



Neutral Citation Number: [2024] EWHC 1847 (Comm)

Case No: CL-2024-000011 and CL-2024-000117

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

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

Date: 31/07/2024

**Before :**

**HIS HONOUR JUDGE PELLING KC**  
**SITTING AS A JUDGE OF THE HIGH COURT**

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**Between :**

**AZ**

**Claimant in the**  
**11 Claim and**  
**Defendant in**  
**the 117 Claim**

**- and -**

**BY**

**Defendant in**  
**the 11 Claim**  
**and Claimant**  
**in the 117**  
**Claim**

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**Sa’ad Hossain KC and Moritz Grimm** (instructed by **Ashurst LLP**) for **AZ**  
**Neil Kitchener KC and Ruth Byrne KC** (instructed by **King & Spalding International LLP**)  
for **BY**

Hearing date: 2 July 2024  
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**Approved Judgment**

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

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HIS HONOUR JUDGE PELLING KC SITTING AS A JUDGE OF THE HIGH COURT

## HH Judge Pelling KC:

### Introduction

1. This is the trial of:
  - i) Claim number CL-2024-000011, issued by AZ<sup>1</sup> on 8 January 2024 (“11 Claim”) for: (i) a declaration in relation to the enforceability of an indemnity awarded to BY<sup>2</sup> pursuant to a final UNCITRAL arbitration award dated 30 January 2023 (“Award”) consequent on an arbitration between BY and AZ; and (ii) an injunction preventing BY from seeking to enforce the indemnity; and
  - ii) Claim number CL-2024-000117, issued by BY on 21 February 2024 (“117 Claim”) for: (i) permission to enforce the Award under Section 66(1) of the Arbitration Act 1996 (“AA”); (ii) the entry of judgment under Section 66(2) of the Act (in terms reflecting the dispositive of the Award, as set out in the Claim Form and a declaration as to the amounts currently owed by AZ.

### Background Facts

2. The background facts are not in dispute. AZ is a producer and supplier of Liquefied Natural Gas (“LNG”). BY is trading company operating in the liquid hydrocarbon sector. The parties’ relationship was governed by a Master Sales Agreement and the particular transactions with which the arbitration the subject of these proceedings was concerned was the subject of a confirmation notice known in these proceedings as the “Spot CN”. The effect of the Spot CN was that AZ agreed to sell and BY agreed to buy 19 cargoes of LNG for delivery in accordance with an agreed delivery programme in a period between [...]<sup>3</sup> and [...]<sup>4</sup> (“Spot CN Cargoes”). BY agreed to sell eight of the Spot CN Cargoes to CX<sup>5</sup> and six of the Spot CN cargoes to DW<sup>6</sup>.
3. AZ breached the Spot CN agreement by failing to deliver in accordance with the agreed programme or at all. This caused BY to breach its agreements with CX and DW. CX referred its claim against BY to arbitration in January 2021 (“CX Arbitration”). BY referred its claim against AZ for breach of the Spot CN contract to arbitration (“Spot CN Arbitration”) in February 2021 and DW referred its claim against BY to arbitration in March 2021 (“DW Arbitration”). By the time of the final award in the Spot CN Arbitration, the CX and DW arbitrations were proceeding but had not been completed. The CX Arbitration has since concluded but the DW Arbitration is yet to be concluded.
4. By its final Award, published on 30 January 2023, the Spot CN Arbitration tribunal (“Spot CN Tribunal”) found BY’s claim for breach of contract proved, awarded it damages representing its lost profits and granted it a declaration that it was entitled to be indemnified in respect of its liabilities to CX and DW (“Spot CN Award”). At the

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<sup>1</sup> Confidentiality Schedule, [1].

<sup>2</sup> Confidentiality Schedule, [2].

<sup>3</sup> Confidentiality Schedule, [3].

<sup>4</sup> Confidentiality Schedule, [4].

<sup>5</sup> Confidentiality Schedule, [5].

<sup>6</sup> Confidentiality Schedule, [6].

conclusion of the Spot CN Award the Spot CN Tribunal set out what BY characterises as its “dispositive” in these terms:

#### **“XVIII. AWARD**

For the reasons set out above, the tribunal hereby DECIDES AND AWARDS as follows:

