Neutral Citation Number: [2022] EWHC 628 (Comm)

Case No: CL-2015-000790

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/03/2022

Before :

THE HONOURABLE MR JUSTICE CALVER

- -

Between :

(1) ASTOR MANAGEMENT AG **(2) ASTOR RESOURCES AG**	**Claimants**
- and –	
(1) ATALAYA MINING PLC **(2) ATALAYA RIOTINTO MINERA SL** **(3) EMED HOLDINGS (UK) LIMITED** **(4) EMED MARKETING LIMITED**	**Defendants**

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Anna Boase QC and Veena Srirangam (instructed by **Hogan Lovells**) for the **Claimants**
Stephen Moriarty QC and Alexander Milner (instructed by **Fieldfisher**) for the **Defendants**

Hearing dates: 21-24, 28 February and 1 March 2022

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JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Monday 21 March 2022 at 10:00 am.

Mr Justice Calver :

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(A) INTRODUCTION

1. The Claimants bring this action for payment of interest which they claim is due by reason of the late payment by the Defendants of consideration under an agreement (the ***Master Agreement***) relating to the Rio Tinto copper mine project in Southern Spain (the ***Project***). The Claimants claim interest of up to €15,157,560, whilst the Defendants deny that any interest is due at all.

(B) PARTIES

2. The First Claimant is the parent company of the Astor group, operating from Switzerland, and the Second Claimant is its wholly owned subsidiary. There is no material distinction between them for present purposes and I will refer to them both as "***Astor***". Astor is the successor-in-title of Marc Rich + Co Investment AG, Shorthorn Ltd, and MRI Trading AG all of whom were parties to the Master Agreement. Nothing turns on the difference between the Claimants and the companies which they succeeded as parties to the Master Agreement.

3. As regards the Defendants:

    i) The First Defendant (***Atalaya Plc***) was formerly known as EMED Mining Public Ltd; it is a Cypriot company listed on AIM (the sub-market of the London Stock Exchange). Atalaya Plc is the ultimate owner of the Second, Third and Fourth Defendants.

    ii) The Second Defendant (***ARM***) was formerly known as EMED Tartessus; it is a Spanish company which was set up as a special purpose vehicle to own and operate the Project. Astor held 49% of the shares in ARM before selling them to the Third Defendant who now owns 100% of ARM.

    iii) The Third Defendant (***Atalaya UK***) was formerly known as EMED Holdings (UK) Limited;[1] it is an English company which owns ARM and which was a source of Intra-Group Funding (as described below). Atalaya UK is 100% owned by the First Defendant.

    iv) The Fourth Defendant (***EMED Marketing***) was formerly known as Curvico Holdings Limited; it is a Cypriot company whose role was to buy from ARM the entirety of the copper produced by the Project and to sell it on (including through offtake agreements). EMED Marketing is 100% owned by Atalaya Plc.

4. I refer to the Defendants collectively as "***Atalaya***" throughout this judgment save where the distinction between them matters.

[1] The Third Defendant changed its name to "Atalaya Minasderiotinto Project (UK) Limited" on 30 June 2017 (as shown on the Companies House website). It has not yet taken steps to replace its old name with its new name in these proceedings.

(C) BACKGROUND TO THE MASTER AGREEMENT

(i) Astor's involvement with the Project

5. The Rio Tinto Copper Mine workings date back to at least 1000 B.C. and have been operated by the Phoenicians, Romans, British, Americans and finally, the Spanish workers' co-operative Minas de Rio Tinto (MRT). Before the arrival of the British miners in 1873, mining activity mainly consisted of underground mining in the Filón Sur area in Andalusia, Spain; after their arrival the mining area expanded substantially.

6. Astor first became involved with the mine in 2004. Mantenimiento en General del Sur, Mantesur Andevalo SL *("**MSA**"),* wished to restart mining operations at the Project as they had previously proved profitable. The mine lay dormant at the time but was estimated to contain a further 123 million tonnes of untapped reserves of ore.

7. To assist in the restarting of mining operations, Astor provided loans to MSA of c. €6.7m. These loans were secured by a pledge over the entirety of MSA's shares.

8. In 2006 Astor sought to enforce its pledge but MSA resisted enforcement, resulting in litigation in the Spanish courts. While the litigation was ongoing, MSA transferred its interest in the Project to ARM in exchange for a 49% shareholding in ARM. The remaining 51% of shares in ARM were held by Atalaya.

9. Astor was successful in its claim in the Spanish courts. It was declared the 100% owner of the shares in MSA and was entitled to challenge the transfer of title in the Project from MSA to ARM.

10. Instead of becoming embroiled in further litigation, Astor and Atalaya entered into the Master Agreement for the sale of Astor's interest in ARM on 30 September 2008. By that agreement, Astor gave up its 49% stake in ARM, and any claim to title of the Project in return for consideration of c. €63.3 million. Payment of the majority of this consideration was deferred as Atalaya did not, at that time, have the resources available to pay and until mining restarted, no revenue could be generated from which payments could be made to Astor.

(ii) Restarting the Project

11. Between 1995 and 2001, the mine was operated by the workers cooperative, MRT. During this six year period, a total of 25Mt of ore was mined[2], but because there was no production in 1999, the *average* annual production was 5Mtpa. Annual production was 5.2Mtpa and 7.1Mtpa in 1996 and 1997 respectively, and peak production equivalent to 9.3Mtpa[3] was achieved in an eight month period in 1998. The mine closed in 2001 due to the low copper price and remained dormant (until it was restarted in 2015 as described below).

12. On 2 August 2007, Atalaya announced (subject to various conditions, including finalising the Master Agreement with Astor) its intention to commence copper

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[2] EMED Mining Public Ltd Technical Report of 18 October 2010, p. 13.

[3] It is in fact common ground that peak production was 9.2Mtpa and that the Project had never operated at a capacity in excess of this: Astor SoC ¶9.2; Atalaya Reply ¶3.1.

production at the Project in 2008. Atalaya engaged AMC Consultants UK Ltd (***AMC***) to provide a forecast of the likely production schedule for the mine.

13. In a report dated November 2007, AMC stated: "*The mine operated successfully in the past at the same levels of throughput that are now proposed by [ARM] on completion of Restart Plan, described in this report*".[4] It was anticipated that reactivation of the mine and plant would take six months and the project life would be eleven years. For this future period, forecast production capacity was recorded in a "Life of Mine Ore Production Schedule" as follows:[5]

Year	2008	2009	2010	2011 to 2017	2018
Estimated Production	0.8Mtpa	5.3Mtpa	6.0Mtpa	7.5Mtpa	4.1Mtpa

14. So far as the figure of 7.5Mtpa is concerned, AMC stated that:

> *"The capital investment required to restart and upgrade the plant, mobilise and commence contract mining services and establish other facilities necessary* <u>to achieve and sustain</u> *a production rate of 7.5 Mtpa is estimated at £23.2M(€33.3M or US$46.6M)."* (emphasis added)

15. It is clear that at this stage AMC was assessing the practical requirements for the operation of the mine on the basis of two alternative production capacities, namely 4.8Mtpa (the restart level) and 7.5Mtpa (the expansion level) (but not at a production level above that):

> *"The ore is drawn through slots into a tunnel underneath the fine ore stockpile and discharged by feeders onto a belt running to the concentrator building where milling and flotation sections are located. With a throughput of 4.8 Mtpa, two milling trains need be employed… To achieve a throughput of 7.5 Mtpa, additional milling capacity will be required… With a throughput of 4.8 Mtpa, three banks of rougher flotation cells will be employed. Each bank contains eleven 500 cubic foot Wemco cells… When operating at a throughput of 4.8 Mtpa not all of the existing flotation cells are required but all will be brought into service to achieve a throughput of 7.5 Mtpa... The scavenger cleaner bank contains ten 500 cubic foot Wemco cells but only seven are required for 4.8 Mtpa. For 7.5 Mtpa, all ten will be used…*[6]
>
> *5.9 Summary*

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[4] AMC Report p. 234.
[5] ibid p. 235.
[6] ibid p. 290-291.

Two levels of annual throughput have been considered for the Rio Tinto Project namely 4.8 million tonnes and 7.5 million tonnes, the plant has proven capacity to achieve these production rates; annual throughputs of 5.2 and 7.1 Million tonnes having been achieved in 1996 and 1997 respectively. Therefore there is little doubt that, after refurbishment of the equipment, these production levels can be achieved once more and the Restart Plan successfully implemented…

Assuming that an EPCM management team is appointed for the start-up phase and the necessary permits are obtained, it is estimated that about 24 weeks (see Schedule, Appendix 5.4) will be required to bring the plant up to point of mechanical completion to allow it to be operated a rate of 4.8 Mt. The cost of this exercise is estimated to be €9.4M including EPCM and first fill but excluding contingency. Expansion to a rate of 7.5M will require a further 20 weeks and will require an estimated additional expenditure of € 5.1M on the same basis. Following the base case mining schedule, the plant operating cost when the plant operates at 4.8 Mtpa will be €3.48/t milled and €3.12/t milled at 7.5 Mtpa[7].”

16. Whilst production levels above 7.5Mtpa were not considered, AMC did note as follows:

“Given that demand for copper metal is predicted to continue in the near term there is also a compelling business case to increase mill throughput to 9.6 Mtpa and to consider plant expansion following exploration success.”[8]

17. It is apparent from a presentation at its AGM in June 2008 that at that time (which was shortly prior to entering into the Master Agreement), Atalaya had formed the intention to restart the mine at a production level of around 5Mtpa. It stated: “*Rio Tinto Mine: production planned to restart at same level as in late 1990's*”. As described above, production levels in the late 1990's averaged 5Mtpa.

18. Consistently with this, on 11 June 2008 the parties entered into a written Memorandum of Understanding which included the following:

“Euro 26.35[9] (twenty six point three five) million shall be paid by EMED Mining to Shorthorn upon mining permits granted by the Andalusian government and availability of the senior debt facility.

Euro 13.175 (thirteen point one seven five) million shall be paid by EMED Mining to Shorthorn on the 12th month following mine restart.

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[7] Ibid, p. 300.
[8] AMC Report, p. 953.
[9] Under Schedule 2 to the Master Agreement this was reduced to Euro 17.53m.

> *Euro 13.175 (thirteen point one seven five) million shall be paid by EMED Mining to Shorthorn on the 24th month following mine restart.*
>
> *Mine restart is defined once 3 months of continuous 400,000 mt/month of ore processing has been reached*[10].
>
> *Any excess cash after paying approved project needs (operating expenses and sustaining capex), project debt service and USD 10 million/year in non Spain expenses) shall be used to repay Shorthorn debt earlier than above. No dividends can be paid by EMED Mining until the above mentioned amounts are fully repaid to MRI."* (emphasis added)

19. Astor was aware of these plans that Atalaya had for the mine at the time[11] and I accordingly consider that the matters set out in paragraphs 13-18 above constitute relevant and admissible factual background to the making of the Master Agreement. I find as a fact that at the time of the Master Agreement which was concluded in September 2008, the documentary evidence before the Court establishes that both parties knew that Atalaya planned to restart the mine at a production level of around 4.8Mtpa/5Mtpa by 2009; and that Atalaya hoped later to expand the mine to 7.5Mtpa (by 2011), and possibly at a later date to even 9.6Mtpa.

