's envisaged purpose, I remind myself that Parliament has enacted what appears in Section 68 of the Act and not what appears in paragraph 280 of the Report. The power to intervene arises if there has been a failure to comply with Section 33 that causes substantial injustice. Some of the phraseology of paragraph 280 (“so far removed from what could reasonably be expected”, “cannot on any view be defended as an acceptable consequence”, “only available in extreme cases”) seems to add something of a gloss on the words of the statute. I do not intend by these observations to imply that the Courts should readily intervene in cases of asserted irregularity (the reverse is true); only to sound a note of caution on treating paragraph 280 of the Report as if it was the statute itself”.
22. For her part, Ms Whiteside, on behalf of the Respondents, accepts that what has to be construed is Section 68, but she prays in aid the statutory purpose as identified by Lord Hamblen in the *RAV Bahamas* case, which I bear well in mind.
23. Each of the section 68 challenges in this case is brought under section 68(2)(a), i.e. a breach of the general duty of fairness (partiality is not in issue).

24. Section 33 (general duty of the tribunal) provides:

“(1) The tribunal shall—

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.”

25. Section 33(1) is replicated in the FCC Arbitration and Appeal Rules at rule 1.7. The duty at subsection 33(1)(b) to adopt procedures which avoid unnecessary delay or expense reflects the general principle at section 1(a) of the Act:

“The provisions of this Part are founded on the following principles, and shall be construed accordingly—

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;”

26. In deciding what procedure to adopt in accordance with its general duty under section 33, a tribunal must have regard to cost-efficiency and the need to avoid unnecessary delay. The Respondents rely upon what was said by Colman J in *Kalmneft JSC v Glencore International AG* [2002] 1 All E.R. 7 per Colman J. at [83]:

“...In deciding what procedure is suitable so as to provide for a fair resolution of the dispute [the arbitrator] must have regard to cost-efficiency and the need to avoid unnecessary delay.”

27. Section 33 obliges a tribunal to give each party a reasonable opportunity of putting his case and dealing with that of his opponent. Whether that opportunity was afforded to a party will be a question of fact and degree.

28. The applicable legal principles in relation to section 68 are not controversial and were largely common ground before me. For its part PBO refer to the recent decision of Sir William Blair in *Grindrod Shipping Pte Ltd v Hyundai Merchant Marine Co Ltd* [2018] 2 Lloyd's Rep. 121 referring also to previous decisions of Popplewell J (as he then was), at paragraphs [35]-[40]. I am satisfied that these paragraphs provide a convenient summary of the applicable principles, supplemented by other authorities to which I was referred by the Respondents, and to which I will also refer.

29. At [35]-[40] Sir William Blair stated as follows:

“The applicable legal principles

35. There is no dispute as to the applicable legal principles, which I can take largely from the submissions of counsel for IVS.

36. Under s. 68(2)(a) of the Arbitration Act 1996, a failure by the tribunal to comply with s. 33 (the "general duty of the tribunal") may constitute a serious irregularity.

37. Section 33(1) imposes obligations on the tribunal to "act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent", and to "adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined".

38. An important element of these duties is that the parties have the right to be given a reasonable opportunity to deal with **any issue that will be relied on by the tribunal when writing its award**. As it is put by the editors of *Russell on Arbitration* (24th edition, 2015), at para. 5-050:

"To comply with its duty to act fairly under s. 33(1) of the Arbitration Act 1996, the tribunal should give the parties an opportunity to deal with any issue which will be relied on by it as the basis for its findings. The parties are entitled to assume that the tribunal will base its decision solely on the evidence and argument presented by them prior to the making of the award. If the tribunal is minded to decide the dispute on some other basis, the tribunal must give notice of it to the parties to enable them to address the point. Particular care is needed where the arbitration is proceeding on a documents-only basis or where the opportunity for oral submissions is limited. That said, a tribunal does not have to refer back to the parties its analysis or findings based on the evidence or argument before it, so long as the parties have had an opportunity to address all [of the] **essential building blocks** in the tribunal's conclusion. Indeed, the tribunal is entitled to derive an alternative case from the parties' submissions as the basis for its award, so long as an opportunity is given to address **the essential issues** which led the tribunal to those conclusions..."

39. *In Zermalt Holdings SA v. Nu-Life Upto/srey Repairs J/d* [1985] 2 EGLR 14 at 15, Bingham J put this principle as follows:

**"If an arbitrator is impressed by a point that has never been raised by either side, then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission, then again it is his duty to give the parties a chance to comment...It is not right that his decision should be based on specific matters which the parties have never had the chance to deal with. Nor is it right that a party should first learn of adverse points in a decision against him. That is contrary both to the substance of justice and to its appearance."**

That was a decision under the previous arbitration legislation but it remains good law for the purposes of sections 33 and 68(2)(a) of the 1996 Act.

40. An analysis of the leading authorities and the legal principles to be derived from them is to be found in the recent judgments of Popplewell J in *Terna Bahrain Holding Co. YJJ v. Bin*



*Kamel Al Shamzi* [2013] 1 Lloyd's Rep 86 , at [85] and *Reliance Industries Ltd and another v. The Union of India* [2018] EWHC 822 (Comm) , at [12]—[15]):

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

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

(b) amounting to a serious irregularity;

(c) giving rise to substantial injustice.

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

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

**(4) There will generally be a breach of section 33 where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. If the tribunal thinks that the parties have missed the real point, which has not been raised as an issue, it must warn the parties and give them an opportunity to address the point.<sup>1</sup>**

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

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

(7) In determining whether there has been substantial injustice, the court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. The applicant does not need to show that the result would necessarily or even probably have been different. What the applicant is required to show is that had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome."

(emphasis added)

30. PBO also refer to what was said by Ackner LJ in *Interbulk Ltd v Aiden Shipping Co Ltd (The Vimeira) (No 1)* [1984] 2 Lloyd's Rep 66 at [76]:

"If an arbitrator considers that the parties or their experts have missed the real point ... then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness

or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it.”

31. For their part the Respondents also refer me to what was said at paragraphs [44], [45], [83] and [87] in *Grindrod*, which I bear well in mind. In particular what was said at paragraph [87] that “*An issue as to prejudice is not a technical one, and standing back, the question is whether fairness required the tribunal to indicate to the parties that it wished to be addressed on the matters*” before an award was issued.
32. The Respondents also place reliance upon what was said by Popplewell J in *Reliance Industries Ltd*, supra, in particular at paragraphs [14] and [32]:

“14. Both sides accepted that the principles governing the application of Section 68(2)(a) included those which I endeavoured to summarise in *Terna Bahrain Holding Co WLL v Bin Kamel Al Shamzi & Others* [2013] 2 CLC 1 at [85] as follows:

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

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

(b) amounting to a serious irregularity;

(c) giving rise to substantial injustice.

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

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

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

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

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

(7) In determining whether there has been substantial injustice, the court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. The applicant does not need to show that the result would necessarily or even probably have been different. What the applicant is required to show is that had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome”.