1. [AZ] shall pay [BY] damages in the amount of US\$[...]<sup>7</sup> (US\$ [...] )<sup>8</sup> in respect of its claim for lost profits on the 19 Cargoes [...] .<sup>9</sup>
2. [AZ] shall indemnify [BY] in respect of any amounts awarded to [CX] by way of damages, compensation, interest or similar as well as its legal costs and expenses in relation to Arbitration proceedings brought by [CX] against [BY] on 26 January 2021 (and any further Arbitration proceedings brought by [CX] against [BY] with respect to the same Cargoes). To the extent that any such amount is the subject of an award or order by consent reflecting terms of settlement between [BY] and [CX], such terms shall be approved as reasonable by the arbitral tribunal seised of the proceedings.
3. [AZ] shall indemnify [BY] in respect of any amounts awarded to [DW] by way of damages, compensation, interest or similar as well as its legal costs and expenses in relation to Arbitration proceedings brought by [DW] against [BY] on 31 March 2021. To the extent that any such amount is the subject of an award or order by consent reflecting terms of settlement between [BY] and [DW], such terms shall be approved as reasonable by the arbitral tribunal seised of the proceedings.
4. [AZ] shall indemnify [BY] in respect of its invoiced and paid legal costs and expenses relating to the [CX] and [DW] proceedings respectively and certified by Counsel for [BY].
5. [AZ] shall make payment of any liabilities described in (2, 3 and 4) above within 21 (twenty-one) days of the presentation by [BY] of final award(s) in the [CX] and/or [DW] proceedings or order(s) by consent reflecting terms of settlement approved as reasonable by the arbitral tribunal seised of the proceedings and signed certificate(s) from [BY’s] lawyers confirming [BY’s] costs of defending those proceedings.
6. BY shall forthwith draw the terms of the indemnities ordered at 2 and 3 above to the attention of the tribunals seised of the [CX] and [DW] Arbitrations respectively.”

Paragraphs 2, 3, 5 and 6 are those that are material for present purposes.

5. AZ maintains that in addition Paragraph 607 of the Spot CN Award is material. That paragraph must be read in its relevant context and so I set it out together with certain other paragraphs that BY maintains it is necessary to refer to in order to understand the intended effect of Paragraph 607.

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<sup>7</sup> Confidential Schedule, [3].

<sup>8</sup> Confidential Schedule, [4].

<sup>9</sup> Confidential Schedule, [5].

6. The relevant section of the Award starts at Paragraph 594, under the sub-heading “*Indemnification in respect of other claims*”. In that paragraph, the Spot CN Tribunal sets out a summary of the sub sales entered into by BY with respectively CX and DW. At Paragraphs 596-597, the Spot CN Tribunal records what it had been told concerning what was being claimed against BY in the CX and DW arbitrations. The claims in summary were said to be US\$[...]<sup>10</sup> by CX and US\$[...]<sup>11</sup> by DW.
7. In Paragraphs 600-603, the Spot CN Tribunal summarised a dispute by AZ concerning the jurisdiction of the tribunal to grant indemnification by final award, which it determined by holding that it had no doubt that it had the jurisdiction to make such an Award. At Paragraph 604, the Spot CN Tribunal concluded that it ought to grant an indemnity “*broadly*” in the terms sought by BY. The Spot CN Tribunal then continued:

“Accordingly, the Tribunal determines that [BY] is entitled to declaratory relief to the following effect:

(1) [AZ] shall (by way of damages) indemnify [BY] in respect of its established liabilities to [CX] and [DW] arising from the 18 Cargoes identified as Nos. [...]<sup>12</sup>), including, but not limited to:

1. any amounts awarded by way of damages, compensation, interest or similar as well as legal costs and expenses, to [CX] in relation to Arbitration proceedings brought by [CX] against [BY] on 26 January 2021 (and any further Arbitration proceedings [CX] brings against [BY] with respect to the same cargoes);
2. any amounts awarded by way of damages, compensation, interest or similar as well as legal costs and expenses to [DW] in relation to Arbitration proceedings brought by [DW] against [BY] on 31 March 2021;
3. [BY’s] legal costs and expenses relating to the [CX] and [DW] proceedings described above.

606. [AZ] shall make payment of any liabilities described in (1) above within 21 days of the presentation by [BY] of final award(s) in the [CX] and [DW] proceedings or order(s) by consent reflecting terms of settlement approved as reasonable by the arbitral tribunal seized of the proceedings and signed statement(s) from [BY’s] lawyers confirming [BY’s] costs of defending those proceedings.

607. The Tribunal further orders that the terms of this indemnity be drawn forthwith to the attention of the tribunals seized of the [CX] and [DW] arbitrations, and that any eventual

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<sup>10</sup> Confidential Schedule, [6].

<sup>11</sup> Confidential Schedule, [7].

<sup>12</sup> Confidential Schedule, [8].

enforcement of this indemnity be subject to the endorsement of those tribunals as to its applicability in the context of any award and, in particular, any consent award, made in either of those proceedings.”

