Case No: CL-2022-000379

Neutral Citation No: [2022] EWHC 3304 (Comm)

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

SITTING IN PRIVATE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/11/2022

Before :

THE HON MR JUSTICE BUTCHER

Between :

YDU	**Claimant**
- and -	
(1) SAB	
(2) BYH	**Defendants**

Simon Colton KC and Sabrina Nanchahal (instructed by **Fieldfisher LLP**) for the **Claimant**
Thomas Plewman KC (instructed by **Seladore Legal Limited**) for the **First Defendant**

Hearing date: 4 November 2022
Further submissions: 17 November 2022

Approved Judgment

This judgment was handed down on Tuesday 29th November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives
(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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Mr Justice Butcher :

1. This is a claim by the Claimant for a declaration that particular sub-paragraphs of a Partial Final Award of a tribunal consisting of the Chairperson, Tribunal Member A and Tribunal Member B ('the tribunal') dated 26 April 2022 ('the First Award') do not constitute an award, alternatively for remission of a sub-paragraph of the First Award to the tribunal for reconsideration under s. 68(2)(f) of the Arbitration Act 1996 ('the 1996 Act'). The Defendants resist this claim.

Background

2. As explained in paragraph 1 of the First Award:

> 'This arbitration principally concerns the entitlement of the [the First Defendant], to purchase preference shares (the "Preference Shares") from [the Claimant], which it holds in the Second Respondent, a joint venture company incorporated in the British Virgin Islands. [The First Defendant] and [the Claimant] respectively hold 65.09% and 34.91% of the shares in [the Second Defendant], and their relationship is regulated by a Shareholders' Agreement concluded on 21 December 2012 (the "SHA"). In addition, [the Claimant] claims certain relief from both [the First Respondent] and [the Second Defendant] in respect of their alleged breaches of the SHA.'

3. Clause 9.03 of the SHA provides that in certain circumstances, one party has to make a 'first offer' to sell its shares or preference shares in the Second Defendant to the other (i.e. the counterparty has a 'right of first offer'). By a letter dated 15 July 2020, the Claimant made such an offer to the First Defendant to sell its Second Defendant shares for USD 35 million (the 'ROFO Offer'). The core dispute between the parties was as to whether the ROFO Offer was validly accepted by the Claimant, and as to whether (if a contract was formed on the basis of the ROFO Offer (the 'ROFO SPA')) the conditions of the ROFO SPA were then satisfied by the First Defendant.

4. The issues before the tribunal were summarised in paragraph 27 of the First Award:

> 'The core issues that arise in this arbitration, and which are accordingly addressed in this Partial Final Award, can be summarized as follows: (1) Did [the First Defendant] validly accept the ROFO Offer and, if not, is [the Claimant] now precluded by estoppel from treating the purported acceptance as invalid? (2) If there was a valid acceptance (or if [the Claimant] is now estopped from contending otherwise), did [the First Defendant] comply with the requirements of clause 2.2 of the ROFO SPA? (3) Was FAS [the Russian Federal Anti-Monopoly Service] approval required in order for the ROFO Transaction to close, and in any event, what is the effect of the FAS Suspension Letter? (4) If [the Claimant] is in breach of the SHA for not closing the ROFO Transaction, should the Tribunal grant specific performance requiring [the Claimant] to transfer the Preference Shares to [the First Defendant]? (5) If the Tribunal declines to grant specific performance, is [the First Defendant] entitled to claim damages in lieu of specific performance, and if so, has it suffered any loss and in what amount? (6) Is [the Claimant] entitled to any relief in respect of any of its counterclaims/cross-claims?'

5. As regards the core issues set out in this summary, in the First Award the tribunal decided that the First Defendant had validly accepted the ROFO Offer by a letter dated 14

August 2020; that the First Defendant did comply with the requirements of clause 2.2 of the ROFO SPA; that FAS approval was not required in order for the ROFO Transaction to close; that the Claimant was in breach of the SHA for not closing the ROFO Transaction; and that specific performance requiring the Claimant to transfer the Second Defendant shares to the First Defendant was not barred as a breach of Russian law, by reason of the maxim of unclean hands, or by reason of the First Defendant itself being in material breach of the SHA.