32. However where a point of construction is squarely in play and addressed by both parties, the Tribunal is not obliged to put to the parties all aspects of the analysis in support of its conclusion in order to fulfil the Section 33 duty of fairness. As is well known, construction is an iterative process involving consideration of the particular wording in question, the other provisions of the contract taken as a whole, and the commercial consequences which follow from the rival constructions. The relevant provisions may be lengthy and admit of many nuances in the analytical argument. If provisions are relevant, and have been adverted to and addressed in argument, it is not necessarily unfair for the tribunal to use them to support its reasoning, even where the other party has not done so in the same way as the tribunal. It is always important to keep in mind the distinction between a lack of opportunity to deal with a case and a failure to recognise or take such opportunity. It is commonplace in judicial decisions on points of construction that a judge may fashion his or her reasoning and analysis from the material upon which argument has been addressed without it necessarily being in terms which reflect those fully expressed by the winning party. There is not perceived to be, and is not, anything which is unfair in taking such a course. It is enough if the point is “in play” or “in the arena” in the proceedings, even if it is not precisely articulated. To use the language of Tomlinson J, as he then was, in *ABB AG v Hochtief Airport* [2006] 2 Lloyd's Rep 1 at [72], a party will usually have had a sufficient opportunity if the “essential building blocks” of the tribunal’s analysis and reasoning were in play in relation to an issue, even where the argument was not articulated in the way adopted by the tribunal. Ultimately the question which arises under s. 33(a), whether there has been a reasonable opportunity to present or meet a case, is one of fairness and will always be one of fact and degree which is sensitive to the specific circumstances of each individual case. That applies to points of construction as much as to other points in dispute.”

33. This test of whether a point was “in play” or “in the arena” in the proceedings, was recently cited with approval by Lord Hamblen and Lord Burrows in *RAV Bahamas*, supra, at [49], and applied at [82].

34. Examples of cases where the tribunal has been found to have decided an issue without giving the parties (or one of them) a reasonable opportunity of putting its case include *Vee Networks Ltd v Econet Wireless International Ltd* [2005] 1 All E.R. (Comm) 303 (where an arbitrator decided a point of construction by reference to certain amendments to the Bermudian Companies Act which were not addressed in the proceedings and the Court held that this constituted a serious irregularity such that the award was remitted to the tribunal); *Cameroon Airlines v Transnet Ltd* [2004] EWHC 1829 (where the tribunal decided an issue of quantum in a way other than the way in which it was put by either party and the Court held that doing so amounted to a serious irregularity) and *K v A* [2020] 1 Lloyd's Rep. 28 (where, in relation to a GAFTA Award the

serious irregularity arose because the tribunal had relied on a clause in the relevant contract which the parties had not relied on in their arguments).

35. Ms Whiteside reminds me that each case turns on its own facts, and it is a rare and extreme case where Section 68 challenges have succeeded in this Court.
36. In the context of the challenging of a procedural decision of a tribunal, the Respondents also refer to what was said by Colman J in *Kalmneft* (which was a case in which an arbitrator’s discretion to deal with jurisdiction by way of a preliminary award was challenged under section 62(2)(a) as a breach of the general duty of fairness) at [84] and [85]:

“Further, intervention under s 68 should be invoked only in a clear case of serious irregularity. The court’s powers to interfere with an arbitrator’s discretionary decision...should not be engaged unless it is clear that in exercising his discretion he has failed to have regard to the relevant facts and to his duty under s 33. Unless he has arrived at a conclusion which no reasonable arbitrator could have arrived at in the case in question having regard to his duties under s 33, it cannot be said that his decision is capable of being characterised as a serious irregularity. This threshold for intervention by the court has long been recognised as appropriately preserving the finality of awards and party autonomy...Where the matter in issue is the exercise of an arbitrator’s discretion as to how to exercise his jurisdiction under section 30(1) there is obviously an even stronger case for the irrationality test.”

See also what is said at [50]-[51] of that judgment.

37. The Respondents also refer to what is said by the editors of *Russell on Arbitration* at 8-096:

“Subject to agreements between the parties, the tribunal is the master of its own procedure. It is highly unlikely that a challenge would be sustained under this ground [section 67(2)(a)] on the basis of the tribunal’s procedural decisions, including for example relating to the decision of a tribunal to refuse a disclosure application... In relation to a complaint about the tribunal’s decision on costs, the Court of Appeal when considering an application for an extension of time to bring a s.68 application said that unless the tribunal’s reasons were “silly or illegal” there would not be a breach of the duty under s.33.” (referring to *Peel v Coln Park LLP* [2010] EWCA Civ 1062, per Longmore L.J. at [18]).”

## **C.2 SECTION 67**

38. Section 67(1) of the Arbitration Act 1996 provides:

“(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).”

39. Section 67(1) is expressly subject to section 73 (Loss of right to object), which provides in part:

“(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—

- (a) that the tribunal lacks substantive jurisdiction,
- (b) that the proceedings have been improperly conducted,
- (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or
- (d) that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

(2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling—

- (a) by any available arbitral process of appeal or review, or
- (b) by challenging the award,

does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal’s substantive jurisdiction on any ground which was the subject of that ruling.”

40. It is well established that an application under section 67 of the Act is by way of a re-hearing rather than a review – see, for example, *Azov Shipping Co v Baltic Shipping Co (No. 1)* [1999] 1 All ER 476. In relation to the operation of section 67 in the context of a “trade arbitration” PBO refer to the case of *Black Sea Commodities Ltd v Lemarc Agromond PTE Ltd* [2021] EWHC 287 (Comm) (a GAFTA arbitration).

## **D. THE S.68 APPLICATIONS**

### **D.1 BOARD OF APPEAL’S DECISION UNDER FCC CONTRACT RULE 19.5**

41. It is convenient to address first the three section 68 applications, starting with the two substantive section 68 challenges in relation to the counterclaim, before addressing the section 68 challenge in relation to the Board’s refusal to allow PBO’s amended case to be advanced on the claim.

42. Rule 19.5 of the FCC Contract Rules (“**Rule 19.5**”) allows a party to a contract governed by the FCC Rules to close out that contract if its contractual counterparty “*displays an intention not to perform or an inability to perform*”. A notice is required and a specific procedure for the close out is set out at Rule 19.5, including a formula for calculating the sum due (if any) to the innocent party. In certain scenarios, an arbitration is also contemplated.
43. The Board found that CODON was entitled to (and had) cancelled the eleven 2018 CODON Contracts because PBO had displayed an intention not to perform them within the meaning of Rule 19.5.
44. After setting out the history matter on the preceding page and at the top of the next page, which I bear well in mind, the relevant conclusions of the Board in the Appeal Award are as follows:-

“The Board of Appeal finds it sufficiently proven that the Respondent [presumably a reference to CODON as CODON is the contractual counter-party to PBO] has shipped 150MT against one of the CODON Contracts, M200A, and that it has presented documents representing this shipment and those documents have not been taken up by the Appellant, nor did the Appellant pay the invoice in relation to this shipment.

According to the FCC Rules for Cocoa Beans, Rule 19.5, the tribunal then set out the rule as follows:

“Rule 19.5 Intention of non-performance: Notwithstanding any other provision in these Contract Rules for Cocoa Beans, if before the fulfilment of their respective contractual obligations either party displays an intention not to perform or an inability to perform, the counterparty may, by notice in writing to the party, declare the party to be in default and call for the contract to be closed out.

“If the party receiving the notice disputes its validity or if the parties cannot agree upon the terms at which to settle the close out then the dispute shall be referred to arbitration subject to the FCC Arbitration and Appeal Rules. If the Arbitrators decide that a default has occurred they shall declare the contract to be closed out and determine the market price at the date of default. The following procedure shall be adopted-”“ and then at (a) to (d) that procedure is set out.

The Board then continues as follows: **As a consequence of this non-payment, combined with the previous experience of non-payments by the Appellant to the Respondent’s associated companies DONPRO and 2DON (all considered to be one and the same by the Appellant), as well as the lengthy history of the conflict without resolution, the Board of Appeal finds that there was an intention not to perform on the part of the Appellant.**

Consequently the Board of Appeal validates the fact that the Respondent declared the Appellant in default and subsequently cancelled the contracts.”

