



Neutral Citation Number: [2023] EWHC 1189 (Comm)

Case No: CL-2021-000471

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN AN ARBITRATION CLAIM

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

Date: 22 May 2023

Before :

THE HONOURABLE MR JUSTICE HENSHAW

Between :

PORT DE DJIBOUTI S.A.

Claimant/
Respondent in the Arbitration

- and -

DP WORLD DJIBOUTI FZCO

Defendant/
Claimant in the Arbitration

Ricky Diwan KC, Georgios Petrochilos KC and Thomas Sebastian (instructed by **Three Crowns LLP**) for the **Claimant**

Graham Dunning KC and Catherine Jung (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Defendant**

Hearing dates: 8 and 9 March 2023

Further written submissions received: 17 March, 30 March and 5 April 2023

Draft judgment circulated to the parties: 11 May 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 22 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Mr Justice Henshaw:

(A) INTRODUCTION	3
(B) BACKGROUND	5
(1) The parties and the key contracts	5
(2) The arbitration agreements	6
(3) Key provisions relating to shareholders and share transfers	7
(4) Subsequent events	10
(C) DP WORLD’S CLAIMS IN THE ARBITRATION.....	11
(D) PDSA’S JURISDICTION OBJECTION BEFORE THE TRIBUNAL	13
(E) THE TRIBUNAL’S CONCLUSIONS	17
(1) JVA Termination Claim	17
(2) Share Transfer Claim	18
(3) Breaches Claims	20
(F) JURISDICTION OVER THE SHARE TRANSFER CLAIM	21
(G) JURISDICTION OVER BREACHES CLAIMS	30
(H) WHETHER PDSA CEASED TO BE A SHAREHOLDER	38
(1) PDSA’s submissions	39
(2) Analysis.....	42
(I) LOSS OF THE RIGHT TO OBJECT.....	45
(J) CONCLUSIONS	48

(A) INTRODUCTION

1. The Claimant, Port de Djibouti SA (“*PDSA*”) brings this jurisdictional challenge under section 67 of the Arbitration Act 1996, in respect of certain determinations made by Professor Dr Maxi Scherer, sitting as a sole arbitrator, in her final partial award of 7 July 2021 (the “*Award*”). The arbitration was seated in London and conducted under the 2014 LCIA Rules.
2. On PDSA’s case, the jurisdiction issue arises from the arbitrator’s determination that, on the proper construction of the arbitration agreements, PDSA remained a “*Shareholder*” (under the applicable contract terms) in the parties’ joint venture company, Doraleh Container Terminal S.A. (“*DCT*”), after a Presidential Ordinance of 9 September 2018 by which the Republic of Djibouti (“*the Republic*”) took ownership of PDSA’s shares in DCT.
3. In brief outline, PDSA submits that:
 - i) Presidential Ordinance No. 2018-001/PRE dated 9 September 2018 (the “*Presidential Ordinance*”) immediately, automatically and

compulsorily transferred to the Republic ownership of PDSA's shares in DCT. As was common ground before the arbitrator, under the applicable Djibouti law that meant that PDSA no longer owned equity in the share capital of DCT, such ownership having been vested in the Republic.

- ii) The arbitration agreements in the parties' Joint Venture Agreement ("*JVA*") and in DCT's Articles of Association ("*the Articles*") were, by their terms, limited to disputes between "*Shareholders*".
 - iii) Under the contractual definitions, a person/entity could not be or remain a "*Shareholder*" unless it (a) actually owned equity in the share capital of DCT and (b) (unless it was an original signatory party to the JVA) had signed a deed of adherence and thereby agreed to be bound by the obligations of the JVA.
 - iv) Even though the Republic signed no deed of adherence, and therefore did not itself become a "*Shareholder*", PDSA ceased to be a Shareholder upon the Presidential Ordinance because it removed PDSA's equity ownership.
 - v) As a result, under the JVA terms, PDSA had no further rights or obligations under the JVA (including the arbitration agreement), save that it remained liable for any allegation of breach that occurred before it ceased to be a Shareholder (for which purposes the arbitration agreements would remain an applicable right and obligation).
 - vi) Consequently, the arbitrator had no jurisdiction to rule on contentions of contractual breach post-dating the Presidential Ordinance, nor on the question of whether PDSA remained a Shareholder thereafter. The arbitrator's contrary conclusion was a jurisdictional finding and was wrong.
4. Again in brief outline, the Defendant DP World Djibouti FZCO ("*DP World*") submits that:
- i) It is undisputed that PDSA was a party to the arbitration agreements in the JVA and Articles, and that DP World validly commenced the arbitration against it by invoking those arbitration agreements.
 - ii) Properly analysed, PDSA has accepted that the arbitrator had substantive jurisdiction to determine the claims on which DP World actually succeeded in the Arbitration. Those include DP World's claim that the transfer of ownership effected by the Presidential Ordinance was made in breach of the JVA and Articles, both of which contained provisions stipulating that signature of a deed of adherence by the putative transferee (i.e. the Republic) was a "*condition of any transfer of Shares*".
 - iii) PDSA's challenge falls outside the scope of section 67, because it does not concern an issue going to the arbitrator's "*substantive jurisdiction*" (as that term is defined in the Arbitration Act). PDSA's real objection

is not to the arbitrator's substantive jurisdiction but to the relief that the arbitrator awarded in respect of DP World's claims.

- iv) In reality, what PDSA is in fact seeking to do is to challenge the arbitrator's findings on the merits of the dispute.
 - v) In any event, PDSA has lost the right to pursue its challenge, pursuant to section 73(1) of the Arbitration Act. PDSA was given the express opportunity by the arbitrator, before the Award was issued, to clarify the scope of the jurisdictional objection it pursued. Not only did PDSA fail to raise any objection to the claims on which DP World succeeded and the relief DP World sought in respect thereof, but it in fact positively confirmed that the arbitrator enjoyed jurisdiction.
 - vi) In any event, PDSA's challenge would fail as a matter of substance, because:
 - a) PDSA did not cease to be a Shareholder for the purposes of the JVA and Articles, despite the transfer of ownership to the Republic as a matter of property law; and
 - b) even if it did, the arbitrator retained jurisdiction to determine all the claims on which it found in DP World's favour, including the claim that PDSA remained a Shareholder following the Presidential Ordinance.
5. I have concluded that the arbitrator did have jurisdiction in relation to all the matters she dealt with, and that PDSA's claim must therefore be dismissed.

(B) BACKGROUND

(1) The parties and the key contracts

- 6. PDSA is a Djiboutian company and legal successor to Port Autonome International de Djibouti ("**PAID**"). As of 14 November 2016, 76.5% of its shares were indirectly owned by the Republic.
- 7. DP World is a UAE company which operates ports in various countries.
- 8. In 2004 the Republic granted DP World the exclusive right *inter alia* to develop, build and operate a container terminal in the port of Dolareh, Djibouti (the "**Terminal**").
- 9. DCT, a Djiboutian company, was established in 2006 to hold the rights to develop and operate the Terminal. PAID and then PDSA held 66.66% of the shares in DCT and DP World held the remaining 33.34%.
- 10. On 30 October 2006, DCT entered into a 30-year concession agreement with the Republic to develop and operate the Terminal (the "**Concession Agreement**").

11. As recorded in the Award , various contracts were concluded in 2007 to progress the venture. On 22 May 2007, the Republic, DCT and PAID entered into a Port Services Agreement. Also on 22 May 2007, PAID and DP World (but not the Republic) entered into the two contractual instruments in issue in these proceedings, namely the JVA and the Articles.
12. According to DP World at least, although it was the minority shareholder in the joint venture, it was agreed – and insisted upon by the international financial institutions financing the construction of the terminal – that DP World would have the right to appoint a majority of the directors on the board of DCT, so that it (rather than the Republic) would control and manage DCT. Those and other protections were expressly incorporated into the JVA and Articles; and, in order to ensure that they were preserved, both contracts also incorporated detailed share transfer provisions, including a requirement that any transferee of shares enter into a deed of adherence binding it to the terms of the JVA.
13. The JVA and the Articles are governed by Djibouti law. However, it is common ground that on this jurisdictional challenge, the court is to apply English principles of interpretation on the basis that PDSA did not invoke any principles of Djiboutian law in its Part 8 arbitration claim form and indicated in its responsive evidence that it was not itself relying upon any principles of foreign law (as recorded in a judgment of HHJ Pelling KC dated 30 March 2022).

(2) The arbitration agreements

14. Clauses 19 and 20 of the JVA include the following provisions:

“19.1 This Agreement shall commence on the date of execution of this agreement and, unless terminated by the written agreement of the parties to it, shall continue for so long as two or more parties continue to hold Shares in the Company but a Shareholder will cease to have any further rights or obligations under this Agreement on ceasing to hold any Shares except in relation to those provisions which are expressed to continue in force and provided that this Clause shall not affect any of the rights or liabilities of any parties in connection with any breach of this Agreement which may have occurred before that Shareholder ceased to hold any Shares.”

“20.1 In the event of any dispute between the Shareholders arising out of or relating to this Agreement, representatives of the Shareholders shall, within 10 Business Days of service of a written notice from any Shareholder to the others (a “Disputes Notice”) hold a meeting (a “Dispute Meeting”) in an effort to resolve the dispute. In the absence of agreement to the contrary the Dispute Meeting shall be held at the registered office for the time being of the Company.”

...

20.3 Any dispute which is not resolved within 20 Business Days after the service of a Disputes Notice, whether or not a Dispute Meeting has been held, shall, at the request of either party made within 20 Business Days of the Disputes Notice being served, be referred to arbitration under the rules of London Court of International Arbitration”

15. Article 52.1 of DCT’s Articles of Association states:

“All disputes which could arise during the course of the Company or its liquidation, either between the Shareholders themselves regarding the Company affairs, or between the Shareholders and the Company, are subject to arbitration, in accordance with the Rules of the International Court of Arbitration of London, the State and the artificial persons of Djiboutian public law, Shareholders of the Company expressly waiving any privilege of jurisdiction or enforcement.”

(3) Key provisions relating to shareholders and share transfers

16. Clause 1.2 of the JVA defines the term “Shareholders” as follows:

“**Shareholders** means:

(i) any shareholders in the Equity Share Capital of the Company who are Parties to this Agreement, being PAID and DPW Djibouti [i.e. DP World] as of the date hereof; and

(ii) any Person to whom Shares are issued or transferred in accordance with this Agreement from time to time and who has executed a Deed of Adherence;

while any Shares are held by such Persons; and Shareholder means any of them (as the context requires).”

17. A series of provisions in the JVA refers to the concept of ‘holding’ shares. For example, the definition of “*Government Shareholders*” indicates that it means PAID and its transferees “*so long as they may hold Shares in the Equity Share Capital*” of DCT, and the “*Government Shares*” are defined to mean “*the Shares held by the Government Shareholders in the Equity Share Capital of [DCT] from time to time*”.

18. The “*Parties*” to the JVA were defined as “*PAID, DPW Djibouti, the Company and any other Persons who may become parties to this Agreement by the execution of a Deed of Adherence ...*”.

19. The JVA provisions on share transfers, which I consider in more detail in section (H) below, include the following:

“14.1 **General**

...

(b) The restrictions on Transfer contained in this Clause 14 shall apply to all Transfers, operating by law or otherwise.

...

(d) The provisions of this Clause 14 are serious and are for the protection of the legitimate interests of all the Shareholders and the Company.

...

14.5 Deed of adherence

It shall be a condition of any transfer of Shares (whether permitted or required) that:

- (i) The transferee, if not already a party to this Agreement, enters into an undertaking to observe and perform the provisions and obligations of this Agreement in the Agreed Form set out in Annexure 5 [sc. 4] hereto (a “**Deed of Adherence**”); and
- (ii) The relevant transferor of Shares assigns its obligations under any guarantee or encumbrance to which it is a party, to the transferee.

14.6 Registration of transfers

(a) The Directors shall only register any Transfer made in accordance with the provisions of this Agreement.

...

(c) A person executing an instrument of transfer of a Share is deemed to remain the holder of the Share until the name of the transferee is entered in the register of members of the Company in respect of it.

(d) Upon registration of a Transfer of Shares, and provided that the requirements of Clause 15.5 [sc. 14.5] have been complied with, a Shareholder’s benefit of the continuing rights under this Agreement shall attach to the transferee who may enforce them as if it had been a party to this Agreement and named in it as a Shareholder.”