(D) MASTER AGREEMENT

(i) The original agreement

20. It is against this factual background that the Master Agreement was then concluded on 30 September 2008 transferring Astor's 49% interest in the Project to ARM. The following provisions of the Master Agreement are relevant to the dispute before the Court:

    i) Clause 1.1 defined "Consideration" as:

    > "*the Consideration Shares, the Deferred Consideration and the consideration payable under the Share Purchase Agreement and the Loan Assignment, as described more fully in Clause 6"*

    and *"*Deferred Consideration" as*:*

    > *"up to €43,883,382.70 payable by [ARM] to [Astor] in accordance with Schedule 2*".

    ii) Clause 6(a) provided "*the Consideration shall be up to €63,300,000 consisting of the following:*

    a) €3,430,000 payable under the Share Purchase Agreement;

[10] Which equates to 4.8Mtpa.
[11] See Astor's RRFI ¶1.3.

b) *€9,116,617.30 payable under the Loan Assignment;*

c) *€6,870,000 to be satisfied by the allotment of the Consideration shares; and*

d) *the Deferred Consideration of €43,883,382.70.*"

21. Clause 6(f) provided:

i) "*Each of [Atalaya], EMED Holdings and [ARM] undertakes to use all reasonable endeavours to obtain the Senior Debt Facility with [ARM] as borrower and to procure* <u>*the restart of mining activities in the Project*</u> *on or before 31 December 2009…*" (emphasis added)

22. Clause 6(g) provided:

i) "<u>*As security for*</u>*, inter alia, the obligations of [ARM] to pay the Deferred Consideration*: …

(ii) subject to Completion, [ARM] undertakes that it will not create or permit to arise any encumbrance over any of the Assets without the prior written consent of [Astor] (not to be unreasonably withheld or delayed) other than as required by the provider of the Senior Debt Facility…"

(iii) subject to Completion, each of [Atalaya Plc], EMED Holdings, and [ARM] undertakes to procure that the documentation for the Senior Debt Facility shall:

(A) permit the payment of any amounts outstanding under the Loan Assignment and the Deferred Consideration when due in accordance with the terms of this Agreement (including Clause 6(g)(iv)(B)), with the first €17,533,382.70 of the Deferred Consideration to be paid directly out of the Senior Debt Facility upon first draw-down of funds pursuant to the Senior Debt Facility by the provider of the relevant finance to MRI or at its request

(iv) subject to Completion, [ARM] undertakes:

(A) not to make, declare, or pay any dividend or distribution (other than as required for up to USD 10 million per annum of EMED Group Expenses (excluding dividends or other distributions to shareholders of EMED) related to matters other than the Project ("EMED Group Expenses"), nor borrow or agree to borrow any amount other than pursuant to the Senior Debt Facility without the prior written consent of [Astor] (not to be unreasonably withheld or delayed), until the Consideration has been paid in full to [Astor] in accordance with the terms of the Transaction Documents; and

(B) to apply any excess cash (after payment of operating expenses and sustaining capital expenditure for the Project, debt service requirements under the Senior Debt Facility and USD 10 million per annum of EMED Group Expenses (without double counting EMED Group Expenses taken into account under paragraph (A) above) to pay outstanding amounts of the Consideration due to [Astor] (including to [Astor] under the Loan Assignment) early. (emphasis added)

23. Clause 6(g)(iv)(B) is the clause which forms the basis of the dispute between the parties. I shall refer to it in this judgment as the "***Excess Cash Clause***".

24. By clause 14.7, the parties agreed that:

> "*If any sum due for payment under this Agreement is not paid on the due date, the party in default shall, forthwith on demand at any time, pay interest on such sum from the due date until the date of actual payment (whether before or after the judgment) at the rate of 4% per annum above the base rate of Lloyds TSB Bank plc from time to time, such interest to accrue on a day to day basis and to be compounded monthly*".

25. This clause forms the basis of the Claimants' present claim for interest on (what it alleges was) the late payment of the Deferred Consideration.

26. The Deferred Consideration is payable according to Schedule 2 to the Master Agreement. In its original form Schedule 2 made provision for the payment of the Deferred Consideration as follows:

> "*The Deferred Consideration shall be payable by [ARM] to [Astor] as follows:*
>
> > *When (A) the authorisations from the Junta de Andalucia to restart mining activities in the Project are granted to [Atalaya] or any other member of the [Atalaya group] ("Permit Approval") and (B) [Atalaya] or another company in the [Atalaya group] secures senior debt finance and related guarantee facilities for a sum sufficient for the re-start of mining operations at the Project (hereinafter the "Senior Debt Facility"), [ARM] shall pay to [Astor] the amount of ... €17,533,382.70 in cash within the maximum term of thirty (30) Business Days from when the relevant company in the [Atalaya group] can effectively draw down on the Senior Debt Facility: and*
> >
> > *The following amounts to be paid when mining activities are restarted in the Project:*
> >
> > *(A) [ARM] shall pay to [Astor] the sum of ...€13,175,000 in cash within twenty (20) Business Days following the first anniversary of the restart of mining activities; and*
> >
> > *(B) [ARM] shall pay to [Astor] the sum of ...€13,175,000 in cash within twenty (20) Business Days following the second anniversary of the restart of mining activities,*

and the Parties agree that the date of restart of mining activities for these purposes shall be such date on which the mining facilities at the Project meet continuous 400,000 mt/month production of ore processing. EMED and EMED TARTESSUS shall keep MRI (on behalf of the MRI Parties) regularly (as well as upon request by MRI on behalf of the MRI Parties) informed in writing as to progress of the Project towards, and the date of, the restart of mining activities as aforesaid, MRI (on behalf of the MRI Parties) shall, following reasonable notice in writing to EMED, be provided with such information regarding and access to the Project by EMED and EMED TARTESSUS as may reasonably be required to enable it to assess such progress and/or the actual or likely date of such restart.

(ii) Amendments to the Master Agreement

27. The Master Agreement was amended and restated twice, in March 2009 and November 2009.

(a) Amendment on 31 March 2009

28. On 31 March 2009, the Master Agreement was amended and restated in the following circumstances. The authorisations to restart mining activities (referred to in Schedule 2) had not yet been granted and efforts to secure a Senior Debt Facility had not proved successful (but were ongoing); maintaining the mine in its dormant state was still incurring costs.

29. The (unchallenged) evidence of Astor's CEO, Mr. Mehra[12], is that Atalaya's then-CEO, Mr. Anagnostaras-Adams called him in late 2008 to explain that, in light of the global financial crisis, he was proposing to borrow funds from Atalaya's shareholders to cover the operating costs of ARM. However, the shareholders were not willing to lend unless the Project economics were improved, and Mr. Anagnostaras-Adams proposed that the timetable for the payment of the outstanding Consideration under the Master Agreement accordingly be extended. Astor agreed to re-schedule payments of the Deferred Consideration to be payable over six years (rather than two years).[13]

30. The Deed of Amendment dated 31 March 2009 incorporated an "Amended and Restated Master Agreement", and contained a number of changes including:

(i) Clause 6(f): The Project restart date was pushed back by one year to 31 December 2010.

(ii) Schedule 2: There were substantial amendments to Schedule 2. The dual triggers for the first payment remained the same (i.e. the grant of Permit Approval and securing a Senior Debt Facility) but the first instalment payment was reduced to €7,313,897.11 and payment dates for 17 further tranches of the Deferred Consideration were referrable to that first payment date and were to be made over a 6 year period, rather than there being two further tranches of the Deferred Consideration due on two annual anniversaries of the mine reaching the specified level of production (i.e. a continuous 400,000 mt/month production of

[12] Mehra7 ¶59.

[13] Mehra7 ¶42.

ore processing)[14].

(iii) Clause 6(g) remained unamended, save that the first payment of Deferred Consideration to be paid directly out of the Senior Debt Facility was reduced from €17.533m to €7.313m (in clause 6(g)(iii)(A)).

(b) Amendment on 10 November 2009

31. On 10 November 2009, the Master Agreement was amended again. Mr. Mehra gives unchallenged evidence (which I accept) that Mr. John Leach (Atalaya's then CFO) told him that Atalaya had been making loans to ARM to provide it with funding and that ARM risked bankruptcy if it were unable to receive funding from such intra-group loans. Atalaya accordingly sought Astor's consent to this new arrangement (as required by clause 6(g)(iv)(A)). Astor agreed to give its consent by these amendments.[15]

32. The Deed of Amendment dated 10 November 2009 contained only two operative (but significant) clauses. By clause 1, it was agreed that:

> "*[Astor] consents, for the purposes of Clause 6(g)(iv)(A) and (B) of the Master Agreement (as hereby amended) to:*
>
> *a) the issue by [ARM] of loan notes to EMED Holdings (the "Loan Notes");*
>
> *b) the borrowing of monies by [ARM] from EMED Holdings pursuant to the Loan Notes; and*
>
> *c) the repayment by [ARM], from the proceeds of the borrowing under the Loan Notes, of loans of £7,671,598 outstanding by it to EMED as at the date of this Deed.*"

33. By clause 2, the parties agreed to amend clause 6(g)(iv) of the Master Agreement as follows (emphasis in original):

> *(iv) subject to Completion, [ARM] undertakes:*
>
> *(A) not to make, declare, or pay any dividend or distribution* ***or make any repayment of or any other payment in respect of loans from members of the EMED Group ("EMED Group Loans")*** *(other than as required for up to USD 10 million per annum* ***in aggregate*** *for EMED Group Expenses… nor to borrow any amount other than pursuant to the Senior Debt Facility* ***or EMED Group Loans*** *without the prior written consent of [Astor] (not to be unreasonably withheld or delayed) until the Consideration has been paid in full to [Astor] in accordance with the terms of the Transaction Documents; and*

[14] In return, it was agreed that Astor would receive additional "*Up-tick Payments*" which would be payable if the price of copper went over a specified level. As a result, the definition of Deferred Consideration was increased to "*up to €59,783,382.70.*"

[15] Mehra7 ¶43.

(B) [quoted in unchanged terms]"

(E) EVENTS FOLLOWING THE CONCLUSION OF THE MASTER AGREEMENT

(i) Financing the Project

34. Between 2008 and 2015, Atalaya sought to arrange finance for the Project but failed to secure a Senior Debt Facility. Leggatt J concluded (at an earlier stage of the litigation described in paragraph 51 below) that Atalaya had nonetheless used all reasonable endeavours to obtain a Senior Debt Facility for a sum sufficient for the restart of mining operations at the Project (as required by clause 6(f)).[16]

35. Pursuant to the original Master Agreement, ARM was prohibited from borrowing other than pursuant to the Senior Debt Facility without the prior written consent of Astor, until the Consideration had been paid in full (clause 6(g)(iv)(A)). However, as noted above, by the Deed of Amendment dated 10 November 2009, ARM had obtained Astor's consent to intra-group borrowing to assist ARM with operating expenses during the financial crisis. Clause 6(g)(iv)(A) was accordingly amended.

36. The seeds of the present dispute were sown when ARM subsequently relied on this consent to borrow some six and a half years later in June 2015 for a different purpose, namely in order to channel into ARM huge amounts of intra-group funding to facilitate the rapid <u>expansion</u> of the mine (the ***Intra-Group Funding***), thereby rendering the Senior Debt Facility unnecessary and seeking as a result to avoid triggering the Deferred Consideration.