6. As regards the alleged lack of mutuality in the order sought by the First Defendant, the tribunal noted the submissions it had received as regards the relief sought by the First Defendant. At paragraph 125 of the First Award, it was stated:

'The Tribunal has given very careful consideration to the parties' respective submissions in relation to this issue. Whilst it agrees with [the First Defendant] that the relevant question is whether the terms of section 9.03 of the SHA and the ROFO SPA are capable of mutual performance, equally were it to be the case that any order for specific performance would require impracticable supervision that would clearly be a factor that would be relevant to the exercise of the Tribunal's discretion to grant specific performance. Ultimately however, the Tribunal has concluded that the requirements of clause 2.2 of the ROFO SPA are objective ones, and that if any dispute subsequently arose as to the meaning or effect of those requirements and hence the preconditions to specific performance, that is an issue which the Tribunal could resolve in short order. It accordingly does not consider that an order for specific performance will require impracticable supervision, albeit that the Tribunal also considers that in all the circumstances it would be appropriate for the Tribunal to reserve jurisdiction to itself in order that it is in a position readily to address any issues that were to arise in this respect. It is for that reason that this Award is a Partial Final Award only.'

7. The First Award then considered the submissions on individual conditions proposed by the parties, before stating at paragraph 126(8):

'Whilst the Tribunal is concerned that events outside of [the First Defendant's] control should not automatically lead to a situation where its order for specific performance is frustrated, it equally does not consider that it would be appropriate for it at this stage to grant an open ended ability to [the First Defendant] to require specific performance in the event that it is not able to comply with the pre-conditions to completion specified by the Tribunal in the period specified in this Award. Should that eventuality arise, the Tribunal considers it would be more appropriate for the issues to be referred back to the Tribunal for further consideration with the benefit of submissions from both parties in light of the facts as they in fact occur.'

8. The tribunal noted at paragraph 149 of the First Award:

'It was in fact common ground that if a constructive trust arose, it was in existence as at 9 October 2020. It was also common ground that if the Tribunal concluded that specific performance should be ordered, the consequence is that [the Claimant] became in equity a trustee for [the First Defendant] of all of [the Claimant's] shares in [the Second Defendant], including the Preference Shares, and the beneficial ownership passed to [the First Defendant].'

9. The tribunal's final conclusions and award were as follows:

‘155. For the reasons set out above, the Tribunal concludes that [the Claimant] was in breach of Section 9.03(b) of the SHA in failing to complete the ROFO Transaction in October 2020, and that [the First Defendant] is entitled to an order requiring [the Claimant] specifically to perform that transaction. The Tribunal further concludes that none of [the Claimant’s] counterclaims or cross-claims are made out.

156. In the circumstances, the Tribunal hereby DECLARES by this PARTIAL FINAL AWARD that:

(1) [The First Defendant’s] letter dated 14 August 2020 constituted a valid acceptance of the ROFO Offer in accordance with section 9.03(b) of the SHA.

(2) In breach of section 9.03(b) of the SHA, [the Claimant] failed to give effect to the closing of the sale of the Offered Shares at the price and under the terms and conditions of the accepted ROFO Offer by 13 October 2020.

(3) In the premises, [the Claimant] holds its shares in [the Second Defendant] on trust for [the First Defendant] and is obliged to exercise its rights as a shareholder in accordance with [the First Defendant’s] instructions and to account to [the First Defendant] for any dividends received from [the Second Defendant] since 13 October 2020.

157. In the circumstances, the Tribunal also hereby ORDERS by this PARTIAL FINAL AWARD that:

(1) [The Claimant] shall not transfer any of its shares in [the Second Defendant] to any party other than [the First Defendant] or its designee following the date of this Partial Final Award.

(2) [The Claimant] shall, on a date nominated by [the First Defendant] as the date for completion within 60 days of the date of this Partial Final Award (the "Completion Date"), execute and deliver to [the First Defendant] a share transfer form in accordance with Article 5 of [the Second Defendant’s] Articles of Association and/or Schedule 6 to the ROFO SPA transferring its shares in [the Second Defendant] to [the First Defendant] or its designee, on condition that:

(a) [The Claimant] be placed in funds by [the First Defendant] by the payment of USD 35,000,000 (thirty-five million) ("the Purchase Price") pursuant to the ROFO SPA.