(emphasis added)

45. I am satisfied that the ordinary and natural reading of the highlighted passage is that (contrary to the Defendants submission before me) the Board of Appeal relied on a “combination” of three matters, namely

- (a) a failure to pay one invoice issued under one of the eleven 2018 CODON Contracts, (b) a failure to pay the Three DONPRO Invoices and
- (c) the “lengthy history of conflict”.

to reach the conclusion it did relying upon Rule 19.5.

46. This was the only basis on which the Board found against PBO (save for in relation to the Jute Bag Losses which is the subject of the second section 68 challenge).
47. PBO says, rightly I am satisfied, that in doing so the Board departed from the way in which the case had been presented by both parties and did so without warning. None of the “central issues”, “essential issues” or “essential building blocks” in the Board’s conclusion were in issue or “in play” before the Board.
48. Firstly, whether PBO evidenced an intention not to perform (each of) the 2018 CODON Contracts within the meaning of rule 19.5 of the FCC Rules was not in issue before the Board for the simple reason that the Defendants did not rely on Rule 19.5 of the FCC Rules in their arguments before the Board .
49. The only reference to Rule 19.5 was in fact made by PBO not before the Appeal Board but in the underlying arbitration and in a different context. This did not result in Rule 19.5 being in play before the Appeal Board in a different context. On the contrary – before the Appeal Board PBO had no need to rely upon Rule 19.5, and Rule 19.5 was not in play, because it had served notices of default.
50. I am satisfied PBO’s deployment in the arbitration below did not put anything “in play” before the Board. In any event it plainly did not put “in play” whether PBO displayed an intention not to perform the eleven 2018 CODON Contracts within the meaning of Rule 19.5 (or otherwise).
51. PBO did not know that it was facing an argument relying on Rule 19.5. Therefore PBO was not given the opportunity to make submissions in relation to the meaning and effect of rule 19.5. I am satisfied that the construction of rule 19.5 is **itself** an “essential issue” or “building block” and informs what the other “essential issues” or “building blocks” in the Tribunal’s conclusion are.
52. This can be illustrated by reference to the Board’s reliance on PBO’s failure to pay **one** invoice issued under one of the eleven 2018 CODON Contracts. This inevitably raises a question as to the proper construction of rule 19.5.
53. In this context, PBO argues before me (as can be seen by reference to PBO’s application under s. 69 of the Act) that on a true construction of Rule 19.5 it is impermissible when analysing whether a party to a contract (governed by the FCC Contract Rules) has “displayed an intention not to perform” to take into account whether that party has displayed an intention not to perform a contract other than the one which is being closed out. Indeed, it appears to be accepted by the Respondents that that is correct. (See paragraph five of the Respondents’ section 69 skeleton argument).
54. However, whether that is so or not – and the Respondents do not accept that that is the case – does not seem to me to be in point. The point is that PBO says that on the true construction of Rule 19.5 it is impermissible when analysing whether a party to a contract governed by the FCC Contract Rules has “displayed an intention not to perform” to take into account whether that party has displayed an intention not to perform a contract other than the one which is being closed out.

55. Thus, certainly says PBO, prima facie, a failure to pay one of the eleven 2018 CODON Contracts is only relevant to whether a party has displayed an intention not to perform that contract. The Respondents submit that the Tribunal treated the eleven 2018 CODON Contracts as “a single transaction” and that for this reason the Tribunal found that a failure to pay one invoice issued pursuant to one of these contracts justified cancelling all eleven (see what is said by Mr McQueen at paragraphs 52.4 & 52.5 of his statement) which leads on to Mr McQueen’s submission that this is permitted by Rule 19.5 which “*does not limit the termination right to a single contract and does appear capable of applying to a single transaction comprising multiple contracts*”.
56. But the difficulty with all of this is that if the Respondents are right as to the Tribunal’s reasoning then it follows, I am satisfied, that there were two findings made by the Tribunal which were “essential building blocks” in its conclusion namely (1) that the 2018 CODON Contracts were to be treated as one “transaction” for the purposes of Rule 19.5, such that (2) as a matter of fact and/or on the true construction of Rule 19.5 a failure to pay pursuant to one of the contracts within the “transaction” justifies cancelling all of the contracts within that transaction.
57. The vice, however, is that neither of these issues were relied on by the Respondents or “in play” before the Board and PBO had no opportunity to address the Tribunal on such points (each of which, says, PBO, is wrong, as they would have submitted to the Board had they been given the opportunity to address the Board).
58. In this regard, I was taken to a number of pages of the bundle by Ms Whiteside, including in particular pages 319, 321, 325 and 327. I am not satisfied that in any of those passages Rule 19.5 was put in issue or, indeed, that any of those paragraphs put in play the points which are now under consideration.
59. In this regard, and secondly, though the Defendants relied on PBO’s failure to pay “invoices” issued (it is now accepted by the Respondents, and the Board in any event that only one invoice was issued) under the 2018 CODON Contracts, they did not, I am satisfied, do so in aid of an argument that by failing to pay that one invoice PBO had displayed an intention not to perform any/all of the eleven 2018 CODON Contracts which justified a cancellation (or termination) of those contracts (i.e. repudiatory breach). Instead the Defendants simply relied on an alleged failure by PBO to perform those contracts.
60. See, for example, the Response to the Statement of Case on Appeal: “*following the conclusion of the contracts with CODON in October 2018, the goods were loaded onto the ships and the documents presented to the bank for collection. PBO however did not pay the invoices...*” and that “*The contracts concluded with CODON were finally cancelled as PBO did not settle its debts, nor pay the invoices that CODON had instructed its bank to bring PBO’s bank in Geneva*” (emphasis added). The legal relevance of the failure to pay the (alleged) “invoices” issued in relation to the 2018 CODON Contracts is set out at Part III of the Response to Statement of Case on Appeal at Part C “non-payment of its debts by PBO” and is as follows:

*“CODON prepared the documents and brought them to the “National Financial Credit Bank” in Douala; these documents included the necessary invoices. However PBO did not pay the invoices as provided for in the contract; therefore obliging*



*CODON to make the decision to cancel these contracts, applying the principle of ordinary law “exception non adimpleti contractus”.*

*As PBO clearly did not respect its obligations, CODON could not have expected to deliver the goods for the benefit of PBO’s (sic) and then, as DONPRO and 2DON, have to pursue the appellant to enforce its debt obligation.*

*Since PBO did not respect the contract entered into with CODON, the latter is perfectly entitled to cancel”*