37. As Leggatt J held at [20]:

> *"The amendment to clause 6(g)(iv)(A) is of critical significance as it has enabled substantial funds raised in 2015 by issuing new shares in [Atalaya] to be channelled to [ARM] through intra-group loans without the need for Astor's consent and used to fund the restart of mining operations. The defendants say that this funding has obviated the need to obtain a Senior Debt Facility."*[17]

38. In fact the funding was used not merely to re-start the mine but to expand it very substantially. Leggatt J also referred to the fact that the financing was deliberately structured to avoid triggering the obligation to pay the Deferred Consideration[18]. The Judge accepted Mr. Fernandez's evidence that Trafigura Group, which became a shareholder of Atalaya in 2014, would have preferred to let Atalaya go bankrupt rather than obtain a Senior Debt Facility, which demonstrated its "*willingness to let the company fail rather than provide finance in a form which would have resulted in Astor being paid*".[19]

39. The total amount of the Intra-Group Funding channelled into ARM in this way was over €136m broken down as follows:

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[16] [2017] EWHC 425 (Comm) [21]-[31] and [82]-[96]
[17] [2017] EWHC 425 (Comm) [20].
[18] [2017] EWHC 425 (Comm) [29] and [85].
[19] [2017] EWHC 425 (Comm) [86].

i) An intra-group loan to ARM of €94,566,725, financed from the proceeds of the share issue in June 2015.[20]

ii) A further intra-group loan of €3,180,417 to ARM in 2016.[21]

iii) A series of further intra-group loans made by EMED Holdings to ARM between 2017 and 2019, amounting to a total of €38,438,711.[22]

40. Crucially, the deployment of the Intra-Group Funding differed from the way in which the parties had envisaged the Senior Debt Facility would be deployed when drafting the Master Agreement in 2008:

i) The Senior Debt Facility was specified as being finance "*for a sum sufficient for the restart of mining operations at the Project*".[23] Restart of mining operations was defined (at Schedule 2 of the Master Agreement) as being when the Project met continuous production of ore processing of 400,000 mt/month (i.e. when the mine reached 4.8 Mtpa level of production).

ii) The Senior Debt Facility was intended to be a <u>facility</u> under which ARM would have drawn down (up to a maximum limit) in accordance with its needs from time to time for the restarting of mining operations at the Project. ARM would therefore have drawn down on this source of funding to meet its needs as they arose and would have been unlikely to draw down more than it required as this would have resulted in it paying interest on sums of money which it was not utilising.

(iii) In contrast, the Intra-Group Funding provided ARM with lump sums of funding in very large tranches (rather than a facility) which was far in excess of its immediate needs (a "sum sufficient") for restarting mining operations in order to reach a capacity of 4.8 Mtpa.

41. In September 2015, Mr. Lavandeira explained to investors at a public conference:

> *"It's very unusual to find a company saying under budget and ahead of schedule. Usually the maximum you can hear is 'on budget' or 'on schedule', which usually is not right, but anyway, here we are. More unusual is to have the money, especially in this market. We are very lucky now. People said, "You diluted a lot in June". Well, I think now we are very clever. We don't have any debt. We raised $95 million from the market and some key shareholders and we are fully financed to get to 7.5 million tonnes. What's 7.5 million tonnes? It's 50 per cent higher than what originally had been planned for the original plans for EMED. We have a 15 years' life ahead of us, and we've brought new shareholders."*

[20] Astor Statement of Case ¶10.2; Atalaya Reply ¶11.1(6).
[21] Astor Statement of Case ¶11.2; Atalaya Reply ¶12.1(4).
[22] Astor Statement of Case ¶12.1 and Atalaya Reply ¶13.1(1) and (2).
[23] Master Agreement, Schedule 2(a)(i).

42. I agree with Ms Anna Boase QC, Leading Counsel for Astor (who appeared together with Ms Veena Srirangam), that Mr. Lavandeira's statement demonstrates that Atalaya thought, by means of the massive Intra-Group Funding, it had been "clever" in:

    (i) avoiding debt under the Senior Debt Facility and (it believed) in avoiding payment of the Deferred Consideration to Astor;

    (ii) significantly increasing the shareholdings of the four investing shareholders at the expense of the other shareholders: they "diluted a lot in June". They were able to put in large sums of money not merely to restart the Project (as a bank would have done under the Senior Debt Facility) but also to massively expand the Project;

    (iii) thereby fully financing the mine in one go in order to get to 7.5Mtpa which Mr. Lavandeira confirmed was <u>50% higher</u> than had originally been planned for ARM, namely 5Mtpa. In other words, ARM received funding for the mine in excess of the originally planned needs of the Project.

43. As Ms Boase explained, in 2015 Atalaya thought it had succeeded in "doing the dirty" on Astor. It believed it had shaken off its Schedule 2 payment obligations and that it could proceed without paying Astor at all. It appears to have believed that the Excess Cash Clause was now of no application so that it could provide ARM with cash significantly in excess of what it needed to restart the mine.

44. Indeed, Atalaya argued before Leggatt J that it had not only avoided the Schedule 2 payment triggers but also that by so avoiding them, it had caused the Excess Cash Clause to be inoperative, such that nothing was payable to Astor. In contrast Astor argued that the Intra-Group Funding was a substitute for the Senior Debt Facility and that it was therefore owed Deferred Consideration under Schedule 2. Both parties were wrong: Leggatt J held at [32] that Atalaya had indeed avoided its Schedule 2 obligations but it remained obliged to pay the Deferred Consideration as soon as it had excess cash under the Excess Cash Clause.

(ii) Restart of the Project

45. With funding to restart the mine now available (and indeed funding greatly in excess of that sum), mining activities recommenced at the Project in June 2015[24] and on 16 July 2015 Permit Approval was granted.[25] On 31 July 2015, the mine reached "*concentrate production*", meaning that copper concentrate was first extracted from the ground at the mine.[26]

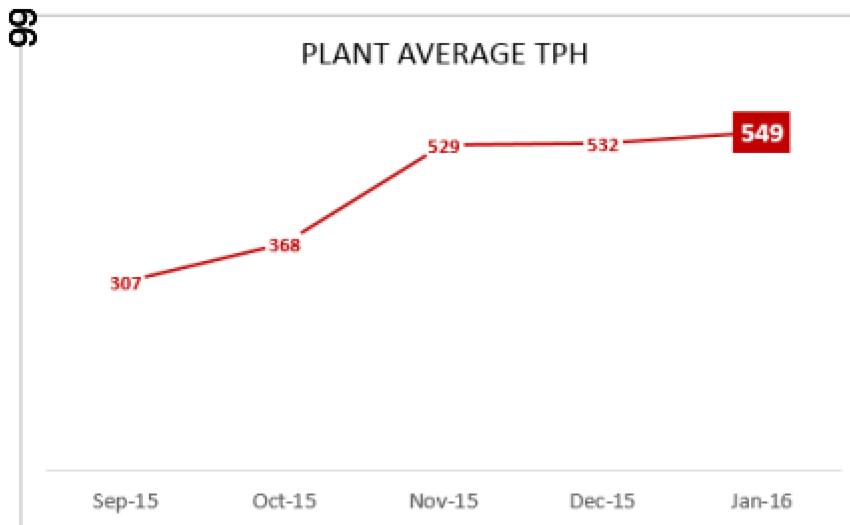
46. From summer 2015 to early 2016, mining operations continued, over time increasing the quality and volume of production such that[27]:

    (i) by November 2015 the mine was producing 529 TPH (tonnes per hour) or ore;

[24] Agreed List of Issues ¶10.
[25] [2017] EWHC 425 (Comm) [21].
[26] Lavandeira 6 ¶11.1 (whose evidence was unchallenged).
[27] See Atalaya's tabular summary dated February 2016, p. 10, reproduced below paragraph 45 herein.

(ii) by December 2015 the mine was producing 532 TPH[28] and

(iii) by January 2016 the mine was producing 549 TPH.



47. As a result, commercial production at the mine at a level of around 5 Mtpa was declared by ARM/Atalaya as from 1 February 2016, being the restart level stipulated in Schedule 2 of the Master Agreement (of 4.8Mtpa)[29]. Under Schedule 2 to the Master Agreement, it fell to ARM/Atalaya to declare the date of restart of mining activities at the Project.

48. As Mr. Lavandeira states in his witness statement, this level constituted "commercial production" where "*a mine meets the necessary product quality and volume levels for commercial sale to the market*."[30]

49. Following restart, by reason of the substantial injection of funds, *expansion* of the mine proceeded at pace, reaching higher production levels than had been anticipated by the AMC report:

i) Work to expand to a production capacity of 7.5Mtpa began as early as September 2015. As reported by Ore Reserves Engineering in September 2016, "*The Rio Tinto mine has been in continuous ramp up since August 2015 with the goal of achieving 5.0Mtpa. Ramp up of phase 1*[31] *and construction activities for phase 2 started to overlap in September 2015 when the phase 2 engineering and construction started*."

ii) In December 2016, the Project achieved a production capacity of 9.5 Mtpa.[32]

[28] For 2015 a modest €4.4m in revenue from the sale of copper was achieved, jumping sharply to €90.15m in 2016.
[29] Agreed List of Issues ¶10.
[30] Lavandeira 6 ¶11.2.
[31] Phase 1 being to 5Mtpa, achieved on 1 February 2016; the Phase 2 target being to 9.5Mtpa.
[32] Atalaya Reply ¶12.1(2).

iii) The decision to expand the Project to 15 Mtpa was approved by Atalaya's board in Q4 2017.[33]

iv) In January 2020, the Project achieved a production capacity of 15 Mtpa.[34]

(F) LITIGATION BETWEEN THE PARTIES

50. Litigation between the parties subsequently ensued.

(i) Trial before Leggatt J and the appeal

51. In October 2015 Astor brought its claim seeking in particular payment of the Deferred Consideration and a declaration that ARM could not make any distribution or repay any loans (except for USD 10 million per annum in respect of EMED Group Expenses) until the Consideration was paid in full and that ARM had to apply any excess cash to pay the Consideration. Astor's claim was in debt (plus contractual or statutory interest), alternatively in damages (in the amount of the outstanding Deferred Consideration plus contractual or statutory interest).

52. By his judgment dated 6 March 2017, Leggatt J held that:

i) The conditions for the payment of the Deferred Consideration had <u>not</u> been triggered because no Senior Debt Facility had been obtained.[35]

ii) The Excess Cash Clause requires that any excess cash be applied towards payment of the Deferred Consideration to Astor.[36]

53. On 1 November 2018, the Court of Appeal upheld Leggatt J's decision[37].

(ii) Summary judgment application

54. Following the judgment of Leggatt J and subsequently the Court of Appeal, the parties became embroiled in a further dispute as to how much "excess cash" Atalaya had actually generated and which was therefore payable as Deferred Consideration to Astor.

55. In short, Atalaya declined to make any payment under the Excess Cash Clause, maintaining that it did not hold (and had never held) any "excess cash". Astor by contrast, submitted that all of the Deferred Consideration (c. €53 million) had become due and payable.