(b) Payment of the Purchase Price is to be made from a Russian or international bank of good repute, which bank if Russian shall be regulated and licensed by the Central Bank of Russia ("the Bank"), and is not to be sourced from any third party that is the subject of sanctions under the Applicable Sanctions Law, pursuant to clause 2.2 of the ROFO SPA; and

(c) If [the First Defendant] funds the Purchase Price from monies paid to it by a third party within the meaning of clause 2.2© of the ROFO SPA:

i. such funds will be subject to the anti-money laundering, know your client and other compliance checks of the Bank; and

ii. in addition, [the First Defendant] shall provide [the Claimant] with documentary evidence of: (i) the source of funds of any lender (being each lender in the event of multiple lenders); (ii) [the First Defendant's]' right to the funds; and (iii) the flow of funds from the lender to [the First Defendant], in order to enable [the Claimant] to conduct its own checks.

(3) [The Claimant] shall do all that is necessary to be done on its part to affect the closing of the sale of its shares in [the Second Defendant] to [the First Defendant] on the Completion Date.

(4) [The Second Defendant] shall register the shares in [the Second Defendant] currently registered in the name of [the Claimant] in the name of [the First Defendant] or its nominee on the Completion Date.

(5) [The Claimant's] counterclaims against [the First Defendant] and its cross-claims against [the Second Defendant] are dismissed.

(6) The Tribunal reserves jurisdiction in respect of all other issues in this arbitration, including costs.'

10. The First Award was made on 26 April 2022. The Claimant considered that elements of the First Award were unclear and ambiguous. Accordingly, on 24 May 2022 Fieldfisher LLP ('Fieldfisher'), on behalf of the Claimant, wrote to the tribunal requesting clarification of certain ambiguities and/or mistakes contained in the First Award, pursuant to Article 27.1 of the LCIA Rules 2020 (the 'LCIA Rules'). Fieldfisher asked ten questions. The tribunal invited the First Defendant to make observations on this request, and on 7 June 2022, Seladore Legal replied on behalf of the First Defendant, arguing that none of the issues raised justified the issuance of an addendum under Article 27.1 of the LCIA Rules, and making comments on the individual questions asked. In particular the following was said:

'1. **Has the Tribunal finally determined all the issues identified in paragraph 27 of the Award?** It is plain from the Award (including in particular paragraphs 130, 156 and 157) that: (a) the Tribunal has finally determined that (i) [the Claimant's] failure to close the ROFO Transaction constituted a breach of the SHA, (ii) that [the First Defendant] is entitled to specific performance requiring [the Claimant] to transfer the Preference Shares to [the First Defendant], and (iii) that [the Claimant] is not entitled to any relief in respect of any of its counterclaims/cross-claims; and (b) the Tribunal has not yet finally determined [the First Defendant's] alternative claim for damages and has not yet expressed a view as to what its position might be on that issue if specific performance cannot be achieved and there were to be an application by [the First Defendant] for damages in lieu of specific performance. Accordingly, it is obvious that, of the issues identified in paragraph 27 of the Award, issues 1 to 4 and 6 have been finally determined and issue 5 has not been finally determined.

2. Is the Tribunal saying at paragraph 125 that there is some existing, unresolved dispute over which it has jurisdiction which it has not yet decided, or is it purporting to retain jurisdiction over some future dispute which has not yet arisen? The Award makes clear that the Tribunal has retained jurisdiction to determine: (a) any issue which may arise in relation to the meaning and effect of its order for specific performance (paragraph 125); (b) whether to vary the pre-conditions to

completion it has ordered in paragraph 157 (including when Completion must take place) "in the event that [the First Defendant] is not able to comply with the pre-conditions to completion specified by the Tribunal in the period specified in this Award" (paragraph 126(8)). …

3. At paragraph 130, there is reference to "any application by [the First Defendant**] for damages in lieu thereof". Is the Tribunal reserving its jurisdiction on such an application? If so, would that mean that the Tribunal is also reserving its jurisdiction to revisit aspects of paragraph 157 (e.g., paragraph 157(1))?** Paragraph 157(6) reads: "The Tribunal reserves jurisdiction in respect of all other issues in this arbitration, including costs".... Accordingly, it is plain that the Tribunal has finally determined each of the matters addressed in paragraphs 157(1) to (5), save in so far as [the Claimant] would plainly be free to sell its shares in accordance with the terms of the SHA if a further Award was made which replaced the order for specific performance with an order for damages.