20. Article 5A.1.xxviii of the Articles similarly defines “*Shareholders*” as:

“(a) The subscribers to these Articles of Association holding Shares in the Capital of the Company, and

(b) Any Persons to whom Shares are issued or Transferred in accordance with these Articles and who have executed a Deed of Adherence;

while any Shares are held by such Persons; and Shareholder means any of them (as the context requires).”

21. The definitions in JVA and the Articles are expressed to apply “*unless repugnant to the context of their usage*”.

22. Article 11, dealing with transfers of shares, includes the following provisions:

“11.2 Any Transfer of Shares is subject to Clause 14 of the [JVA]. Any Transfer of the Shares of the Company in contravention of this Article 11 or the provisions of the [JVA], shall be void and unenforceable and the Board of Directors shall not register such Transfer under Article 11.1”.

“11.3 Consequently

...

(ii) The conditions provided by the present Article 11 are applicable to any legal or conventional Transfer;

...

(iv) The provisions of this Article 11 are serious and are for the protection of the legitimate interests of the Company.”

“11.7 Deed of Adherence

It shall be a condition of any Transfer of Shares (whether permitted or required) that:

(i) The Transferee, if not already a Party to this Agreement, enters into an undertaking to observe and perform the provisions and obligations of these Articles under a Deed of Adherence; and

(ii) The relevant transferor of Shares assigns its obligations under any guarantee or encumbrance to which it is a party, to the transferee.”

“11.8 Registration of Transfers

(i) The Directors shall only register any Transfer made in accordance with the provisions of these Articles and the [JVA].

...

- (iii) A person executing an instrument of Transfer of a Share is deemed to remain the holder of the Share until the name of the transferee is entered in the register of members of the Company in respect of it.
- (iv) Upon registration of a Transfer of Shares, and provided that the requirements of [the JVA] have been complied with, a Shareholder's benefit of the continuing rights under this Agreement shall attach to the transferee who may enforce them as if it had been a party to this Agreement and named in it as a Shareholder."

23. The recitals to the prescribed form of deed of adherence, in JVA Annexure 4, contemplate that the deed will be entered into before the proposed share sale and purchase occurs.

(4) Subsequent events

24. It appears that relations between the parties subsequently soured. DP World complains that since 2013, by a series of measures including the events precipitating the arbitration, the Republic and PDSA have sought to oust DP World from its role in managing the terminal without compensation, renege upon the terms of the contracts in place between the two sides, and grant rights over the terminal to a Chinese rival of the group of which DP World forms part (and, as of 2012, minority shareholder in PDSA) in breach of those contracts.
25. On 28 July 2018 PDSA purported to terminate the JVA with immediate effect, on the alleged basis that DP World had failed to act in the best interests of DCT.
26. By a letter dated 8 August 2018, PDSA called for an extraordinary general meeting of DCT's shareholders to remove the DP World-appointed directors from the board.
27. DP World on 31 August 2018 obtained without notice injunctive relief from this court (Bryan J), *inter alia* restraining PDSA from treating the JVA as terminated and from voting in favour of the removal of DP World's directors from DCT's board.
28. On 5 September 2018 DP World commenced the arbitration, claiming *inter alia* that PDSA's purported termination was unlawful and of no legal effect (the "**JVA Termination Claim**").
29. The Presidential Ordinance was issued four days later, on 9 September 2018. It stated:

“Article 1: The ownership of the shares held by the company [PDSA] in the capital of the company [DCT] is transferred to the State to ensure protection of the nation’s fundamental interests.

Article 2: The State will compensate the company [PDSA] within a maximum period of two months in exchange for the shares transferred to the State. The compensation terms will be determined by decree.

Article 3: The State representatives in the corporate bodies of the company [DCT], in respect of its stake in the share capital, will be appointed by decree.

Article 4: This order shall take effect upon signature and shall be published under the emergency procedure.”

30. A press release issued by the Republic the following day explained that the purpose of the Presidential Ordinance was to ensure that “*the DCT company cannot under any circumstances ‘come back’ under the control of DP World ... DP World’s ‘strategy’, which consists in trying to oppose the will of a sovereign state, is both unrealistic and destined to fail*”.
31. The Presidential Ordinance was ratified by the Djiboutian Parliament (a constitutional requirement) on 28 October 2018 by “*Law 29*”, the provisions of which were expressed to be backdated to apply “*as of 09 September 2018*”.
32. The change in ownership effected by the Presidential Ordinance was apparently registered in the Djiboutian Company Register on 17 October 2018 (although the document stating this was itself dated 6 August 2019). No share transfer was recorded in DCT’s share register.
33. At the return date hearing on 14 September 2018 (at which PDSA did not appear), DP World sought and obtained from Teare J the continuation of the interim injunction granted by Bryan J the previous month. The injunction was continued on terms that restrained PDSA and its “*Affiliates*” (as that term was defined in the JVA and Articles, which extended to the Republic) from taking any steps to effect a transfer of shares in DCT in the absence of a deed of adherence.
34. Following the Presidential Ordinance, DP World amended its Request for Arbitration *inter alia* to advance further claims that PDSA (i) remained a shareholder in DCT notwithstanding the Presidential Ordinance (the “*Share Transfer Claim*”), and (ii) had breached various provisions of the JVA and Articles, in particular by reason of the Share Transfer (the “*Breaches Claims*”, referred to in the arbitration as the “*JVA and Articles Breaches Claims*”).

(C) DP WORLD’S CLAIMS IN THE ARBITRATION

35. The substantive relief which DP World sought in the arbitration, by way of partial award, was encapsulated in §§ 231 and 232 of its Reply. I quote those paragraphs below with definitions interpolated for ease of reference:

“231. Without prejudice to its right to amend, supplement or restate the relief to be requested in the arbitration, DPWD respectfully requests that the Tribunal, by way of a partial award, to:

- (a) DISMISS PDSA challenge to the admissibility of DPWD’s claims;
- (b) UPHOLD its jurisdiction to determine DPWD’s claims under DCT’s Articles;
- (c) [**JVA Termination Claim**] DECLARE that, notwithstanding PDSA’s purported termination of the JVA on 28 July 2018, the termination of the JVA is unlawful and consequently, the JVA remains valid and binding;
- (d) [**Share Transfer Claim**] DECLARE that notwithstanding the Presidential Ordinance, the purported transfer of shares from PDSA to the Republic is in breach of the JVA and Articles and, consequently, invalid and unenforceable and that PDSA remains a shareholder of DCT;
- (e) [**Breaches Claims**] DECLARE that PDSA has also breached Clauses 4.3(c), 5.2(a), 7, 8.5, 9.3, 11.1, 13.1, 14.1(a), 14.3(b), 14.5, 15.1(a), 15.1(i), 15.1(j), 16.1, 17.1, 17.2(d) of the JVA and Articles 11.1, 11.2, 11.7, 17, 21.5, 23, 42A, 47.1 of the Articles;

232. In addition, DPWD respectfully requests that the Tribunal:

- (a) DECLARE that PDSA is liable to indemnify DPWD for any damages resulting out of the wrongful termination;
- (b) ORDER PDSA to pay to DPWD compensation for damages DPWD has incurred as a result of PDSA’s wrongful actions in an amount to be quantified at a later date;
- (c) DECLARE that PDSA remains party to the JVA and the Articles.”

36. The alleged breaches involved in the Breaches Claim were listed in § 64 of DP World’s written opening in the arbitration, which stated:

“64. DPWD has described each breach committed by PDSA (or through its affiliate the Republic) in its Statement of Case: ¶¶ 153–173. In summary, PDSA is liable for breaches of Clauses 4.3(c), 5.2(a), 7, 8.5, 9.3, 11.1, 13.1, 14.1(a), 14.3(b), 14.5, 15.1(a), 15.1(i), 15.1(j), 16.1, 17.1, 17.2(d) of the JVA and Articles 11.1, 11.2, 11.7, 17, 21.5, 23, 42A, 47.1 of DCT’s Articles in respect of the following actions:

- (a) treating the JVA as terminated (also a breach of the English Injunction);
 - (b) purporting to transfer its shares to the Republic in breach of the JVA and the Articles, having failed to secure a Deed of Adherence from the Republic;
 - (c) attempting to unlawfully remove DPWD’s nominated directors on the DCT Board at a shareholders’ meeting and depriving those directors from exercising their rights as directors of DCT;
 - (d) seeking to invalidate DCT’s Articles and the 18 February 2018 Board Resolution in the Djibouti courts;
 - (e) appointing an Administrator to take over the Board of DCT, notwithstanding that action is a Reserved Matter;
 - (f) failing to ensure the distribution of dividend to the shareholders of DCT for at minimum, the year 2017;
 - (g) preventing DPWD from managing the Terminal and instead managing the Terminal itself, through SGTD, following the passage of Law 29 and Decree 99, as well as undertaking such management and operations of the Terminal, in breach of DCT’s exclusivity rights (which are given additional protection under the JVA and Articles);
- and
- (h) using DCT’s assets, including the Terminal and cash in the on-shore bank accounts of DCT for its own benefit and at DPWD’s expense.” (footnotes omitted)

(D) PDSA’S JURISDICTION OBJECTION BEFORE THE TRIBUNAL

37. PDSA raised a partial jurisdictional objection that the arbitrator had no jurisdiction over claims arising from allegations of breach occurring after the Presidential Ordinance on 9 September 2018 because it ceased to be a Shareholder on that date.

38. In its Rejoinder, for example, PDSA said:

“As PDSA set out in its Statement of Defence, the Tribunal does not have jurisdiction to hear DP World’s claims under the Articles, insofar as they relate to events that occurred after the passage of the Dispossession Ordinance on 9 September 2018. As shown in Section III above, upon the passage of the Dispossession Ordinance, PDSA was dispossessed of its shares as a matter of law and fact. As a result, PDSA ceased to be a ‘Shareholder’ (as defined in the Articles). Since the arbitration clause in the Articles is limited to disputes either ‘between the

Shareholders themselves regarding the Company affairs’ or ‘between the Shareholders and the Company’, the Tribunal has no jurisdiction to hear any claims under the Articles against PDSA arising out of events that occurred after the Dispossession Ordinance. ...

In the event that the Tribunal finds that the JVA was wrongfully terminated and that the effect of this is that the JVA remains valid and binding, the Tribunal would also lack jurisdiction for any of DP World’s claims under the JVA after the passage of the Dispossession Ordinance. This is because the arbitration clause in the JVA also applies only to disputes between ‘the Shareholders arising out of or relating’ to the JVA (JVA, C-1, Clause 20). ‘Shareholders’ is defined in the JVA, *inter alia*, as ‘any shareholders in the Equity Share Capital of [DCT] who are parties to’ the JVA ... ” (§§ 89-90)

39. The Award recorded *inter alia* that:

“188. The Respondent disputes the Tribunal’s jurisdiction in the following terms:

“Declare that the Tribunal does not have jurisdiction to hear DP World’s claims under the Articles post-dating the dispossession of PDSA’s shares in DCT; [...] and

Declare that the Tribunal does not have jurisdiction to hear DP World’s claims under the JVA post-dating the dispossession of PDSA’s shares in DCT.” (footnote omitted)

40. A 3-day hearing took place in January 2021, covering all of the issues (both in relation to jurisdiction and merits) raised in the parties’ statements of case. During the course of Day 1, counsel for PDSA said:

“So upon the issuance of that ordinance, PDSA no longer have the quality of a shareholder in DCT which is a necessary component of the Tribunal’s jurisdiction . Thus, for events which occurred after the ordinance, this Tribunal is not the available forum; for events which occurred before the ordinance, the Tribunal remains an available forum, in principle.”

and:

“Let me turn now to the jurisdiction consequences of the dispossession of PDSA which took effect on 9 September 2018. As of that date, we respectfully submit, the Tribunal is to find that PDSA was no longer a shareholder in DCT and, as we see on the slide that is now on your screen, the arbitration clause in DCT’s articles applies only to disputes between shareholders, so far as company affairs are concerned, or between shareholders and DCT itself. That is the effect of article 52.1 of DCT’s articles

of association. ... Exactly the same conclusion applies, Madam ... with respect to clause 20.1 of the JVA.”

41. At the end of Day 1, following PDSA’s oral opening, the arbitrator specifically asked PDSA’s counsel – by reference to the “*Relief Sought*” section of DP World’s Reply quoted above – to which claims PDSA advanced an objection to jurisdiction. The arbitrator said, “*what I would like to do is make sure that for every claim of [DP World] I understand whether or not there is actually a jurisdictional objection or not*”. The first two exchanges between the arbitrator and PDSA’s counsel were then set out in the Award, in subsections headed “*Tribunal’s Jurisdiction*”, in the parts of the Award dealing with the JVA Termination Claim and the Share Transfer Claim (Award §§ 216 and 403).