56. On 16 March 2021, faced with an application by Astor for summary judgment made on 29 October 2020, Atalaya finally paid Astor €53m (representing the outstanding amount of Consideration, made up of €43.9m of Deferred Consideration and €9.1m under a related Loan Assignment), without accepting liability to do so[38] because "*the*

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[33] Agreed List of issues ¶12.
[34] Agreed List of issues ¶ 11 and 12.
[35] [2017] EWHC 425 Comm [41]-[58].
[36] [2017] EWHC 425 Comm [100]-[109].
[37] [2018] EWCA Civ 2407.
[38] Fieldfisher letter dated 11 March 2021.

Board believes that now is the appropriate time”.[39] Atalaya maintains that no part of this sum had become payable at any time in the 12½ years since 2008 and that it has no obligation to pay any interest upon it.

57. On 9 July 2021, Mr. Charles Hollander QC, sitting as a Deputy Judge of the High Court, dismissed Astor’s application for summary judgment on its interest claim but made no binding decisions on the proper construction of the Excess Cash Clause.[40] I return to this judgment below.

(G) THE CLAIMS

58. It follows that the sum of €53m claimed by Astor has now been paid by Atalaya. However, this has not put an end to the dispute as to whether that sum (or some other sum) fell due for payment, and if so, when. The dispute remains live because Astor claims it is entitled to contractual interest (pursuant to clause 14.7 of the Master Agreement) from such date or dates as the debt should have been paid under the Excess Cash Clause.

59. The Claimant invites the Court to:

    i) declare that all of the Deferred Consideration was payable under the Excess Cash Clause by 31 December 2015, and order Atalaya to pay Astor interest of €15,157,560 (plus contractual interest which accrues until the date of payment); or

    ii) alternatively, to make a declaration as to when excess cash in the sum of €53m was available and should have been paid to Astor, and to order Atalaya to pay contractual, alternatively statutory interest from such date until payment.

(H) LEGAL PRINCIPLES

60. The principles concerning contractual interpretation are well-established and were agreed by the parties. The following well-known principles are germane to the questions of construction which arise in this case:

    i) When interpreting a contract, the Court is concerned to identify the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of contracting.[41]

    ii) Events subsequent to the making of a contract are not relevant to construing the contract[42].

[39] Announcement dated 15 March 2021.
[40] [2021] EWHC 1919 (Comm), [61].
[41] *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896.
[42] *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 at 603.

iii) Where a contract has been "*negotiated and prepared with the assistance of skilled professionals*" the Court will interpret the agreement "*principally by textual analysis*".[43]

iv) However, where a document contains technical terms which the Court does not understand, "*the court may discover the meaning of such terms through the use of an appropriate dictionary, unless the meaning of the terms is in dispute, in which case it seems the court can only proceed upon the evidence*".[44] In this regard, "*the court may consider extrinsic evidence from a witness experienced in the field. Such evidence is admissible as part of the relevant background, and it is admissible even if the meaning falls short of a trade custom*."[45] There may, of course, be difficulties in "*making any sharp distinctions between ordinary and technical terms*"; what is technical and what is ordinary may vary from judge to judge depending on their experience.[46]

v) Although expert evidence may be employed to explain technical terms to the Court, it is, of course, not the function of an expert to interpret the contract. That remains wholly the prerogative of the Court.[47]

vi) Generally speaking, "a *clause must not be considered in isolation but must be considered in the context of the whole of the document*."[48]

vii) Where there is ambiguity or rival meanings, the Court can consider which construction is more consistent with business common sense or the commercial purpose of the document. However, commercial common sense:

a) Should not be invoked to undervalue the importance of the language of the provision which is to be construed;[49] and

b) Should not be invoked retrospectively: "*The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date the contract was made*."[50]

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[43] *Wood v Capita* [2017] AC 1173, [13]; *Chitty on Contracts* (33rd ed), §15-082.
[44] Lewison, *The Interpretation of Contracts,* [5.55] (7th edn. Sweet & Maxwell). This proposition has been cited with approval in *Kellogg Brown & Root Inc v Concordia Maritime AG* [2006] EWHC 3358 (Comm) and *Encia Remediation Ltd v Canopius Managing Agents Ltd* [2007] 1 CLC 818.
[45] Lewison, *The Interpretation of Contracts,* [5.55].
[46] *Sussex Investments Ltd v Secretary of State for the Environment* [1998] PLCR 172 (per Walker LJ).
[47] Lewison, *The Interpretation of Contracts,* [5.61]; *Kingscroft Insurance Co Ltd v Nissan Fire and Marine Insurance Co Ltd* [2000] 1 All ER (Comm) 272; *JP Morgan Chase Bank v Springwell Navigation Corp* [2007] All ER (Comm) 549.
[48] Lewison, *The Interpretation of Contracts,* [7.07]
[49] *ABC Electrification Limited v Network Rail Infrastructure Limited* [2020] EWCA Civ 1645; *Arnold v Britton* [2015] UKSC 36.
[50] [2015] UKSC 36 (per Lord Neuberger).

(I) EVIDENCE

61. By his Order, Mr. Hollander QC gave the parties permission to rely at trial upon the witness statements of fact served in connection with the summary judgment application and, additionally, reports by experts "*in the field of accountancy and/or mine finance*". This has resulted in the parties adducing evidence from experts in entirely different areas of expertise, which is what has led to the parties adopting their differing approaches to the Excess Cash Clause.

62. Before me, Astor relied on the following:

    i) *Factual evidence*: The sixth witness statement (dated 29 October 2020) and the seventh witness statement (dated 9 April 2021) of Mr. Ashwath Mehra, the Chief Executive Officer of the Astor Group (**"*Mehra 6*"** and **"*Mehra 7*"**).

    ii) *Expert evidence*: The first and second reports, dated 15 October 2021 and 17 December 2021 respectively of Mr. Andrew Webb, an expert in mine finance, who has 25 years' experience of advising on debt and equity financing in the mine sector (***Webb 1*** and ***Webb 2***). He also produced a joint statement together with Mr. Dearman, the accounting expert witness relied upon by Atalaya.

63. Atalaya relied on the following:

    i) *Factual evidence:* The sixth witness statement dated 29 January 2021 of Mr. Alberto Lavandeira Adan, who is the Chief Executive Officer of Atalaya Plc (since December 2014) and ARM (since March 2014) ("***Lavandeira 6***").

    ii) The second witness statement dated 15 October 2021 of Mr. César Sánchez Fernández, who is the Chief Financial Officer of Atalaya Plc ("***Sánchez 2***").

    iii) *Expert evidence*: Two expert accountancy reports of Mr. David Dearman, namely "***Dearman 1***" dated 29 January 2021, and "***Dearman 2***" dated 17 December 2021.

64. Neither party sought to cross-examine the other's witnesses of fact but they did cross-examine the other's expert. I consider that both Mr. Webb and Mr. Dearman were doing their best to assist the Court and gave their evidence in a candid and straight-forward manner. However, because the parties chose to call experts in different disciplines, the experts viewed the intended operation of the Excess Cash Clause from fundamentally different perspectives.

65. Astor submitted that the clause needed to be construed in the light of its plain wording, but in so far as it is helpful to understand the industry context in which the Master Agreement was made and intended to operate, then it suggested that an expert in mine finance such as Mr. Webb is ideally placed to assist, as opposed to an accountant such as Mr. Dearman.

66. Astor accordingly submits that the task for the Court in construing the Excess Cash Clause is one which requires it to:

i) go back in time to the period September 2008 – November 2009 when the Master Agreement was made and amended, and consider what, with the knowledge available to the parties at that time, they intended by this clause; and

ii) consider what these parties, being business people who were experienced participants in the mining industry and who were doing a "*buy now, pay later*" deal in relation to the mine, are likely to have intended.

67. Atalaya on the other hand, for whom Mr. Stephen Moriarty QC, leading Mr. Alexander Milner appeared, contend that the calculation of excess cash under the Excess Cash Clause would fall to the parties' accountants and so the Court should approach the proper construction of the clause from the perspective of an accountant:[51]

> *"Since it would fall to the parties' accountants in the first instance to perform and verify any excess cash calculations, it would be reasonable to assume (in the absence of any indication to the contrary) that "excess cash" was intended to have the meaning which it would ordinarily have in an accounting context."*

68. I consider that the expert evidence before the Court in fact provided very limited assistance on the questions of construction that I have to decide. Leggatt J rightly observed that the Master Agreement "*has all the hallmarks of a professionally drafted contract made by sophisticated commercial parties*"[52] and I consider that the Master Agreement is to be interpreted principally by a textual analysis, and that the Excess Cash Clause requires to be considered in the context of clause 6(g) and Schedule 2 in particular, giving it a construction which is consistent with business common sense, when viewed against the factual background known to both parties (set out above) who are participants in the mining industry.

69. In particular (and as explained below), I do not consider that an "accounting approach" to the Excess Cash Clause is appropriate. As Ms Boase pointed out, the parties were not accountants, they agreed to the wording of the Excess Cash Clause without any accountancy advice and it is their objective intention, as participants in the mining industry, which the Court is seeking to determine.

70. In any event, Mr. Dearman himself states that "excess cash" is not defined by the International Valuation Standards Council and "*has no standard or universally accepted meaning in accounting or valuation literature*"[53]. That this is so is reinforced by the fact that as Astor point out, Mr. Dearman's approach is notably inconsistent with that of the external accountants engaged by Atalaya itself in 2019. Mr. Mehra makes this point in his sixth witness statement at [24]:

> *"Amongst other things, Atalaya now contends that, as part of its calculations of 'excess cash', it is entitled to make an 'operating*

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[51] Atalaya's Opening, ¶35, although it is fair to say that the way in which it presented its case was that the way an accountant would approach this clause is consistent with its ordinary meaning.

[52] [2017] EWHC 425 Comm [51].

[53] Dearman, ¶ 4.2.1. He goes on to assert that excess cash is "*generally understood*" by accountants as referring to cash that is held by an entity over and above what it needs to continue to operate, as part of its working capital, to pay its creditors and to meet future expenditure to which it has committed.

> *cash headroom' deduction, equivalent to the trade creditors due in the first three months of the following financial year, and a deduction for 'sustaining capital expenditure headroom', equivalent to one quarter of the sustaining capital expenditure budgeted for the next financial year. Notwithstanding the fact that Atalaya provided their calculations of 'excess cash' in August 2019 – in purported compliance with a consent order requiring them to do so, and having spent over 7 months with the benefit of external accountants to produce them – those calculations did not include these 'headroom' deductions."*

71. Approaching the proper construction of the Excess Cash Clause from an accounting perspective also gives rise to significant difficulties as I explain below, not least because, on Atalaya's approach to the clause, there is no reliable yardstick which the Court can use to determine its calculation of whether there exists excess cash and if so how much in the case of a dispute.

(J) PROPER CONSTRUCTION OF THE MASTER AGREEMENT

(i) Preliminary observations

72. The fundamental dispute between the parties, on the question of construction, was distilled by them into their Issue 1 as follows:

"Until the Consideration has been paid to Astor in full:

(1) Does clause 6(g)(iv)(B) of the Master Agreement limit (until payment to Astor of the Consideration in full) ARM's entitlement to spend available cash to payment of those items of expenditure identified in parentheses and oblige ARM to apply the balance as excess cash to pay Astor (as Astor contends)?[54]

(2) Or does clause 6(g)(iv)(B) refer to the cash balance held by ARM at the end of the financial year, less allowances for anticipated payments of operating expenses incurred but not yet paid for, sustaining capital expenditure and EMED Group Expenses (as Atalaya contends)?[55]*"*

73. The parties' differing approaches to the proper construction of the Excess Cash Clause give rise to this central issue between them, which is essentially whether clause 6(g)(iv)(B) is "backward-looking" as Astor maintains or "forward-looking" as Atalaya maintains.