8. Returning to the chronology, on 28 February 2023, BY demanded that AZ make payment of sums said to be due under a Partial Final Award made by the tribunal in the CX Arbitration (“CX Tribunal”) dated 22 October 2021. This was challenged by AZ as not being within the scope of the Indemnity contained in the Spot CN Award because it was not a “... *final award(s) in the [CX] ... proceedings...*”. The Spot CN Tribunal accepted this submission by an Interpretation Decision that it issued.
9. On 1 December 2023, the CX Tribunal published its final award (“CX Award”). It awarded to CX damages against BY totalling US\$[...]<sup>13</sup>. On 5 December 2023, BY presented the CX Award to AZ as required by Paragraph 5 of the Dispositive in the Spot CN Award set out earlier. On 13 December 2023, the CX Tribunal issued a schedule of corrections to its final award which corrected some typographical errors that are immaterial for present purposes.
10. AZ objected to the CX Award on two grounds. Of those only one is relevant for present purposes, being an assertion that the CX Award did not comply with what AZ alleges is the requirement imposed by the Spot CN Tribunal by Paragraph 607 of its final award “...*that any eventual enforcement of this indemnity be subject to the endorsement of...*” the CX Tribunal “...*as to its applicability in the context of any award...*” (“Endorsement Requirement”) and on 8 January 2024, AZ issued the 11 Claim seeking a declaration that the declaration by the Spot CN Tribunal that BY was entitled to be indemnified in respect of the claim against by CX was not enforceable in respect of the CX Award.
11. On 12 January 2024, BY and CX sought an additional award from the CX Tribunal so as to satisfy the Endorsement Requirement. It did so without prejudice to its primary position that no additional award or express endorsement is required from the CX Tribunal to the effect that the AZ indemnity applies to the CX Award. AZ was not entitled to be heard and was not heard on that application, which however was made jointly by CX and BY.
12. AZ’s position is that the CX Tribunal was *functus officio* from no later than the date when it published the CX Award and thus did not have jurisdiction to publish any additional award. The CX Tribunal considered the jurisdiction issue and concluded at Paragraph 29 of its additional award (which it called the “*Addendum to the [CX] Award*”) dated 12 February 2024 (“CX Additional Award”) that it had jurisdiction to address the endorsement issue because what was being sought by the parties to the CX Arbitration was either a “... *clarification of an ambiguity or, more probably, matters that the parties have agreed should be stated by way of additional award...*” and “... *the confirmation requested falls within the scope of matters we were appointed to decide, and is consistent with the findings we made in the 1 December Final Award and also with the evidence provided to us both before that award and in support of the Application.*” As the CX Tribunal added at [32]:

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<sup>13</sup> Confidential Schedule, [9].

“... we have jurisdiction to make the findings requested, allow the Application and grant the relief sought pursuant to Article 27 of the LCIA Rules or by reason of the parties’ agreement conferring jurisdiction on us to make an additional award, and also agreeing the terms upon which such an award should be made.”

13. Having dealt with the jurisdiction issue, the CX Tribunal then held at Paragraph 36 of the CX Additional Award:

**“ADDENDUM AND FINAL ADDITIONAL AWARD**

36. After consideration of the evidence and submissions which have been presented to us and for the reasons set out in full above, we the Tribunal hereby unanimously and finally make this addendum of correction and additional final award, and finally declare as follows:

- a) The amounts stated in sub-paragraphs B. to F. and J. of Section J (Dispositive) of the 1 December Final Award are awarded to the Claimant by way of damages, compensation, interest or similar.
- b) The Tribunal is aware of the [AZ] Indemnity.
- c) The Tribunal gives its endorsement that the sums that it has ordered the Respondent to pay in sub-paragraphs B. to F. and J. of Section J (Dispositive) of the 1 December Final Award fall within the scope of the [AZ] Indemnity...”

On 21 February 2024, BY commenced the 117 Claim seeking leave that the Spot CN Award be enforced in the same manner as a Judgment.

**The Issues**

14. There are two issues between the parties that will resolve both claims. The first issue is whether as a matter of construction, the Spot CN Award includes within it a requirement that the CX Award (and the DW final award when it is made) should contain an express declaration to the effect that the sums awarded come within the scope of the indemnity declaration made by the Spot CN Tribunal in its final award and, if so, whether the Additional Award issued by the CX Tribunal fulfilled that requirement.
15. BY’s case is that the dispositive within the Spot CN final award is that part set out at the end of the Spot CN Award quoted in Paragraph 4 above; that it performs the function of an order made in court proceedings and since it contains nothing that requires an express declaration to the effect that the sums awarded in the CX Arbitration come within the scope of the indemnity declaration in Paragraph 2 of the Dispositive, it therefore follows that there is no such requirement. In any event, even if that is wrong, it submits that the CX Tribunal’s Additional Award contains the necessary declaration. It submits that if and to the extent that the CX Tribunal might

have become *functus* following the publication of the CX Award, it was open to the parties by agreement to re-open the arbitration reference, provided that the CX Tribunal also agreed, which in the event it did. In those circumstances, BY submits that the 11 Claim should be dismissed and the relief sought by it in the 117 Claim should be granted.