42. In relation to the JVA Termination Claim the following exchange was recorded:

“THE ARBITRATOR: ... If I look now at the claimant’s request for relief in the statement of reply, the first declaration other than not challenging admissibility and upholding jurisdiction is regarding the termination of the joint venture agreement. My understanding here is that there is no challenge regarding the jurisdiction of this Tribunal regarding that particular claim and I would like to confirm that with the respondent.

DR PETROCHILOS: Madam President, let me perhaps take that starting with your latter point. Your understanding is correct. The termination pre-dates the dispossession arguments and therefore temporally it is within your jurisdiction.”

43. In relation to the Share Transfer Claim, the following exchange was recorded:

“THE ARBITRATOR: ... Let me now go to the next claim by the claimant, which is the one that, notwithstanding the presidential ordinance, the purported transfer - - and I’m here quoting from the claimant’s request for relief - - the purported transfer of the shares from the respondent to the Republic is in breach of the JVA and the articles and, as a consequence, is invalid and unenforceable.

My understanding is that you have of course a number of objections to, you know, making that particular claim, but am I right that you are not objecting to the jurisdiction on the basis that that is not postdating 9 September?

DR PETROCHILOS: That is correct, Madam President.”

44. It will be noted that when putting this question the arbitrator did not read out the last eight words of § 231(d) of DP World’s Reply, “*and that PDSA remains a shareholder of DCT*”.

45. In relation to the JVA and Articles Breaches Claims, the exchange between the arbitrator and PDSA’s counsel referred to a slide in which PDSA had listed the

alleged breaches set out in § 64 of DP World’s written opening (quoted above) and indicated, by a red tick in the right-hand column, which of them PDSA said post-dated the Presidential Ordinance and thus fell outside the arbitrator’s jurisdiction. The slide was as follows:

PDSA's alleged actions by reference to DP World's Written Opening	Action of the Republic	Post-termination of the JVA	Post-Dispossession Ordinance
64(a) Treating the JVA as terminated (also a breach of the English Injunction)		✓	
64(b) Purporting to transfer its shares to the Republic in breach of the JVA and the Articles, having failed to secure a Deed of Adherence from the Republic	✓	✓	
64(c) Attempting to unlawfully remove [DP World]'s nominated directors on the DCT Board at a shareholders' meeting and depriving those directors from exercising their rights as directors of DCT		✓	
64(d) Seeking to invalidate DCT's Articles and the 18 February 2018 Board Resolution in the Djibouti courts	✓	✓	✓
64(e) Appointing an Administrator to take over the Board of DCT, notwithstanding that action is a Reserved Matter	✓	✓	✓
64(f) Failing to ensure the distribution of dividend to the shareholders of DCT for at minimum, the year 2017	✓	✓	✓
64(g) Preventing [DP World] from managing the Terminal and instead managing the Terminal itself, through SGTD, following the passage of Law 29 and Decree 99, as well as undertaking such management and operations of the Terminal, in breach of DCT's exclusivity rights (which are given additional protection under the JVA and Articles)	✓	✓	✓
64(h) Using DCT's assets, including the Terminal and cash in the on-shore bank accounts of DCT for its own benefit and at [DP World]'s expense	✓		

46. The exchange between counsel and the arbitrator was:

“THE ARBITRATOR: So what we have left with is the list of various other breaches, and I would like here to take your list that you have put, for instance, on slide 46 of the presentation that we just went through. It very helpfully lists the various actions on the left-hand side and you’ve identified those that are in your submission post 9 September, post ordinance, presidential ordinance, and so these concern - - and I believe here the numbers are referenced in the claimant’s skeleton. These are 64(d), 64(e), 64(f) and 64(g). So in your submission it is these four claims that there is a jurisdictional challenge, not for the others?”

DR PETROCHILOS: Madam, the issue of the temporal limitation, post termination of the JVA, applies to a number of claims. Forgive me, the issue of the post dispossession ordinance applies to a number of claims and these are the four claims that you have identified. I am confirming it in long form so you have it on the record. So they are 64(d), (e), (f) and (g), that is correct.”

47. As noted later, DP World was in fact unsuccessful on the merits in relation to the alleged breaches listed as 64(d), (e), (f) and (g) in its written opening and in PDSA’s slide.

(E) THE TRIBUNAL'S CONCLUSIONS

48. In the Award, which addressed issues of both jurisdiction and merits, the arbitrator substantially upheld the JVA Termination Claim, the Share Transfer Claim and (in part only) the Breaches Claims. I quote below the relief granted in Section VI of the Award, with definitions incorporated for ease of reference:

“VI. AWARD

NOW THEREFORE THE ARBITRAL TRIBUNAL DECIDES, HOLDS, AND ORDERS AS FOLLOWS:

- a. Decides that it has jurisdiction to hear the Claimant's claims under the JVA and the Articles;
 - b. [**JVA Termination Claim**] Declares that notwithstanding the Respondent's purported termination of the JVA on 28 July 2018, the termination of the JVA is unlawful and consequently, the JVA remains valid and binding;
 - c. [**Share Transfer Claim**] Declares that notwithstanding the Presidential Ordinance, the purported transfer of shares from the Respondent to the Republic is in breach of the JVA and Articles and, consequently, unenforceable and that the Respondent remains a shareholder of DCT;
 - d. [**Breaches Claims**] Declares that the Respondent breached Clause 14.5 of the JVA and Article 11.7 of the Articles;
 - e. Declares that the Respondent is liable to indemnify the Claimant for any damages resulting out of the wrongful termination;
 - f. Declares that the Respondent remains a party to the JVA and the Articles;
 - g. Order the Respondent to pay to the Claimant GBP 1,644,165.78 as Legal Costs and GBP 91,743.75 as Arbitration Costs; and
 - h. Reserves its decision on other matters.”
49. The arbitrator's essential conclusions leading to this relief can be summarised as follows.

(1) JVA Termination Claim

50. After setting out in detail the relevant events and the parties' contentions, the arbitrator analysed the JVA Termination Claim in section E of her Award. She found that the purported termination of 28 July 2018 was unlawful, and declared that the JVA remained valid and binding (Award §§ 352 and 395, and section

VI § (b)). As recorded in Award § 216, there was no jurisdictional challenge to this claim, which related to matters pre-dating the Presidential Ordinance.

(2) Share Transfer Claim

51. The arbitrator dealt with this claim in section F of her Award (§§ 396 to 463), addressing DP World's claim for a declaration that:

“notwithstanding the Presidential Ordinance, the purported transfer of shares from PDSA to the Republic is in breach of the JVA and Articles and, consequently, invalid and unenforceable and that PDSA remains a shareholder of DCT.” (as quoted in Award § 396)

52. As to jurisdiction, the arbitrator noted that “*the Respondent's jurisdictional challenge only concerns claims post-dating the 9 September 2018 Share Transfer, whereas the Share Transfer Claim concerns the Share Transfer that occurred on 9 September 2018*”, quoting the exchange which I quote in § 43 above, and concluded that the jurisdiction challenge therefore did not affect the arbitrator's jurisdiction, as such, to hear the Share Transfer Claim (Award §§ 403 and 404).

53. The arbitrator then considered an argument raised by PDSA based on the act of state doctrine, concluding that the doctrine was not engaged because:

“this Tribunal has not been asked to, and will not, make any determination on the lawfulness or validity of any foreign act of state, such as the Presidential Ordinance or Law 29 confirming it. Rather, this Tribunal accepts as a given the lawfulness and validity of the Presidential Ordinance or Law 29 under Djiboutian law and decides only on the contractual rights of the Parties to this arbitration under the JVA and the Articles” (Award § 412)

“... the Tribunal will take the validity and the lawfulness of the Presidential Ordinance as a given under Djiboutian law and assess whether the Share Transfer it effected was in breach of the JVA and Articles” (Award § 419)

54. Under the heading “*Share Transfer and Breach of JVA and Articles*”, the arbitrator concluded that the JVA and the Articles made signature of a deed of adherence a necessary pre-condition of any share transfer (Award § 433) and that the share transfer in the present case was in breach of JVA § 14.5 and Article 11.7 of DCT's Articles of Association (Award § 444).

55. The arbitrator then proceeded to consider the legal consequences of the fact that the share transfer breached the share transfer restrictions in the JVA and the Articles. She concluded that, pending a signed deed of adherence, PDSA was still deemed to be a shareholder in DCT for the purposes of the JVA and the Articles. It is appropriate to set out in full these paragraphs of the Award:

“457. ... it is important to keep in mind the scope of the Tribunal’s decision regarding the Claimant’s Share Transfer Claim. As set out above, the Tribunal’s decision is limited to determining the contractual rights of the Parties to this arbitration under the JVA and the Articles, as governed by Djiboutian law. As noted, it is not for this Tribunal to make any determination as to whether the Presidential Ordinance is valid and lawful as a matter of Djiboutian law, but instead takes its validity and lawfulness as a given.

458. In light of the above, the Tribunal accepts as valid the order contained in the Presidential Ordinance, which as matter of Djiboutian law is deemed valid. Article 1 of the Presidential Ordinance states that “[t]he ownership of the shares held by [the Respondent] in the capital of [DCT] is transferred to the State [...]” The validity of this act by a sovereign State, and the transfer of ownership resulting from it, are not questioned by the Tribunal. Accordingly, the declaration sought by the Claimant that the “the purported transfer of shares from [the Respondent] to the Republic is [...] invalid” is beyond the scope of the Tribunal’s decision.

459. This is so even though Article 11.2 of the Articles specifically provides that any transfer of shares in breach of the JVA’s transfer restriction “shall be void”. The Parties’ private agreement cannot change the order contained in the Presidential Ordinance, an executive act by a sovereign State, and part of Djiboutian law as the law governing the JVA. In light of the conflict between the order contained in the Presidential Ordinance (ordering the transfer of ownership of the DCT shares) and the contractual provisions of the JVA (providing that the transfer of shares is void), the former prevails, as a mandatory part of the law governing the JVA (and the Articles).

460. However, at the same time, as detailed above, the JVA and the Articles require not only a valid share transfer but also the signature of a deed of adherence by the transferee as a new shareholder. Without such deed of adherence, the transfer of shares – be it valid in and of itself – is unenforceable vis-a-vis the Company, i.e., DCT. Concretely, as detailed above, this means that the transferee is not registered in the Company’s share register, is not deemed to be a shareholder, and therefore cannot benefit from any right under the JVA and Articles linked to being a DCT shareholder.

461. Accordingly, since it is undisputed that the Republic, as the transferee, has not signed or provided a deed of adherence, the Share Transfer pursuant to the Presidential Ordinance, even though valid, is unenforceable vis-a-vis DCT under the JVA and the Articles. In other words, pending the signed deed of

adherence, for the purposes of the JVA and the Articles, the Respondent is still deemed to be a shareholder in DCT.

462. For the avoidance of doubt, the Tribunal notes that the fact that the share transfer is held unenforceable vis-a-vis DCT is not in contradiction with the order contained in the Presidential Ordinance. That order, as detailed above, only relates to the transfer of ownership of the DCT shares between the Respondent and the Republic. It does not deal with the effect this transfer of ownership has vis-a-vis DCT (or the Claimant). Accordingly, the Share Transfer, even though valid, is unenforceable vis-a-vis DCT (or the Claimant), pending the signature of the deed of adherence by the Republic.

* * *

463. In sum, for the reasons detailed above, the Tribunal partially grants the Claimant's Share Transfer Claim and declares that notwithstanding the Presidential Ordinance, the purported transfer of shares from the Respondent to the Republic is in breach of the JVA and the Articles and consequently unenforceable and that the Respondent remains a shareholder of DCT."

(footnotes omitted)

56. As discussed in section (F) below, PDSA argues that the arbitrator's conclusion that it remained a shareholder in DCT (i) was a jurisdictional finding and (ii) was incorrect.