61. The principle of “*exception non adimpleti contractus*” (i.e. no performance is due to one who has not performed) is a civil law principle (derived from Roman law) which allows a party to a bilateral contract to suspend performance where its counterparty fails to perform. Therefore the Respondents’ argument and the alleged relevance of PBO’s (alleged) failure to pay “the invoices” despite CODON’s preparation of “the documents” was based on an (alleged) failure by PBO to **perform** its contractual obligations. The Defendants were not advancing an argument that CODON was entitled to terminate the eleven 2018 CODON Contracts because PBO had displayed an **intention not to perform** any of the eleven contracts by not paying the “invoices”.
62. Thirdly, I am satisfied as PBO submitted before me, that even if it was part of the Respondents’ case that PBO’s failure to pay “the invoices” (plural) evidenced an intention not to perform eleven 2018 CODON Contracts (which PBO denies), the Respondents’ submissions referred to an (alleged) failure to pay the “invoices” (plural) despite the “documents” (plural) being presented to the relevant bank. It was therefore not part of the Respondents’ argument that the failure to pay **one** invoice evidenced an intention by PBO not to perform all eleven 2018 CODON Contracts.
63. Fourthly, I am satisfied that though the Respondents relied on PBO’s failure to pay the three DONPRO Invoices, they did not do so in aid of an argument that PBO had by doing so displayed an intention not to perform any of the eleven 2018 CODON Contracts which justified a cancellation of those contracts. Instead the Respondents argued that payment of the Three DONPRO Invoices was a pre-condition to the eleven 2018 CODON Contracts coming into force (or possibly a pre-condition to performance).
64. The non-payment of the Three DONPRO Invoices is referred to in the Respondents’ Response to the Statement of Case on Appeal in the Introduction “... *the contracts concluded with the company CODON were cancelled due to the fact that PBO had not settled its debts vis-à-vis the respondents...*”. This is relied on as part of an argument (denied by PBO and which was not addressed or accepted by the Tribunal) that the 2018 CODON Contracts were executed under the condition that PBO pay the entirety of the debts to DONPRO and 2DON (see paragraph 35 and 38 of the Response to the Statement of Case on Appeal). See also Defence to Counterclaim at pages 22-23 and Mr Poux’s statement “*the conclusion of contracts between PBO and CODON was subject to the condition that PBO had previously discharged all of its debts vis-à-vis the companies ... DONPRO and... 2DON*” (emphasis added) and the Response to Statement of Case on Appeal at [35].
65. Therefore, the argument being advanced concerned an alleged contractual pre-condition to the eleven 2018 CODON Contracts coming into force (or possibly a condition to performance). It was not an argument about whether PBO’s failure to pay the Three DONPRO Invoices evidenced

an intention by PBO not to perform the eleven 2018 CODON Contracts which justified “cancelling” all eleven contracts.

66. PBO points out that even on the Respondents’ own case, payment under the 2017 DONPRO Contracts fell due many months before the eleven 2018 CODON Contracts were entered into (see Appeal Award at internal pages 1 and 4). PBO says that as such (and even if one ignores the fact that DONPRO and CODON are separate legal entities) the non-payment of the Three DONPRO Invoices cannot (on a true construction of Rule 19.5) amount to or evidence an intention not to perform the eleven 2018 CODON Contracts which were entered into in the knowledge that PBO had failed to pay the Three DONPRO Invoices. PBO’s stance seems perfectly arguable, and in any event PBO was not provided with the opportunity to advance such argument.
67. Fifthly, the third matter relied on by the Board, namely the “lengthy history of conflict” was not relied on by the Respondents.
68. I am satisfied that in the above circumstances, and taking into full account the matters raised by Ms Whiteside by reference to pages 319, 321, 325 and 327 of the bundle and what she characterised as the “building blocks” that she identified both in relation to conduct, intention not to perform, declaration of cancellation and all 11 contracts being terminated, the “*essential issues*” or “*essential building blocks*” leading to the Board’s conclusion were **not** in issue or “*in play*” or “*in the arena*” before the Board, and as such PBO was not given a reasonable opportunity of putting its case on these points. I consider that this was, indeed, a classic example of the situation envisaged in *Zermalt Holdings* and *The Vimeira* (referred to above), namely where the Board appears to have considered that the parties have “*missed the real point*”.
69. This was one of those occasions where, as Sir William Blair expressed it in *Grindrod* at [87], standing back, fairness required the tribunal to indicate to the parties that it wished to be addressed on the matters before an award was issued. It was therefore incumbent on the Board to “*warn the parties and give them an opportunity to address the point*”. It failed to do so.
70. As set out above, in determining whether there has been substantial injustice, “[w]hat the applicant is required to show is that had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome” (*Grindrod* at [40]). See also *Vee Networks* at [90] which refers to showing that “*the opposite conclusion was at least reasonably arguable.*”
71. The Respondents submit that there is no injustice to PBO by the Board’s reliance on Rule 19.5 (and associated reasoning of the Board) since such reasoning was correct based on the matters set out by Mr McQueen at paragraph 41 of his first statement. However these assume that the Board’s reasoning was correct. I am also invited to bear in mind the high hurdle that section 68 imposes on an appellant, and it is submitted that this is not one of those “extreme cases” in which it would be appropriate to set aside the Board’s decision.
72. It would not be appropriate for me to express any concluded view on the merits as to any of the following arguments that are advanced by LIT. Indeed, I am not concerned with the merits, but with due process. It suffices for me to conclude, as I do, that each of the following arguments is “*at least reasonably arguable*” and any one of them “*might well have*” resulted in the Board reaching a different conclusion and produced a significantly different outcome. This approach was also recognised by Popplewell J in *K v A*, supra at [37].

73. The arguments are as follows:-

- (1) Failure to pay the (one) invoice issued pursuant to the eleven 2018 CODON Contracts did not in fact evidence an intention not to perform that contract still less all eleven 2018 CODON Contracts. PBO says that it was refusing to take up the documents representing the shipment (and therefore not paying the invoice) because CODON was setting the price incorrectly (by reference to the terms of the 2017 DONPRO Contracts and not the 2018 CODON Contracts) and were therefore demanding payment of a price that was not the contractually agreed price (see Rabinowicz 1 at [42(g)] and email dated 26 November 2018). PBO therefore says that its failure to take up the documents and pay the invoice was therefore justified.
- (2) Failure to pay the one invoice did not, in any event, evidence an intention not to perform all eleven (individual) contracts.
- (3) Non-payment of the three DONPRO Invoices does not amount to or evidence an intention not to perform the eleven 2018 CODON Contracts because those contracts were entered into in the knowledge that PBO had failed to pay the Three DONPRO Invoices.
- (4) The non-payment of the Three DONPRO Invoices does not amount to or evidence an intention not to perform the eleven 2018 CODON Contracts because those contracts were entered into between CODON and PBO rather than DONPRO and PBO.
- (5) The points raised in PBO's Skeleton Arguments in the section 69 Appeal (which PBO say would have been raised before the Board had they been given the opportunity). and the arguments contained therein.

74. I would only add that if, as I consider the Board should have done, it had raised with the parties the question of Rule 19.5, it is an unreal submission to suggest that PBO would have remained supine and would not have made the points that I have just identified in circumstances where a Tribunal draws the parties' intention to a point which it considers important. I infer that the inevitable consequence is that such matters would have been aired and would have seen the light of day.

75. There is, therefore, substantial injustice in circumstances where PBO did not have an opportunity to raise those points before the Tribunal in response to an express invitation by the Tribunal to address them upon Clause 19.5.

76. In the above circumstances, I am satisfied that there has been a serious irregularity by reason of the Board's failure to comply with section 33 of the Act as PBO was not provided with a fair opportunity to address Rule 19.5 and the other points relied upon by the Board in order to reach the conclusion it did, and I am satisfied that such serious irregularity has caused substantial injustice to PBO in the circumstances also identified above. LIT's application under section 68 in this regard accordingly succeeds. I address the question of appropriate relief in due course below.