16. AZ's case is that Paragraph 607 of the Spot CN Award forms part of the dispositive part of the Spot CN Award and that on its proper construction it requires that before the indemnity in the Spot CN Award will respond, the tribunals in the CX and DW arbitrations would have to declare that the sums awarded by the CX Award and that are to be awarded in the DW arbitration come within the scope of the indemnity declaration contained in the Spot CN Award. It further submits that once an arbitral tribunal becomes *functus* then it cannot be revived even by agreement of all the parties and the relevant tribunal and in the result, since the CX Award does not declare the sums it awards to CX against BY to come within the scope of the indemnity declaration in the Spot CN Award, it follows that the sums awarded to CX in the CX Award cannot be recovered by BY from AZ.

### **The Effect of the Spot CN Award**

17. While the form of arbitral awards varies, the format adopted by experienced legally trained arbitrators generally follows a conventional format, which will start with some formal paragraphs and then will contain a long narrative section setting out the tribunal's factual findings, then its conclusions on any issues of law between the parties before reaching conclusions based on the application of the law as found or agreed to be applicable to the facts as found. This will then lead the tribunal to reach conclusions on the issues that it is required to determine, which in the case of the Spot CN Tribunal were all issues relating to liability and the sums recoverable by way of damages in the event liability was established, and to a dispositive section in which the tribunal sets out the sums awarded and other remedies granted as a result of the conclusions that it has reached.
18. I agree with BY's submission that where such an approach is adopted, the section of the award that commences "*... the tribunal hereby DECIDES AND AWARDS as follows ...*" is likely to, and to have been intended by the tribunal to, contain, and to be read by a reasonable person with all the knowledge reasonably available to the parties to the reference as being a comprehensive statement of what in English court proceedings would appear in the order following a trial. This is all the more likely to have been what was intended when the curial law of the reference is English law and at least a majority of the arbitrators are English lawyers – see Bank Mellat v GAA Development and Construction Co [1988] 2 Lloyd's Rep. 44 at [55], where Steyn J observed that "*(c)onventionally, in England, the dispositive part of an award is introduced by the words 'We award and adjudge'. That, in England, is the arbitral equivalent of a judgment or order by a Court of law, as opposed to the reasons for it. No doubt other words may be used to serve the same purpose.*".
19. If that is the correct construction of the Spot CN Award then the CX Tribunal would only need to be involved in reaching a conclusion as to whether its award came within the scope of the declaratory indemnity in the Spot CN Award "*...(t)o the extent that any such amount is the subject of an award or order by consent reflecting terms of*

*settlement between [BY] and [CX]...*” or where sums were due from BY to CX as a result of “... *order(s) by consent reflecting terms of settlement...*” which the Spot CN Award required to be “... *approved as reasonable by the arbitral tribunal seised of the proceedings...*” if it was to come within the scope of the indemnity declaration it had granted. None of this applies to the CX Award because it is neither an award nor an order by consent.

20. I fully accept the principle identified by Hamblen J, as he then was, in Cadogan Maritime Inc v Turner Shipping Inc [2013] EWHC 138 (Comm); [2013] 1 Lloyd’s Rep. 630 at [43] that “... *where, as is almost invariably the case, the written reasons form part of the award, the whole of the award needs to be considered, and the dispositive part of the award considered in the context of the written reasons.*” That being so, I do not accept the proposition that a court should decide on the true meaning and effect of an Award without first reading it as a whole. So read, a reasonable person with all the relevant knowledge available to the parties would conclude at least as a starting point that a section at the end of the Award that expressly states that what follows is what the Spot CN Tribunal “...*DECIDES AND AWARDS...*” was intended by the Spot CN Tribunal to set out what it was deciding. Although Mr Hossain KC placed some emphasis on there being no necessity for an award to contain a formal dispositive of the sort that appears in the Spot CN Award, to my mind that misses the point: where there is no such section then it may be necessary to comb through the award in order to find the paragraphs that can be described as dispositive of particular claims and issues. However, that is not what happened in this case. In this case the Spot CN Tribunal structured its award by setting out its fact finding and reasoning in the Sections of the Award that preceded Section XVIII. This included a section (Section XVII) which was a summary of the conclusions that had been reached by reference to the list of issues identified by the parties. It was only thereafter that the Spot CN Tribunal added Section XVIII, which by its positioning and the way it was expressed was plainly intended to set out the orders that the tribunal wished to make for the reasons given in the previous 619 paragraphs.
21. I do not accept that on a proper reading of Section XVIII of the Award its role was “...*merely signposting*” as AZ submitted. No doubt one drafting technique would be to set out some conclusions in summary form at the end of an award that are cross referenced back to sections or paragraphs of the award that came earlier (much as the CX Tribunal did in Section XVII when summarising the conclusions it had reached by reference to the list of issues agreed between the parties to the CX Arbitration) and if that technique had been adopted it might have been tenable to contend that the section should be treated as “... *merely signposting...*”. However, that is not the technique that has been adopted by the Spot CN Tribunal. To my mind it is entirely clear that the Spot CN Tribunal intended Section XVIII to be what the tribunal described it to be - its Award. That of itself suggests that what follows was not mere signposting.
22. The opening words of the section emphasise the same point by stating expressly that what it is the Spot CN Tribunal is deciding and awarding is what appears in the numbered sub-paragraphs that follow and was for the reasons that were set out earlier. That this is what the Spot CN Tribunal intended receives further emphasis from the fact that nowhere in what follows is there any cross referencing back to earlier



paragraphs of the Award, culminating with Paragraph 11 by which all claims are dismissed other than to the extent allowed by what is set out in Paragraphs 1-10.