(3) Breaches Claims

57. In section G of the Award (§§ 464-544), the arbitrator considered DP World's Breaches Claims.

58. As to jurisdiction, the arbitrator said:

"471. As set out above, the Respondent challenges the Tribunal's jurisdiction to hear the Claimant's claims post-dating the Presidential Ordinance on the basis that the Respondent ceased to be a shareholder in DCT after that date, i.e., after 9 September 2018. However, the Tribunal has determined in the previous section of this award that the Respondent remained a shareholder in DCT, even after 9 September 2018. Accordingly, the Tribunal finds that it has jurisdiction to hear the Claimant's JVA and Articles Breaches Claim, irrespective of whether the underlying events pre- or post-date 9 September 2018." (Award § 471, footnotes omitted)

59. As to the merits, the arbitrator rejected the Breaches Claims, other than DP World's claim that the JVA and Articles were breached because the share

transfer (which the arbitrator defined as “[t]ransfer of [PDSA’s] shareholding interest in DCT to the Republic pursuant to the Presidential Ordinance”) lacked the required deed of adherence. She considered that claim in Award §§ 481-502.

60. In the light of the arbitrator’s previous findings, the only live defences PDSA could put forward to this claim were that (i) the requirement to sign a deed of adherence was an obligation imposed on the transferee (the Republic) not the transferor (PDSA), and (ii) the Presidential Ordinance was a force majeure event excusing PDSA from liability. As to those defences, the arbitrator concluded that:
- i) on the true construction of JVA § 14.5 and Article 11.7, PDSA promised to procure (or, possibly to use best efforts to procure) the signature of a deed of adherence from any transferee of shares, but failed to do so (§§ 491-492); and
 - ii) the Presidential Ordinance could not excuse performance of that obligation, because nothing in it prevented the Republic from signing a deed of adherence nor prevented PDSA from taking any steps towards procuring such a signature. There was no evidence that PDSA had taken *any* step to procure it, even though “[i]t could clearly have done so, even in light of the Presidential Ordinance” (§§ 499-500).
61. As discussed in section (G) below, PDSA argues that the arbitrator lacked jurisdiction to make these findings because (i) they included findings of breach post-dating the Presidential Ordinance, (ii) the effect of the Presidential Ordinance was (contrary to the arbitrator’s earlier findings) that PDSA ceased to be a Shareholder and (iii) the alleged breach thus fell outside the scope of the arbitration agreements.

(F) JURISDICTION OVER THE SHARE TRANSFER CLAIM

62. PDSA accepts that the arbitrator had jurisdiction to decide that the share transfer effected by the Presidential Ordinance constituted a breach of Clause 14.5 of the JVA and Article 11.7 of the Articles since no deed of adherence was signed by the Republic (Award §§ 433 and 443-444), i.e. that the share transfer effected through the Presidential Ordinance on 9 September 2018 was in itself a breach of contract. PDSA states that, as a matter of *ratione temporis* analysis, that was a matter that did not post-date PDSA ceasing to be a “Shareholder”, so (as recorded in the Award at §§ 402-404) PDSA did not take jurisdictional objection to it.
63. However, PDSA submits that the arbitrator lacked jurisdiction to decide, in the second part of her analysis of the Share Transfer Claim, that it remained a Shareholder after the Presidential Ordinance, because:
- i) under the contractual definitions, PDSA could not remain a “Shareholder” once the Presidential Ordinance deprived it of actual ownership, under Djibouti law, of shares in DCT;

- ii) the arbitration agreements in the JVA and the Articles did not apply to any matters occurring once PDSA ceased to be a Shareholder; and
 - iii) those matters included the question of whether PDSA remained a Shareholder following the Presidential Ordinance.
64. I consider point (i) above in section H below. However, points (ii) and (iii) are logically prior, in the sense that they raise the question of whether or not the arbitrator's jurisdiction over this part of the Share Transfer Claim is contingent on PDSA actually having remained a Shareholder after the Presidential Ordinance.
65. DP World's submission, in essence, is that it is not so contingent: the question of whether PDSA ceased to be a Shareholder is a "*dispute between the Shareholders*" within the scope of the arbitration agreements regardless of whether or not the answer to that question is yes or no.
66. PDSA submits as follows:
- i) The question of whether it remained a Shareholder after the Presidential Ordinance is a jurisdictional issue, because the arbitration agreements apply only to disputes between "*Shareholders*" (as defined). They thus impose a *ratione personae* jurisdictional requirement that both the party invoking the arbitration agreement and the party against whom the arbitration agreement was being involved fulfil the requirements of being a "*Shareholder*".
 - ii) The position stated in (i) above is subject to the point that (as JVA § 19 confirms) all rights and obligations arising prior to ceasing to be a Shareholder remain, including the obligation to arbitrate any question of breach arising prior to ceasing to be Shareholder. In other words, (as PDSA puts it) the *ratione temporis* jurisdiction of the tribunal extends to any alleged breach occurring prior to a party ceasing to be a Shareholder.
 - iii) These limitations on the arbitrator's jurisdiction are not merely questions about the scope of the arbitration agreements, but raise the logically antecedent question about the existence of party consent to arbitration, that being a precursor to any question of subject-matter scope.
 - iv) When there is an issue as to whether a party has consented to arbitration in the first place, no question of the scope of the arbitration agreement arises, because the 'arbitration shop' is closed for business: see *DHL Project & Chartering v Gemini Ocean Shipping (The "Newcastle Express")* [2022] EWCA Civ 1555:

"... the modern 'one-stop' dispute resolution presumption in contractual interpretation" ... is concerned with the interpretation of dispute resolution clauses, as made clear in *Fiona Trust*. ... The presumption has nothing to do with the question whether the parties have concluded a contract (including a contract to arbitrate) in the first place. On the

contrary, to hold that the question whether a binding arbitration agreement has been concluded is subject to ordinary principles of contract formation is a principled approach. It recognises that an arbitration agreement is a contract like any other, so that there is no justification for treating the question whether such an agreement has been concluded as subject to special presumptions uniquely applicable in arbitration cases. One-stop shopping is all very well, but if the parties have not entered into an arbitration agreement, the shop is not open for business in the first place.” (§ 75)

“[The separability principle] applies where the parties have reached an agreement to refer a dispute between them to arbitration, which they intend (applying an objective test of intention) to be legally binding. It means that a dispute as to the validity of the main contract in which the arbitration agreement is contained does not affect the arbitration agreement unless the ground of invalidity relied on is one which “impeaches” the arbitration agreement itself as well as the main agreement. But it has no application when, as in the present case, the issue is whether agreement to a legally binding arbitration agreement has been reached in the first place.” (§ 80(5))

The same analysis applies, PDSA submits, in the present case where a Shareholder loses the status of Shareholder. In this situation too, the ‘arbitration shop’ is closed for business, and any subsequent question about the scope of the arbitration agreement does not arise.

- v) Thus the question of whether PDSA remained a Shareholder was a jurisdictional issue, which concerned whether party consent remained or had been withdrawn. That was an issue on which the arbitrator could not make any final determination: only the court can do so.
- vi) This is a ‘gateway’ question: the parties agreed that only Shareholders can cross the gateway and invoke arbitration. The definition of Shareholder by its nature involved a question as to whether the party said to be a Shareholder had certain required attributes (of holding shares). Investment treaty cases are a useful analogy: jurisdictional clauses under such treaties require one of the parties to have the attribute of being an “investor” in order to invoke the arbitration agreement against the respondent State (cf *GPF GP Sarl v Poland* [2018] EWHC 409 (Comm) § 70 and *Republic of Korea v Dayyani* [2019] EWHC 3580 (Comm) § 88). Determinations by arbitrators of these necessary jurisdictional qualities, which all go to the question of party consent to arbitration, are subject to the court’s control under section 67.
- vii) For the question of jurisdiction to decide whether PDSA remained a Shareholder to be an issue of the scope of the arbitration clause, the arbitration agreement would have needed to be drafted in unusual terms so as to confer on the arbitrator jurisdiction to determine questions of party consent as a matter of the scope of the arbitration agreement. It

would have had to be drafted along the lines of: “*Any dispute between the parties as to whether they have the contractual status of Shareholders shall be determined by arbitration*”: see, e.g., the decisions of the Supreme Court in *Dallah Real Estate v Ministry of Religious Affairs* [2011] 1 AC 763 (§§ 24 and 84), and *AES Ust-Kamenogorsk Hydropower Plant* [2013] 1 WLR 1889 (§ 35) where Lord Mance said:

“In short, any tribunal convoked to determine a dispute may, as a preliminary, consider and rule on the question whether the dispute is within its substantive jurisdiction, without such ruling being binding on any subsequent review of its determination by the court under sections 32, 67 or 72 of the 1996 Act. However, a tribunal cannot by its preliminary ruling that it has substantive jurisdiction to determine a dispute confer on itself a substantive jurisdiction which it does not have. Absent a submission specifically tailored to embrace them (as to which there is no suggestion here), jurisdictional issues stand necessarily on a different footing to the substantive issues on which an award made within the tribunal’s jurisdiction will be binding.” (emphasis supplied)

Thus only under a very specifically tailored arbitration agreement could: (a) the question of whether PDSA remained a Shareholder raise a question of scope (as opposed to party consent), and (b) the arbitrator’s finding on the (in-scope) issue be a merits determination. By contrast, the arbitration agreements in the JVA and the Articles contain no such language, and require Shareholder status as a necessary quality of consent to arbitration. Thus, in the present case the question of whether PDSA remained a Shareholder is a jurisdictional question: it is a question of whether PDSA’s consent to arbitration remains or has ceased.

viii) The question of whether PDSA remained a Shareholder in this case is analogous to the jurisdictional question that arises in cases of implicit or express revocations of an arbitration agreement. The jurisdictional implications when Shareholder status ceases are identical to the implications when an arbitration agreement is terminated or revoked. In both situations, the arbitration agreement falls away and disputes pertaining to matters after that time cannot be arbitrated (because the arbitration agreement is inoperative and therefore there is no longer a valid arbitration agreement). See in this regard:

a) G Born, *International Commercial Arbitration* (3rd ed., 2021) at § 5.06[D][6] (first paragraph):

“The termination, repudiation, or abandonment of international arbitration agreements provides another basis for challenging the validity of such agreements in particular cases. ... Issues of termination and repudiation are generally, and properly, regarded as falling within

Article II(3)'s reference to arbitration agreements that are inoperative.”

- b) AJ van den Berg, “*The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation*” (1981) at pages 158-159, stating that the term “*inoperative*” as used in Article II(3) of the New York Convention (1958) refers *inter alia* to cases where the arbitration agreement has ceased to have effect because for example the parties have “*implicitly or explicitly revoked the agreement to arbitrate*”.
- c) The analysis of the Court of Appeal in *Downing v Al Tameer Establishment* [2002] 2 All ER (Comm) 545 §§ 25, 34-35, 39 holding that, for the purposes of section 9(4) of the Arbitration Act 1996 (which implements Article II(3) of the New York Convention), if a concluded arbitration agreement has come to an end, then it is inoperative. See also *Costain v Tarmac Holdings* [2017] EWHC 319 (TCC) § 88 (indicating that the question is whether there was an express or implied agreement that the arbitration would not be the final means of dispute resolution so as to render the arbitration agreement inoperative).
- ix) It makes no difference that PDSA was previously a party to the arbitration agreements: the question of whether it remained a Shareholder after the Presidential Ordinance is an issue that arises post-Ordinance i.e. after PDSA's loss of Shareholder status. It is therefore irrelevant whether there was party consent to arbitration pre-Ordinance.
- x) It is indicative that the arbitrator herself did not approach the matter on the basis that the question whether PDSA remained a shareholder did not involve a merits determination, or solely a merits determination. The arbitrator did not determine the issue of whether PDSA remained a Shareholder in the context of her finding (at Award § 444) that there was a breach in failing to procure a deed of adherence prior to the transfer of ownership effected by the Presidential Ordinance. Instead, she addressed it in Award §§ 460-463 and 471 as a jurisdictional finding which was the predicate for her view that she could resolve claims of post-Presidential Ordinance breach.
- xi) Accordingly, the question of whether PDSA ceased to be a Shareholder following the Presidential Ordinance is not one that the arbitrator would have jurisdiction over PDSA to resolve, if, on the true analysis by the court, PDSA had ceased to be a Shareholder. To that extent, this case is no different from a contract formation case.
- xii) It follows that unless the court concludes that PDSA did indeed remain a Shareholder following the Presidential Ordinance, the arbitrator lacked jurisdiction to decide that issue i.e. whether PDSA did or did not remain a Shareholder.

