Neutral Citation Number: [2022] EWHC 2641 (Comm)

Case No: CL-2021-000620

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/10/2022

Before :

THE HON MR JUSTICE BUTCHER

- -

Between :

NATIONAL IRANIAN OIL COMPANY

Claimant

- and –

(1) CRESCENT PETROLEUM COMPANY INTERNATIONAL LIMITED

(2) CRESCENT GAS CORPORATION LIMITED

Defendants

- -
- -

David Bailey KC, Jessica Sutherland and Frederick Alliott (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimant**
Ricky Diwan KC and Tariq A Baloch (instructed by **McDermott Will & Emery UK LLP**) for the **Defendants**

Hearing dates: 27-28 September 2022

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Approved Judgment

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Mr Justice Butcher:

1. There are two applications before the Court, brought by the Defendants, to whom I will refer to as 'CPCIL' and 'CGC' respectively and, when unnecessary to distinguish between them as 'Crescent'. Both applications are in respect of a challenge which has been brought by the Claimant ('NIOC') under s. 67 Arbitration Act 1996 ('s. 67' and 'the 1996 Act', respectively) relating to a Partial Award on Remedies dated 27 September 2021 by a Tribunal consisting of Hon Murray Gleeson AC, Lord Phillips of Worth Matravers, and Sir Jeremy Cooke ('the Partial Remedies Award').

Background

2. The Partial Remedies Award was issued in the course of an arbitration arising out of a Gas Sale and Purchase Contract ('the GSPC') entered into on 25 April 2001 between CPCIL (subsequently assigned to CGC) and NIOC for the long-term supply of gas from Iran to the UAE.

3. The GSPC provides that the contract is governed by Iranian law. It further provides, by Article 22.2 that:

'Any dispute, controversy or claim arising out of or relating to this Contract, or the breach, termination or validity or invalidity thereof shall be finally settled by arbitration [in accordance with the Procedures for Arbitration contained in Annex 2]'.

4. CGC had in its turn entered into a gas supply agreement with a partly-owned subsidiary, Crescent National Gas Corporation Ltd ('CNGC'), under which CGC undertook to supply volumes of gas on terms which were broadly similar to those in the GSPC. CNGC in turn entered into contracts to supply gas to various third-party end users. CGC also entered into one sale contract with an end user, namely Sharjah Electricity and Water Authority ('SEWA'), directly.

5. NIOC did not perform its obligations under the GSPC. Crescent commenced a first arbitration under the arbitration clause in the GSPC on 15 July 2009. The parties agreed London to be the seat for the first arbitration. That arbitration was bifurcated between Jurisdiction and Liability, and Remedies.

6. On 31 July 2014, the then-constituted Tribunal issued an Award ('the Liability Award') in which NIOC was found to be in continuing breach of the GSPC from 1 December 2005 to the date of that Award. NIOC sought to challenge the Liability Award under ss. 67 and 68 of the 1996 Act. Those applications were dismissed on preliminary issues by Burton J by judgments of 4 March 2016 and 18 July 2016.

Arbitration after the Liability Award

7. Following the Liability Award, the Remedies phase of the arbitration proceeded. CGC advanced three heads of loss:

(1) CGC's loss of profits arising from the sale of gas to CNGC under its gas supply agreement with CNGC.

(2) CGC's damages in respect of CGC's liability to CNGC in respect of CNGC's loss of profits on contracts with end-user customers.

(3) A declaration of an entitlement to indemnification in respect of future claims made against it by SEWA or CNGC in respect of any claims by third parties.

8. On 28 June 2018, Crescent commenced a second arbitration to claim damages for breach of the GSPC for the period post 31 July 2014 through to the end of the 25-year period specified in the GSPC. The parties agreed the seat of that arbitration to be Geneva.

The Partial Remedies Award and NIOC's s. 67 Application

9. The Partial Remedies Award was made in the first arbitration. As I have said, it was dated 27 September 2021. In the Partial Remedies Award Crescent's claims were dealt with as follows:

(1) CGC was awarded US$1,334.70 million in respect of its loss of profits from the on-sale of gas to CNGC. This may be termed 'CGC's loss of profits'.

(2) CGC was awarded US$1,085.27 million in respect of CGC's liability to CNGC for CNGC's lost profits on the sales to customers of gas and liquid products. This may be termed 'CGC Liability to CNGC Losses'.

(3) The Tribunal deferred for further consideration CGC's claims for declarations of an entitlement to indemnification in respect of future liabilities to third parties arising out of the non-supply of gas, on the basis that it did not have sufficient information to determine those claims. This may be termed the 'Indemnity claim'.

10. NIOC had taken no objection to the Tribunal's jurisdiction over (1), the claim for CGC's loss of profits. The Partial Remedies Award in respect of this head was the subject of a challenge under s. 69 of the 1996 Act, but that application was dismissed by Picken J in a judgment of 30 June 2022.

11. NIOC had taken before the Tribunal a jurisdictional objection to (2), the CGC Liability to CNGC Losses. The nature of the jurisdictional objection taken will be considered in more detail below. After the issuance of the Partial Remedies Award, NIOC issued, on 25 October 2021, an application to challenge that Award under s. 67 insofar as the Tribunal had declared that NIOC was liable to CGC in respect of the CGC Liability to CNGC Losses and had ordered NIOC to pay US$1,085.27 million in respect of such losses. NIOC contended that the Tribunal 'had no substantive jurisdiction to determine whether and/or to what extent CGC was liable to CNGC under the terms of a separate contract and to make the award in respect of the existence and/or amount of CGC's alleged liability to CNGC.'

Crescent's Application and Directions given

12. In response to NIOC's s. 67 application, Crescent issued the two applications which are before the Court. Those applications were (1) for the determination as a preliminary issue that NIOC's s. 67 claim was precluded by s. 73 of the 1996 Act, and (2) for the summary dismissal of NIOC's s. 67 application.

13. The parties agreed on directions as to how these applications should be dealt with, and these were embodied in an order of Foxton J dated 7 February 2022. It was ordered that there should be a combined hearing of: (1) a preliminary issue, in the following terms: 'Is the Claimant precluded from advancing the jurisdictional objection in the Section 67 Claim by Section 73(1) of the Arbitration Act 1996?'; and (2) Crescent's application for summary judgment on the basis that the s. 67 application had no real prospect of success. It is that combined hearing which came before me and to which this judgment relates.

The Preliminary Issue

14. The preliminary issue relates to s. 73 of the 1996 Act. That section provides in part:

> '**73 Loss of right to object.**
>
> (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.'

15. Crescent's case is that, while NIOC did raise a jurisdictional objection to the Tribunal's determination of the CGC Liability to CNGC Losses head of claim, it was not the same jurisdictional objection as it now seeks to raise under s. 67. Crescent contends that as NIOC knew or at least could with reasonable diligence have discovered what Crescent characterises as NIOC's new objection during the Remedies phase of the arbitration, NIOC's participation in the arbitration without raising that objection means that it is now precluded from doing so.

16. The preliminary issue thus raises the question of whether the objection which NIOC seeks to raise on its s. 67 application is different from the one which was raised before the Tribunal. This entails an analysis of both.