…

5. **Is the Tribunal reserving to itself the power to decide the meaning and effect of paragraph 157 (reflecting paragraph 125: "if any dispute subsequently arose as to the meaning or effect of those requirements and hence the preconditions to specific performance, that is an issue which the Tribunal could resolve in short order")?** The Award is clear that the Tribunal has reserved jurisdiction to determine any dispute as to the meaning and effect of its order for specific performance. This would include any dispute as to the meaning and effect of paragraphs 157(1) to (4). Paragraph 157(5) is not amenable to any such dispute.'

11. On 21 June 2022, the tribunal decided the application made under Article 27.1 of the LCIA Rules. Save in one respect, the tribunal declined to provide an addendum, concluding that there was no ambiguity in the First Award, and so the requests for clarification were not justified. The one respect, which the tribunal did consider justified a clarification, was in relation to whether the tribunal had dealt with an issue on the Claimant's cross-claim, and the tribunal published an addendum in that regard.

12. Separately from the Claimant's application under Article 27.1 of the LCIA Rules, by email of 20 June 2022 the First Defendant indicated to the tribunal that the First Defendant would not be able to comply with the conditions for specific performance set out in paragraph 157(2) of the First Award within the period of completion there specified. On 24 June 2022, the First Defendant made an application for an extension of time ('the Extension Application') to enable the First Defendant to complete those conditions. The First Defendant justified its Extension Application by reference to both paragraph 126(8) of the First Award, and Article 22.1 (ii) of the LCIA Rules:

'6. Moreover, as the Tribunal indicated in paragraph 126(8) of the Award, it remains open to the Tribunal to permit further time for the ROFO transaction to be specifically performed.

7. This is consistent with LCIA Rule 22.1(ii) which provides that the Tribunal may "extend (even where the period of time has expired) any period of time prescribed under... any order made by the Arbitral Tribunal" and with the well established principle that a Tribunal has discretion to grant additional time for specific performance.'

13. As summarised in the concluding paragraphs of the Extension Application, the First Defendant requested that:

> 'Request for relief.
>
> 45. It will be apparent from what we say above that it would be appropriate to extend time in this case, as absent an extension, the Tribunal's order would be frustrated by events outside of [the First Defendant's] control arising both since the breach and since the hearing in February 2022.
>
> 46. We therefore respectfully request that the Tribunal exercises its discretion to vary paragraph 157(2) of its Award so that [the First Defendant] may nominate a date for completion which falls within 90 days of the date of this application.'

14. The Claimant filed its response and counter-application on 4 July 2022. The Claimant's primary case was summarised in section E1 of that response:

> 'E1. No extension of time and consequential declarations
>
> 75. For the reasons set out above, [the Claimant] respectfully asks the Tribunal to refuse [the First Defendant's] Application and decline to extend the time in which [the First Defendant] must comply with the preconditions in paragraph 157(2) of the Award.
>
> 76. [The Claimant], by way of its Counter-Application, further seeks the following declarations, consequential upon the Tribunal's refusal to grant an extension to [the First Defendant]: (a) [the First Defendant] has failed to comply with the pre-conditions under paragraph 157(2) of the Award; (b) [the First Defendant] is no longer entitled to specific performance of the ROFO SPA; (c) The ROFO SPA is terminated; (d) [the Claimant] is no longer subject to the restriction under paragraph 157(1) of the Award.'

15. On 8 July 2022, the First Defendant filed reply submissions. The tribunal then proceeded to determine the Extension Application, which it did in the First Defendant's favour, on 27 July 2022. It issued a 'Second Partial Final Award' ('the Second Award') in which it varied the First Award at paragraph 157(2) to provide that the Completion Date was postponed until 22 September 2022. The remainder of the terms at paragraph 157 remained the same.