74. Astor considers that the Excess Cash Clause must be viewed in its context as "*part of a suite of terms which imposed potentially onerous and restrictive obligations on ARM's ability to function as a business*".[56] By the Excess Cash Clause, ARM was only allowed to spend money on the expenditure referred to in the parenthesis within that clause ("***Permitted Expenditure***") and nothing else until it had repaid Astor. As such,

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[54] Astor SoC ¶5.1, 34 {**A/18/157, 169**}; Astor Skeleton Argument ¶76-80.

[55] Atalaya SoC ¶6(3), 9-10 {**A/18/128-129**}; Atalaya Reply ¶6 {**A/19/187**}; Atalaya Skeleton Argument ¶29-31.

[56] Claimants' Written Opening [75].

"*if ARM had complied with the Excess Cash Clause, it would only have spent money on the permitted items and excess cash would be literally the cash available within ARM at the moment of assessment*."[57]

75. By contrast, Atalaya submitted that "excess cash" refers to the cash actually held by ARM at the end of each financial year, less allowances to be made by way of deduction for anticipated future payments in respect of the items mentioned in parentheses in clause 6(g)(iv)(B). In other words, what is required is not a backward-looking calculation to identify a notional cash surplus, but a forward-looking calculation which ensures that ARM is only required to pay what it can actually afford. Such an interpretation, Atalaya submits, removes the otherwise very real risk of the operation of the Excess Cash Clause rendering the company cashflow insolvent[58] (emphasis added).

76. These competing interpretations have an important practical consequence because of the very substantial sums lent to ARM by Atalaya's shareholders by way of Intra-Group Funding (instead of funding being obtained by ARM on a more modest scale under the Senior Debt Facility) for the purpose of developing the mine, which Atalaya spent for that purpose from 2015 onwards. On Astor's approach, this money is included in the calculation of excess cash as it does not fall within the categories of Permitted Expenditure in the Excess Cash Clause. Atalaya disputes that this is so, and submits that the significance of the fact that expenditure on developing the mine is not listed as a permitted deduction in clause 6(g)(iv)(B) is simply that, when then calculating what part of the cash balance is to be treated as excess cash, a "headroom" allowance is not made for costs which are expected to be incurred in developing the mine in the following year (because of the restriction in that part of the clause to "*sustaining capital expenditure*").

77. A very substantial amount of the Intra-Group Funding provided in this way was provided in 2015 as can be seen in Table 16 to Mr. Dearman's expert report:

[57] Claimants' Written Opening [79].

[58] Defendants' Written Opening [21(2)].

Table 16: Summary of Intercompany Loan Account

€		
Intercompany Loans to ARM		
02-Jan-15	Loan	4,000,000
14-Jan-15	Loan	9,000,000
29-Jan-15	Loan	5,000,000
31-Jan-15	Loan	133,947
31-Jan-15	Loan	56,262
31-Jan-15	Loan	56,262
10-Apr-15	Loan	3,200,000
04-May-15	Loan	1,000,000
20-May-15	Loan	700,000
	Sub Total (1 January 2015 to 31 May 2015)	**23,146,471**
26-Jun-15	Loan	1,000,000
26-Jun-15	Loan	9,000,000
26-Jun-15	Loan	2,000,000
26-Jun-15	Loan	9,000,000
26-Jun-15	Loan	7,000,000
29-Jun-15	Loan	1,000,000
29-Jun-15	Loan	4,995,833
29-Jun-15	Loan	1,362,500
29-Jun-15	Loan	9,537,500
29-Jun-15	Loan	1,500,000
29-Jun-15	Loan	5,000,000
29-Jun-15	Loan	5,445,833
30-Jun-15	Loan	8,629,167
24-Jul-15	Loan	5,000,000
	Sub Total (1 January 2021 to 31 July 2021)	**93,617,304**
17-Sep-15	Loan	89,063
23-Sep-15	Loan	779,128
28-Oct-15	Loan	3,000,000
28-Oct-15	Loan	3,000,000
29-Oct-15	Loan	3,000,000
	Total	**103,485,495**

78. As Atalaya correctly points out, the Excess Cash Clause was never intended to be the primary mechanism by which the Deferred Consideration was to be paid by Atalaya to Astor. Rather, the parties envisaged that the Deferred Consideration would be paid in accordance with the timetable set out in Schedule 2 to the Master Agreement once it was triggered on the securing of (i) Permit Approval and (ii) the Senior Debt Facility to fund the restart of the mine (as was anticipated to happen). Given the way funding was ultimately obtained for the Project (by way of the Intra-Group Funding) the primary contractual mechanism for repayment was rendered redundant and Astor is now reliant on this subsidiary mechanism to secure repayment of the Deferred Consideration.

(ii) The Master Agreement as concluded on 30 September 2008

What constitutes "excess cash"?

79. The starting point in determining the proper construction of the Excess Cash Clause is to determine the proper construction of the Master Agreement in its original form, when concluded on 30 September 2008.

80. Clause 6(b) of the Master Agreement provided that the Deferred Consideration was to become "*payable by [ARM] in accordance with the terms and conditions set out in Schedule 2…*". By Schedule 2, the Deferred Consideration was to become payable to Astor in three tranches.

81. **Tranche 1** was to be payable as soon as (i) ARM secured Permit Approval "*to re-start mining activities* in the Project" and (ii) a Senior Debt Facility was secured "*for a sum sufficient for the restart of mining operations at the Proje*ct". Once these two conditions were satisfied, €17.533m became payable out of the Senior Debt Facility within 30 days of drawdown. It follows that Tranche 1 would become payable before mining activities had actually restarted.

82. To ensure the effective operation of Schedule 2, ARM undertook by Clause 6(g)(iii)(A) to procure that the documentation for the Senior Debt Facility permitted (i) payment of the Deferred Consideration when due as per Schedule 2 - including allowing payment of Tranche 1 *directly* out of the Senior Debt Facility - and (ii) any early payment of the Deferred Consideration which might become due under clause 6(g)(iv)(B) (i.e. the Excess Cash Clause).

83. Only once the "*mining activities [were] restarted in the Project*" were the next two tranches of Deferred Consideration due under Schedule 2:

    i) **Tranche 2** (€13.175m) was due within 20 Business Days following the first anniversary of the restart of mining activities; and

    ii) **Tranche 3** (€13.175m) was due within 20 Business Days following the second anniversary of the restart of mining activities.

84. The parties expressly agreed in Schedule 2 that "*the date of restart of mining activities for these purposes shall be such date on which the mining facilities at the Project meet continuous 400,000 mt/month production of ore processing"* (i.e. 4.8 Mtpa). As Mr. Lavandeira states on behalf of Atalaya, this was a key production threshold given it was only at this level that the mine would be at "*commercial production*" having "*the necessary product quality and volume levels for commercial sale to the market*."[59]

85. I consider that Mr. Lavandeira is accordingly right to say that:

> *"… mining operations commenced[60] at the Mine once it reached 'commercial production' (i.e. in February 2016), when the copper produced by the Mine could be sold to the market and the Mine started to produce revenue from mining operations (as opposed to relying solely on external or intragroup funding). This is consistent with the Memorandum of Understanding dated 11 June 2008, which defined 'mine restart' as '3 months of continuous 400,000 mt/month of ore processing" (broadly equivalent to 5 Mtpa), and the original definition of 'restart of mining activities' in the "now superseded 2008 Master Agreement at Schedule 2, namely "the date on which the mining*

[59] Lavandeira 6, ¶11.2

[60] In the sense of "re-started"

facilities at the project meet continuous 400,000 tonnes/month production of ore processing".[61]

86. Schedule 2 envisaged that, upon the date when the mine restarted commercial production (i.e. commercial production of 4.8 Mtpa), ARM would begin generating revenue from which it would likely be able to pay the Deferred Consideration, certainly by the time of the first and second anniversaries respectively of the mine restart. That this was what was objectively intended is also apparent from the use in clause 6(g)(iii)(A) of the words *"[payment] directly out of the Senior Debt Facility*": Tranche 1 would be paid directly out of the Senior Debt Facility but there is no reference to direct payment out of the Senior Debt Facility in respect of Tranches 2 and 3.

87. In the context of the projected payment timetable for Tranches 2 and 3 of the Deferred Consideration in Schedule 2, which was fixed by reference to the mine having reached commercial production after its restart, ARM gave a number of undertakings in clause 6(g), including in particular 6(g)(iv), "[a]s *security for, inter alia, the obligations of [ARM] to pay the Deferred Consideration*" in Schedule 2. Thus, ARM undertook:

i) *"not to make, declare or pay any dividend or distribution (other than as required for up to USD 10 million per annum for EMED Group expenses (excluding dividends or other distributions to shareholders of EMED) related to matters other than the Project ("EMED Group Expenses")), nor borrow or agree to borrow any amount other than pursuant to the Senior Debt Facility without the prior written consent of MRI (not to be unreasonably withheld or delayed), until the Consideration has been paid in full to the MRI Parties in accordance with the terms of the Transaction Documents; and*

ii) *to apply any excess cash (after payment of operating expenses and sustaining capital expenditure for the Project, debt service requirements under the Senior Debt Facility and USD 10 million per annum for the EMED Group Expenses […] to pay any outstanding amounts of the Consideration due to [Astor] […] early.*"[62]

88. The Excess Cash Clause is accordingly an undertaking in respect of the timing of payment of the Consideration, and in particular the timing of the payment of the Deferred Consideration as defined in Schedule 2. The clauses are linked. The Excess Cash Clause is concerned (in particular) with *early* payment of the Deferred Consideration. It envisages a situation where the mine has restarted commercial production (i.e. the mine has reached continuous production of 400,000 mt/month of ore processing) and ARM[63] has excess cash which means that it is in a position to pay Tranche 2 or Tranches 2 and 3 of the Deferred Consideration earlier than agreed in Schedule 2.

89. In other words, "early" payment in the context of Deferred Consideration is focussing in particular upon payment after the achieving of commercial production (so that the mine begins to generate revenue) but before (20 business days following) the first and

[61] Lavandira 6 [12].
[62] I quote the Excess Cash Clause in full so as not to paraphrase it and risk altering its meaning.
[63] It is common ground that the financial position of both ARM and EMED Marketing are to be taken into account for this purpose, but I refer in this judgment to ARM for simplicity.

second anniversary (respectively) of that date. Prior to the restart of the mine (as defined), the clause does not envisage there being any "excess cash" in ARM to pay out "early" as the mine would not yet be operating at the level of commercial production and so would not be generating any meaningful revenue. Contrary to the submission of Ms Boase, I do not consider that the parties would, objectively, have contemplated paying Tranche 1 early, as it was always anticipated that this Tranche would be paid out of the Senior Debt Facility: see clause 6(g)(iii)(A).

90. It follows that the Excess Cash Clause was only likely to come into operation if, following the attainment of the restart of the mine at the stated continuous level in Schedule 2 (ie. continuous commercial production of 400,000 Mt/month), higher than anticipated levels of revenue were achieved in the first year following restart. In that case, any "excess cash", as calculated under the Excess Cash Clause, would become payable to Astor.