67. I do not accept those submissions.

68. First, whether or not it is also a jurisdictional issue, the question of whether PDSA remained a Shareholder was a substantive issue between the parties, and had been one ever since the Presidential Ordinance was made. DP World's Amended Request for Arbitration dated 30 November 2018, following publication of the Ordinance, alleged that PDSA remained a Shareholder and remained contractually liable as such under the JVA and the Articles: see § 117, Section J and the relief sought in § 172(d) of the Amended Request. For example, § 136 stated that “[DP World’s] position is that [PDSA] is bound by the provisions of the Articles and the JVA at all relevant times as a shareholder of DCT”, and § 138 made clear that DP World disputed PDSA’s stance to the contrary. Moreover, DP World’s claim that PDSA remained a shareholder underlay DP World’s substantive claims in section K of the Amended Request that PDSA was contractually liable for the Republic’s subsequent actions after the making of the Presidential Ordinance.
69. Secondly, the present case is not directly analogous with cases, such as contract formation cases and cases where an arbitration agreement has been terminated or revoked, where the actual or putative arbitration agreement may never have come into existence at all, or may have ceased to exist for all purposes. Nor are investor/state cases analogous: there, a claimant must establish that it is an ‘investor’ in order to be able to invoke at all the dispute resolution mechanism of a treaty to which it is a non-party. In the present case, there is no dispute that (i) the arbitration agreements did come into existence and (ii) those agreements did not cease to exist for all purposes if and when PDSA ceased to be a Shareholder. It is common ground that the arbitration agreements continued to apply to alleged breaches occurring before PDSA ceased to be a Shareholder. The current question is: to precisely which categories of matters do the arbitration agreements continue to apply, even if PDSA did cease to be a Shareholder upon issue of the Presidential Ordinance. The answer to that question has to be found in the parties’ agreements, particularly the arbitration provisions themselves. That is a question of construction of the provisions, whether it be labelled a question of scope or a question of party consent. In this somewhat nuanced situation, I suspect that the metaphor of an arbitration ‘shop’ is not particularly instructive: but, if one does seek to apply it, then the position here is that (i) an arbitration shop has opened for business, (ii) it remains open, on any view, at least for some purposes, and (iii) in order to identify which those purposes are, it is necessary to construe the arbitration agreements which the parties have undoubtedly entered into.
70. Thirdly, the question of whether the arbitrator had jurisdiction to decide whether PDSA ceased to be a Shareholder is certainly a jurisdictional question, on which the court has the final say. However, it does not follow that the substantive question of whether or not PDSA did cease to be a Shareholder is itself a jurisdictional question in that particular context. That depends on whether the arbitrator’s jurisdiction to decide the issue was contingent on the answer, i.e. whether the arbitrator had jurisdiction to decide whether PDSA remained a Shareholder only if PDSA did (in the court’s view, ultimately) remain a Shareholder.

71. Fourthly, in my judgment the answer to the latter question is no, essentially for two reasons.

- i) The question of whether PDSA remained a Shareholder after the Presidential Ordinance is indistinguishable from the question of whether PDSA ceased to be a Shareholder at the moment when the Presidential Ordinance was issued. PDSA was a Shareholder at the moment in time at which it ceased to be a Shareholder (if it did so cease). That is sufficient, in my view, to mean that the question of whether PDSA remained a Shareholder is a dispute “*between the Shareholders*” for the purposes of the arbitration agreements: even if, at the moment in question, PDSA in fact ceased to be a Shareholder.

It is true that § 19 of the JVA provides for the parties’ obligations under the JVA to cease when they cease to be Shareholders, except in relation to “*provisions which are expressed to continue in force*” and “*rights or liabilities in connection with any breach of this Agreement which may have occurred before that Shareholder ceased to hold any Shares*” (my emphasis); and § 19 applies to the arbitration agreement as it does to other provisions of the contract (cf *Enka Insaat Ve Sanayi v OOO Insurance Company Chubb* [2020] UKSC 38 §§ 61-62), so that §§ 19 and 20 need to be read together. However:

- a) The natural reading of both the arbitration agreement in the JVA and the arbitration agreement in the Articles (which contains no equivalent to JVA § 19) is that they are of general application to disputes about matters that arose while the parties are/were Shareholders, whether or not such disputes concern allegations of “*breach*” as such as distinct from other matters in contention. In my view JVA §§ 19 and 20, read as coherent whole, are to be interpreted in the same way: the parties have agreed to refer to arbitration all disputes relating to their relationship as Shareholders, whether or not any such dispute relates specifically to an allegation of breach of contract/duty. The disagreement about whether PDSA ceased to be a Shareholder upon issue of the Presidential Ordinance is such a dispute.
- b) In any event, the question of whether PDSA ceased to be a Shareholder upon issue of the Presidential Ordinance is a question “*in connection with*” a breach or alleged breach of the JVA that occurred before PDSA ceased (if it did cease) to be a Shareholder, within JVA § 19. On DP World’s case and on the arbitrator’s analysis, the cessation issue is directly linked to the breaches of JVA § 14.5 and Article 11.7 which the arbitrator found to have occurred in the first section of her analysis of the Share Transfer Claim (in relation to which no jurisdictional objection was made). PDSA rightly has never sought to argue that those breaches occurred only at, as opposed to before, the moment at which on PDSA’s case it ceased to be a Shareholder, and hence outside JVA § 19 and two arbitration agreements. That would have been an untenably narrow view of those

provisions. On the contrary, as noted earlier, PDSA expressly confirmed to the arbitrator that it took no jurisdictional objection in respect of DP World's claim that PDSA was in breach by "*purporting to transfer its shares to the Republic ... having failed to secure a Deed of Adherence*".

- ii) More broadly, the parties as rational business entities are likely to have intended any dispute arising out of relationship of co-shareholders into which they entered to be decided by the same tribunal (*Fiona Trust & Holding Corp v Privalov* [2007] 4 All ER 951 § 13). In my view, they should be taken to have intended that the arbitration agreements would apply to disputes about matters arising when they are both *alleged* to have been Shareholders, even if the ultimate conclusion of the arbitrator or court is that one or both of them had in fact ceased to be a Shareholder by the relevant time. It is unlikely that rational businessmen would have intended, in a situation where a dispute arose about alleged breaches during a period when one party alleged the other to have remained a Shareholder but the other denied it, would be validly subject to arbitration if the ultimate conclusion were that the party did remain a Shareholder but not if the ultimate conclusion were the converse.
72. Fifthly, the conclusions set out above do not require the arbitration agreements to be interpreted as including any special drafting of the kind referred to in § 66.vii) above. This is not a case of the parties having conferred on the arbitrator power to determine questions of party consent so as to confer on herself a jurisdiction that it would not otherwise have. On the contrary, the present issue concerns whether, in the court's view, the arbitrator had jurisdiction to decide the substantive question about whether PDSA had ceased to be a Shareholder, and whether any such jurisdiction was contingent on the answer to that question. In my judgment, the arbitrator did have such jurisdiction, and it was not contingent on the answer to the question. The arbitrator had such jurisdiction whether or not PDSA in fact (as ultimately found by the court) ceased to be a Shareholder upon issue of the Presidential Ordinance.
73. Sixthly, I do not agree that the arbitrator herself treated the question of whether PDSA ceased to be a Shareholder as a jurisdictional issue in the context of the Share Transfer Claim. As summarised earlier, she treated it as the second limb of the Share Transfer Claim (the first being the alleged breaches of JVA § 14.5 and Article 11.7), but still as a merits issue, which it was. The arbitrator treated the cessation question as a jurisdictional issue only in the context of the Breaches Claims, when she considered in Award § 471 her jurisdiction to address those claims.
74. For these reasons, I conclude that the arbitrator had jurisdiction to determine the Share Transfer Claim, in all its aspects, regardless of whether PDSA did or did not cease to be a Shareholder upon the issue of the Presidential Ordinance.
75. For completeness, I consider in section (H) below whether PDSA did cease to be a Shareholder for the purposes of the JVA and the Articles, concluding that it did not. This part of the jurisdiction challenge therefore fails on that ground too.

76. In those circumstances it is not strictly necessary to address two further points which DP World made in this context, namely that (i) the arbitrator's conclusion about whether PDSA remained a Shareholder was no more than an aspect of the relief granted following her prior findings of breach, so that no section 67 jurisdiction question arises at all, and (ii) PDSA is estopped by those prior findings of breach from objecting to the arbitrator's conclusion, derived therefrom, that PDSA remained a Shareholder. Briefly, my views on those two matters are as indicated below.
77. On the first point (no section 67 issue arises), DP World submits as follows:
- i) A challenge under section 67 of the Arbitration Act can be made only in relation to "*substantive jurisdiction*", defined in section 82(1) by reference to the matters specified in section 30(1)(a) to (c), viz:
 - “(a) whether there is a valid arbitration agreement,
 - (b) whether the tribunal is properly constituted, and
 - (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.”
 - ii) As the arbitrator noted, “[PDSA] does not challenge as such the validity of the arbitration agreements ... nor does it contest that this Tribunal is validly constituted under these arbitration agreements” (Award § 193).
 - iii) The definition of "*matters*", for the purposes of s. 30(1)(c) and section 67, was considered by Flaux J in *Gulf Import & Export Co v Bunge SA* [2008] 2 All ER (Comm) 161 at [20]:

“Mr Stephen Males QC for Gulf submits that “matters” in section 30(1)(c) is referring to the claims that can be submitted to arbitration, not the way in which discretion is exercised in relation to a claim which has been validly submitted to arbitration. It seems to me that this must be right.”
 - iv) The question of whether PDSA remained a Shareholder post the Presidential Ordinance goes only to the relief the arbitrator granted to DP World in respect of the claims on which it succeeded. It does not concern one of the "*matters*" submitted to arbitration, but only the arbitrator's exercise of one of the "*powers exercisable by the arbitral tribunal as regards remedies*" referred to in section 48 of the Act, viz the section 48(3) power to "*make a declaration as to any matter to be determined in the proceedings*". As the phraseology makes clear, the granting of such relief is not itself a "*matter*" for the purposes of the Act but rather the consequence of the arbitrator's determination of that matter.
78. I would not have accepted step (iv) in the above line of argument. I would agree that the question of whether PDSA remained or ceased to be a Shareholder is closely linked to the question of whether PDSA was in breach of JVA § 14.5

and Article 11.7, i.e. the matters on which the arbitrator made findings in the first section of her reasoning about the Share Transfer Claim. However, her conclusion that, in the light of those breaches, PDSA remained a Shareholder was nonetheless a distinct substantive legal conclusion about the parties' rights, obligations and status, which depended in part on the further steps in the arbitrator's reasoning set out in Award §§ 460 and 461. As I have indicated earlier, the question of whether PDSA remained a Shareholder was in itself one of the substantive matters referred to the arbitrator for decision, and I would have concluded that it was a "*matter*" submitted to arbitration within sections 30 and 67 of the Act.

79. PDSA also submitted that its challenge raised a question about whether there was a valid arbitration agreement, within section 30(1)(a). There undoubtedly was, and remains, a valid arbitration agreement in the present case. However, to the extent that questions about whether a dispute falls within the scope of an arbitration agreement can, at least on one view of the taxonomy of section 30, be regarded as falling within s. 30(1)(a) rather than s. 30(1)(c) (see *Obrascon Huarte Lain v Qatar Foundation* [2020] EWHC 1643 (Comm) § 19 and *NDK Ltd v Huo Holding* § 22), a challenge to the arbitrator's jurisdiction over the question of whether PDSA remained a Shareholder might alternatively be regarded as raising a section 30(1)(a) issue.
80. On the second point (estoppel), DP World submits that as part of the first limb of the Share Transfer Claim, to which no jurisdictional objection was made, the arbitrator found that "*both the JVA and Articles make the signature of a deed of adherence a necessary pre-condition of any share transfer*", and that as that pre-condition had not been satisfied, "*the Share Transfer in the present case was in breach of Clause 14.5 of the JVA and Article 11.7 of the Articles*" (Award §§ 433 and 444). Those determinations are, in consequence *res judicata*. It is a legal nonsense to suggest that the arbitrator nonetheless lacked jurisdiction to decide on what were, in her words, "*the legal consequences of the breach of the share transfer restrictions contained in Clause 14.5 of the JVA and Article 11.7 of the Articles*" namely that PDSA remained a Shareholder. Thus in substance PDSA is seeking to obtain a reversal of the arbitrator's binding findings on the question of breach.
81. I would not have accepted that submission. As noted above, though closely connected with the question of breach, the impact on PDSA's status as a Shareholder was a further substantive question. It was in principle open to PDSA, whilst bound by the findings of breach of JVA § 14.5 and Article 11.7, to argue that they did not have the legal consequence which the arbitrator found, and (had grounds for such an objection existed) to challenge the arbitrator's jurisdiction to determine that issue.
82. I consider later, in section G below, whether an estoppel could arise from the arbitrator's finding that PDSA remained a Shareholder.