16. In considering whether it had jurisdiction to permit further time for the ROFO Transaction to be specifically performed, the tribunal noted that '[i]t was common ground between the parties, that the Tribunal has jurisdiction to vary paragraph 157(2) of the First Partial Final Award to permit further time for the ROFO transaction to be specifically performed' and that the Claimant had 'acknowledged that the Tribunal had reserved to itself the power to vary its order for specific performance under paragraph 126(8) of the First Partial Final Award, and that that power was to be exercised in accordance with equitable principles'.

17. Before the issue of the Second Award, namely on 19 July 2022, the Claimant had issued the present arbitration claim in court.

18. On 20 September 2022, the First Defendant filed with the tribunal a second application for extension of time ('the Second Extension Application') until 30 days after the present claim is determined or, in the alternative, for a further 30 days. The Claimant lodged response submissions on 23 September 2022 requesting that the tribunal 'refuse the Second Extension Application and to decline to extend time for Completion under the Award as requested by [the First Defendant] or at all'.

19. On 30 September 2022 the tribunal granted the First Defendant's Second Extension Application in a 'Third Partial Final Award' ('the Third Award'). The tribunal varied paragraph 157(2) of the Second Award so that the last possible Date for Completion became 'on or before 30 days from the final determination of the claim issued by [the Claimant] in the High Court pursuant to section 68 of the Arbitration Act 1996'.

The Claimant's Application for a Declaration: The Parties' Positions

20. In these circumstances, the matter came before the court. The Claimant's application was for a determination that paragraphs 157(1)-(4) of the First Award are not an award within the meaning of the 1996 Act, and are not final and binding within the meaning of s. 58 of that Act. The Claimant's position was that those paragraphs amount to no more than an order of the tribunal. The Claimant accepted that the First Award was in other respects an award, and in particular that there was an award in paragraph 156, and an award that, in principle, the First Defendant was entitled to specific performance; but that sub-paragraphs 157(1)-(4) were not an award, and in particular that sub-paragraph 157(1) was not. The Claimant's case, in a nutshell, was that an award has to be final, and paragraphs 157(1)-(4) were not final, because the tribunal intended to be able to vary them, and indeed had varied them in certain respects. An arbitral tribunal does not have the same powers as a court. If it makes an award, it cannot revisit it; If it can revisit a determination, it is not an award.

21. This was said to be significant for enforcement purposes. Firstly, on a domestic plane, there is a different mechanism for enforcement of orders (which is by way of enforcement by the court under s. 42 of the 1996 Act but only if the order is a peremptory one), and of awards (which can be enforced under s. 66 of the 1996 Act). Secondly, on the international plane, the New York Convention applies only to awards.

22. The Claimant further contended that there was no need to recognise that the tribunal can amend an order for specific performance which has been made as an award. This was because, the Claimant argued, the court would have the power to vary the conditions ordered by a tribunal by way of an award. Reference was made to what was said in Sodzawiczny v McNally [2021] EWHC 3384 (Comm) at [37] per Foxton J.

23. The First Defendant's position is that the relevant sub-paragraphs are (part of) an award. This is a case in which the tribunal has ordered specific performance. Once a specific performance order has been made, its supervision passes to the court or relevant tribunal. The First Defendant relied, inter alia, on the statement in Jones v Mahmut [2017] EWCA Civ 2362, [2018] 1 WLR 6051 by Lewison LJ (at [18]) that:

> '... where the court has made an order for specific performance which does not result in an actual transfer of the property the party in whose favour the order was made may go back to the court for an order discharging the order for specific performance and an award of damages instead. He may do so without the need to begin a fresh action. The

mere fact that the court has made an order for specific performance does not deprive the court of its future ability to enforce the contract; and in that sense the dispute between the parties has not been finally determined'.

24. The First Defendant contended that the position was the same with an arbitral tribunal. The fact that the tribunal retained that supervisory power, and could indeed discharge the order for specific performance and award damages instead, did not mean that its decisions as to whether and how there should be specific performance were not an award. The relevant paragraphs were substantive and not procedural in nature and that was the critical indication that they were awards.

25. The First Defendant accordingly submitted that the relevant paragraphs were a final award. Alternatively, if those paragraphs were not to be regarded as a final award, they must be either a provisional award or peremptory order, or (in the case of paragraph 157(1)) an interim measure under the Arbitration Agreement.