NIOC's Jurisdictional Objection before the Tribunal

17. NIOC made a jurisdictional objection in its Counter-Memorial on Remedies of 3 February 2016. This was put as follows:

'[30] In reality, by asking this Tribunal to award damages to CGC for its liability to CNGC for CNGC's lost profits, the Claimants would have the Tribunal assert jurisdiction over a lost profits claim by a company who is not a party to the arbitration clause in the GSPC. In fact, CNGC is a party to a different contract, containing a different arbitration clause and a different governing law clause.

[31] [NIOC] submits, therefore, that the Tribunal cannot properly hear any claims relating to CNGC's alleged lost profits. To do so would be to trespass on the jurisdiction of another tribunal, which CGC and CNGC have contractually agreed should determine any disputes between them. This Tribunal should therefore dismiss this part of the claim *in limine* for lack of jurisdiction.

…

2. The Tribunal's jurisdiction *ratione personae*

[113] The Tribunal's jurisdiction in this Case is derived from the arbitration agreement contained in Article 22 and Annex 2 of the GSPC.

[114] CNGC is not a party to the GSPC, and it has never been alleged by the Claimants that it is a party…

[115] … as the Claimants appear to have understood, any claim with respect to lost profits allegedly suffered by CNGC must be framed as a claim by a party to the GSPC. [NIOC] surmises that it is for this reason that the Claimants have not put forward a claim for CNGC's lost profits as such, but rather a claim for CGC's damages resulting from its alleged liability to CNGC for such lost profits.

[116] Consequently, if this Tribunal were to consider such a claim, it would first be necessary for it to determine whether, and to what extent, CGC is indeed liable to CNGC. This is in essence what the Claimants have asked the Tribunal to do.

3. The Tribunal's jurisdiction *ratione materiae*

[117] Under Article 22 of the GSPC, the Tribunal has jurisdiction to rule upon any dispute, controversy or claim arising out of or relating to the GSPC itself. On the other hand, the Tribunal's jurisdiction does not extend to making any determination whatsoever as to whether and, if so, to what extent CGC may be liable to CNGC in the context of their own contractual relationship.

[118] On the contrary, CGC and CNGC are parties to a different gas sales and purchase contract dated 8 June 2005. [The Memorial then quoted the Governing Law and Arbitration provision of that agreement].

[119] As a result, the only body having jurisdiction to determine whether and, if so, to what extent CGC is liable to CNGC for CNGC's alleged lost profits is an arbitral tribunal sitting in Sharjah in accordance with the LCIA Rules, and applying the law of the United Arab Emirates.

[120] That is clearly not this Tribunal. Yet by seeking from this Tribunal a holding that [NIOC] is liable for an amount of almost US$10.5 billion, and by arguing

CNGC's lost profits claim before this Tribunal, the Claimants are in essence asking this Tribunal to go beyond the limits of its own jurisdiction and to trespass on the jurisdiction of the only tribunal that would be competent to determine such a claim.

4. Conclusion: the claim relating to lost profits of CNGC must be rejected for lack of jurisdiction

[121] In conclusion, therefore, the portion of the claim relating to CGC's alleged liability for lost profits allegedly suffered by CNGC, in the amount of US$ 9.482 billion plus US$ 968 million in interest, must be dismissed for lack of jurisdiction.

[122] In sum, the Tribunal lacks jurisdiction both *ratione personae*, since CNGC is not a party to the arbitration agreement under the GSPC, and *ratione materiae*, since a different tribunal, with a different seat, acting under different procedural rules and applying a different governing law, has jurisdiction with respect to any claim arising out of the contract between CGC and CNGC.

[123] Finally, the Claimants fail to explain why CGC's claim for damages for its alleged liability to CNGC should be treated any differently from its claim for an indemnity for liabilities to other third parties…

…

[202] … Indeed, there appears to be no reason for CGC's claim for damages for its alleged liability to CNGC to be treated any differently from its claim for an indemnity for liabilities to other third parties.'

18. To that Counter-Memorial Crescent replied in its Reply Memorial on Remedies dated 25 April 2016. It contended, at para. 62, that the jurisdictional objection was wrong as:

'… This Tribunal, having its seat in England, is perfectly entitled to determine CGC's loss under the GSPC by reference to another contract (in this case the agreement between CGC and CNGC). That is part of the Tribunal's mandate to determine the dispute between the Parties present before it, and does not entail any assertion of jurisdiction over a third party.'

19. Crescent proceeded to cite Re R and H Hall Ltd and WH Pim (Junior) & Co.'s Arbitration [1928] All ER 763 and *Mustill and Boyd: Commercial Arbitration 2001 Companion*, at p. 73 where the authors said:

'The position is, we suggest, similar to that which does from time to time arise in practice, where in order to resolve a dispute between A and B an arbitrator has to decide an issue arising under a contract between B and C. There is nothing inarbitrable about such an issue, and the arbitrator commits no impropriety by deciding it, although his award will have no effect at all on C. Nor does he exceed his jurisdiction in doing so, for he is not purporting to act as arbitrator in relation to the contract between B and C, in relation to which he was not appointed, but instead he is deciding under the contract between A and B an issue which, albeit involving C, does properly arise under that contract.'

20. NIOC served a further Reply Counter-Memorial on Remedies on 19 August 2016. In relation to the claim for damages in respect of CGC's liability to CNGC, it was said:

'[195] Moreover, and in any event, the Tribunal simply cannot determine the existence and/or the amount of this alleged liability, because it would require the Tribunal to make legal and factual determinations under a different contract, the CGC-CNGC Contract, which is not a contract within the jurisdiction of this Tribunal (and which has different terms to the GSPC, is subject to a different dispute resolution mechanism and is governed by a different applicable law).

[196] The Claimants do not dispute this jurisdictional problem.

[197] Rather, they seek to sidestep it, by now reframing the claim, arguing instead that the Tribunal is somehow authorised to "determine CGC's loss under the GSPC by reference to another contract (in this case the agreement between CGC and CNGC)".

[198] The Claimants refer (bizarrely) to English law as authority for this proposition … [NIOC then responded to Re Hall and Pim and the passage from *Mustill and Boyd* which Crescent had cited]

…

[201] … In the present case, however, the Claimants are asking the Tribunal to give a decision that would have an effect on C – CNGC in this case – since it would be determining issues of whether and, if so, to what extent, CNGC is entitled to recover against CGC.

[202] Further, it must be borne in mind that, in the present case, the Parties have in no way "mandated" the Tribunal to decide issues arising under the contract between CGC and CNGC and that therefore, applying Mustill and Boyd's reasoning, such issues are both inarbitrable and outside the scope of the Tribunal's jurisdiction in these proceedings….'

21. In its Second Post-Hearing Brief, dated 23 August 2017, NIOC stated (at para. 3) that it maintained the jurisdictional objection made in its Counter-Memorial and to which reference has been made above. It further stated that 'Crescent's claim in respect of CNGC's alleged loss of profits, albeit framed as a claim for a quantified indemnity for CGC's liability to CNGC, can thus only be seen as an attempt to "pass through" a claim of CNGC directly against NIOC – a claim over which this Tribunal has no jurisdiction.'

22. The way in which the matter was dealt with by the Tribunal in the Partial Remedies Award was as follows:

'[551] NIOC has advanced a number of objections of principle in answer to Crescent's claim for an indemnity:

…

(2) The Tribunal has no jurisdiction to resolve issues between CGC and CNGC ….