## **D.2 BOARD OF APPEAL'S DECISION IN RELATION TO THE JUTE BAG LOSSES**

77. In the Appeal Arbitration PBO alleged that it was entitled to claim €77,802 for breach, wrongful termination and failure to deliver the shipments, of the 2018 CODON Contracts as “Additional Loss” at Rule 19.2.3 in addition to the amounts awarded under Rule 19.2.1. Rule 19.2.3 (“Additional Losses”) provides that “*In addition to the amounts awarded under 19.2.1 and 19.2., arbitrators may, at their discretion, award such amount(s) as they see fit in respect of any proven further loss and/or expenses incurred by a Party.*”
78. PBO argued that it was entitled to recover this amount as losses arising out of the provision of jute bags by PBO and intended for use in relation to the delivery of cocoa beans to it (the “Jute Bag Losses”).
79. In the Appeal Award the Board concluded as follows : “*The Board of Appeal finds that the agreement to supply and receive any form of services other than those as specified in the FCC Contracts cannot be considered by the Board of Appeal*” - i.e. the Jute Bag Losses fell outside of the scope of the disputes within the jurisdiction of the Board.
80. PBO contends that in reaching the above conclusion on the Jute Bag Losses the Board departed from the way in which the case had been presented by both parties without warning and that this constituted a serious irregularity causing PBO substantial injustice because PBO was not given a reasonable (or any) opportunity of putting its case on the point.
81. Whilst the decision concerned the Board’s jurisdiction, I am satisfied that it is open to argue that the manner in which that decision was reached was in breach of section 33 of the Act: see by analogy *Alfred Uwe Maass v Musion Events Limited and Others* [2016] 1 All E.R. (Comm) 292 at [39]. In that case the arbitrator had decided a jurisdictional challenge without giving notice to the parties - the court found that it was not in dispute, “and it could not be disputed” that doing so was in breach of s.33 as it denied the parties an opportunity to present their case on the challenge.
82. The Respondents address this application at paragraphs 42 to 49 of the statement of Mr McQueen. In those paragraphs it is not suggested that the Tribunal decided in their favour on the Jute Bag Losses on the basis of an argument advanced by the Respondents.
83. It is right that the Respondents did challenge the Board of Appeal’s ability to consider the Jute Bag Losses, but this was on a different basis, namely that the point had not been raised before the first instance Tribunal and had not been raised within the time period said to apply to such claims pursuant to rule 2.1 of the FCC Rules: see the Respondents’ Reply Submissions at paragraph 44 (middle of page).
84. I do not accept the submission that it was implicit within those submissions that it was being said that there had been no reference of such matters, nor do I consider that what was there set out were the building blocks for the Tribunal’s conclusion. Nowhere in that material that was referred to me by Ms Whiteside was there any language of, or express reference to, jurisdiction.
85. Nevertheless, the Respondents argue that by doing so they put “in play” “*whether or not the alleged jute bag losses could be considered by the Board of Appeal at all*” (see McQueen [46]-[47]). It is conceded in the Respondents’ Skeleton argument put before me that they “*did not elaborate*” but the Respondents submit that “*the Board’s jurisdiction to determine the Jute Bags Claim [was put] squarely in play*”. However, as I have noted, there was in that material no reference to jurisdiction, or a lack of jurisdiction.

86. Equally, I am satisfied that if the Tribunal had gone so far as to say, as I consider they should have said, that they were considering of their own motion that they had no jurisdiction, I am satisfied that PBO would again not have remained supine, but would have responded given the important nature of a matter relating to jurisdiction to say what it considered were the reasons why there was jurisdiction.
87. I do not consider that the Respondents have made good their argument that, by what they said, they put in play whether or not the alleged jute bag losses could be considered by the Board of Appeal at all, essentially for the reasons that are given by PBO.
88. First, section 33 of the Act requires the “*essential building blocks in the tribunal’s conclusion*” to be in issue or in play. Arguing that the Jute Bag Losses should have been referred to earlier plainly does not put “*in play*” whether the Board was right to conclude that arguments about the Jute Bag Losses fell outside of the scope of the matters which the Board was entitled to decide.
89. Secondly, I consider that there is force in what Mr Rabinowicz states at paragraph [35] of his third statement that “*If [the Respondents’ argument was] correct, it would mean that as long as a party raises an argument (however bad) relating to the board of appeal’s lack of jurisdiction over a particular matter, it is then incumbent on the other party to point out other possible arguments which may have been (but were not) raised as to the board’s lack of jurisdiction and then explain why each of those arguments (which were not in fact raised by the other side) is not correct.*”
90. I do not consider (as alleged by the Respondents) that the Board’s jurisdiction was squarely in issue. Rather it was (if anything) a situation where the Board, of its own motion, considered that it might not have jurisdiction. Mr McQueen submits as follows at paragraph 49 of his statement in this regard, “*In any event, it must be correct as a matter of principle that, if an arbitral tribunal considers it may not have jurisdiction to decide a matter but that the parties have not raised that point, it must be determined by the Board on its own motion*”. Certainly a tribunal should raise the matter with the parties in such a situation, but what a tribunal cannot do, consistent with its duty under section 33, is to proceed to determine jurisdiction (*a fortiori* in an arbitration based on written submissions alone) without giving the parties any opportunity, still less a fair opportunity, to address the tribunal on the bases on which the tribunal is considering that it may not have jurisdiction.
91. It again appears that the Board, as with its decision on Rule 19.5, considered that the parties had “*missed the real point*”. It was therefore incumbent on the Board to “*warn the parties and give them an opportunity to address the point*”. It failed to do so, and I am satisfied that there was, in such circumstances, a serious irregularity.
92. The next question is whether such irregularity gave rise to substantial injustice. The Respondents argue that there was no substantial injustice because PBO’s claim for the Jute Bag Losses claim was time barred and/or PBO was precluded from raising it before the Board because the point had not been raised before the (first instance) Tribunal (see McQueen at [49]). This argument, I am satisfied, is interlinked with a further argument that the claim for Jute Bag Losses was a claim for damages for breaches of the *DONPRO* Contract. In summary the Respondents’ case appears to be that because no claim for losses caused by the *DONPRO* Contracts (as opposed to the eleven 2018 *CODON* Contracts) was before the (first instance) Tribunal PBO was precluded

from claiming the Jute Bag Losses at the appeal stage of the arbitration and/or had waived its entitlement to do so (Rules 2.3 and 5.7 of the FCC Arbitration Rules are relied on by the Respondents in this regard).