(G) JURISDICTION OVER BREACHES CLAIMS

83. PDSA contends that at Award § 500, the arbitrator found that PDSA was in breach of Article 14.5 of the JVA and Article 11.7 of the Articles for failing to

obtain the Republic's signature to a deed of adherence after the Presidential Ordinance. PDSA submits that the arbitrator lacked jurisdiction to determine that issue, because it related to a matter occurring after PDSA ceased (by reason of Presidential Ordinance) to be a Shareholder.

84. PDSA says the fact that the arbitrator's findings include events post-dating the Presidential Ordinance is clear from the last sentence of Award § 500: "*It clearly could have done so, even in the light of the Presidential Ordinance*". Moreover, it had been DP World's case that PDSA was in breach both before and after the Presidential Ordinance: see, e.g., DP World's Reply at § 164 ("*PDSA was contractually obliged ... to procure the signing of a Deed of Adherence by any transferee. Undeniably, it failed to do so before purporting to transfer its shares to the Republic*") and § 175 ("*PDSA does not deny that it breached its obligation under the Articles and the JVA in failing to procure the signing of a Deed of Adherence by the Republic following the attempted transfer on 9 September 2018*"). PDSA's Rejoinder indicates that it understood DP World's case in the same way, contending for example that any post-Ordinance breach was excused by Presidential Ordinance as a *force majeure* event (an argument which the arbitrator rejected on the facts, as noted earlier).
85. I quote Award §§ 500-502 below in full including the footnotes:

"500. As set out above, the Tribunal finds that the Respondent's failure to seek or procure a signed deed of adherence from the Republic is in breach of Clause 14.5 of the JVA and Article 11.7 of the Articles.⁵¹⁴ It is this contractual breach that would have to be excused by the Presidential Ordinance as a force majeure event. However, the Presidential Ordinance (which ordered that the ownership of the DCT shares be transferred from the Republic to the Respondent) does not provide any excuse for the Respondent to have not sought the signature of a deed of adherence from the Republic. Indeed, nothing in the Presidential Ordinance prevents the Republic from signing a deed of adherence, or the Respondent from taking any steps towards procuring such a signature. As already noted above, there is no evidence on record that the Respondent has taken any step to procure the signature of such a deed of adherence from the Republic.⁵¹⁵ It clearly could have done so, even in light of the Presidential Ordinance."

"514 See above at paras. 442-444."

"515 See above at para. 451.

"501. In these circumstances, the Tribunal finds that the Presidential Ordinance cannot excuse the Respondent's contractual breach of the JVA/Articles, and this is irrespective of the question whether it could, in principle, rely on it as a force majeure event.

“502. In sum, for the reasons detailed above, the Tribunal finds that the Respondent breached Clause 14.5 of the JVA and Article 11.7 of the Articles.”

86. The arbitrator thus restated her finding of breach in the first sentence of § 500, by reference (as footnote 514 indicated) to her findings in Award §§ 442-444. In those paragraphs, the arbitrator held that (a) JVA § 14.5 and Article 11.7 required the transferee to sign a deed of adherence, (b) “*It is uncontested that, in the case at hand, no such deed of adherence was signed or provided by the Republic*”, and (c) that failure was not cured by the Republic’s subsequent public claims to be a shareholder in DCT.
87. DP World argues that the finding of breach restated in the first sentence of Award § 500 referred to the breach committed as at the date of the Presidential Ordinance (as to which no jurisdiction objection was or is taken), and that the last sentence of § 500 did not find any new breach but merely stated that PDSA had not cured the original breach. Similarly, § 502 in substance merely cross-referred to the findings made in §§ 442-444.
88. In my view, Award § 500 indicates that the arbitrator found there to be a single breach (“*this contractual breach*”) which began when PDSA failed to procure a deed of adherence by the time of the Presidential Ordinance and continued thereafter. The analysis of *force majeure* and, in particular, the statement that PDSA could still have procured a deed of adherence “*even in the light of the Presidential Ordinance*”, make little sense unless the arbitrator was concluding that the breach continued after the date of the Ordinance.
89. However, I do not consider that the arbitrator lacked jurisdiction for that finding, for three reasons.
90. First, even if PDSA did cease to be a Shareholder upon issue of the Presidential Ordinance, the finding of a breach that began on or before the date of the Ordinance and continued thereafter was still a “*dispute between the Shareholders*” for the purposes of the arbitration agreements. The general considerations referred to in §§ 71.i)(b) and 71.ii) above apply again here. The breach commenced, on any view, while PDSA remained a Shareholder; and its continuation after the date of the Ordinance (even if PDSA thereupon ceased to be a Shareholder) remained at least “*connected with*” a breach that occurred while PDSA remained a Shareholder, and remained a “*dispute between the Shareholders*” within the arbitration clauses. A rational businessman would not expect a claim relating to the breach’s initial occurrence, but not a claim regarding its continuation, to be subject to arbitration .
91. Secondly, I conclude in section (H) below that PDSA did not cease to be a Shareholder for the purposes of the JVA and the Articles. This part of the jurisdiction challenge therefore fails on that ground too.
92. DP World advanced a third reason why the PDSA’s jurisdiction challenge in relation to the Breaches Claim should fail, namely that PDSA is estopped by the arbitrator’s findings on the Share Transfer Claim.

93. DP World's initial contention was that PDSA is issue estopped by the arbitrator's findings, in the first part of her consideration of the Share Transfer Claim, that the transfer involved breaches of JVA § 14.5 and Article 11.7. However, I agree with PDSA that that point would not assist, because those findings did not in and of themselves amount to a finding that PDSA remained a Shareholder: it is only the arbitrator's further finding, in the second part of her analysis, that PDSA remained a Shareholder that directly bears on the jurisdiction challenge regarding the Breaches Claims.
94. I raised with the parties the question of whether an issue estoppel could arise, in the context of the Breaches Claim, from the arbitrator's conclusion (when considering the substantive merits of the Share Transfer Claim) that PDSA remained a Shareholder, if that finding was itself within the arbitrator's jurisdiction. I have concluded in section (F) above that the arbitrator's conclusion that PDSA remained a Shareholder following the Presidential Ordinance was within her jurisdiction, and that she had jurisdiction to reach a conclusion on that issue regardless of whether PDSA did or did not in fact (ultimately in the court's view) remain a Shareholder. I have also already concluded that the arbitrator's finding that PDSA did remain a Shareholder was a finding on the merits, even though the arbitrator also treated it as a jurisdictional finding in the context of the Breaches Claims. The parties are, DP World submits, bound by that conclusion, even in the context of the jurisdictional issue concerning the Breaches Claim.
95. DP World refers to the decisions in *Westland Helicopters Ltd v Al-Hejailan* [2004] 2 Lloyd's Rep 523 and *C v DI* [2015] EWHC 2126 (Comm). In *Westland Helicopters*, Westland argued that an arbitrator had no jurisdiction to award interest because (i) he had no jurisdiction to award any principal sum calculated by reference to a notional annual retainer; and (ii) there being no jurisdiction in respect of (i), there could be no jurisdiction to award interest on that impermissible principal sum (§ 30). However, Westland had not challenged the arbitrator's jurisdiction to resolve the dispute by reference to a notional annual retainer, so his decision to that effect was binding on the parties (§ 33). Accordingly, Colman J stated:

“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” (§ 34)

“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”. (§ 37)

96. In *C v DI*, the claimant sought to challenge an arbitral tribunal's conclusion that it had jurisdiction under the arbitration clause in a contract (the SPA) to determine claims arising from alleged breaches by the claimant of an earlier contract (the PSC). The tribunal decided:

“241(1) By majority decision, the Tribunal declares that Clause 26 the SPA does confer jurisdiction on the Tribunal to determine claims arising from alleged breaches by the Claimant of the terms of the PSC, as asserted by [D1]; ...

(2) By majority decision, the Tribunal declares that Clause 11.1 of the SPA requires the Claimant to indemnify [D1] in respect of Pre-Economic Date Liabilities (including claims with respect to the PSC covered thereby) suffered by [D1] and its Affiliates subject to the limitations and other provisions of the SPA.”

C challenged the jurisdictional finding quoted at § 241(1) above. The finding at § 242(2) was a finding on the merits, to which no jurisdictional objection was taken, but was relevant to C's jurisdiction challenge to § 241(1). Carr J rejected C's contention that it could attack the finding at § 241(2) for the purpose of its jurisdiction challenge:

“81. Overnight, C committed its position to paper as follows. On a section 67 challenge, the court determines the jurisdictional issues de novo, by way of a complete re-hearing. This means that no relevant issue is or can be res judicata or the subject of an issue estoppel. If and insofar as the meaning of any clause in the SPA is relevant to the issues before the court on C's section 67 challenge, the court is to determine the meaning of that clause itself, unfettered by any ruling by the Tribunal.

82. If the court were not able to determine any relevant issue afresh on a section 67 challenge, the applicant would not be able effectively to challenge the jurisdiction of the Tribunal. A tribunal could potentially extend its jurisdiction by deciding matters within its jurisdiction (pulling itself up by its bootstraps).

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 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 ...

86. ...

[after quoting Westland § 37]

This last paragraph is directly on point and confirms that it is not open to C to challenge paragraph 241(1) by reference to a challenge to paragraph 241(2), in relation to which finding there is an issue estoppel.

87. This is the result of the scheme of the Act and the LCIA Rules under which the parties chose to contract. If the Tribunal made an error of law on the merits (rather than jurisdiction), absent the possibility of any challenge under s.68 of the 1996 Act, the parties have elected finality.”

97. DP World submits that those two cases show that a section 67 challenge cannot be used as a means of attacking a prior merits decision which was itself within the tribunal’s jurisdiction, or in respect of which jurisdiction was not objected to or challenged.
98. The situation in the present case is not completely analogous to that in *Westland Helicopters* or *C v DI*. In both of those cases, the finding by which the claimant was held to be bound (even in the context of a jurisdiction challenge) was a pure merits finding to which no jurisdiction objection had been taken at all. In the present case, the arbitrator’s conclusion that PDSA remained a Shareholder (a) is the subject of a jurisdiction challenge, at least before this court, and (b) was regarded by the arbitrator as a jurisdictional finding in relation to the Breaches Claims.
99. However, I do not see why the underlying principle should not equally apply here. If an arbitrator has made a finding on a substantive issue between the parties, it is difficult to see why its binding effect in the context of a jurisdiction challenge to some other part of the arbitrator’s award should depend on whether (a) no jurisdiction objection has ever been made to the finding on the substantive issue or (b) there has been a challenge but the court has concluded that the arbitrator had jurisdiction. Either way, the arbitrator has made a finding on an issue between the parties that the arbitrator had jurisdiction to determine. In principle one would expect that finding to be binding for all purposes, following the logic of the two cases discussed above, even if the finding also has relevance to a jurisdiction issue (regarding some other part of the case) which *prima facie* would ultimately be for the court to determine.
100. PDSA submits that (i) the arbitrator’s finding that PDSA remained a Shareholder was a purely jurisdictional one, and (ii) alternatively, if it went to both merits and jurisdiction, then it was a ‘doubly relevant’ fact that there needed to be asked twice, citing *The Newcastle Express* §§ 74 and 75. I have already quoted § 75 of that case, but for ease of reference I quote both paragraphs below:

“74. The discussion in Mr Born's book includes at pages 493-5 the valuable insight that the non-existence of the main contract does not necessarily mean that an arbitration agreement is also non-existent. Rather, the separability principle means that the question of contract formation must be asked twice, once in relation to the main contract and again in relation to the arbitration agreement. In most cases the same answer will be given to both questions, although it is theoretically possible for parties to conclude a binding agreement to arbitrate even if they have not (or not yet) agreed on the main contract. But in both cases the issue is one of contract formation, in particular whether, applying usual principles, the parties have evinced an intention to be bound. As Mr Born puts it:

"It is true that the non-existence of an underlying contract may be accompanied by the nonexistence of the arbitration agreement. Thus, where two parties never met or negotiated in any way, there will be no arbitration agreement and no underlying contract. This is not, however, in any way inconsistent with the separability presumption; on the contrary, properly analyzed, this type of case is a useful illustration of the separability presumption's application.