…

4. Jurisdiction

[555] [NIOC] raised a jurisdictional argument to the effect that this Tribunal has no capacity to resolve any dispute between CGC and CNGC. The CGC-CNGC GSA contains an arbitration clause which, so far as the evidence shows, has never been invoked and is materially different from the arbitration clause applicable to the dispute between NIOC and Crescent. However, CGC is not inviting the Tribunal to resolve any dispute between CGC and CNGC. In the context of a dispute between CGC and NIOC, CGC is inviting the Tribunal to reach a conclusion that CGC is liable to CNGC in a certain amount, and to award damages against NIOC to compensate CGC for that liability. The argument advanced by NIOC is misconceived.'

NIOC's Jurisdictional Objection in its s. 67 challenge

23. NIOC's s. 67 challenge includes the following:

'[53]…[a] The Tribunal did not have substantive jurisdiction (within the meaning in section 30(1)(c) of the Act), to determine the existence and/or amount of CGC's alleged liability to CNGC under the separate gas supply agreement between CGC and CNGC (the CGC-CNGC GSA) dated 8 June 2005. In particular:

i. The Tribunal's jurisdiction is derived from the Arbitration Agreement contained in Article 22 of the GSPC between NIOC and CGC.

ii. CNGC was not a party to the GSPC or to the Arbitration Agreement in Article 22 of the GSPC between NIOC and CGC.

iii. The alleged liability of CGC to CNGC arose out of a separate contract, the CGC-CNGC GSA …

iv. The CGC-CNGC GSA contained a different dispute resolution mechanism …

v. The determination of the existence and/or extent of CGC's liability to CNGC were matters that fell within the scope of the arbitration agreement in Article 21 of the CGC-CNGC GSA. The Tribunal to be appointed under Article 21 of the CGC-CNGC GSA had, and has, jurisdiction to determine those matters.

vi. In light of the foregoing, on the proper construction of the Arbitration Agreement (contained in Article 22 of the GSPC), as a matter of applicable Iranian law, the determination of the existence and/or extent of CGC's liability to CNGC under the terms of the CGC-CNGC GSA were not matters within the scope of the Arbitration Agreement. Whether and to what extent CGC was liable to CNGC were controversies that arose out of and related to a separate contract between separate parties and, on the true construction of the Arbitration Agreement in accordance with

Iranian law, they were not matters that arose out of or related to the GSPC. They were not therefore matters which could be submitted to the Arbitration in accordance with the Arbitration Agreement within the meaning of Section 30(1)(c) of the Act. As a matter of Iranian law, the Tribunal exceeded its substantive jurisdiction, and its determinations as to the existence and/or amount of CGC's alleged liability to CNGC under the CGC-CNGC GSA are void and/or of no effect. In this regard NIOC relies upon the Expert Report on Iranian law of Dr Ali Mohammad Mokarrami dated 25 October 2021.'

24. Dr Mokarrami's expert report, which will be considered in more detail below, recorded that the question he had been asked to address was '*whether, on the proper construction of Article 22.2 of the GSPC as a matter of Iranian law, the Tribunal had jurisdiction to determine the existence and/or amount of CGC's alleged liability to CNGC under the terms of the separate' CGC-CNGC GSA?* At para. 11 Dr Mokarrami gave a summary of his opinion, saying 'In my opinion, on the proper construction of Article 22.2 of the GSPC as a matter of Iranian law, the Tribunal appointed pursuant to the GSPC clearly did not have jurisdiction to determine the existence and/or amount of CGC's alleged liability to CNGC under the terms of the separate contract, the CGC-CNGC GSA.' Dr Mokarrami gave evidence that Iranian law would adopt a restrictive interpretation of the arbitration clause in the GSPC.

Analysis

25. Crescent contends that NIOC's jurisdictional objection before the Tribunal was, and was only, one which can be described as a 'party consent objection', namely that CNGC was only bound by and subject to the arbitration agreement in the CGC-CNGC GSA and that no disputes involving it could be resolved pursuant to the GSPC arbitration agreement. What NIOC was now seeking to do was to raise a different objection, namely an objection based on the allegedly limited scope of the arbitration agreement in the GSPC. As that objection had not been raised before the Tribunal, s. 73 precluded it being raised now as a s. 67 challenge.

26. Section 73 of the 1996 Act embodies a compromise between different principles. On the one hand, arbitrators do not have the final decision as to their own jurisdiction. A party may challenge a decision by arbitrators as to their own jurisdiction under s. 67, and on such a challenge the court will examine for itself the jurisdiction of the arbitrators by way of a re-hearing. On the other hand, and subject to agreement otherwise, arbitrators have competence to rule on their jurisdiction (subject to challenge under s. 67), under s. 30 of the 1996 Act; and considerations of fairness dictate that a party who has an objection to the jurisdiction of the arbitrators should raise it in the arbitration and not keep it in reserve for a challenge in court.

27. In relation to the first of those principles, the position was stated by Thomas J in People's Insurance Company of China v Vysanthi Shipping Co Ltd (The 'Joanna V') [2003] 2 Lloyd's Rep 617, as follows:

> '[25] … It is self evident, as par. 138 of the DAC Report makes clear, that an arbitral tribunal cannot be the final arbitrator of the question of jurisdiction; as is pointed out in the DAC Report, this would provide a classic case of "pulling

> oneself up by one's own boot straps". However, giving a tribunal power to rule on its own jurisdiction means that the parties cannot delay valid arbitration proceedings indefinitely by making spurious challenges to the jurisdiction of the arbitral tribunal. Nonetheless the protection of the party objecting to the jurisdiction of the tribunal is its right to apply to the Court. That is an unfettered right and in any such application the party challenging the jurisdiction of the arbitrator is entitled to adduce such evidence as it considers necessary to show that the arbitrator had no jurisdiction. The Court is not in any way bound or limited to the findings made in the award or to the evidence adduced before the arbitrator; it does not review the decision of the arbitrator but makes its own decision on the evidence before it; I entirely agree … that the Court's duty is to rehear the matter and in doing so the Court is not limited to the evidence before the arbitral tribunal…'

28. As to the second, Moore-Bick J said, in Rustal Trading Ltd v Gill & Duffus SA [2000] 1 Lloyd's Rep 14, at page [20] of the policy underpinning s. 73:

> '[A party] is not entitled to allow the proceedings to continue without alerting the tribunal or the other party to a flaw which in his view renders the whole arbitral process invalid. That could often result in a considerable waste of time and expense which is no doubt something which the legislation seeks to avoid. There is, however, a more fundamental objection of principle to a party's continuing to take part in proceedings while at the same time keeping up his sleeve the right to challenge the award if he is dissatisfied with the outcome. The unfairness inherent in doing so is, of course, magnified if the defect is one which could have been remedied if a proper objection had been made at the time.'

29. Colman J identified 'a principle of openness and fair dealing' as underlying s. 73. In JSC Zestafoni v Ronly Holdings Ltd [2004] 2 Lloyd's Rep 335, he said (at [64]):

> 'The principle of openness and fair dealing between the parties to an arbitration demands not merely that if jurisdiction is to be challenged under s. 67 the issue as to jurisdiction must normally have been raised at least on some grounds before the arbitrator but that each ground of challenge to his jurisdiction must previously have been raised before the arbitrator if it is to be raised under a s. 67 application challenging the award. This was conceded by counsel and accepted by Mr Richard Field QC then sitting as a Deputy High Court Judge in Athletic Union of Constantinople v National Basketball Association [2002] 1 Lloyd's Rep 305 at page 311. That concession was, in my judgment, clearly correct. Were it otherwise, the policy of the sub-section could be frustrated by introducing at the last minute grounds of challenge not hitherto raised and thereby potential causes of delay and disruption of the application to the prejudice of the opposite party.'