93. Whilst it would not be appropriate for me to express any concluded view I consider there is substance in the three reasons given by PBO as to why the Respondents' argument is incorrect.
94. First, it appears that the Jute Bag Losses were being claimed as losses for breach of the eleven 2018 CODON Contracts for the reasons given by Mr Rabinowicz at paragraphs 33 and 34 of his third statement. The relevant plea can be found at paragraphs 24, 29, 30, 32 and 34(c) of the Statement of Case on Appeal. Jute bags were provided in anticipation of the deliveries to be made under the DONPRO Contracts. These deliveries were never made. PBO was the buyer under these contracts and therefore had the deliveries been made PBO say that it would have received the jute bags / the jute bags would have been returned to PBO when the cocoa beans were delivered to it – whilst this is not expressly pleaded PBO says that this would have been obvious to the parties. The 2018 CODON Contracts were on materially similar terms as the remaining 2017 DONPRO Contracts (subject to differences in price), the reason being that the 2018 CODON Contracts were replacement contracts entered into to replace the remaining 2017 DONPRO Contracts after DONPRO became unable to contract with PBO due to a tax investigation and frozen bank accounts. The fact that the 2018 CODON Contracts were replacement contracts was accepted by the Board which stated that *“The Board of Appeal... agrees that the CODON Contracts were a replacement of the DONPRO Contracts”*. Therefore, had the 2018 CODON Contracts been performed PBO, as the buyer, would have received the jute bags on delivery. However, as the 2018 CODON Contracts were (PBO says wrongfully) terminated by CODON, the deliveries were never made and the jute bags were never delivered to PBO. PBO says this resulted in a loss to it.
95. At paragraph 24 of the Statement of Case on Appeal PBO expressly states that it is claiming *“damages as a result of CODON’s failure to deliver the shipments”*. The losses claimed are set out at paragraphs 28 and 29 of PBO’s Statement of Case on Appeal. Paragraph 29 expressly states that, in addition to the losses calculated by reference to FCC Rule 19.2.1, PBO is claiming *“Additional Losses”* pursuant to FCC Rule 19.2.3. The fact that the Jute Bag Losses are claimed as *“Additional Losses”* on top of the losses calculated by reference to FCC Rule 19.2.1 is expressly stated at paragraph 34(c).
96. Secondly, PBO says that it clearly counterclaimed for losses arising out of breaches of the eleven 2018 CODON Contracts at *“first instance”*, and at the Appeal stage of the arbitration. PBO acknowledges that it did not specifically raise the Jute Bag Losses until the Appeal Award stage, but PBO submits that this does not matter because whether loss had been suffered as a result of the breaches of the 2018 CODON Contracts alleged (by PBO) was clearly in issue before the Tribunal and the Board of Appeal - the manner in which PBO quantified its loss changed following, and responsive to, the findings made in the Award – which was something it was entitled to do.
97. In this regard, and thirdly, PBO is entitled to raise new issues at the appeal stage because the FCC Arbitration Rules provide that *“appeal proceedings are new proceedings in which fresh submissions and evidence may be submitted”* (FCC Arbitration Rule 3.15).

98. As for the merits of the claim itself, and whilst again it would be inappropriate for me to express a concluded view on the merits, I am satisfied that each of the following arguments raised by FIT is “*at least reasonably arguable*” and any one of them “*might well have*” resulted in the Board reaching a different conclusion and producing a significantly different outcome.
99. PBO claimed the Jute Bag Losses as “Additional Loss” under Rule 19.2.3. PBO submits that the dispute about whether the Jute Bag Losses are recoverable as “Additional Losses” is clearly within the scope of the Board of Appeal’s jurisdiction.
100. Rules 19.2.1 and 19.2.2 provide for payment to the Buyer or Seller (as appropriate, depending on who is in default) on a “close out for non-fulfilment” of a contract for the sale and purchase of cocoa beans governed by the FCC Contract Rules. The quantum of that payment is calculated by reference to a comparison between the contract price and the market value of the cocoa beans at the date of default. The difference is paid to the buyer or seller (as appropriate).
101. Rule 19.2.3 then states “[i]n addition to any amounts awarded under 19.2.1 or 19.2.2, arbitrators may, at their discretion, award such amount(s) as they see fit in respect of any proven further loss and/or expense incurred by a Party.” Rule 19.2.3 is widely drafted. PBO submits that by its terms, when read in the context of Rule 19.2 as a whole, it is intended to allow the tribunal to compensate the innocent party for any losses it has in fact suffered beyond (“additional to”) the difference between the market price and the contract price.
102. PBO submits that obvious examples of such potential additional losses include loss of profits suffered by an innocent buyer as a result of a lucrative contract for the on-sale of cocoa beans to a third party, wasted expenses incurred by an innocent seller in organising for cocoa beans to be delivered to the buyer and wasted expenses incurred by an innocent buyer in organising for the purchase and receipt of cocoa beans from the Seller. PBO points out that all of these examples require (or potentially require) the tribunal to consider contracts between one of the parties to the arbitration (the buyer and/or seller) and the other party or third parties regardless of whether those other contracts are also covered by the FCC Contract Rules.
103. Finally, PBO submits that the Board of Appeal was in any event not being asked to consider a dispute arising out of “*an agreement to supply and receive a service other than those specified in the FCC Contracts*” divorced from the FCC Contract in question. It was being asked to consider and quantify the loss suffered by a party to the relevant FCC Contract but doing so may (quite often) require the tribunal to evaluate a contract not governed by the FCC Contract Rule.
104. Again, I am satisfied that if PBO had been given an opportunity to address the Tribunal in relation to the Tribunal’s concerns about jurisdiction, it would not have been supine and not responded or addressed the points, rather it would have raised, on such an important issue, the points which it now identifies.
105. In the above circumstances, I am satisfied that there has been a serious irregularity by reason of the Board’s failure to comply with section 33 of the Act as PBO was not provided with a fair opportunity to address the Board’s view on jurisdiction on the Jute Bag Losses (and all the associated points that PBO would have wished to advance as addressed above), and I am satisfied that such serious irregularity has caused substantial injustice to PBO in the circumstances also identified above because I consider it would not have remained supine and would have taken up

the opportunity to raise the points it now wishes to raise. PBO's application under section 68 in this regard accordingly succeeds. I address the question of appropriate relief in due course below.

### **D.3 THE BOARD OF APPEAL'S DECISION IN REFUSING PERMISSION FOR AN AMENDED STATEMENT OF CASE**

106. PBO contends that the Board of Appeal failed to comply with its duty under section 33 of the Act (also set out at Rule 1.7 of the FCC Arbitration Rules), as required by section 68(2)(a) of the Act, and this has and/or will cause substantial injustice to PBO by refusing permission for PBO to put in an amended Statement of Case on Appeal.
107. This is, therefore, a section 68 challenge to a discretionary procedural decision of the Board. Section 33 imposes a general duty on the tribunal to act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent; and to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined. The tribunal is required to comply with that general duty in conducting the arbitration proceedings, in its decisions on matters of procedure and evidence.
108. In *Brake v Patley Wood Farm LLP* [2014] EWHC 1439 (Ch) it was recognised that a case management decision can be so unfair as to amount to a serious irregularity causing substantial injustice (see at [141]: “[a] case management decision could, in principle, be so unfair as to amount to a serious irregularity causing substantial injustice to a party in an arbitration...”).
109. PBO rightly acknowledges that it is rare for a case management decision to have that quality and effect, and the Respondents also highlight what was said in *Klamneft*, supra at [85] and *Russell on Arbitration* at para 8-096, which I bear well in mind.
110. It is to be borne in mind, however, that there is a wide range of case management decisions that a tribunal can make ranging from matters such as timetabling directions to a hearing, or discrete points such as costs, through to matters that may well be determinative of the outcome of the arbitration itself (which may be the effect of a successful or unsuccessful amendment application). In the case of the former, and general case management decisions, it is highly unlikely that a challenge will be sustained whilst in relation to the latter the duty in section 33 is in sharp focus. It is easier to conceive of a situation where section 68 could apply in the latter case if a tribunal made a decision which was so unfair as to amount to a serious irregularity causing substantial injustice to a party in the arbitration – that would be so if they reached a conclusion that no reasonable arbitrator could have reached again by reference to the authorities that I have already quoted.
111. PBO submits that this is just such a case in that in deciding to refuse permission to make the Amendments the Board failed to take into account relevant considerations, took into account irrelevant considerations and failed to carry out any (or any real) analysis of the balance of prejudice. In consequence, it is said, not only was the Tribunals' conclusion unfair but the Board approached the question in entirely the wrong way and reached a decision that no reasonable arbitrator could have reached.
112. In particular PBO make the following points:-