91. I consider that, viewed in the context of the above analysis, the proper construction of the Master Agreement is clear. "Excess cash" was any cash which was available, after the re-start of the mine, to pay the Deferred Consideration earlier than in accordance with the payment dates for the Tranches in Schedule 2, and the cash is only "excess" after ARM had paid (i) operating expenses (ii) sustaining capital expenditure for the Project; (iii) debt service requirements under the Senior Debt Facility[64]; and (iv) USD 10 million per annum for the EMED Group Expenses[65].

92. Consistently with this interpretation of the Excess Cash Clause, clause 6(g)(iv)(A) prohibits ARM from making, declaring or paying any dividend or distribution out of any excess cash until the Consideration has been paid in full.

93. As Ms Boase submitted, clauses 6(g)(iv)(A) and (B) provide a coherent scheme for the regulation of money flowing into and out of ARM <u>pending payment in full of the Consideration</u>. So far as money flowing into ARM is concerned, by clause 6(g)(iv)(A) ARM can (i) take in funding by drawing down on the Senior Debt Facility but not otherwise borrow; and (ii) generate revenue from mining operations.

94. So far as money flowing out of ARM is concerned, clause 6(g)(iv)(B) allows payment out of operating expenses, sustaining capital expenditure, debt service requirements under the Senior Debt Facility and $10m per annum for EMED Group Expenses, but no payments for any other purpose, including dividends or distributions (unless required for the $10m EMED Group Expenses).

Sustaining capital expenditure

95. So far as the meaning of "*sustaining capital expenditure*" is concerned[66], once it is appreciated that the purpose of clause 6(g)(iv) is that it affords Astor with security for payment of the Deferred Consideration in Schedule 2, then it becomes clear that the reference to "sustaining" capital expenditure in this context is a reference to capital expenditure for the mine to sustain its production of the ore at a commercial production

[64] Because drawdown of Tranche 1 under the Senior Debt Facility has by now taken place.
[65] This was an annual expenses allowance which the parties must have considered was needed by the Group as a whole.
[66] The parties' Issue 2

rate, namely at the rate of 400,000 mt/month (or around 5Mtpa) as agreed by the parties and set out in Schedule 2.

96. The Excess Cash Clause does not allow for capital expenditure to *expand* the Project beyond that production level, as opposed to *sustaining* it at that level because then it would not be providing the security for payment of the Deferred Consideration in Schedule 2. This construction is consistent with the fact that the wording of Schedule 2 suggests that the parties did not envisage that any excess cash could become available until the mine had reached commercial production (i.e. 4.8 Mtpa).

97. This construction is also consistent with the fact that at the time of the Master Agreement which was concluded in September 2008, the documentary evidence before the Court suggests that Atalaya planned to restart the mine at a production level of around 5Mtpa by 2009.

98. Indeed, it is noteworthy that this construction is consistent with *Atalaya's* pleaded case:

> "*Sustaining capital expenditure*" is the capital expenditure required for a company to sustain its current level of operations through the repair and replacement of capital assets used in a company's business. It is to be contrasted with what is referred to as "*expansion*", "*growth*" or "*investment*" capital expenditure, which is capital expenditure for the purposes of growing the business of a company."

99. The technical meaning of this phrase is also consistent with this construction. Mr. Webb gave evidence that (to a mine finance expert – which I consider to be the appropriate field of expertise for this purpose) "sustaining capital" refers to the ongoing (yearly) capital investment that an asset must make to continue to operate. It includes maintenance capital and investment required to adapt to regulatory changes. It does not include investment for expansion or margin improvement. Thus, he says, sustaining capital expenditure is limited to the expenditure required to maintain the current level of production and the capacity of an asset. The way in which Mr. Webb understands this term is consistent with the way in which I consider that the parties would, objectively, have understood it when they entered into the Master Agreement. Mr. Dearman, the accountant expert instructed by the Defendants, did not suggest otherwise, but he said that he did not have the expertise to comment on the meaning of "*sustaining capital expenditure*", not being an expert in mine finance[67].

100. The Excess Cash Clause allows the deduction of "*sustaining capital expenditure*" once the mine has "re-started". That is, once it has reached the level of operations specified in Schedule 2, capital expenditure spent in order to sustain that level may be deducted, which level the parties agreed to be the continuous production of 400,000 mt/month[68].

101. But, as Atalaya state and contrary to Astor's submission, it does not include the costs of *expanding to that level* of production in the first place[69]. As Atalaya rightly observed

[67] Joint Statement, ¶5.1.8.

[68] As Leggatt J stated [2017] EWHC 425 (Comm) [8]: "*until mining restarted, no revenue was being generated from which payments could be made to Astor*", as was obviously the parties' intention.

[69] ¶25, Atalaya's closing.

in closing[70] that *"[i]f at the end of 2015 there still happened to be in ARM's hands cash needed to get to 5 Mtpa, on Astor's approach to the calculation of excess cash it would nonetheless fall to be included in the calculation and paid over to Astor — and regardless of whether, if and when it was spent, it would fall to be treated as sustaining capital expenditure or otherwise be a permissible deduction. That obviously cannot be right*".

102. In essence, what the parties agreed by the Excess Cash Clause was that ARM would not be entitled to invest any excess cash on expanding beyond the stated level of production in Schedule 2 *before using it to pay Astor*.

103. Atalaya contend that "*the words in parentheses in clause 6(g)(iv)(B) do not prohibit ARM from spending money on anything: they only identify the categories of anticipated expenditure for which "headroom" deductions can be made from the cash balance at the date of calculation to arrive at "excess" cash*".

104. Atalaya further contend that if clause 6(g)(iv)(B) had been intended to impose a limit on the extent to which the mine could be developed then it would surely have done so expressly – and identified the applicable limit – but it does not. Nor, they say, is there any indication anywhere else in the Master Agreement that the parties intended to impose such a limit. To the contrary, Recital C to the Agreement, which contains the definition of the "Project", refers simply to the "*development*" of the mine, without any indication that the development could not exceed 5 Mtpa, 9.5 Mtpa or any other capacity. The clear implication, Atalaya reasons, is that the "Project" was not limited to any capacity lower than the maximum capacity at which it made commercial sense to operate.

105. I do not accept Atalaya's contentions. It was never intended by clause 6(g)(iv)(B) to impose a limit on the extent to which the mine can be developed. Atalaya could develop the mine to any extent that it wished. But if Atalaya chose to extend the mine beyond the level specified in Schedule 2, then it could not deduct operating and capital expenditure from the calculation of its excess cash beyond that which was required to sustain the level specified in Schedule 2. That is because clause 6(g)(iv)(B) and Schedule 2 are concerned with the quantum and timing of the payment of the Deferred Consideration to Astor.

106. Similarly, Atalaya argue that the purpose of referring in the original Master Agreement to the restart of mining activities being attained when production reached a continuous level of 400,000 Mt per month was to define the date by reference to which the second and third Tranches of the Deferred Consideration became payable. It is, they submit, a complete *non sequitur* to infer from the fact that instalments of the consideration became payable after the mine reached 400,000 Mt per month that ARM was not then permitted to increase the level of production any further. But again, this misunderstands the effect of the combined operation of clause 6(g)(iv)(B) and Schedule 2. They do not prevent ARM from increasing the level of production beyond 400,000 Mt per month. It is simply that should ARM do so, it cannot deduct the cost of doing so (beyond 400,000 Mt per month) in order to carry out the calculation of the available excess cash under the Excess Cash Clause.

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[70] ¶48, Atalaya's closing.

107. I do not consider that Atalaya is right to say that this construction of the Excess Cash Clause is undermined by the definition of "The Project" in Recital (C), which states "*In 2004 and 2005, [Astor's predecessor in title] granted several loans to MSA and IEG for the care, maintenance and development of the Riotinto Mine Project (hereinafter the "Project")*". It is clear from their use throughout the Master Agreement that the words "*the Project*" are used simply as shorthand for "*the Riotinto Mine Project*". But in any event, even if the definition of "*the Project*" is taken to mean "*the care, maintenance and development of the Project*", the construction of the Excess Cash Clause set out above remains unaffected. That is because the development of the Project with which Schedule 2 is concerned, and accordingly the early payment under the Excess Cash Clause, is the development of the Project *up to the re-start of the mine* (i.e., up to a continuous production of 400,000 mt/month).

108. It is true that Atalaya anticipated in its project planning documents before the mine was reactivated that it would in due course increase production to around 7.5mtpa from 2011 and that it might one day reach a rate of 9 or 9.6 Mtpa. But that has no relevance to the proper construction of the Excess Cash Clause, which is concerned with *early payment* of the Deferred Consideration which was to become payable *upon the restart* of the Project's mining activities. That the trigger is the restart of the mining facilities, so far as the payment of the Deferred Consideration is concerned, is also emphasised in Schedule 2(a)(i) itself, which refers to "*the re-start of mining operations at the Project*" (see also recitals (E) and (G) to the Master Agreement).

109. Atalaya argues that its construction of the Excess Cash Clause is consistent with but *not* driven by an accountant's approach to it, namely that "excess cash" from an accountancy perspective is cash held over and above the operating cash needed for a business to continue operating.[71] Atalaya states that it can "take comfort from the fact that its construction aligns with the professional opinion of Mr. Dearman as to how "*excess cash*" is normally understood by accountants (and how the concept of "*cash*" is distinct from "*cashflow*")". Atalaya argues that *"[h]owever the clause is interpreted, its application is inevitably a complex exercise which it would fall largely to accountants or other financial specialists to perform for the parties, and that it is natural and logical to treat "excess cash" as meaning what it would normally be understood to mean by those responsible for carrying out the necessary calculations*". Accordingly, Atalaya relies upon Mr. Dearman's accountancy approach: the need for "headroom" was, he says, "*implicit in the words "excess cash"*".[72] As he explained "*Excess cash must be forward-looking because it's assessing well, what do we need in the future to continue to operate this business…*"[73].

110. But I consider that Atalaya's construction of the Excess Cash Clause is indeed driven by an accountant's approach to the meaning of "excess cash". As stated above, there is no reason at all to believe that the parties were approaching the drafting of the Master Agreement from an accounting perspective. The parties were not accountants and they agreed to the wording of the Master Agreement without any accountancy advice. This was a professionally drafted agreement and it should be interpreted principally by textual analysis, and (insofar as it matters) in the context of the Master Agreement being concluded by business people operating in the mining sector, and not operating as

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[71] Dearman1 ¶4.2.6.
[72] {**Day2/119/6-7, 120/2-9**}.
[73] {**Day2/119/25-120/15**}.

accountants. When properly constricted, it is clear that the meaning of "excess cash" in the Excess Cash Clause must be constricted in its contractual context and it does not have the particular meaning that an accountant would give to it.