30. The question which arises is as to the degree of specificity with which the ground of challenge has to be raised before the arbitrator if it is to be raised before the Court on

a s. 67 challenge. This issue was the subject of detailed and helpful consideration by Knowles J in Province of Balochistan v Tethyan Copper Co Pty Ltd [2021] EWHC 1884 (Comm), [2021] 2 Lloyd's Rep 443. At [101] – [109] Knowles J conducted a review of authority, which included reference to the Rustal and Zestafoni cases to which I have referred, and also to Thyssen Canada Ltd v Mariana Maritime SA (The Mariana) [2005] 1 Lloyd's Rep 640, Primetrade AG v Ythan Ltd (The Ythan) [2006] 1 Lloyd's Rep 457, Ases Havacilik Servis ve Destek Hizmetleri AS v Delkor UK Ltd [2013] 1 Lloyd's Rep 254, Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd [2014] 1 Lloyd's Rep 479, Konkola Copper Mines plc v U&M Mining Zambia Ltd [2014] EWHC 2210 (Comm), C v D1 [2015] EWHC 2126 (Comm), A v B [2017] 1 Lloyd's Rep 1, and *Russell on Arbitration* (24th ed).

31. At paragraphs [110 – 111] Knowles J summarised the principles and approach which he considered to be supported by the legislation as follows:

"[110] In my judgment the relevant legislation and authorities support the following principles and approach relevant to the present case:

(1) The fundamental principle, or policy, is fairness, and justice, in the sense of openness and fair dealing between the parties: see Moore-Bick J in Rustal at 19-20, Colman J in Zestafoni at [64], Cooke J in Thyssen at [18], Aikens J in Primetrade at [59]-[61] and Carr J in C v D1 at [150].
(2) There is also a concern to seek to avoid waste of time and expense: see Moore-Bick J in Rustal at 19-20 and Cooke J in Thyssen at [18].
(3) The issue as to jurisdiction must normally have been raised at least on some grounds before the arbitrator: see Colman J in Zestafoni at [64].
(4) In addition, each ground of challenge to jurisdiction or of objection to jurisdiction must have been raised if it is to be raised; by this is meant the irregularity that the party considers renders the whole arbitral process invalid: see Colman J in Zestafoni at [64], Cooke J in Thyssen at [18] and Aikens J in Primetrade at [59]-[61].
(5) It is wrong to be prescriptive or try to lay down precise limits in the abstract for the meaning of the phrase "ground of objection", but it is usually easy to recognise (or obvious) in particular cases whether a party is attempting to raise a new ground of objection to jurisdiction on an appeal: see Aikens J in Primetrade at [59]-[61].
(6) The 'grounds of objection' should not be examined closely as if a pleading, but broadly, or adopting a broad approach. The fact that different and broader arguments are raised or new evidence is put forward does not mean that there is a new ground: see Aikens J in Primetrade at [59]-[61] and [112] and Hamblen J in Ases at [36]-[37] and Habas Sinai at [86]-[87].
(7) This is not to suggest a relaxed approach, especially bearing in mind (1) above. The other party (and the arbitral tribunal) must know the specific grounds which are to be advanced in challenge to an arbitration award not only because they must know the case to be met but also because they should know the extent to which what would otherwise be a valid award is challenged: see Field J in Konkola at [18].
(8) It would be unfair if a party took part in arbitration yet kept an objection up his sleeve and only attempted to deploy it later: see Moore-Bick J in Rustal at 10-20 and Carr J in C v D1 at [150].
(9) Different and broader arguments may be raised, and evidence and argument relied upon may be expanded, provided these are within the same existing "ground of

objection" to the jurisdiction of the arbitrator: the fact that it raises different and broader arguments or new evidence does not mean that it is a new ground: see Aikens J in Primetrade at [61]-[62] and 112 and Hamblen J in Habas.
(10) It is not enough that the party mention an issue; the issue must be properly put to the arbitral tribunal as denying jurisdiction.

[111] I accept point (10) from Lord Goldsmith QC's argument summarised above. Although the authorities may not quite reach this tenth point in terms, they lead to it and are not fully given effect without it. In the words of the statute, the objection must be "ma[d]e" or "raise[d]".

32. That summary was the subject of extensive debate before me. For NIOC, Mr Bailey KC accepted that sub-paragraphs (2), (3), (5) and (6) of Knowles J's summary were accurate, but he made a number of criticisms of the remaining sub-paragraphs, as follows:

(1) That sub-paragraph (9) duplicates sub-paragraph (6).

(2) That sub-paragraph (4) was potentially misleading, and in particular the reference to an irregularity rendering the whole arbitral process invalid was out of place in the context of a s. 67 challenge and was language referable instead to a challenge under s. 68, which was what the Thyssen case had been concerned with.

(3) That sub-paragraph (7) was wrong, and was inconsistent with the broad approach referred to in sub-paragraph (6), and was not properly supported by Konkola which was a case involving amendment to an Arbitration Claim Form and not a case in relation to s. 73 of the 1996 Act.

(4) That sub-paragraph (10), in its reference to a matter being 'properly put' to the tribunal, was potentially misleading. Mr Bailey KC contended that the sub-paragraph should make clear that the point being made is that a party cannot simply mention an issue in passing, but must express it as an objection to jurisdiction.

(5) That the references to 'fairness' in sub-paragraphs (1) and (8) have to be qualified by, or seen in the context of, the principle that a party's objections to jurisdiction as taken before the tribunal are not to be narrowly construed; and that a party should not too readily be held to be precluded from coming to Court and having the Court determine what was the extent of the tribunal's jurisdiction.

33. The most important of these issues is that relating to sub-paragraph (7) in Knowles J's summary, and I will consider that in more detail below. As to the other points, I considered that: (i) those in relation to sub-paragraphs (9) and (4), albeit not of very great significance, had force; (ii) the point in relation to sub-paragraphs (1) and (8) was not any reason for criticising the terms in which those sub-paragraphs were expressed by Knowles J, which is supported by authorities decided in respect of s. 67; (iii) as to sub-paragraph (10) I consider that it is implicit in Knowles J's formulation, and confirmed by what he said in paragraph [111] that he was saying that the relevant point should be distinctly put as one going to the tribunal's jurisdiction.