23. Finally, while it is possible to see utility in an endorsement requirement in relation to consent awards and orders, there is no such utility where what has been awarded results from a decision of the CX Tribunal following a contested process resulting in a reasoned final award. If there is a dispute as to the applicability of the indemnity as between the parties to the CX Arbitration (however unlikely that may be in practice), that would be resolved by the CX Tribunal as part of that contest. If there is a dispute between BY and AZ as to the obligation of AZ to indemnify BY then that would have to be resolved by a new reference under the arbitration agreement between them.
24. There is nothing in the Spot CN Award, when it is read as whole, that suggests the Spot CN Tribunal could reasonably be thought to have intended that what appears in Paragraph 607 of the Award should augment what is set out in what in my judgment was plainly intended to be and what was a comprehensive statement of the remedies that it had concluded should be made available to BY.
25. All this leads fairly firmly to the conclusion that the search for what the Spot CN Tribunal decided should be the outcome of the Spot CN Arbitration should be confined to what is set out in the dispositive section (Section XVIII) of the Award. However, before reaching a final conclusion it is necessary to consider Paragraph 607. If on its proper construction and contrary to what might be thought from the points so far considered, the paragraph is expressed to, or otherwise it is to be inferred that it was intended to, take effect as an order in addition to those set out in Section XVIII, then effect must be given to it. Before considering Paragraph 607 further, it is necessary to be clear on the limited scope of the exercise. The only application under the Arbitration Act that has been made is an application by BY under AA, s.66. There is no serious irregularity challenge by AZ under AA, s.68, nor is there an appeal on a point of law under AA, s.69. The parties are now out of time for the purpose of making such challenges – see AA, s.70(3). Generally, where there is an ambiguity or uncertainty as to the effect of an Award, that must be challenged under AA, s.68 – see AA, s.68(2)(c). It follows that Mr Hossain must succeed in his submission that Paragraph 607 is an additional Dispositive that takes effect as such in addition to the decisions and awards set out in Section XVIII of the Spot CN Award.
26. Mr Hossain submits that it is to be inferred from the opening words of the paragraph that the tribunal intended the paragraph to take effect as an order because it expressly states that the Tribunal “...*further orders...*” what then follows. This language is submitted to be “*directive language*” and that for BY to succeed on this part of its case, it would be necessary in effect for the court to ignore the language used. He also submits that if the Endorsement Requirement were not a term of the indemnity, Paragraph 6 of the Dispositive (which provides that BY “... *shall forthwith draw the terms of the indemnities ordered at 2 and 3 above to the attention of the tribunals seised of the [CX] and [DW] Arbitrations respectively...*”) would serve no practical purpose. I don’t entirely follow this last point since the need to approve the terms of consent awards and orders as reasonable would not otherwise be apparent to the CX Tribunal. Indeed, that is probably the only practical purpose of making that direction. In any event, in relation to this requirement Paragraph 607 and Paragraph 6 of the

Dispositive are similar in effect. The point therefore is not one that assists in resolving the issue that arises.

27. Mr Hossain places particular emphasis on the use of the phrase “... *further orders...*” as supporting his submission that the paragraph takes effect as an additional order above and beyond directions and orders contained in Section XVIII of the Spot CN Award. He also relies on the phrase “... *any eventual enforcement of this indemnity...*” as supporting that analysis. Finally, he relies on the phrase “... *applicability in the context of any award and, in particular, any consent award...*” as necessarily meaning that the Spot CN Tribunal intended the endorsement apparently required by the paragraph to apply to both consent and non-consent Awards. In considering these submissions in my judgment they should be approached bearing in mind the point identified by Carr J, as she then was, in paragraph 44 of her judgment in Obrascon Huarte Lain SA (t/a OHL Internacional) v Qatar Foundation for Education, Science and Community Development [2019] EWHC 2539 (Comm); [2019] 2 Lloyd’s Rep. 559:

“As a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults. The approach is to read an award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault”

This principle leads to the conclusion that in determining “... *whether an award is internally inconsistent, courts should assume that the arbitral tribunal intended to make a coherent decision and use every effort to interpret the award’s provisions in a consistent manner...*” – see Professor Gary Born, International Commercial Arbitration, at 25.05. Generally, it will not be appropriate to permit language used in the narrative reasoning section of an award to contradict the language used by the tribunal in the part of the Award that is intended to be its final order. This leads me to conclude that particular care must be taken when construing commercial arbitral awards by focussing on particular words and phrases used in awards to make sure they are read in their correct context – that is in the context of the paragraph in which they appear, read as a whole, in the section of the award that paragraph appears, read as a whole and in the context of the award and in particular the structure of the award in which it appears read as a whole.