As discussed above, the separability presumption does not provide that, where the underlying contract is non-existent or invalid, the arbitration agreement is nonetheless necessarily existent and valid. Rather, that the arbitration agreement may be existent and valid even if the underlying contract is not; that is because the arbitration agreement is presumptively a separate agreement, distinct from the underlying contract, whose terms and status differ from those of the underlying contract. The relevant question, therefore, is whether the parties did or did not negotiate and conclude a valid agreement to arbitrate their disputes even if they did not also conclude the underlying contract.

In general, given the close relationship between the underlying contract and the arbitration agreement, defects in the formation of the former are likely to affect the latter: parties do not ordinarily agree to arbitration provisions in the abstract ('floating in the legal ether'), without an underlying contract. Nevertheless, there will be instances where the parties are held to have concluded their negotiations, and reached a valid binding agreement, on an arbitration clause, but not on the underlying contract. ...

The most difficult issues arise when a particular alleged defect in formation affects both the arbitration clause and the underlying contract (e.g. the contract, including the arbitration clause, was never executed, or the contract was affected by forgery, or a party lacks mental capacity). These are cases of

'doubly relevant facts' or 'identities of defects', is simultaneously relevant to the validity or existence of both the underlying contract and the associated arbitration agreement.

In these cases, absent special or additional circumstances, the reasons for the defect in the underlying contract almost always also affects the substantive validity of the arbitration agreement. There is seldom a credible basis for arguing that forgery of a signature on a contract, affecting the underlying contract, does not also impeach the arbitration clause: unless the arbitration clause was separately signed, or agreed in some other manner, then a forged signature on the underlying contract evidences the absence of agreement on anything in that document. Similarly, the failure to execute the underlying contract will generally evidence a failure to agree upon the associated arbitration clause; there may be cases where separate expressions of assent exist with regard to the arbitration agreement, but the circumstances will be unusual, and must be established through allegations directed specifically at the existence of an arbitration agreement. ..."

75. I do not accept that the approach which I have set out is (as Mr Young submitted) "antithetical to the modern 'one-stop' dispute resolution presumption in contractual interpretation". That presumption is concerned with the interpretation of dispute resolution clauses, as made clear in *Fiona Trust*. But there is no issue about the interpretation of the arbitration clause in this case. The presumption has nothing to do with the question whether the parties have concluded a contract (including a contract to arbitrate) in the first place. On the contrary, to hold that the question whether a binding arbitration agreement has been concluded is subject to ordinary principles of contract formation is a principled approach. It recognises that an arbitration agreement is a contract like any other, so that there is no justification for treating the question whether such an agreement has been concluded as subject to special presumptions uniquely applicable in arbitration cases. One-stop shopping is all very well, but if the parties have not entered into an arbitration agreement, the shop is not open for business in the first place."

101. I do not accept PDSA's submission that the above considerations are relevant to the issue in the present case. They indicate, in brief, that (a) the question of whether an arbitration agreement has been formed and subsists is in principle separate from the question of whether the substantive contract has been formed and exists, though (b) in some cases, the same factual issue will be relevant to both questions, for example where the question is whether any contract was executed at all or whether a purported contract is vitiated by forgery or lack of mental capacity. However, such cases are unlikely to involve the situation arising in the present case, where the arbitrator has made a finding on the merits, which the court concludes was made within his/her jurisdiction, but which also

has a bearing on the arbitrator's jurisdiction over some other aspect of the dispute. Nothing in *The Newcastle Express* touches on any such question.

102. It is very likely, in a contract formation case, that the jurisdiction issue will be whether the arbitrator had any jurisdiction at all in respect of the dispute. That was the situation in *The Newcastle Express*, where the court concluded that the charter was 'fixed on subjects', which were never lifted, meaning that the parties never formed the intention to create legal relations with respect to the envisaged contract, including the arbitration agreement that would have formed part of it.
103. In the present case, by contrast, it is common ground that an arbitration agreement was made and subsisted at least for certain purposes, and I have concluded that those purposes included determination of the question of whether PDSA remained a Shareholder. The arbitrator's finding on that question accordingly fell within her jurisdiction, and, as it appears to me (following *Westland Helicopters* and *C v DI*), binds the parties both as a finding on the merits and as a finding relevant to the arbitrator's jurisdiction to determine the Breaches Claims. That constitutes a further reason why the arbitrator did have jurisdiction to determine the one Breaches Claim on which she found in DP World's favour.

(H) WHETHER PDSA CEASED TO BE A SHAREHOLDER

104. In the preceding sections of this judgment, I have concluded that the arbitrator had jurisdiction to determine both limbs of the Share Transfer Claim and the one Breaches Claim on which she upheld DP World's claim, regardless (in both cases) of whether PDSA did or did not in fact remain a Shareholder once the Presidential Ordinance had been issued.
105. In this section, I consider for completeness whether PDSA did remain a Shareholder following the issue of the Ordinance. For these purposes I accept PDSA's submissions that:
- i) the Court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement: *Wood v Capita Insurance Services Ltd* [2017] AC 1173 § 10;
 - ii) where there are rival meanings to the words used, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense (*ibid.* § 11);
 - iii) however, in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting and be alive to the possibilities that one side may have agreed to something that with the benefit of hindsight did not serve its interests, or a provision may be a negotiated compromise, or that the negotiators were not able to agree more precise terms;

- iv) commercial common sense is not to be invoked retrospectively: the mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly for one of the parties is not a reason for departing from the natural language: it is not the function of the Court to re-write the parties' bargain (*Arnold v Britton* [2015] AC 1619 §§ 18-20); and
- v) business common sense has a role to play only when the language used by the parties is open to different interpretations: its role is not to replace the language used with something which is not to be found in the documents at all: *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL Plc* [2013] 1 WLR 1408 § 64.

(1) PDSA's submissions

106. I have cited the basic provisions of the JVA and the Articles relevant to shareholders and share transfers in section (B)(3) above. PDSA's submissions may be summarised as follows.
107. First, the JVA distinguished "*Parties*" to the JVA from "*Shareholders*". The "*Parties*" were defined as named entities and any subsequent party who signed a deed of adherence:
- "Parties means PAID, DPW Djibouti, the Company and any other Persons who may become parties to this Agreement by the execution of a Deed of Adherence; and Party means any of them."
108. By contrast the definitions of "*Shareholder*" in both the JVA and the Articles, quoted earlier, imposed a further attribute, namely an ownership requirement. They referred, respectively, to "*shareholders in the Equity Share Capital of the Company*" and "*subscribers ... holding Shares in the Capital of the Company*". Unless contractually provided otherwise, an entity cannot be a "*shareholder[] in ... Equity Share Capital*" or "*hold[] Shares*" without owning shares in the company. (The terms "*Equity Share Capital*", "*Shares*" and "*Capital*" were also defined: "*Equity Share Capital from time to time, shall mean the total issued share capital of the Company*" (JVA § 1.2); "*Shares means the issued equity shares of par value FD 25,000 per share in the Capital of the Company, whether they be DPW Shares or Government Shares*" (Article 5A.1.xxxi); and "*Capital from time to time, shall mean the total issued Share capital of the Company*") (Article 5A.1.vi).)
109. Likewise, the definitions of "*Shareholder*" refer to the "*Person[s] to whom Shares are issued or Transferred*". An entity which receives shares pursuant to a share issue or a share transfer will own those shares.
110. These points were re-emphasised at the end of each definition, which stated that an entity's status as a "*Shareholder*" continues only "*while any Shares are held by such Persons*".

111. The definitions of “*Government Shareholders*” and “*DPW Shareholders*” in the JVA and the Articles are also consistent with a contractually stipulated property ownership requirement. They provide that listed entities will only be (DPW/Government) “*Shareholders*” “*so long as they may hold Shares in the [Equity Share] Capital of the Company*”.
112. These provisions are also consistent with the provision in JVA § 19.1 that “*a Shareholder will cease to have any further rights or obligations under this Agreement on ceasing to hold any Shares ...*”.
113. Thus in order to be a “*Shareholder*”, it was necessary to own equity in DCT’s share capital. Following the Presidential Ordinance, PDSA no longer satisfied that requirement (as held by the arbitrator) and was therefore not a “*Shareholder*”.
114. Secondly, the JVA and the Articles define “*Transfer*” as follows:

“**Transfer** shall include:

- (i) any transfer or other disposition of any Shares or voting interests or any interest therein, including, without limitation, by operation of Applicable Laws, by court order, by judicial process, or by foreclosure, levy or attachment;
- (ii) any sale, assignment, gift, donation, redemption, conversion or other disposition of any Shares or any interest therein, pursuant to an agreement, arrangement, instrument or understanding, including retention arrangements, by which legal title to or beneficial ownership of any Shares or any interest therein passes from one Person to another Person or to the same Person in a different legal capacity, whether or not for value;
- (iii) the creation of any Encumbrance over any Shares or any interest therein, other than a pledge of the Shares of the Shareholders that is made in favour of the Financiers.”

“*Applicable Laws*” was widely defined and included decrees and ordinances.

115. Consistently with that definition, the JVA envisages various types of “*Transfers*”, including:
- i) a voluntary transfer by way of (*inter alia*) sale, assignment, gift or donation, which was subject to the restrictions on “*Permitted Transfers*” contained in JVA § 14.2 (which included certain pre-emption rights);
 - ii) a contractually required transfer, by reason of contractual default, under § 14.3 (which made provision for the other party to have an option to purchase shares at a fair value); and

- iii) any form of compulsory transfer by operation of law, including an immediate and automatic transfer. This included the transfer brought about by the Presidential Ordinance.
116. Thirdly, and further to the above, whilst the parties could contractually dictate who were to be treated as “*Parties*” by dictating that such an entity would have to sign a deed of adherence (which is what the arbitrator found) and could dictate the timing of the transfer of ownership in such a scenario, they could not dictate – in a situation of automatic, immediate and compulsory transfer by law – the timing of the transferring of ownership in the equity. The arbitrator expressly recognised this in accepting that:
- i) the Presidential Ordinance had to be treated as valid (Award § 458);
- ii) the Presidential Ordinance overrode the provisions of the Articles and JVA and their share transfer restrictions to the extent that the latter provided for the transfer of shares to be void (Award § 459); and
- iii) PDSA therefore ceased to own the shares.
117. Fourthly, the provisions in the definitions of “*Shareholder*”, JVA § 14.5 and Article 11.7 that make any Transfer conditional upon execution by the transferee of a deed of adherence are concerned with the question of whether the transferee becomes a Shareholder. They do not, and could not, prevent a shareholder who loses ownership of its shares by compulsory transfer from thereby ceasing to be a Shareholder.
118. Fifthly, JVA §§ 14.6(a) and (d), and the corresponding provisions in Articles 11.2, 11.8(i) and 11.8(iv), are concerned with registration on the share register and ensuring compliance with the second component of the definition of Shareholder, viz execution of a deed of adherence. They do not affect the first component, namely that a Shareholder must actually own the shares in question.
119. Sixthly, the arbitrator concluded that PDSA was “*deemed*” to remain a Shareholder. However, the only deeming provision in the JVA has no application to the present case (and there was no attempt by the arbitrator to explain how it could possibly apply). Clause 14.6(c) provides:
- “A person executing an instrument of transfer of a Share is deemed to remain the holder of the Share until the name of the transferee is entered in the register of members of the Company in respect of it.”
120. However, that provision is by its own plain terms incapable of applying to an immediate, automatic and non-voluntary transfer of ownership by operation of law to divest ownership, with PDSA having no control over the transfer or its timing: because such a transfer did not involve a person “*executing an instrument of transfer*” (the “*Transfer*” had already happened). Indeed, the arbitrator correctly found that the Presidential Ordinance would necessarily override any inconsistent provision in the agreements. In other words, in such a non-contractual situation, the parties recognised in the JVA that they could

not regulate the timing of the transfer of share ownership with the signing of a deed of adherence. The JVA specifically contemplated this situation by defining “*Transfers*” to go beyond any form of voluntary or contractual transfer but to include an immediate, automatic and compulsory transfer of shares.