34. The significant issue, as I have said, relates to Knowles J's sub-paragraph (7). It is correct, as NIOC pointed out, that Konkola is not a case which directly related to s. 73. I consider that NIOC was also correct to say that language derived from a case in which what was at issue was amendment of an Arbitration Claim Form, and in particular the language of the other party having to 'know the case to be met' is potentially misleading if applied to the specificity with which a jurisdictional objection must be raised before the tribunal if it is to be raised on a s. 67 challenge. A jurisdictional objection may be sufficiently raised before the tribunal as to allow a s. 67 challenge, even though the way in which that objection was raised before the tribunal would almost certainly not be regarded as sufficient notice of the 'case to be met' in the context of a pleading in court. Thus, in Habas Sinai, an objection to jurisdiction was put to the arbitrator on the basis that, as a matter of English law, putative agents had had no authority to bind the party to the relevant sale contract or the arbitration agreement in it. There was no reliance on Turkish law. On the application under s. 67 it was argued that issues of authority were governed by Turkish law. Hamblen J held that that fell within the ground of objection made at the arbitration. Similarly in Arsanovia Ltd v Cruz City 1 Mauritius Holdings [2012] EWHC 3702 (Comm), [2013] 1 Lloyd's Rep 235, the party which brought a s. 67 challenge had not expressly contended before the tribunal that Indian law governed the relevant arbitration agreement, but sought to do so on the s. 67 application and to contend that, in accordance with Indian law, the tribunal had had no jurisdiction under that agreement to decide on claims made because they were premature and/or fell outside the scope of the arbitration provision. Andrew Smith J held (at [47]-[48]) that the ground of objection had been raised before the tribunal; the reliance on Indian law was not an 'objection' within s. 73; and while a party must have raised each ground of challenge before the tribunal, 'that does not mean that a party must have advanced (still less that he must expressly have advanced) each stage in the argument in support of each ground of objection.'

35. In my judgment, the point which is addressed in sub-paragraph (7) of Knowles J's summary in paragraph [110] of Province of Balochistan is perhaps better formulated in terms of the party challenging the tribunal's jurisdiction needing to have communicated to the other party (and the tribunal) the substance of each ground of objection relied upon.

36. Accordingly, in the light of the arguments addressed to me I would respectfully propose the following somewhat modified summary of the relevant principles and approach to a case where s. 73 is raised as an objection to a s. 67 challenge.

(1) The fundamental principle, or policy, is fairness, and justice, in the sense of openness and fair dealing between the parties: see Moore-Bick J in Rustal at 19-20, Colman J in Zestafoni at [64], Aikens J in Primetrade at [59]-[61] and Carr J in C v D1 at [150].

(2) There is also a concern to seek to avoid waste of time and expense: see Moore-Bick J in Rustal at paras. [19-20].

(3) The issue as to jurisdiction must normally have been raised at least on some grounds before the arbitrator: see Colman J in Zestafoni at [64].

(4) In addition, each ground of challenge to jurisdiction or of objection to jurisdiction must have been raised if it is to be raised; by this is meant the jurisdictional objection that the party considers renders the whole or the relevant part of the arbitral process invalid: see Colman J in Zestafoni at [64], and Aikens J in Primetrade at [59]-[61].

(5) It is wrong to be prescriptive or try to lay down precise limits in the abstract for the meaning of the phrase "ground of objection", but it is usually easy to recognise (or obvious) in particular cases whether a party is attempting to raise a new ground of objection to jurisdiction on an appeal: see Aikens J in Primetrade at [59]-[61].

(6) The 'grounds of objection' should not be examined closely as if a pleading, but broadly, or adopting a broad approach. The fact that different and broader arguments are raised or new evidence is put forward does not mean that there is a new ground: see Aikens J in Primetrade at [59]-[61] and [112] and Hamblen J in Ases at [36]-[37] and Habas Sinai at [86]-[87].

(7) This is not to suggest an unduly relaxed approach, especially bearing in mind sub-para. (1) above. The substance of each ground of objection relied upon should have been communicated to the other party (and the arbitral tribunal).

(8) It would be unfair if a party took part in arbitration yet kept an objection up his sleeve and only attempted to deploy it later: see Moore-Bick J in Rustal at 10-20 and Carr J in C v D1 at [150].

(9) It is not enough that the party mention an issue; the issue must be distinctly put to the arbitral tribunal as denying jurisdiction.

37. I turn to apply this approach to the facts of the present case, which I have set out above. In favour of Crescent's position are the facts that before the Tribunal, NIOC's case on jurisdiction undoubtedly focused on the fact that CNGC was not a party to the GSPC, but to another contract which had its own, separate arbitration clause; that the objection was not put explicitly in terms of the proper construction of the arbitration clause; and still less was there any reference to the arbitration clause having to be given a narrow construction by reference to Iranian law. On the other hand, NIOC can point to the fact that it unequivocally raised an objection to the Tribunal's jurisdiction over the CGC Liability to CNGC Losses claim, on the basis that the Tribunal's jurisdiction was founded only on the arbitration clause in the GSPC, and did not extend to a claim of this nature.

38. The point appears to me to be close to the borderline. Mr Bailey KC accepted that NIOC could have put the point much more clearly than it was; and that it might be that it had only just done enough to raise the ground of objection. Nevertheless, he submitted, enough had been done. Ultimately, I was persuaded that he was right in this submission. I have reached this conclusion for the following reasons:

(1) There is no doubt that NIOC was taking a point as to the Tribunal's lack of substantive jurisdiction over the relevant claim.

(2) That objection was being put on the basis that a jurisdiction which was founded on the arbitration clause in the GSPC did not embrace a claim which was founded on an assertion of a liability of CGC to CNGC under another contract.

(3) The objection was said to be one both 'ratione personae' and 'ratione materiae'. In relation to the latter, what was said in paragraph 117 of NIOC's Counter-Memorial on Remedies was that the Tribunal's jurisdiction was to rule upon 'any dispute, controversy or claim arising out of or relating to the GSPC itself', but that '[o]n the other hand, the Tribunal's jurisdiction does not extend to making any determination whatsoever as to whether and, if so, to what extent CGC may be liable to CNGC in the context of their own contractual relationship'. That paragraph does, at least implicitly, put forward the case that a claim as to whether and if so to what extent CGC may be liable to CNGC is not one which arises out of or relates to the GSPC itself.

(4) No specific contention was put forward as to the proper construction of the arbitration provision being a matter which had to be determined by reference to Iranian law. Nevertheless it was apparent that NIOC was contending that English law was irrelevant to the question of the jurisdiction of the Tribunal to decide the claim for CGC Liability to CNGC Losses: hence the reference, in paragraph 198 of NIOC's Reply Counter-Memorial on Remedies, to Crescent's reference to English law being 'bizarre'. That NIOC was contending that English law was not relevant will have come as no surprise to Crescent, given that, as Darowski 2, served on Crescent's behalf, states (at [30]:) 'Throughout the First Arbitration the law of the GSPC's arbitration agreement has never been controversial and the Parties have proceeded on the basis that it is governed by Iranian law, the governing law of the underlying contract.'

(5) In these circumstances, and applying a broad approach, I think NIOC had raised the ground of objection it now seeks to rely upon. Or, to put the matter another way, it had raised the substance of its present point. What it had not raised were the stages in the argument upon which it now relies, nor the facets of Iranian law which it now contends to be relevant. But these points, as indicated by Habas Sinai and Arsanovia, are not sufficient to mean that the ground of objection had not been made to the Tribunal.

(6) I do not consider that the principle of openness and fair dealing between the parties is contravened by recognising that NIOC is not precluded by s. 73 from now raising its s. 67 challenge. NIOC was not guilty of having kept a jurisdictional objection 'up its sleeve'. It had raised such an objection. It is true that it had not put that point in the way in which it now seeks to do, but I do not consider that there is any significant unfairness in Crescent now having to deal with that point which would outweigh an unfairness to NIOC if it were precluded from raising before the court a point which went to the arbitrators' jurisdiction by reason only of its not having properly elaborated that point before the Tribunal.