28. Mr Hossain submits that in essence that the true scope of the decisions of the Spot CN Tribunal are all set out in the section of the Award starts at Paragraph 594, under the sub-heading “*Indemnification in respect of other claims*” and that what appears in Section XVIII of the Spot CN Award is merely a non-comprehensive summary that impliedly refers the parties and any reasonable reader of the Award back to the earlier section of the Award.
29. I reject AZ’s submission essentially for the reasons already set out above. In my judgment the earlier section of the Award on which it relies was and was intended by the Spot CN Tribunal to be narrative reasoning and the conclusions that the tribunal intended to draw and in fact drew from the reasoning and conclusions set out in the earlier section of the Award and the orders it intended to make were set out

exclusively in Section XVIII of the Award. Had the tribunal intended to go further than in fact it did in Section XVIII, there is no reason why it would not have said so expressly in Section XVIII, as it did with all other elements of the narrative concerning the scope and effect of the declaratory indemnity. The dispositive makes sense when read as a whole and each element serves a practical purpose if (as it is) the final sentence of Paragraph 3 is limited in its effect to consent awards and orders. This is so because it focusses attention on the reasonableness of any consent settlement terms not the applicability of the Spot CN indemnity to the CX Award, which is an issue that would arise only between BY and AZ and could only be resolved in the manner I have described - that is by a new reference under the Spot CN arbitration agreement.

30. No practical purpose would be served by requiring the CX Tribunal to endorse the applicability of a non-consensual indemnity to any award that it made in the absence of a challenge by one of the parties to the CX Tribunal (indeed the practical lack of utility is revealed by the nature and scope of the CX Additional Award). Ultimately, any issue as to the scope and effect of the indemnity was likely to arise only as between BY and AZ and that could not be resolved by the CX Tribunal, but only by either the Spot CN Tribunal or a new tribunal convened to resolve any such question pursuant to the arbitration agreement between them.
31. I do not accept that the Interpretation Decision is material to the issue I have to resolve simply because that was not the or an issue that the Spot CN Tribunal was either asked to resolve or had to resolve when determining what it had been asked to resolve. As Mr Hossain submits, the Spot CN Tribunal was considering whether the CX Partial Final Award fell within the scope of the CX Indemnity and held that it did not because the Partial Final Award was not a “*final award...*”.
32. Finally, I reject the suggestion that the inclusion of Paragraph 607 gives rise to such uncertainty as to render the Spot CN Award unenforceable.. The presence of the paragraph gives rise to a need to construe the Award as a whole “... *in a reasonable and commercial way...*”. Once that exercise is carried out, then the supposed ambiguity is resolved.

### **The CX Additional Award Jurisdiction Issue**

33. Given the conclusions I have so far reached, it is not necessary for me to reach any conclusions on whether the CX Additional Award is valid. However, I do so in case I am wrong in relation to the conclusions I have reached so far.
34. The issue that arises is a short one. This is so because by the time the hearing started, BY no longer argued that the CX Tribunal had jurisdiction to issue the CX Additional Award pursuant to Article 27.3 of the LCIA Rules or AA, s. 57(3). It follows that in the events that have happened as summarised earlier, BY’s only case is that the agreement of the parties to the CX Arbitration was sufficient to confer jurisdiction on the CX Tribunal to re-open the CX Arbitration and issue the CX Additional Award and that the agreement of the parties to the CX Arbitration to it being re-opened by the CX Tribunal is a complete answer to AZ’s objection that the CX Tribunal became *functus* when it published the CX Award and was incapable thereafter of exercising any functions irrespective of the agreement of the parties. AZ’s counter argument is that once a tribunal is *functus* its jurisdiction cannot be revived even by agreement

between the parties and any such agreement can only have constituted the CX Tribunal as a new tribunal, which would not enable the endorsement requirement supposedly imposed by Paragraph 607 to be satisfied because such a new tribunal would not be “... *the tribunal... seised of the [CX] ... arbitration...*”.

35. Arbitration is a contractual process, which depends on the consent of the parties to resolve disputes within the scope of their arbitration agreement using the arbitral process they have agreed to. The arbitration agreement is a bilateral contract between the parties to the contract in which the arbitration agreement is embedded. Where one of the parties refers a dispute to arbitration in accordance with the parties’ agreement, on appointment of the arbitrator, “... *the arbitrator becomes a third party to that arbitration agreement, which becomes a trilateral contract*” - see Compagnie Europeene de Cereals S.A. v. Tradax Export S.A. [1986] 2 Lloyd's Rep. 301. “*Under that trilateral contract, the arbitrator undertakes his quasi-judicial functions in consideration of the parties agreeing to pay him remuneration*” – see K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd [1992] QB 863 *per* Sir Nicolas Browne-Wilkinson at [885].
36. Once a final award has been published, the arbitrators’ contract is terminated and the jurisdiction of the tribunal seised of the arbitration ceases. In support of the proposition that this precludes the parties by agreement from re-opening the reference, AZ relies on Fidelitas Shipping Co Ltd v V/O Exportchleb [1966] 1 QB 630 *per* Diplock LJ, as he then was, at [644B], where he summarised the applicable principles as being:

“Once his final award is made, whether or not stated in the form of a special case, the arbitrator himself becomes *functus officio* as respects all the issues between the parties unless his jurisdiction is revived by the court's exercise of its power to remit the award to him for his reconsideration. ... He has decided the questions of fact as to which he is the exclusive tribunal; he has determined their legal consequences subject only to correction by the High Court on the stated questions of law. The parties cannot reopen the same matters again before him. Where his award is an interim award stated in the form of a special case, it determines the particular issue or issues to which it relates in alternative ways dependent upon the answer of the High Court to the question of law stated in the special case. It creates an issue estoppel or issue estoppels between the parties and the arbitrator is *functus officio* as respects the issues to which his interim award relates.”

This does not provide an answer to the issue that arises in this case. Firstly, the observation that “*(t)he parties cannot reopen the same matters again before him...*” does not really assist in this case where the point is that the question of endorsement by the CX Tribunal had not been raised by either party or determined by the CX Tribunal, but secondly and more importantly, that case was concerned with a claim by ship owners for demurrage, where the issue was whether the owners were precluded from advancing such a claim having failed to insist on a lien over the cargo before releasing it. The case was decided under the old English curial law of arbitration. The

Umpire had held in a special case that the claim for demurrage had not been excluded as claimed by the consignee of the cargo, but the Judge and the Court of Appeal decided that it was, and the Award was sent back to the Umpire. There the owners sought to re-open the question whether demurrage was recoverable. Thus, it was a unilateral attempt by one party to re-open an issue already decided by the Umpire. As I have explained that is not what happened in this case, where both parties to the CX Arbitration were in agreement that the CX Tribunal should decide the endorsement issue being an issue that neither had asked the tribunal to decide previously and which the tribunal had not decided.

37. That AA, ss.67-69 tightly circumscribe the circumstances in which remission can be ordered and require orders from the court does not assist either because those provisions are concerned with a challenge by one party to an Award.
38. Although AZ distinguishes between antecedent agreements between the parties permitting the survival of an arbitrator's jurisdiction beyond the publication of a final award and any purported agreement arrived at thereafter, I do not see on what principled basis such a distinction can or should be drawn. I accept that if the parties want to enter into such an agreement at any time after a tribunal has been appointed, the arbitration agreement will by definition have become a tripartite agreement to which the arbitrators will be parties. I agree therefore that if any such agreement is to be effective it would require not only the agreement of the parties but also the agreement of the arbitrator or arbitrators concerned. It follows therefore that even if the parties were agreed, that agreement would not be and could not be effective unless the arbitrators also agreed. However, that does not undermine the principle that it is open to the parties to reach such an agreement as long as the arbitrator also agrees. In any event, the requirement that the arbitrators as well as the parties agree was not an issue in this case because as I have explained the CX Tribunal did agree.
39. Some reliance was placed by AZ on authorities concerning the revivability of a contract following its termination by agreement or accepted repudiation. Primary among the authorities relied on by AZ was Signet Partners Limited v. Signet Research & Advisory SA and others [2007] EWHC 1263 (QB). The part of the judgment relied on was *obiter* but in any event was concerned with whether a party to a contract that had purported to terminate the contract could unilaterally withdraw a notice of termination so as to permit the contract to continue as before. That case was concerned with a conditional notice of termination that had become unconditional at 1700 on 4 February and the effect of a subsequent email sent on 8 February. Burton J held that "... *if the contract has been terminated the previous Friday it is too late to revive it on the Tuesday*". This does not assist on the issue that arises in this case because it was a unilateral attempt to resile from a notice of termination. It says nothing about the capacity of parties to agree that such a notice shall not take effect in accordance with its terms.
40. There is some limited authority that suggests as a matter of principle that the authority of an arbitrator can be revived by agreement. In Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Ltd [2015] 2 Lloyd's Rep. 487, Popplewell J concluded that a partial award was final as to what it decides, then concluded that had two consequences. The first was that "... *absent contrary agreement between the*

*parties, the ability to challenge the validity of such an award in this Court is limited by the rights of challenge and appeal conferred by ss. 67-69 of the Act...*” (emphasis supplied) and the second was that:

“...subject to limited exceptions, the tribunal no longer has power to review or reconsider the subject matter of the award. There is a longstanding rule of common law that when an arbitrator makes a valid award, his authority as an arbitrator comes to an end and, with it, his powers and duties in the reference: he is then said to be *functus officio* (see Mustill and Boyd's *The Law and Practice of Arbitration* 2nd Edition pp. 404–405 and Companion Volume 404-414). This applies as much to a partial award as to a final award: see *Fidelitas* per Diplock LJ at p. 644B-E. Absent agreement of the parties, the tribunal may only reconsider or review its decision if the matter is remitted following a successful challenge to the award in Court, or pursuant to the express powers of correction or reconsideration conferred by section 57 of the Act or by the arbitral rules which the parties have agreed to govern the reference. Otherwise the tribunal has no authority or power to do so.” [Emphasis supplied]

41. It is suggested in Merkin's Arbitration Law at paragraph 18.3 that whilst English law does not permit the making of a supplementary award following what purports to be a final award as the arbitrators become *functus officio*, “... *the parties may by agreement in writing confer additional jurisdiction on the arbitrators...*” Although no authority is cited for that proposition, it is consistent with Popplewell J's analysis set out above. Russell on Arbitration (24<sup>th</sup> Ed), at paragraph 6-166 notes the effect of a tribunal becoming *functus* in conventional terms and then states “*However, the parties may agree to give the tribunal powers with regard to correcting an award or making an additional award.*” The only authority cited however is AA, s.57(1). Finally, in Mustill & Boyd Law & Practice of Commercial Arbitration (2<sup>nd</sup> Edition) the editors state at page 405, that “... *the most important consequence of the arbitrator becoming functus officio ... is that he has no power to alter the award without the consent of the parties...*” The only authority cited as supporting this proposition is IRC v Hunter [1914] 3 KB 423.
42. IRC v Hunter (ibid.) was a decision by Scrutton J, as he then was, on a statutory appeal by the IRC from a decision of a statutory referee. The issue in that case was that an award had been issued that contained an error by the referee. One of the parties approached the referee who then purported to issue a corrective award. In fact, the referee was *functus*. The IRC refused to accept the revised award on this ground, the other party then appealed and the IRC did not oppose the appeal because it was satisfied that the original award was a mistake. In relation to the issue of principle, Scrutton J held that:

“It is clear, also, as stated by the Solicitor-General, that a referee, having once issued his award, cannot issue another without the consent of both parties. If an error is to be

corrected, unless the parties assent, it can only be done by the Court on proper evidence, and with proper procedure ...”

Although it was suggested that this authority could be distinguished on the basis that it was concerned with a statutory referee procedure, in my judgment that distinction is immaterial. The process was one in which the decision-maker exercised a quasi-judicial role by operation of statute rather than agreement between the parties but that made no difference to the application of (and any relevant limitations to) the *functus* principle.

43. The only remaining point concerns the role of the LCIA. AZ submits that the consent of the LCIA Court would be required before an agreement enabling the tribunal to be revived could take effect. The LCIA is not a party to these proceedings. I am satisfied that there is a contract between the parties and the institution concerned (in this case the LCIA). In my judgment that agreement is however different from the agreement between the parties to which the *functus* principle and the exceptions to it apply. That is why in my view Mr Kitchener KC is correct in his submission that “(t)he fact that the administrative tribunal may not have consented really can't make the award a nullity, which is what would have to be suggested, especially after the parties and the tribunal have both proceeded on the basis that an award can be made and they haven't challenged it.” In any event, it is difficult to see how the LCIA, having accepted a fee by reference to the re-opening of the CX Arbitration, could then contend that it had not agreed and, in any event, there is no evidence that the LCIA has objected to what the parties to the CX Arbitration and the CX Arbitrators have chosen to agree.
44. In principle I do not see why the parties to an arbitration should not be entitled by agreement to revive the jurisdiction of a tribunal. This approach is not merely consistent with all the academic authority to which I have been referred but is consistent too with the first instance decisions in Hunter and Emirates Trading. It is not inconsistent with the point that a contract once terminated cannot be unilaterally revived nor is it inconsistent with the narrowly framed statutory exceptions set out in AA, ss. 67-69, each of which is concerned with unilateral challenges. I accept that where the parties reach such an agreement after the appointment of a tribunal it is necessary for the arbitrators also to agree but that is not an issue in this case because the CX Tribunal agreed to proceed specifically on the basis of the parties' agreement. Subject to that qualification, in my view this conclusion is consistent with the founding principles of English arbitration law as set out in AA, s.1 which include at AA, s.1(b) that the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest. Although Mr Hossain submits that if correct, such an outcome could result in potentially unfair results particularly in relation to arbitrations becoming over-extended in time, in my judgment this is unreal because the ultimate controls are that before a tribunal can be reconvened it requires all parties to the arbitration and the arbitrator or the arbitral tribunal to consent. In practice the circumstances where these conditions will be satisfied are likely to be very rare.

## Conclusion

45. For the reasons set out above, I conclude that the effect of the Spot CN Award is as contended by BY and that AZ's challenge to the jurisdiction of the CX Tribunal to publish the Additional Award fails. I will hear the parties following the hand down of this judgment as to the form of order that should follow from these conclusions.