121. By including the ‘deeming’ provision in Article 14.6(c), the parties recognised that they were altering – though only in respect of voluntary Transfers – the position that would otherwise prevail, namely that following a transfer a shareholder would cease to be a Shareholder (as defined) because it would no longer own shares in the company.
122. Thus, in a situation of compulsory automatic transfer:
- i) the “*Party*” to the JVA (PDSA) would no longer be a “*Shareholder*” because it did not own the Shares; and
 - ii) the entity now owning the “*Shares*” (the Republic) would not be a “*Party*” and therefore would not be a “*Shareholder*”.
123. Seventhly, there is nothing commercial surprising about a result in which an entity that has involuntarily been deprived of its shares should cease to incur the liabilities of a Shareholder and party to the contracts.
124. For all these reasons, PDSA submits, the arbitrator was wrong to assume that the fact that the Republic did not become a Shareholder meant that PDSA remained a Shareholder.

(2) Analysis

125. In my view, PDSA’s analysis of these provisions is incorrect. In simple terms, I consider that the contractual regime is designed to, and does, have the effect that unless and until a deed of adherence has been executed, the original shareholder remains a Shareholder and subject to the duties thereby arising.
126. By way of context, I note that the share transfer provisions in both the JVA and the Articles stated that the restrictions on Transfer in § 14 and Article 11 respectively “*are serious and are for the protection of the legitimate interests of [all the Shareholders and] the Company*”. Requirements for any transferee to enter into a deed of adherence are a well-established feature of shareholders’ agreements in order to “*ensur[e] continuity*”: see, e.g., *NDK Ltd v Huo Holding Ltd (No. 1)* [2022] EWHC 1682 (Comm) at § 42(v)(a) and *NDK v Huo (No. 2)* [2022] EWHC 2580 (Comm) § 16.
127. It is also significant that JVA § 14.5 makes a deed of adherence “*a condition of any transfer of Shares*” and Article 11.7 makes it “*a condition of any Transfer of Shares*”, whether permitted or required. The use of the defined term “*Transfer*”, at least in Article 11.7, which includes transfers by operation of law, confirms that the deed of adherence condition applies to such transfers too; and that is reinforced by the stipulation in Article 11.2 that any “*Transfer*” of shares is subject to JVA § 14, and by the stipulations in JVA § 14.1(b) and Article

- 11.3(ii) that the restrictions in JVA § 14 and Article 11 respectively apply both to conventional transfers and to transfers by operation of law.
128. Further, JVA § 14.6(a), Article 11.2 and Article 11.8(i) have the effect that the directors must not register any transfer unless that condition has been fulfilled. It follows that the entity whose shares have purportedly been transferred must remain the registered shareholder.
129. The clear effect and intention of these provisions is that, for the purposes of the JVA and the Articles, the shares are not to be regarded as having been transferred until a deed of adherence has been executed; and that unless and until that occurs, the original shareholder will remain the Shareholder: thus preserving continuity and avoiding the peculiar results of (a) there being no counterparty to the JVA and (b) for the purposes of the JVA and the Articles, the shares purportedly transferred having no holder at all.
130. I do not consider that view to be inconsistent with the definitions of Shareholder. Those definitions themselves emphasise the importance of a deed of adherence upon any transfer. The words “*while any Shares are held by such Persons*” simply express the point that once an entity has transferred away all of its shares, in accordance with the JVA/Articles, it will then cease to be a Shareholder. They do not import any additional requirement of share ownership as a matter of property law; nor do they mean that one can be regarded as ceasing to ‘hold’ shares even though the JVA and Articles require the directors to refrain from registering any transfer. Nor do the words “*shareholders in the Equity Share Capital of the Company*” import any such additional requirement. The existence or otherwise of a shareholding is to be assessed applying the detailed provisions of JVA § 14 and Article 11.
131. The conclusion above is also not inconsistent with the arbitrator’s acceptance that the Presidential Ordinance overrode the provision in Article 11.2 that any Transfer in contravention of the restrictions shall be “*void*”. It was the validity of the Presidential Ordinance “*and the transfer of ownership resulting from it*” which the arbitrator concluded she could not question (Award § 458). However, the Presidential Ordinance did not alter the parties’ agreements as to the circumstances in which any Transfer of shares would or would not be regarded contractually as altering Shareholder status for the purpose of the JVA and the Articles.
132. I do not agree that JVA § 14.6(c) implies that a person whose shares have been transferred by operation of law, rather than by execution of an instrument of transfer, ceases to be a Shareholder. In my view, that provision simply spells out one consequence of the effect of the other provisions I have referred to above, making clear that even where an instrument of transfer has been executed, that does not in itself alter the shareholding: the transferor remains the Shareholder until the transferee has been registered.
133. PDSA submits that its approach is consistent with JVA § 3, which did not condition the (original) Parties to the JVA becoming “*Shareholders*” on the registration of their shareholding. Instead, once the DCT Board had issued a resolution issuing the Shares to the Parties, they became “*Shareholders*”. I

disagree. JVA § 3.1(b)(1)-(3) provided for the Board to allot shares to “*the Government Shareholders*” and the “*DWP Shareholders*” (as already defined) and then for a shareholders’ meeting to pass resolutions *inter alia* that shares should be allotted to DP World and PAID, and that “[*t*]he names of such allottees shall be entered in the register of members as the holders of the number of Shares allotted to them respectively”. If anything, that provision underlines the importance of registration.

134. PDSA also suggested (in oral reply submissions) that JVA § 14.2(f) was at least consistent with its approach:

“The Government Shareholders agree that, at any time during the Operations Period the DPW Shareholder(s) shall have the right to propose the sell-down of the Government Shares by the Government Shareholders on a pro rata basis in favour of any Shipping Companies. The Transfer of Government Shares in favour of such Shipping Companies shall be decided as a Reserved Matter.

For the avoidance of doubt, it is clarified that the provisions of Clause 14.2(g) shall not apply to such a Transfer of Shares by the Government Shareholders to the Shipping Companies, provided always that the Shareholding Proportion of the Shipping Companies does not exceed the Shipping Companies Equity Cap. Upon such Transfer, the Parties hereto shall procure a Deed of Adherence from such transferee Shipping Companies.

...”

The Government Shareholders further agree that they shall (if required) mutually discuss and agree with the DPW Shareholders and the Shipping Companies, any changes that may be required to be made to this Agreement; provided always that no such changes shall in any way have a material adverse effect on the rights or powers of the DPW Shareholders and the management and control of the Project by the Manager.”

The disappplied clause 14.2(g) would otherwise provide pre-emption rights to the DPW Shareholders in the event of a proposed sale of shares by the Government Shareholders.

135. PDSA suggested that § 14.2(f) contemplates a “*Transfer*” taking place, followed by a deed of adherence, indicating that a party could cease to be a Shareholder before a deed of adherence is executed, but for the deeming provision in § 14.6(c) (which, as noted earlier, does not apply to transfers by operation of law). However, that suggestion simply begs the question of whether, upon the “*Transfer*” referred to in § 14.2(f), the transferring Government Shareholder would immediately cease to be a Shareholder. Nothing in the contractual provisions in my view points to that conclusion.

136. Equally, I do not consider that JVA § 19 assists PDSA. It begs the question of whether PDSA did cease to be a Shareholder. In my view, it did not.
137. For these reasons, I do not consider that PDSA ceased to be a Shareholder for the purposes of the JVA and the Articles (including their arbitration clauses) by reason of the Presidential Ordinance.

(I) LOSS OF THE RIGHT TO OBJECT

138. DP World submits that PDSA has lost the right to pursue its challenge, because the arbitrator gave PDSA an express opportunity to clarify the extent to which it advanced any jurisdictional objection to DP World’s claims and the relief it sought in respect thereof; and PDSA not only failed to object, but in fact positively confirmed that it was advancing no challenge to the three claims that succeeded, nor the relief sought in relation to them.

139. Pursuant to section 73(1) of the Arbitration Act:

“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

...

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.”

140. In *National Iranian Oil Company v Crescent Petroleum Company International Limited* [2022] EWHC 2641 (Comm) Butcher J, after reviewing the authorities, provided the following helpful summary of the principles:

“(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." (§ 36)

141. The emphasis upon fairness and efficiency was also reflected in the Departmental Advisory Committee report that preceded the Arbitration Act, which explained that:

“Recalcitrant parties or those who have had an award made against them often seek to delay proceedings or to avoid honouring the award by raising points on jurisdiction etc. which they have been saving up for this purpose or which they could and should have discovered and raised at an earlier stage. Article 4 of the Model Law contains some provisions designed to combat this sort of behaviour (which does the efficiency of arbitration as a form of dispute resolution no good) and we have attempted to address the same point in this Clause. In particular, unlike the Model Law, we have required a party to arbitration proceedings who has taken part or continued to take part without raising the objection in due time, to show that at that stage he neither knew nor could with reasonable diligence have discovered the grounds for his objection (the latter being an

important modification to the Model Law, without which one would have to demonstrate actual knowledge, which may be virtually impossible to do). It seems to us that this is preferable to requiring the innocent party to prove the opposite, which for obvious reasons it might be difficult or impossible to do ...”

142. DP World relies on the exchanges with the arbitrator referred to in section (D) above. It submits that the relief granted by the arbitrator in relation to the JVA Termination Claim and the Share Transfer Claim was substantively identical to that sought by DP World as set out in § 231 of DP World’s Reply, except that in relation to the Share Transfer Claim the arbitrator declined to declare the share transfer to have been “*invalid*”. PDSA stated expressly to the arbitrator that it made no jurisdictional objection regarding either of those claims.
143. Further, DP World says, the only one of the Breaches Claims that succeeded was that set out in § (d) of the operative part of the Award: “*declares that the Respondent breached Clause 14.5 of the JVA and Article 11.7 of the Articles*”. That corresponded to the claim referred to in § 64(b) of DP World’s written opening and its slide (“*purporting to transfer its shares to the Republic in breach of the JVA and the Articles, having failed to secure a Deed of Adherence from the Republic*”), as to which PDSA told the arbitrator it had no jurisdictional objection. It was not one of the four claims, marked with a tick, which PDSA submitted to the arbitrator were outside her jurisdiction. The arbitrator found against DP World on those four claims and awarded no relief in respect of them.
144. In relation to the Share Transfer Claim, as I note in § 44 above, the arbitrator in the exchange quoted in § 43 above did not read out the final eight words of § 231(d) of DP World’s Reply, “*and that PDSA remains a shareholder of DCT*”. In those circumstances it is an overstatement, in my view, to suggest that PDSA positively indicated to the arbitrator that it made no jurisdictional objection to that part of DP World’s claim. On the other hand, those words clearly formed part of DP World’s claim, and PDSA did not distinctly or openly raise any jurisdictional objection to the claim for a declaration that it remained a Shareholder. I do not consider that PDSA was entitled to assume that the arbitrator deliberately omitted to read those words out because she recognised that PDSA challenged her jurisdiction to decide whether PDSA remained a shareholder.
145. The fact that PDSA said it objected to jurisdiction in respect of “*claims under the Articles against PDSA arising out of events that occurred after the Dispossession Ordinance*” or “*claims under the JVA after the passage of the Dispossession Ordinance*” (as it was put in DP World’s Rejoinder, quoted earlier) was not sufficient to indicate that it objected to jurisdiction over that part of the Share Transfer Claim. Nor is there any indication in the Award that PDSA challenged her jurisdiction to decide, as a substantive issue, whether it remained a Shareholder after the Ordinance. The fact that she understood her jurisdiction over some of the Breaches Claims to turn on the answer to that issue is not the same thing. If PDSA’s position was that the question of whether it remained a Shareholder was itself a post-Ordinance event that the arbitrator lacked jurisdiction to decide, then it needed distinctly to say so.

146. Consequently, I conclude that PDSA has, in any event, lost the right to object to the arbitrator's jurisdiction in respect of the whole of the Share Transfer Claim, including the question of whether PDSA remained a Shareholder after the Presidential Ordinance.
147. The position in relation to the Breaches Claim is more finely balanced. The claim on which DP World succeeded was expressed in § 64(b) is one that occurred, once and for all, when the purported share transfer took place: "*purporting to transfer its shares ..., having failed to secure a Deed of Adherence*". On the other hand, it is part of PDSA's case on the present challenge that DP World's case included a failure to secure a deed of adherence after the date of the Presidential Ordinance. I have concluded that the arbitrator's findings are best regarded as being that a breach occurred at the moment of the Ordinance and continued thereafter. On balance, I consider that the reservations PDSA made clear to the arbitrator were sufficient to preserve any right to challenge jurisdiction, if and insofar as the arbitrator were to find that there was a breach post-dating the Presidential Ordinance, including a continuing breach commencing on that date.

(J) CONCLUSIONS

148. For these reasons, I conclude that the arbitrator had jurisdiction over all the matters she determined, and that the claim must therefore be dismissed.