39. For these reasons, I would answer the preliminary issue: 'No'.

Crescent's Application for Summary Judgment

40. Crescent applies for the summary dismissal of NIOC's s. 67 application. It was not in issue that the court has power under the CPR summarily to dismiss a jurisdictional challenge without a full rehearing. This was confirmed in Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2021] UKSC 48, [2022] 1 Lloyd's Rep 24, at [80]-[82]. As was stated at [82]:

> 'The CPR allow for summary judgment to be given against either a claimant or a defendant. If there is no real prospect of a party's case succeeding at trial, then it is generally appropriate to determine the issue summarily regardless of whether that party is the claimant or defendant or, in this context, the party seeking to enforce or the party resisting enforcement of the award.'

The Applicable Principles

41. The test for summary determination is well-known. A helpful recent summary was given by Henshaw J in Lex Foundation v Citibank N.A. [2022] EWHC 1649 (Comm) at [33]-[35] as follows:

> 33. In *The LCD Appeals* [2018] EWCA Civ 220, the Court of Appeal quoted with approval the following considerations applicable to summary judgment applications, taken from passages in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) and *Swain v Hillman* [2001] 1 All ER 91 at 94:
>
> i) the court must consider whether the claimant has a "*realistic*" as opposed to a "*fanciful*" prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
>
> ii) a "*realistic*" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 § 8;
>
> iii) in reaching its conclusion the court must not conduct a "*mini-trial*": *Swain v Hillman*;
>
> iv) this does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* § 10;
>
> v) however, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> vi) although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no

obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 3;

vii) on the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725; and

viii) a judge in appropriate cases should make use of the powers contained in Part 24. In doing so, he or she gives effect to the overriding objective as contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose; and it is in the interests of justice. If the claimant has a case which is bound to fail, then it is in the claimant's interest to know as soon as possible that that is the position: *Swain v Hillman* [2001] 1 All ER 91 § 94.

34. If an applicant for summary judgment adduces credible evidence in support of the application, the respondent then comes under an evidential burden to prove some real prospect of success or other reason for having a trial: *Sainsbury's v Condek* [2014] EWHC 2016 (TCC) § 13.

35. A respondent to a summary judgment application who claims that further evidence will be available at trial must serve evidence substantiating that claim: *Korea National Insurance Corp v Allianz* [2007] 2 CLC 748 (CA):

"It is incumbent on a party responding to an application for summary judgment to put forward sufficient evidence to satisfy the court that it has a real prospect of succeeding at trial. If it wishes to rely on the likelihood that further evidence will be available at that stage, it must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court. The court may then be able to see that there is some substance in the point and that the party in question is not simply playing for time in the hope that something will turn up. It is not sufficient, therefore, for a party simply to say that further evidence will or may be available, especially when that evidence is, or can be expected to be, already within its possession, as is the case here. …" (§ 14 per Moore-Bick LJ)

42. For NIOC, Mr Bailey KC contended that this statement of the relevant principles should be supplemented in two particular respects. In the first place, he contended that the notion of the distinction between a fanciful and a realistic prospect of success is the same as the distinction between a case which the court can see is bound to fail and one where that cannot be said. In support of that contention, he referred to the decision of the Court of Appeal in Begum (on behalf of Mollah) v Maran (UK) Ltd [2021] EWCA Civ 326, [2022] 1 All ER (Comm) 940. At [22] Coulson LJ said:

> '… (a) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91. A realistic claim is one that carries some degree of conviction: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, [2003] 24 LS Gaz R 37, [2003] All ER (D) 75 (Apr). But that should not be carried too far: in essence the court is determining whether or not the claim is 'bound to fail': *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 All ER (Comm) 319, [2012] 1 WLR 1804 (at [80] and [82]).'

This is a helpful elucidation of what is involved in deciding whether a claim or defence stands a realistic prospect of success.

43. Secondly, Mr Bailey KC pointed out, correctly, that guidance as to what is meant by the inappropriateness of conducting a 'mini-trial' is provided by the decision of the Supreme Court in Okpabi v Royal Dutch Shell [2021] UKSC 3, [2021] Bus LR 332. Specifically, at [127]-[128] Lord Hamblen JSC stated that the correct approach, when asking whether the position might change from how it appears at the summary judgment stage, was not to ask whether there was 'a clear prospect that new material will become available before the trial which is likely to give the claimants a real prospect of success', but rather to ask whether there are reasonable grounds for believing that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success. That was not, of course, in issue before me as an accurate statement of the position. What was in issue was whether and how it was applicable in the present case.

The Grounds of the Application

44. Crescent put forward its application for summary judgment on two grounds.

(1) In the first place, Crescent submitted that NIOC's case that the CGC Liability to CNGC Losses claim fell outside the scope of the arbitration clause in the GSPC was inconsistent with findings made by the Tribunal, which had *res judicata* effect, that CGC's liability to CNGC was the natural and ordinary consequence of non-delivery, and would have been 'certain, direct and foreseeable', and that the liability of CGC was harm directly resulting from NIOC's breach.

(2) Secondly, and in any event, if Dr Mokarrami's evidence was confined to what was admissible, it did not establish that NIOC's case had any realistic prospect of success, and it could be seen that NIOC's objection based on the limited scope of the arbitration clause is bound to fail.

I will consider these two grounds in turn.

Crescent's First Ground

45. As to the first, Crescent submitted that it is not open to a party to raise a s. 67 jurisdictional objection which is in conflict with a final and binding determination, having *res judicata* effect, of the Tribunal. Crescent relied in support of this contention on Westland Helicopters v Sheikh Salah Al-Hejailan [2004] 2 Lloyd's Rep 523 and on C v D1 [2015] EWHC 2126 (Comm). In the former, Colman J said this:

> '[33] Westland, although not formally admitting that the arbitrator had, as he concluded, jurisdiction to resolve the dispute as to quantum by reference to an annual retainer never applied to set aside the Second Award on the grounds that he had no such jurisdiction. It is said that this was a decision taken "for commercial reasons". However, the consequence of that decision is that, in as much as the Second Award determined that such jurisdiction existed, there is a decision binding on the parties to that effect. Moreover, it is now too late either to apply to set aside the award under s. 67 or to appeal it by applying for leave to appeal under s. 69.
>
> [34] It follows that it is not open to Westland to deploy as a basis for their case that the arbitrator had no jurisdiction to award interest the submission that there was no jurisdiction to award the capital sum by reference to which such interest was awarded. This is because there is an issue estoppel in respect of the award as to the capital sum. …
>
> [37] … where issues A and B have been determined by an arbitrator who has issued an interim award and the losing party wishes to use a procedure under the 1996 Act for challenging the arbitrator's conclusion on issue B but not on issue A, it is not open to him to challenge the conclusion on issue B by arguing that the arbitrator should have reached a different conclusion on issue A.'