- (1) PBO submits that the Amendments were limited in scope and primarily of a legal nature, namely (a) that the Claim was time barred due to Rule 20.2.1 of the FCC Contract Rules, which required a claim to have been brought within one year of the “Final Day of Landing” and (b) that the alleged assignment of debts arising out of the Three DONPRO Invoices did not bind PBO because (among other things) Rule 4 of the FCC Contract Rules required written consent from PBO which had not been requested or obtained from PBO (which PBO refers to as the “Time Bar Amendment” and the “Assignment Amendment”).
  - (2) Secondly, PBO submits that the balance of prejudice was clearly in favour of allowing the Amendments. PBO submits that the Arguments had (at least) a real prospect of success and were potentially determinative of the Claim. The Amendments would have primarily required legal argument and would have required only minimal (if any) further factual evidence. Given the limited nature of the Amendments the delay caused to the proceedings would have been a matter of a few weeks and as such insignificant. Further, they rely on the fact that interest would continue to run on the Award, and the Board of Appeal could have ameliorated any additional expense with an award of costs. Therefore there would have been no (or very limited) prejudice to 2DON and DONPRO if the Amendments had been allowed.
  - (3) Thirdly, no consideration was given to the substance of the Arguments, whether they had a reasonable prospect of success, what the likely length of delay caused by the Amendments would be or whether any delay and further expense could be ameliorated by an award of interest or costs or otherwise.
  - (4) Fourthly, in refusing permission to make the Amendments, the Board of Appeal concluded that the delay and expense caused by the Amendments was unnecessary because it could have been avoided if PBO had changed its lawyers earlier stating “*That delay and expenses would be unnecessary since it could have been avoided if the Appellant had changed its lawyers at a much earlier stage*”. PBO submits that the fact that the Amendments were being suggested by PBO’s new legal representatives is irrelevant. The Board’s reasons for refusing the Amendments should apply regardless of whether the Amendments are being proposed by PBO’s old or new legal representatives. It is said that this reasoning also shows that the Board of Appeal misunderstood what “necessary” means in the context of section 33 of the Act. Whether delay is “necessary” falls to be construed within the context of section 33(1)(b) of the Act which imposes an obligation on the Tribunal to provide a fair means for the resolution of the matters falling to be determined. When amendments to a statement of case are being considered fairness must involve consideration of the balance of prejudice. However instead of doing so the Tribunal appears to have applied a blanket rule whereby amendments to statements of case are not to be permitted if they relate to matters that could have been argued earlier (at least where they are being proposed by a party’s new legal representatives). PBO submits that such a blanket rule is clearly unfair.
113. There is no substitute for considering the reasons given by the Board when assessing the validity and weight to be attached to each of these points and when considering whether no reasonable arbitrator could have reached the conclusion which was reached.
114. After setting out the background to the appellant’s application, and noting the fact that on 1 April 2020 the appellant requested permission to submit an amended statement of case (a draft of which the Board had received before it made its decision on 9 April), the Board noted that it

appeared that that draft contained substantial amendments to the original version. This means that the Tribunal must have considered that draft, and it noted that the respondent had objected to the application on grounds set out in a letter on 2 April.

115. After setting out the background to the application, the Tribunal said the following:

“The timetable for the presentation of written submissions is laid down in Arbitration Appeal Rules 3.8, 3.8.2. The last paragraph of Rule 3.8 provides that the timetable may be varied by the Board of Appeal in accordance with its general duty under Rule 1.7 and the first sentence of Rule 3.9 makes it clear that we may allow the exchange of additional submissions pursuant to Rule 3.8. The question which we have to determine therefore is whether we should allow the appellant to submit an amended statement of case in accordance with our duty under Rule 1.7. That rule requires the Board of Appeal to act fairly and impartially as between the parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent, and also to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined. The appellant has not suggested that it has not had a reasonable opportunity of putting its case or dealing with that of the respondent and we consider that it has had such an opportunity.

The appellant’s application has arisen because it has changed its legal representatives at a very late stage, and its new representatives take a different view from its original lawyers as to how its appeal should be presented. It is obviously open to the appellant to change its lawyers, but we do not consider that that should be allowed to interfere with the progress of the appeal, having regard to the requirement that disputes be resolved without unnecessary delay or expense. If we were to allow the appellant’s application, then this would no doubt require consequential amendments to the other submissions, all of which would involve additional delay and expense. That delay and expense would be unnecessary since it could have been avoided if the appellant had changed its lawyers at a much earlier stage. In all the circumstances, given that the appellant has already had a reasonable opportunity of presenting its case, we do not consider that it would be right to allow it a second opportunity at this very late stage given the unnecessary expense and delay which would arise as a result. The appellant’s application is therefore refused”.

116. For their part the Respondents submit that after expressly reminding itself of the general duty of fairness, the requirement to give each party a reasonable opportunity of putting its case and dealing with that of its opponent, and the need to avoid unnecessary delay or expense, the Board concluded that PBO had been afforded such an opportunity. The Respondents submit that in circumstances where the Claimant had submitted two statements of case on appeal, that reasoning is unimpeachable.

117. Regrettably I cannot agree, and I consider that the reasons given do demonstrate the very failings that PBO identify, and that the Board has not complied with its duty to act fairly under section 33 of the Act in relation to the amendment application:-

- (1) First, the Board makes no attempt whatsoever to identify the amendments themselves still less grapple with their perceived merits (or the relatively low requirement of reasonable

prospect of success) – the content and substance of the proposed amendments are clearly material facts which have to be considered as part of the requirement to act fairly.

- (2) Secondly, there is no attempt whatsoever to address the applicable principles in relation to whether amendments should be allowed - which involve a consideration of the points raised and their merits, why they are raised now, and whether the Respondents would be prejudiced by the amendments (and if so whether such prejudice could be ameliorated).
- (3) Thirdly, there is no attempt to consider, still less grapple with, the potential prejudice to PBO if the amendments are not allowed.
- (4) Fourthly, there does appear to be substance in the criticism that the Board seems to have focussed unduly, upon whether any delay could have avoided if the change of representation had occurred earlier, and failed to identify that the change of representation could itself be a good reason why the amendments were only being made at this stage and, it appears from Mr Rabinowicz's latest statement, certainly in terms of the final version of the amended statement very soon after new solicitors had been instructed, albeit it appears that there may have been some form of draft in play before the new solicitors were formally instructed.
- (5) Fifthly, the Tribunal failed to focus on the fact that little if any delay would result, that disputes are best determined on their true merits, and that there would be little if any prejudice to the Respondents (in a relevant sense) other than a very short delay, that interest would be running in the meantime, and that if necessary any prejudice to the Respondents could ameliorated by an appropriate costs order, whereas if the amendment was refused there was the potential for very great prejudice to PBO if it was shut out from making the proposed amendments.

118. I consider that this is one of those rare cases where the tribunal has failed to apply the applicable principles, failed to grapple with the merits of the application, and reached a decision that no reasonable tribunal would have reached. In reaching this conclusion I should make clear that I do not consider that the Board would not have been capable of acting fairly had it applied the applicable principles to the facts before it. I have no doubt that had the Board applied the applicable principles to the facts, the Board, like any tribunal applying the applicable principles to such facts, would have granted the amendment.

119. In such circumstances I am satisfied that the refusal to grant the amendment was so unfair as to amount to a serious irregularity in the arbitration. So far as substantial injustice is concerned, and as was said in *Brake*, supra, at [96] “*The injustice is substantial if a party is “unfairly deprived of an opportunity to present its case or make a case which had that not occurred might realistically have led to a significantly different outcome”*”

120. I am satisfied that if the Amendments had been allowed they could clearly “*realistically have led to a significantly different outcome*”. I do not understand the Respondents to be submitting that the Arguments would not have had real prospects of success. If they are suggesting that, I do not agree. Furthermore I am satisfied that the Arguments could realistically have led to a “significantly different” outcome. PBO’s time bar argument (if successful) would have been a complete answer to the Claim. The argument that the alleged assignment between DONPRO and 2DON did not bind PBO is also an important one. As matters stand PBO has been

ordered to pay significant sums to DONPRO though the Board of Appeal found that DONPRO has assigned the relevant debts to 2DON.