111. Moreover, looked at from a mine finance perspective, Mr. Webb explained that:

i) Cash sweep clauses (such as the Excess Cash Clause) sometimes permit headroom and sometimes they do not[74] and he has "relatively frequently seen an *agreed and specified quantum of cash* (typically either a numerical amount or something like one month's operating expenses defined by reference to the financial model for the Project as of a specific date) deducted in the calculation of "excess cash" to allow the retention by the borrower of a "cash cushion"."[75]

ii) Where such headroom is not expressly provided for (as here), he explains, it is usually because the Project is cash generative and has the ability to manage its creditors and debtors. He emphasised that parties negotiating a cash sweep clause would be "*fairly relaxed*" about headroom where the expectation was that the Project would be cash-generative, as was the case here.[76]

112. It follows that it is far from obvious that the parties, had they been asked about it in September 2008, would have considered provision for a headroom to be necessary and it certainly cannot be assumed (as Atalaya's construction assumes) that they *would* have considered it to be necessary. Events subsequent to the making of the Master Agreement cannot be used to influence its construction.

113. In any event, as Astor pointed out, one can think of a number of reasons why the parties might have decided against including a headroom. The Project was to re-start an existing mine. From a technical perspective, it was relatively low risk. As shown by the AMC Report, the Project was expected to be cash-generative. Once the mine was restarted and operating at a fixed level (commercial production), it was to be expected that, subject to copper prices, there would be a steady relationship between costs incurred and revenue generated. Most of the copper would be pre-sold under offtake agreements, providing security as to revenue flow.[77] Indeed, clause 7(c) of the Master Agreement actually contemplated an offtake agreement for 100% of production with Astor as the counterparty.

114. It would defeat the purpose of the Excess Cash Clause to construe the clause as being forward looking (as suggested by the Defendants), thereby allowing ARM to allocate sums for its <u>future</u> operating and capital expenditure which are much greater than it in fact sustained in restarting the mine to the level of commercial production for the purposes of Schedule 2. If ARM were permitted to spend available cash on whatever it liked, and in particular developing the mine well in excess of the level required for commercial production of 5Mtpa, the Excess Cash Clause would not facilitate "early" payment of the Deferred Consideration, in the sense of earlier than that envisaged in

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[74] Such as in the Çöpler Agreement, relied upon by Atalaya, but that was a very different agreement to the one in the present case. I do not consider that it is helpful to reason in this case by reference to other, differently drafted agreements reached in entirely different factual contexts.

[75] Webb1 ¶3.1.28.

[76] {**Day2/36/21-37/12**}.

[77] Webb1 ¶3.1.32

Schedule 2. Indeed, the Deferred Consideration might never become payable because there might never be excess cash.

115. Moreover, the undertaking given in the Excess Cash Clause is an undertaking given as security for the obligation of ARM to pay the Deferred Consideration in Schedule 2. The undertaking would not be security for a debt if it imposed no constraint on ARM's spending ability. As Ms Boase pointed out, the obligation is framed as an "undertaking" to "apply" any excess cash, which leaves no room for discretion by ARM.

116. It follows that I do not consider that there is any warrant for the construction which Atalaya puts on the Excess Cash Clause, which is that "excess cash" refers to the balance held by ARM at the end of the financial year, less allowances to be made by way of deduction for *anticipated* payments of operating expenses incurred but not yet paid for, sustaining capital expenditure and EMED Group Expenses.

117. Rather, the Excess Cash Clause is concerned with any cash ARM holds *after payment of* the Permitted Expenditure. Upon reaching the "restart" of the mine as defined in Schedule 2 (viz. 4.8 Mtpa/ commercial production), if thereafter Atalaya holds cash after payment of (i) its operating expenses and (ii) capital expenditure to sustain the re-start before Tranche 2 or Tranche 3 become due, then it was obliged to pay that excess cash over early to Astor.

118. I should add that precisely how payments of tax fall to be treated under the Master Agreement is something of a puzzle. Both parties agree that tax falls to be deducted in calculating the excess cash at year end and so in that sense there is no practical problem in this regard. However, Atalaya argue that Astor's construction fails to account for payments of tax which ARM might be required to pay but which (it argues) do not constitute operating expenses, sustaining capital expenditure or EMED Group Expenses. Atalaya contend that the simple reason why tax payments *can* be deducted without difficulty is that clause 6(g)(iv)(B) does not in fact purport to limit what ARM is entitled to spend money on in the course of its day-to-day operations at all.

119. However, as Ms Boase pointed out in closing submissions, how tax is to be treated is a problem for both parties on their respective constructions. On Atalaya's case, if the Permitted Expenditure in clause 6(g)(iv)(B) describes what Atalaya is allowed to keep back for headroom, then since tax is not mentioned in the Permitted Expenditure there is no allowance for it.

120. I consider that the better construction of the Excess Cash Clause is that payment of tax is, for the purposes of clause 6(g)(iv)(B) at least, an "operating expense" being one of the costs of "operating" the business[78]. Alternatively, as Mr. Webb observed[79], in the calculations of "excess cash" in Atalaya's cash flow models, taxes paid by ARM and EMED Marketing are deducted against EMED Group Expenses rather than operating expenses and this is how they could be treated by reference to the Excess Cash Clause,

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[78] I am not dissuaded from this construction by reason of the views of the respective experts. Indeed, I note that, consistently with this construction, the Çöpler Agreement which was before the court, tax was expressly included in that category: "***Operating Costs*** *means all costs and expenses incurred by the Borrower in operating, maintaining, protecting and implementing the Project and the Project Assets including mining, milling ... or marketing activities in relation to the Project, including: ... Taxes and Royalties…"*. This suggests that it is not necessarily inapposite to refer to tax as an operating cost or expense.

[79] Webb 1, ¶4.1.4

as an EMED Group Expenses allowance, which is a broad category with a large allowance of USD10m per annum.

When is excess cash first assessed?

121. The next question which arises is: *at the end of which financial year should excess cash have been assessed for the first time?*[80] In particular:

i) Should excess cash have been first assessed on 31 December 2015, since excess cash fell to be assessed from what Astor contends to have been the restart of the Project in 2015?[81]

ii) Or should excess cash have been first assessed on 31 December 2016, since excess cash fell to be assessed from the restart of commercial production in February 2016 (as Atalaya contends)?[82]

122. It is common ground between the parties that excess cash is to be calculated annually, at the end of the financial year, with interest on any excess cash starting to run from 31 December. It is also common ground that the dispute about whether the calculation is carried out three months after year end (as Astor contends) or six months after year end (as Atalaya contends) is insignificant.

123. Whilst the MOU referred to mine restart as having taken place once 3 months of continuous 400,000 mt/month of ore processing had been reached, the parties chose not to refer to 3 months' processing in Schedule 2 of the Master Agreement, but rather to refer only to the mining facilities at the Project meeting a continuous 400,000 mt/month production of ore processing; and they provided for Atalaya/ARM to inform Astor of "the date of the restart of mining activities as aforesaid". In fact, production at a rate of 5Mtpa was achieved at the mine for a continuous period of 3 months by sometime in January 2016[83], and it is no surprise therefore that ARM declared commercial production at the mine on 15 January 2016, to take effect on 1 February 2016.

124. It follows that, since it is agreed between the parties that commercial production at a rate of 5 Mtpa[84] at the Project was indeed declared by Atalaya on 1 February 2016 (and Schedule 2 expressly provides that it is Atalaya who is to inform Astor of the date of restart), on the proper construction of the Excess Cash Clause and Schedule 2, any excess cash is to be assessed on 31 December 2016, being the end of the 2016 financial year. It is accordingly inappropriate[85] to select an earlier date in 2015 for the operation of the Excess Cash Clause simply because the mine happened in December 2015 to have produced 5mtpa of ore during that month.

125. Astor state in their closing submissions that:

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[80] The parties called this Issue 4.

[81] Astor SoC ¶45.3 {**A/18/174**}; Astor Skeleton Argument ¶89-92.

[82] Atalaya SoC ¶7(3) {**A/17/128**}; Atalaya Reply ¶14.2 {**A/19/190**}; Atalaya Skeleton Argument ¶49-55.

[83] As described above, (i) by November 2015 the mine was producing 529 TPH of ore; (ii) by December 2015 the mine was producing 532 TPH and (iii) by January 2016 the mine was producing 549 TPH.

[84] The parties have proceeded on the basis that this amounts to commercial production despite being slightly higher than 4.8Mtpa and I have done the same.

[85] as Astor seek to do

> *"77. The effect of delaying the operation of the Excess Cash Clause until 1 February 2016 (as Atalaya contends) is radical.*
>
> *(1) First, it excludes from consideration all of the cash available to ARM in 2015, including some of the €103m intragroup borrowing some of which Mr. Dearman accepted (if ARM was not permitted to expand without paying Astor) was "surplus to ARM's needs in 2015".*[86]
>
> *(2) Secondly, it means that the first assessment date is not until 11 months later (on 31 December 2016) by which time ARM had moved far beyond mere restart of the Project, having achieved not only Phase I expansion to 7.5 Mtpa, but also Phase II expansion to 9.5 Mtpa.*
>
> *78. In circumstances where the Excess Cash Clause has no start date and there are a range of possible events which might naturally prompt the first assessment of excess cash, it is reasonable to adopt the earliest and not the latest of those events. The Court may well wish to be guided by the only person to have given evidence who actually knows how these things work in practice: Mr. Webb. In his experience, a reasonable point at which to start assessing cash would have been 31 December 2015."*

126. However, in so far as any of the cash available to ARM in 2015 is still available to it in 2016 after commercial production has been attained on 1 February 2016, then it falls to be included in the excess cash calculation, as Ms Boase rightly agreed in closing[87] (as opposed merely to "inflows and outflows" of cash from 1 February 2016, as Atalaya submitted).

127. Furthermore, the fact that ARM had moved far beyond the "restart" of the Project by the time of the first assessment date of 31 December 2016 does not mean that it can deduct more than the sustaining capital expenditure based upon the re-start of the mine at a level of 400,000 mt/month in carrying out the excess cash calculation.

128. It is worth noting that Mr. Webb also supports taking the date of 31 December 2016 for this purpose. He gave evidence that (i) a calculation of excess cash is not carried out <u>until</u> production has commenced under whatever is the agreed phase of the Project being financed;[88] (ii) when that calculation is carried out, it looks back over cash inflows and outflows over the preceding 12 months.[89] The logical point at which to carry out that calculation in this case, he said, is in fact February 2016 when Atalaya declared commercial production,[90] but because he has no figures for the 12 months

[86] {**Day2/114/10-116/16**}.

[87] {**Day 4/62/3-16**}

[88] Webb 1, §3.1.19 ***[D3/1/1926]***

[89] Day 2, p. 47, lines 2-20

[90] Webb 1, §3.1.20

period to that date, he said he was obliged to carry out calculations as at the end of December 2015.[91]

Do the amendments to the Master Agreement affect the construction above?

129. The next question which arises is: do the amendments to the Master Agreement affect the proper construction of the Excess Cash Clause? The answer to that that is that they do not.

(iii) Amendment and restatement of 31 March 2009

130. The Master Agreement was amended and restated on 31 March 2009. The main amendments were to Schedule 2. Following those amendments, the Deferred Consideration was to be paid in 18 instalments and the first payment, due on the "*First Payment Date*", was reduced to €7.313m. "*First Payment Date*" was defined as follows by Schedule 2(b):

> *"For the purposes of this Schedule, the "First Payment Date" shall be the date on which (i) the authorisations from the Junta de Andalucia to restart mining activities in the Project are granted to EMED or any other member of the EMED Group ("Permit Approval") and (ii) EMED or any other member in the EMED Group secures senior debt finance and related guarantee facilities for a sum sufficient to restart mining operations at the Project (hereinafter the "Senior Debt Facility") and the relevant member of the EMED Group is entitled to draw down funds pursuant to the Senior Debt Facility."*

131. The dual triggers for the first payment remained the same and were still linked to the restart of mining activities, namely the grant of Permit Approval and securing a Senior Debt Facility; however, the subsequent payment dates changed and were referable to the First Payment Date, rather than anniversaries of the mine reaching commercial production (400,000 mt/month of ore).