46. In C v D1, arbitrators appointed under an arbitration clause in a Share Purchase Agreement ('SPA') had decided that they had jurisdiction to determine claims arising out of C's breach of a separate contract, the Production Sharing Contract (or 'PSC'). They had also decided that under an indemnity clause in the SPA the claimant was obliged to indemnify D1 in respect of certain losses resulting from C's breaches of the PSC. C brought an application under s. 67 challenging the tribunal's jurisdiction to determine claims arising out of breach of the PSC. In support of that application C sought to argue that the tribunal had been wrong in its construction of the indemnity clause in the SPA, and that it did not oblige C to indemnify D1 in respect of losses by reason of C's breaches of the PSC. Carr J found that C was precluded from raising this argument, even for the purposes of supporting a jurisdictional challenge. At [75] she set out that the determination of the question of interpretation of the indemnity clause in the SPA (which was described as the 'paragraph 241(2)' determination) was a finding on the merits. At [83]-[85] Carr J then said this:

> '[83] I cannot accept that it is open to C now to seek to challenge the Tribunal's reasoning and finding at paragraph 241(2), even if only for jurisdictional

> purposes.
>
> [84] The settled position for all purposes between the parties is that, pursuant to paragraph 241(2) of the Award, Clause 11.1 [i.e. the indemnity clause in the SPA] extends to claims arising out of breaches of the PSC. In the absence of a challenge to that finding, the finding is final and binding, enforceable under s. 66 of the 1996 Act and under the New York Convention internationally. Any challenge under s. 67 of the 1996 Act has to be to a finding on jurisdiction. Here there is no challenge to the Tribunal's jurisdiction for the purposes of paragraph 241(2) of the Award.
>
> [85] This position is consistent with the decision of Colman J in *Westland Helicopters Ltd v Sheikh Salah Al-Hejailan* …'

47. Crescent's contention is that there is a similar preclusion of NIOC in the present case. Crescent's case in this regard is that NIOC is seeking to argue, in reliance on Dr Mokarrami's expert report (especially at paragraphs 26.3 and 26.4), that under Iranian law, and in particular by reason of Article 520 of the Code of Civil Procedure, damages can be claimed or awarded only where the relevant losses are the 'direct result of the non-performance' of the obligations contracted for; that the losses suffered by CNGC were not a direct result of the breach of obligations between NIOC and CGC but rather arose out of the putative breach of a different contract; and therefore cannot be regarded as a claim arising out of the GSPC and therefore not within the scope of the arbitration clause. That, Crescent argues, is inconsistent with the Tribunal's finding in paragraphs 567-576 of the Partial Remedies Award, which were part of the decision on the merits, that NIOC was liable to CGC in respect of its liability to CNGC. As found in paragraph 572 of the Partial Remedies Award, without the interposition of CNGC, 'the loss of profit on the sales to end-users and the product sales would have been recoverable [by CGC] as certain, direct and foreseeable losses.' Given CNGC's interposition, CGC was liable to it. That liability was, as found in paragraph 574, 'harm directly resulting from NIOC's failure to discharge its obligation to deliver unprocessed gas.' NIOC was liable to CGC in respect of that liability. This involved a finding that this liability on the part of NIOC was for harm which was both the direct and foreseeable consequences of NIOC's breach, satisfying the Iranian law requirements in those respects.

48. For its part, NIOC did not, as I understood it, dispute that the findings of the Tribunal at paragraphs 567-576 of the Partial Remedies Award were decisions on the merits and had *res judicata* effect. Mr Bailey KC said that it was no part of NIOC's case on its s. 67 application to attack or seek to go behind the findings of causation in those paragraphs. What NIOC did submit was that there was no inconsistency between Dr Mokarrami's report and paragraphs 567-576 of the Partial Remedies Award. It argued that Dr Mokarrami was saying only that losses suffered by CNGC were not a direct result of the breach of NIOC's contract with CGC. The Tribunal, in paragraphs 572-574 of the Partial Remedies Award, in particular, had been saying only that the damages for which CGC was liable to CNGC were direct, and that NIOC's liability to CGC for its own loss was direct, but not that CNGC's losses were directly caused by NIOC's breach.

49. I consider that there is an inconsistency between what is being said in Dr Mokarrami's report, in particular in paragraphs 26.3 and 26.4, and the findings of the Tribunal at paragraphs 567-576 of the Partial Remedies Award. In paragraph 26.3, what Dr Mokarrami is seeking to argue is that any liability of CGC to CNGC for CNGC's losses cannot be compensated in damages because CNGC's losses are not the direct result of NIOC's breach. However, the Tribunal has found: (a) that CGC's liability to CNGC was the natural and ordinary consequence of the failure to deliver under the CGC-CNGC GSA, (b) that that failure to deliver was caused by NIOC's failure to deliver under the GSPC and (c) that CGC's liability to CNGC was harm to CGC which was directly caused by NIOC's breach and thus compensatable as a matter of Iranian law. Those findings are inconsistent with Dr Mokarrami's contention that the losses for which CGC is being compensated are not the direct result of the non-performance.

50. I am not, however, persuaded by Crescent's argument that this conclusion as to inconsistency means that, for this reason alone, NIOC cannot rely on Dr Mokarrami's report, or that the s. 67 application is bound to fail. In my view, what this point means is that those parts of Dr Mokarrami's report which seek to contend that the liability of CGC for CNGC's losses was not, in fact, the direct result of NIOC's breaches cannot be relied upon. That does not preclude reliance on other parts of the report.

Crescent's Second Ground

51. I therefore turn to consider Crescent's wider case that NIOC has no realistic prospect of success on its s. 67 challenge, and that Dr Mokarrami's report, insofar as admissible, does not provide material for considering that it has.

52. In analysing this question the first matter to be considered is the proper role of evidence as to foreign law in a case such as this.

53. The issue raised by NIOC is as to the scope of the arbitration clause in the GSPC. The law applicable to the GSPC and to the arbitration agreement in it is Iranian law. What that means is that the process of construction of the arbitration clause must be conducted in accordance with the principles of construction established by Iranian law. The province of an expert is to inform the court as to what those principles are. It is not to tell the court what the proper construction is, or to say what construction the expert would put on the words used. The position is as set out by Hamblen LJ in BNP Paribas v Trattamento Rifiuti Metropolitani [2019] EWCA Civ 768, [2019] 1 CLC 822 at [45]-[49] as follows:

> 45. "The role of foreign law experts in relation to issues of contractual interpretation is a limited one. It is confined to identifying what the rules of interpretation are.
>
> 46. It is not the role of such experts to express opinions as to what the contract means. That is the task of the English court, having regard to the foreign law rules of interpretation.
>
> 47. This is well established law and is clearly set out and summarised by Lord Collins in *Vizcaya Partners Ltd v Picord* [2016] UKPC 5, [2016] 1 CLC 806

at [60]:

"60. …Where the applicable law of the contract is foreign law, questions of interpretation are governed by the applicable law. In such a case the role of the expert is not to give evidence as to what the contract means. The role is "to prove the rules of construction of the foreign law, and it is then for the court to interpret the contract in accordance with those rules": *King v Brandywine* [2005] EWCA Civ 235, [2005] 1 CLC 238, para 68; Dicey, paras 9-019 and 32-144 ("the expert proves the foreign rules of construction, and the court, in the light of these rules, determines the meaning of the contract")."

48. To similar effect is the judgment of Longmore LJ in *Savona* at [15]:

"15. …In a case in which the main, let alone the only, issue is as to the construction of a foreign jurisdiction clause as opposed to an English jurisdiction clause, the only relevance of evidence of foreign law is to inform the court of any difference of law in relation to the principles of construction, see *King v Brandywine* [2005] 1 CLC 238, para 68 per Waller LJ and *Vizcaya Partners Ltd v Picord* [2016] 1 CLC 806 para 60 per Lord Collins. It is not to have competing arguments as to how the highest court in the foreign jurisdiction would decide the question whether a claim brought in England would (or would not or would also) fall within the foreign jurisdiction clause. The task of the English court is merely to inform itself of any relevant different principles of construction there might be in the foreign law and, armed with such information, look at both jurisdiction clauses and decide whether the English claim falls within the English clause. That should be a comparatively straightforward exercise."