121. Again, it would not be appropriate to express any concluded views on the merits of the Amendments given that the points raised in the Amendments will have to be considered by the Board on their merits in due course. It suffices to say not only that the amendments stand a real prospect of success (the low threshold that is required for the purpose of an amendment) but also those amendments could “*realistically have led to a significantly different outcome*”. Out of courtesy to the parties, I will briefly refer to the respective arguments.
122. The Respondents’ arguments relate to procedural matters (which were not raised by or relied on by the Board of Appeal in their reasons for refusing the Amendments). As to the Time Bar Amendments, the Defendants contend that this was no longer open to PBO at the time when the permission for the Amendments was sought because even though the Respondents accept that limitation / time bar was a live issue before the first instance Tribunal, the point was not raised in the Appeal Arbitration until the Amendment Application was made and it is said this was precluded by the FCC Rules. The Defendants rely on the Rule 3.1(b) of the FCC Arbitration Rules which sets out time limits for when a notification of appeal is to be lodged.
123. PBO’s risposte, as recounted at paragraph 10 of Mr Rabinowicz’s third statement is as follows:

*“Rule 3.1(b) provides that “The Appellant’s Notice of Appeal shall reach the Secretary not later than 12 noon on the 21<sup>st</sup> consecutive day after the date of the Arbitration Award”. The document sent by PBO in this case is attached... It simply states that PBO had decided to appeal the Award. It did not contain (nor was it required to contain) reasons or grounds for appealing the Award. Thereafter Rule 3.8 sets out “time limits for submitting evidence” which includes submissions. Rule 3.8 provides for a standard timetable which “may be varied by the Board of Appeal in accordance with its general duty under Rule 1.7” [Rule 1.7 requires the Board of Appeal to act fairly, impartially etc]. The possibility of further statements and evidence is referred to again at Rule 3.9 of the FCC Arbitration Rules. The Tribunal was therefore not precluded or prevented from allowing the Amendments (including the amendment pleading a time bar defence to the claim) by Rule 3.1(b) or otherwise, nor did the Tribunal (in this respect rightly) suggest that it was so prevented in its letter dated 9 April 2020.”*

124. At one point, it was thought that the Respondents were arguing that PBO had made a relevant admission. I do not think this is pursued in the light of the oral submissions before me today but, if that point had been pursued, it is well established that even if admissions have been made they can be withdrawn.
125. I am satisfied that the balance of prejudice would clearly be in favour of allowing the Time Bar Amendments. As to the Assignment Amendment, there are two aspects to this: the first is whether PBO had submitted to the Tribunal’s jurisdiction in relation to Section 73(2) of the Act. Section 73(2) of the Act requires an objection to Tribunal’s jurisdiction to be made “*within such time as is allowed by the arbitration agreement or the Tribunal...*” and that, pursuant to the FCC Arbitration Rules, the Tribunal is entitled to allow late objections to its jurisdiction (see FCC Arbitration Rules 4.2 and 4.1.12 in particular).

126. I say no more about that jurisdictional point, as it may end up being canvassed before the Board and I consider that this Court should not opine upon such point when it is arguably still a live issue before the Board.
127. However, for present purposes, even if PBO is no longer able to challenge the Board of Appeal's jurisdiction over 2DON – and that will be a matter for the Board – it can still argue, as PBO did in the amended statement of case, that 2DON cannot claim against PBO because no notice of the (purported) assignment was given to PBO pursuant to requirements to do so at Rule 4 of the FCC Rules.

### **D.3 RELIEF UNDER SECTION 68**

128. The three applications under section 68 have succeeded. PBO urges me to set aside the entire Appeal Award and direct that the dispute between PBO and the Respondents be heard by a new tribunal alternatively that the Appeal Award should be remitted to the Board for reconsideration. For their part the Respondents urge upon me that the appropriate relief is to remit the points in relation to which PBO has been successful to the Board for reconsideration.
129. There has been no challenge to the impartiality of the Board, and I am satisfied that it is unnecessary, and inappropriate, to set aside the Appeal Award in its entirety. Quite apart from the fact that to set aside the Appeal Award in its entirety would be inconsistent with the policy of striving to uphold arbitration awards, to set aside the Award would also lead to unnecessary costs, and the rearguing of matters afresh which have already been determined. I make clear, however, that in remitting the Appeal Award to the Board such reconsideration should include reconsideration by the Board after receiving submissions from both parties on all the matters raised in relation to each section 68 challenge, including on the basis that the defences the subject matter of the amendments are live before the Board for determination.
130. One matter that was canvassed before me was whether or not it was appropriate for me to leave the question of whether the amendments should be allowed to the Tribunal. In circumstances where I have found that no reasonable Tribunal could have refused the amendments, I do not consider that to be the right approach. The right approach, I am satisfied, is that the defences which were the subject matter of the amendments are live before the Board for determination, and therefore all available points that could arise in relation to those alleged defences are available to PBO and to the Respondents by way of rebuttal.
131. I have chosen remission in order to save unnecessary costs being incurred. I anticipate that the Board (and this Court if called upon hereafter) would not look favourably upon any attempt by the Respondents to construe narrowly such remission for reconsideration.
132. I accordingly order that the Appeal Award be remitted to the Board for reconsideration of the points raised in each section 68 challenge which has succeeded. For the avoidance of doubt, I make clear that may involve the Board considering matters which it did not have to consider previously in the light of its previous findings. One example – but it is only an example – was given by the appellants, which would be in relation to the washout point, a point which it was not necessary for the Board to consider but – depending on the outcome of the points which arise for reconsideration – could arise for consideration.

133. The appellants were understandably keen to ensure it was apparent from the face of the judgment, which I trust it is, that such points would still be available and would still need to be determined by the Board if they arose.

#### **E. THE JURISDICTIONAL APPLICATIONS UNDER SECTION 67 OF THE ACT**

134. There were also two applications under section 67, the first to the effect that the Board does not have jurisdiction over 2DON, the second that the Board does have jurisdiction over the Jute Bag Losses. Those applications now have to be viewed in the light of the success of the applications under section 68 of the Act and the relief that I have granted in that regard. In such circumstances, it was accepted before me that it was inappropriate to rule upon the Section 67 applications at this time.

135. That applies to both of those jurisdictional challenges, not least in the case of the Section 68 relief that was granted in relation to the Jute Bag Losses because that does relate to jurisdiction and will, no doubt, be considered before the Board.

136. It would be inappropriate to express any views at this stage on jurisdiction when there will be, no doubt, an award from the Tribunal in relation to jurisdiction matters. It would be, I consider, inappropriate to rule upon section 67 applications at this stage when the outcome of that award from the Tribunal could resolve the disputes between the parties and either party may not wish to pursue jurisdiction any further.

137. Of course, if either party wish to pursue jurisdiction further, then there would be the right – as there always is – to make an application under Section 67 and have the matter reheard afresh in front of the Court.

138. In the light of the outcome of the Section 68 challenges, the Section 69 application for permission to appeal falls away addressing, as it does, the Appeal Award which has now been remitted and, accordingly, no order is made on that Section 69 application.

139. The further award or awards of the Board hereafter will, of course, carry their own time limits for any application to seek permission to appeal by any party.