26. In relation to these alternative cases, the First Defendant relied on s. 39 of the 1996 Act, which provides:

'Power to make provisional awards.

(1) The parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award.

(2) This includes, for instance, making—

(a) a provisional order for the payment of money or the disposition of property as between the parties, or

(b) an order to make an interim payment on account of the costs of the arbitration.

(3) Any order shall be subject to the tribunal's final adjudication; and the tribunal's final award, on the merits or as to costs, shall take account of any such order.

(4) Unless the parties agree to confer such power on the tribunal, the tribunal has no such power. This does not affect its powers under section 47 (awards on different issues, &c.).'

27. The First Defendant also referred to Rule 25.1 of the LCIA Rules, which provides, in part, as follows:

'The Arbitral Tribunal shall have the power ...

...

(ii) to order the preservation, storage, sale or other disposal of any documents, goods, samples, property, site or thing under the control of any party and relating to the subject-matter of the arbitration; and

(iii)to order on a provisional basis, subject to a final decision in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including the payment of money or the disposition of property as between any parties. ...'

28. The First Defendant further referred to the terms of the Arbitration Agreement in the SHA which provided, in part:

> '(e) ... In addition to the authority conferred on the arbitration tribunal by the [LCIA] Rules, the arbitration tribunal shall have the authority to make such orders for interim relief, including injunctive relief, in respect of any Party, as it may deem appropriate. The Parties agree that any ruling by the arbitration tribunal on interim measures shall be deemed to be a final award with respect to the subject matter thereof and shall be fully enforceable as such.'

Analysis

29. The 1996 Act does not define an award. S. 52 lays down certain rules as to what the form of an award should be, unless the parties have agreed otherwise. S. 58 provides that, unless otherwise agreed between the parties, 'an award made by the tribunal ... is final and binding on the parties and on any persons claiming through or under them.'

30. Both parties referred me to the summary of considerations relevant to determining whether a decision of an arbitral tribunal did or did not constitute an award given by Cockerill J in ZCCM Investments Holdings plc v Kansanshi Holdings plc [2019] EWHC 1285 (Comm), [2020] 1 All ER (Comm) 132 at [40], as follows (citations omitted):

> '(a) The court will certainly give real weight to the question of substance and not merely to form.
>
> (b) Thus, one factor in favour of the conclusion that a decision is an award is if the decision is final in the sense that it disposes of the matters submitted to arbitration so as to render the tribunal *functus officio*, either entirely or in relation to that issue or claim.
>
> (c) The nature of the issues with which the decision deals is significant. The substantive rights and liabilities of parties are likely to be dealt with in the form of an award whereas a decision relating purely to procedural issues is more likely not to be an award.
>
> (d) There is a role however for form. The arbitral tribunal's own description of the decision is relevant, although it will not be conclusive in determining its status.
>
> (e) It may also be relevant to consider how a reasonable recipient of the tribunal's decision would have viewed it.
>
> (f) A reasonable recipient is likely to consider the objective attributes of the decision relevant. These include the description of the decision by the tribunal, the formality of the language used, the level of detail in which the tribunal has expressed its reasoning
>
> (g) While the authorities do not expressly say so I also form the view that:
>
> (i) A reasonable recipient would also consider such matters as whether the decision complies with the formal requirements for an award under any applicable rules.
>
> (ii) The focus must be on a reasonable recipient with all the information that would have been available to the parties and to the tribunal when the decision was made. It

follows that the background or context in the proceedings in which the decision was made is also likely to be relevant. This may include whether the arbitral tribunal intended to make an award.'

31. In the present case, many of those indicia provide no assistance in determining the narrow question before me. This is because there is here no issue that the First Award was in many respects, and in large part, an award. Its form was that of an award, it complied with the formal requirements of an award, it was expressed in formal language, it dealt (at least in part) with substantive issues, and a reasonable recipient would undoubtedly consider that it was (at least in part) an award.

32. The debate centered on whether the challenged paragraphs can be an award notwithstanding that they can be revisited, in the sense that the arbitrators can change what is there ordered, and substitute something in different terms. There is no doubt that the tribunal considered that it could do that, and has done it, and it is not contended by the Claimant that it could not do so.