49. TRM's Italian law expert did express views as to how an Italian court would interpret the IJC and what she considered the IJC to mean. That is inadmissible and irrelevant evidence.'

54. In the present case, once the court has been informed as to the relevant rules of construction as a matter of Iranian law, it is for the court to interpret the arbitration clause. Given that the GSPC was written in English, no question of translation of the language of the clause arises.

55. Dr Mokarrami does not give evidence to the effect that the English words 'arising out of or relating to', or indeed equivalent words in Farsi or any other language, are legal terms of art, or have a technical meaning which could not be appreciated by a reading of the phrase in accordance with the relevant principles of construction. He does seek to give inadmissible evidence as to what the contractual words mean and how they apply to the present case. This is most obviously the case in relation to paragraph 11 of his report, but is not confined to that paragraph.

56. For present purposes, the relevant questions are: (1) what principles of construction does Dr Mokarrami's report indicate are applicable? and (2) whether, applying those principles, does an argument that the scope of the arbitration clause did not cover the claim for CGC Liability to CNGC Losses have a realistic prospect of success in the sense discussed above?

57. As to the first of those questions, Dr Mokarrami's admissible evidence appears to indicate the following principles of construction:

(1) That Iranian law looks to the words of the arbitration agreement itself. 'This is because the words of the arbitration agreement are paramount in conveying the mutual intention and consent of the parties thereto to submit their disputes (as defined in the relevant arbitration agreement) to arbitration.' (paragraph 22) '[A]n arbitration agreement, like any other contract, is only subject to interpretation under the relevant principles of applicable law where there is an ambiguity in the text of the agreement. If there is no ambiguity, the text is strictly interpreted.' (paragraph 29)

(2) That Iranian law applies a restrictive approach in interpreting the scope of arbitration provisions, whereby 'there is a presumption that jurisdiction is only conferred on to arbitrators to resolve those specific claims, disputes or controversies that the parties have expressly agreed and articulated in the arbitration agreement to be within the competence of the arbitrators.' (paragraph 23)

(3) Iranian law does not recognise an equivalent of what may be called the *Fiona Trust* presumption that arbitration clauses are to be interpreted widely such that any dispute arising out of the relationship between the parties should be decided by the same tribunal and that distinctions in the wording of arbitration clauses should not normally result in significant differences in scope. (paragraph 32)

58. While Dr Mokarrami refers to certain texts on Iranian law and to two Iranian court decisions, these do not support any more specific rule of construction relevant to the wording of the arbitration clause in the GSPC than I have outlined above. Dr Mokarrami cites an article by Dr Abdolhossein Shiravi entitled (in translation) 'Formation of Arbitration Agreement in Light of the Law of International Commercial Arbitration of Iran' in Qom Advanced Studies Law Review (1999). That article expresses the view that while a clause which referred to arbitration disputes arising out of the contract might not cover disputes as to its formation or validity, a clause which referred 'all the disputes related to the contract … shall be construed as more extensive'. This indicates that Iranian law mandates that attention is given to the words used, and such words as 'related to' are regarded as wider than other formulations. Neither of the cases cited by Dr Mokarrami considers the width or otherwise of the phrase 'arising out of or relating to' the contract, or of similar language. One of those cases was decided on the ground that the particular subject matter of the dispute (dissolution of a company) was inarbitrable under Iranian law. That is of no relevance to the present case.

59. Applying the principles of construction which I have distilled from Dr Mokarrami's report, as above, I do not consider that NIOC's case that the relevant claim fell outside the scope of the arbitration clause stands a realistic prospect of success. This is for the following reasons:

(1) As has been set out above, the question is whether there is a realistic prospect that the court, itself construing the words of the arbitration provision in the light of the relevant principles of construction, will hold that it did not extend to the claim in issue.

(2) The words of the clause refer to arbitration 'any dispute, controversy or claim arising out of or relating to this Contract, or the breach, termination or validity or invalidity thereof'. Without adopting any 'pro-arbitration' construction, or a '*Fiona Trust*' presumption, and indeed taking a literalistic approach to them, the words used are wide. In particular the words 'relating to' are wide, and the category of disputes, controversies or claims which may at least 'relate to' the GSPC or to its breach is broad.

(3) The proper interpretation of an arbitration clause must necessarily be considered 'at the time that the … agreement is made', and be 'forward looking'. That is how it was put in BNP Paribas v Trattamento at [56]-[57]). There is no reason for considering that Iranian law, if it is relevant in this regard, is to any different effect, given that Dr Mokarrami states that the starting point of the enquiry as to the scope of the clause is the words used because they convey 'the mutual intention and consent of the parties'. What is accordingly involved here is to ask whether the clause, in referring to arbitration all claims arising out of or relating to the GSPC or its breach, extended to a claim which might in the future be brought by one of the parties to the GSPC for damages which that party alleged that it had sustained by reason of its liability to a third party as a direct result of the other contracting party's breach of contract. I do not consider that there is a realistic prospect of that question being answered in the negative.

60. I have carefully considered NIOC's argument that it would be inappropriate to give summary judgment because the court does not have before it all the evidence which there would be at trial. Mr Bailey KC pointed to the fact that there has not been a report from an expert on behalf of Crescent at all; there has not therefore been an exchange of reports; there has not been a joint memorandum of experts; the experts have not had the opportunity to change their minds; and there has been no cross-examination.

61. I accept that it may be a somewhat rare case in which, if there is a material and disputed issue as to a foreign law, a court can give summary judgment. In the present case, however, the considerations which might apply to make such a course inappropriate appear to me to be absent. Specifically:

(1) NIOC has had the opportunity to put before the court what Iranian law it contends is applicable. NIOC is very familiar with dealing with issues of Iranian law. A very great deal of consideration was given to Iranian law during the course of the arbitration, and NIOC adduced extensive expert evidence in relation to Iranian law. It has now put forward the evidence of Dr Mokarrami.

(2) There is no reason for thinking that, if there were to be a trial, the principles of construction as a matter of Iranian law would be shown to be *more* favourable to NIOC's argument than Dr Mokarrami's report suggests them to be. Mr Bailey KC accepted that NIOC was not contending that there was something which Dr Mokarrami wished to add which was not in his report.

(3) There is, however, clearly at least a possibility that the procedures which would be adopted at a trial, and in particular the introduction of expert evidence on behalf of Crescent, would result in the position as to the relevant principles of construction as a

matter of Iranian law appearing as *less* favourable to NIOC's current argument than that presented by Dr Mokarrami's report.

(4) This is not a case in which there is any question of disclosure being given which might add to or alter the evidence now available.

(5) I do not consider that there are reasonable grounds for considering that if the matter were to proceed to trial the position which would emerge would be materially different, in a way which favoured NIOC, from what emerges from Dr Mokarrami's report.

62. Insofar as NIOC maintains on its s. 67 application as a separate point the jurisdictional objection which the Tribunal understood was made to it, then I consider that that point was misconceived for the same reasons as the Tribunal itself gave.

Conclusion

63. For these reasons, I conclude that NIOC's s. 67 application stands no realistic prospect of success and I grant summary judgment on it in favour of Crescent.