132. Unlike Schedule 2 to the original, unamended Master Agreement, the parties did not state in the amended Schedule 2 what they intended to mean by "*restart*" of mining activities. However, it was unnecessary for them to do so – both parties knew what was meant by this: that the mine would restart once it reached a continuous production of 400,000 mt/month of ore. This constituted part of the background knowledge reasonably available to both parties at the time of the amended agreement and against which it accordingly falls to be construed.

133. Additionally, Clause 3.1 of the Deed of Amendment dated 31 March 2009 states that: "*The Master Agreement and this Deed shall together constitute and be read as one and the same written instrument*" save as amended by the Deed of Amendment.[92] As such, in interpreting the amended Master Agreement recourse may be had to the unamended Master Agreement save where an amendment specifically modifies the Master

[91] Webb 1, §3.1.20

[92] Clause 3.1 and 3.2. I note that the actual wording of clause 3.2 is less than clear: "*Except as otherwise amended by the foregoing, the provisions of this Master Agreement shall be and continue in full force and effect and are hereby confirmed*".

Agreement. Although the definition of "*restart*" of the mining operations is absent in the revised Schedule 2, the word continues to appear in numerous other places in the Master Agreement with no suggestion that its meaning has changed.

134. In all the circumstances, I consider that the Excess Cash Clause is to be construed in the same way under the amended Master Agreement as of 31 March 2009 as it is under the original Master Agreement, and which I have set out above.

(iv) Amendment and Restatement of 10 November 2009

135. On 10 November 2009, the Master Agreement was amended a second time.

136. By the amendments, Astor provided consent (for the purposes of Clause 6(g)(iv)(A) and (B)) to ARM borrowing funds from Atalaya UK by way of loan notes and for ARM to use some of the proceeds of this loan note borrowing to repay c. €7m to Atalaya PLC.

137. Furthermore, as noted above, the parties also amended clause 6(g)(iv)(A) of the Master Agreement so that ARM undertook not to make "*any repayment of or any other payment in respect of loans from members of the EMED Group **("EMED Group Loans")***" (i.e. the loan note borrowing) until the Deferred Consideration had been repaid to Astor.

138. Notably, the parties did <u>not</u> provide in the amended agreement that any sums obtained by the EMED Group Loans would <u>not</u> constitute "excess cash" for the purposes of the Excess Cash Clause. That was presumably because the parties anticipated, consistently with the way in which they intended to defray the sums obtained under the Senior Debt Facility, that they would draw down under the "EMED Group Loans" only such sums as were necessary to achieve commercial production at the mine and that after that date the mine would begin to generate its own operating profit.

139. What happened next was not anticipated by Astor. As explained at paragraphs 34-4639 above, five and a half years later Atalaya funnelled €136m of Intra-Group Funding into ARM for the development of the Project following ARM's inability to obtain a Senior Debt Facility. Furthermore, as noted at paragraph 40 this funding was not made available by way of a facility so that ARM drew down on the debt to meet its needs, but rather as a series of lump sums.

140. The consequence of Atalaya's actions is that in 2015 it had huge quantities of cash sitting in ARM. Atalaya failed to foresee that the consequence of this might be that it would be required under clause 6(g)(iv)(B) to pay out this excess cash to Astor. Of course, if a Senior Debt Facility had been put in place, then ARM would not have drawn down the full amount of the facility in one go. It would have drawn down according to its needs: such needs would have included making payments for operating expenses and sustaining capital expenditure, as well as payments to Astor under Schedule 2. ARM would have avoided drawing down more than it required, because that would have increased its interest liability and have left cash sitting unused in the business. Thus, if a Senior Debt Facility had been put in place, it is unlikely that ARM would have had much (if any) excess cash on 31 December 2016. The six-year payment schedule found in Schedule 2 would then not have been "up-ended in one go" or "negated" as the Defendants suggest in paragraph 9 of their closing submissions.

141. But insofar as ARM held more cash (including that derived from the EMED Group Loans) than it required for payment of the Permitted Expenditure after commercial production at the mine re-started on 1 February 2016, then such cash constituted excess cash and was payable to Astor under the Excess Cash Clause. The Excess Cash Clause makes no distinction between cash derived from revenues and cash derived from any other source, including Intra-Group Funding[93].

Decision of the Deputy Judge

142. Finally, Atalaya also relied upon the reasons given by Mr. Hollander QC for rejecting Astor's construction. They suggested that the significance of the fact that the Master Agreement uses the word "*cash*" was explained accurately by Mr. Hollander QC, who noted in his judgment that:

> *"[T]he wording is "cash" not "income" or "receipts". The reference to "cash" must refer to available liquid assets. There is nothing in the wording which indicates the parties had in mind that this should refer to the company's income or receipts."*[94]

143. But this reasoning implicitly (and wrongly) assumes that it is necessary to perform a cash flow analysis at year end[95] as it is only then that the question of distinguishing between "*income*" and "*liquid assets*" arises; whereas in fact the words "excess cash" in the context of the Excess Cash Clause simply refer to the excess cash available to ARM/Atalaya at year end (or which ought to have been available to them at year end) after deduction of the Permitted Expenditure. In carrying out the calculation of excess cash, there is no need to carry forward surplus or loss from the year-end cash balance (in the way that an accountant might do). Rather, an annual calculation (cash held after 1 February 2016 less Permitted Expenditure) is carried out at year end, and if there is a positive cash balance at year end, then the cash is swept out to Astor under the Excess Cash Clause.

144. Atalaya also contend that as a matter of ordinary language, *"excess"* cash is more apt to refer to cash that a party actually has at its disposal and can afford to pay, as opposed to cash that it has received in the past but which may no longer be available or may be needed to meet imminent liabilities. Again they submit that this point was made clearly by Mr. Hollander QC:

> *"Assume the company has 95 in cash on 31 December, does not expect any income on 1 January but has a bill of 100 to pay on 1 January. Does it have any excess cash? It can hardly have excess cash if the foreseeable result of paying out the excess cash on 31 December is that it is unable to pay its bills."*[96]

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[93] The parties refer to this aspect of the dispute as Issue 3.

[94] Judgment, §49 ***[A/15/116]***

[95] It is fair to say that the Deputy Judge only had an expert report of Mr. Dearman before him.

[96] Judgment, §51 ***[A/15/117]***

145. But the way in which the question is posed by the Deputy Judge again assumes the answer to it. It assumes that the Court approaches this issue from an accounting perspective and gives "excess cash" an autonomous meaning that it might have to an accountant, rather than the meaning which it has when construed in the context of clause 6(g) and Schedule 2. What matters is whether there is excess cash once the mine has re-started commercial production and after deduction of the permitted expenses. If not, ARM only had to pay Astor the Deferred Consideration in accordance with the agreed timetable in Schedule 2.

146. Similarly, in his judgment at [52], Mr. Hollander QC suggested that Astor's construction did not make sense, because:

> *"If the company has excess cash at the year end, then why does it need to consider and deduct expenses at all? Past expenses will already have been paid. It follows that the subclause must contemplate foreseeable future expenses".*

147. But again, the way in which the question is framed assumes the answer to it. It again gives the phrase "excess cash" an autonomous meaning which an accountant might give to it, unconstrained by the context in which the phrase is used (namely clause 6(g) and Schedule 2). Having given the phrase such an autonomous meaning, the Judge is then led inevitably to the erroneous conclusion that the language in parentheses must refer to future expenses; whereas the appropriate question to ask in carrying out the calculation at the year-end[97] is simply whether there is any excess cash to pay the Deferred Consideration early, after deduction of the Permitted Expenditure (which will necessarily be past expenditure) .

148. A further difficulty with Atalaya's approach is, as observed above, that the operation of the Excess Cash Clause (and in particular the calculation of the quantum of the excess cash) becomes arbitrary and uncertain. This is illustrated by [53] of Mr. Hollander QC's judgment, where he states:

> *"Atalaya submit that the appropriate "headroom" to be taken into account is the specified USD10 million plus three months operating expenses and "sustaining capital expenditure".... <u>It is a matter of debate whether three months is an appropriate period.</u> It seems to me that the subclause probably had in mind deducting foreseeable expenses which should properly be taken into account in determining whether the cash was "excess" but I do not need to form a final view as to the precise meaning. I accept for the purposes of this summary judgment application the principle that in determining "excess cash" it is permissible to deduct expenses within the categories bracketed in the clause which can be foreseen to occur over the forthcoming period, <u>and a three month period may well be broadly appropriate</u>".* (emphasis added)

149. But the selection of a 3 month period is arbitrary and would give rise to significant scope for dispute between the parties. The parties may very well differ over what

[97] once the mine has re-started commercial production

expenses can be foreseen or anticipated to occur; and they may very well differ over the length of the "forthcoming period". How would a court resolve such a dispute over the appropriate headroom in circumstances where there are no objective criteria laid down in the Master Agreement which the Court can reliably apply in this respect? This renders the application of the Excess Cash Clause uncertain; whereas its application on Astor's construction of the clause is clear and certain.

Deferred mining costs

150. In the light of my findings above, the remaining subsidiary issues between the parties do not require consideration, save that I should mention for completeness one further matter, which is as follows. The parties differ in respect of one discrete point concerning the treatment of deferred mining costs (i.e. costs incurred in "stripping" to remove waste rock and expose the orebody in the mine) and whether they are in principle a permissible deduction under clause 6(g)(iv)(B). It became apparent during the course of the evidence of the parties' respective expert witnesses[98] that it was common ground, and I so find that, in-production stripping costs are a type of sustaining capital expenditure and can in principle, therefore, be deducted from any excess cash, whereas stripping costs associated with the expansion of the mine above 5Mtpa are not sustaining capital expenditure and cannot be so deducted[99].

Quantum of interest payable

151. I leave it to the parties to draw up an Order reflecting my findings in this judgment; in particular as to when, on the figures, excess cash (up to the total sum of €53m) was available and should have been paid to Astor, and accordingly the date or dates from which Atalaya was obliged to pay contractual interest on this sum under clause 14.7 of the Master Agreement. Monthly compound interest is payable at the contractual rate laid down in clause 14.7 from the date on which the Consideration became payable in accordance with the Court's judgment herein until 16 March 2021 (being the date of payment of the €53m) and from 16 March 2021 to 28 February 2022 as regards the unpaid interest, which continues to accrue on a daily basis thereafter until payment. It is to be hoped that this will not give rise to any further dispute between the parties but should that not be so, the Court will have to resolve it.

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[98] Joint Statement, ¶ 6.2(1); Day 2, p. 42-44 (Mr. Webb) and Day 3, p. 40/11 (Mr. Dearman).

[99] In his Schedules 2 and 3 to his expert report (which produce calculations of excess cash) Mr. Dearman does not distinguish between in-production and expansion (i.e. beyond 5Mtpa) deferred mining costs in the way that Mr. Webb does (see ¶6.2 (1) of the Joint Statement). It follows that Mr. Dearman's calculations in this respect do not assist.