33. The usual position is that if an award has been made, then the arbitrator is functus in relation to the matters decided. That is supported by the cases to which Mr Colton KC referred, namely Cargill v Kadinopoulos [1992] 1 Lloyd's Rep 1 esp at 5, and Ronly Holdings Ltd v JSC Zestafoni G Nikoladze Ferroalloy Plant [2004] EWHC 1354 (Comm).

34. However, it appears to me to be too dogmatic and absolutist a position to say that something which is 'an award' can never be revisited. There seem to me to be three analyses which indicate that the relevant paragraphs of the First Award do constitute 'an award'.

35. The first is that, under s. 48(5) of the 1996 Act, unless the parties agree otherwise, an arbitral tribunal has the same power to order specific performance of a contract (other than a contract relating to land) as the court. I regard it as consonant with that, and with the general principles in s. 1 of the 1996 Act, that the court should give effect to procedures and decisions adopted by a tribunal which seek to make effective and to provide supervision over an order for specific performance which it has made. The course adopted by the tribunal in the present case was to make an award of specific performance and set out certain terms on which that should take place, but to reserve jurisdiction to revisit whether and how specific performance was to be effected by subsequent awards. It seems to me that the court should be very slow to conclude that that course was not one which was open to the tribunal, nor that what the tribunal considered it was doing was not in fact what it was doing.

36. On this analysis, the decision of the tribunal, including in the contested paragraphs, was final, in the sense that the tribunal could not have revisited them without some change of circumstances; but had expressly reserved to itself the possibility of making further awards, in the case of changed circumstances.

37. An alternative analysis is that the most contested paragraph, namely paragraph 157(1), amounted to an interim measure, as being an order preserving rights or property pending a specified event or further order. That appears to me to be an accurate characterisation of the purpose and effect of paragraph 157(1). Furthermore, under

paragraph (e) of the Arbitration Agreement, quoted above, an interim measure is 'deemed to be a final award with respect to the subject matter thereof".

38. A further analysis is that the relevant paragraphs constituted a provisional award.

39. The making of a provisional award was within the tribunal's powers, given the terms of LCIA Rule 25.1. Such an award would remain subject to the tribunal's final adjudication, pursuant to s. 39(3) of the 1996 Act.

40. As the Claimant submitted, there has been little authoritative consideration of provisional awards under s. 39. It is clear from its heading that s. 39 envisages that orders made on a provisional basis may be 'provisional awards'. In my judgment if there is a provisional award under this section, then it is an award for the purposes of the 1996 Act, and, for example, ss. 67-69 will apply to such an award. I do not see why the relevant paragraphs cannot be regarded as provisional awards within the meaning of s. 39. They decided on what the position should be, but that was subject to modification, and to the tribunal's final adjudication.

41. On any of the above three analyses, the relevant paragraphs of the First Award were 'an award' for the purposes of the 1996 Act. That provides the answer to the first part the Claimant's application, which is a determination that they are not an award for the purposes of that Act. The second part is that they are not 'final and binding' for the purposes of s. 58. In my judgment, under each analysis, the contested paragraphs were 'final and binding' awards, for what they decided, and could not have been revisited without a change in circumstances.

Konkola Copper Mines

42. Although it has not been necessary to rely on it for the above analysis, I should mention the decision of Cooke J in Konkola Copper Mines v U&M Mining Zambia Ltd [2014] EWHC 2374 (Comm), [2014] 2 Lloyd's Rep 649. In that case there was an award in terms that 'unless [A] shows cause, supported by evidence, within 14 days of the Award, why such an order should not be made', various matters (including payment of invoices, release of an Advance Payment Guarantee and payment of demobilisation and termination fees) were to be done by A. It was argued that that could not be an award, because it was conditional; and could only be a provisional order which could be the subject of reconsideration at a later stage.

43. At [97] –[100] Cooke J said this:

> ' 97. I do not see why, as matter of principle, whatever the statements in Russell are intended to mean, an award cannot be final and conclusive in its terms where it clearly provides for specific relief, including payments of money, which only bites at a point in the future, in the absence of submission and evidence from an absent party to the contrary. The tribunal has made decisions which are final and complete and are not subject to further decisions on its part or of any other person or body unless a specified contingency occurs. Such an award is complete and final on its own terms, albeit conditional. Whilst this might present difficulties for enforcement purposes, that is nothing to the point and does not prevent it from being an award which binds the parties. So, here, those parts of the Second Award which contained the "show

cause" provisions were final, complete and conclusive, as between the parties, albeit conditional.

98. I can see nothing wrong with this form of order, whether it is contained in a document headed "Award" or not. The orders made were plainly substantive and not procedural and have been the subject of applications under section 67 and section 68 by KCM as part of an Award.

99. Mr Dunning QC relied on authorities relating to enforcement of awards in submitting that this was either not an award or was an impermissible form of award. I am however not concerned here with enforcement, only with section 67 and section 68 of the Act.

100. It is true that section 66 of the Act refers to enforcement of an award in the same manner as a judgment or order of the court to the same effect and that, where leave is given to do so, "judgment may be entered in terms of the award". Decisions of Mr Justice Aikens (as he then was), Mr Justice Moore-Bick (as he then was) and Mr Justice Beatson (as he then was) support the proposition that a judgment so entered must truly be "in terms of the award", in other words, in identical terms and I do not think that this is in doubt. In *Tongyuan (USA) International Trading Group v Uni-Clan Ltd* [2001] WL 98036 (unreported), Moore-Bick J referred to an earlier decision of the Court of Appeal as authority for the proposition that an award which is effectively couched in purely declaratory terms cannot be enforced as a judgment and also as authority for the wider proposition that, in order to be enforceable as a judgment under section 66 of the Act, the award must be framed in terms which should make sense if those terms were translated straight into the body of the judgment. Whether this means that there is any difficulty in enforcing the award in its current form is not a matter which I have to decide. What I have to decide is whether or not, as matter of English law, the award as it stands is binding on the parties or should be set aside or remitted on the basis of section 67 or section 68 of the Act. If it be the case that a further Award is needed, consequent upon the Second Award, which states that no representations were made or cause shown within the 14-day time limit, no doubt an application could be made to the tribunal for it.'

44. It seems clear that Cooke J considered that there was an award as at the date it was made, not simply after the period of time specified for submissions had elapsed. The analysis in Konkola is not without some difficulties, as identified in *Merkin on Arbitration Law* (looseleaf) para. 18.38. However, as Mr Plewman KC submitted, if there was a final award in the Konkola case, *a fortiori* the relevant paragraphs of the First Award in this case are a final and binding award. There, the award was in terms whereby the order could be changed in light of submissions which might subsequently be put in relation to the parties' positions and rights at the time of the putative award. Here, the tribunal has reserved to itself only the right to make further decisions in the light of developments relevant to the specific performance of the SPA 'as they in fact occur'.

Conclusion on the Claimant's primary application

45. For these reasons I conclude that the relevant paragraphs constituted an award within the meaning of the 1996 Act, and counted as final and binding for the purposes of s. 58 though they were susceptible to alteration by the tribunal in particular circumstances.

The Claimant's Alternative Application

46. If the court held, as I have, that the relevant paragraphs were an award, the Claimant applied, in the alternative, under s. 68 of the 1996 Act on the basis that they were uncertain or ambiguous in effect within the meaning of s. 68(2)(f).

47. The Claimant contends that there is an ambiguity, in that paragraph 157(1) might mean either (i) that if the specific performance conditions specified are not complied with, then the injunction in paragraph 157(1) immediately falls away; or (ii) that it would fall away if the tribunal made a further order which replaced the order for specific performance.

48. I do not consider that there was any ambiguity or uncertainty. I consider that the effect of paragraph 157(1) was to enjoin the Claimant from transferring to a third party the Second Defendant shares, which the tribunal found it held on trust for the First Defendant, unless there was a subsequent award to different effect.

49. In any event, I do not consider that any uncertainty or ambiguity has caused or will cause substantial injustice to the Claimant, because should the First Defendant fail to complete within the (extended) time allowed any uncertainty could be addressed by a further award.

50. Accordingly, the Claimant's alternative s. 68 application fails.

Overall Conclusion

51. Both the Claimant's applications will be dismissed.