Neutral Citation Number: [2020] EWHC 3342 (Comm)

Case No: CL-2020-000148

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
QUEEN'S BENCH DIVISION
In the Matter of the Arbitration Act 1996
and in the Matter of an Arbitration Claim

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/12/2020

Before :

SIR ROSS CRANSTON
sitting as a High Court Judge

- -

Between :

(1)	**DOGLEMOR TRADE LIMITED**	**Claimant**
(2)	**ALEXANDER BOGATIKOV**	
(3)	**DL MANAGEMENT LIMITED**	

- and –

(1) CALEDOR CONSULTING LIMITED	**Defendant**
(2) MIKHAIL KHABAROV	

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GRAHAM DUNNING QC and PAUL STANLEY QC (instructed by **instructed by Herbert Smith Freehills LLP**) for the **Claimants**

CHRISTOPHER HARRIS QC and DOMINIC KENNELLY (instructed by **Three Crowns LLP**) for the **Defendants**

Hearing dates: 16-17 November 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR ROSS CRANSTON sitting as a High Court Judge

SIR ROSS CRANSTON:

Introduction

1. "[M]istakes will occur even in the practices of the best of arbitrators", said Sir John Donaldson MR in *The Montan* [1985] 1 WLR 625, 632, commenting on what he described as the serious error which the arbitrator had accidentally made in that case. That is what has happened here: a tribunal of leading arbitrators made the sort of simple mistake any of us can make - which because of the circumstances described below they did not realise - but with the most unfortunate consequences, including the application to this court.

2. In summary, in the course of assessing damages where a contract conferring an option to acquire shares in a substantial business had been repudiated, the Tribunal made a computational error in estimating their value, adding rather than subtracting an adjustment in relation to the business's historic tax liabilities. That was contrary to the common ground between the parties and contrary to what the Tribunal had intended to do. The result was that damages were assessed at $US 58 million whereas, if the amount had been subtracted, on the Tribunal's other findings the figure would have been $US 4 million. The Tribunal has sincerely apologised for the error but has refused to amend the Award, on the grounds that to do so in this way would depart from what it regards as a reasonable and fair assessment of the loss.

3. The claimants in this application under section 68 of the Arbitration Act 1996 (the "1996 Act") contend that the Tribunal's mistake is a serious irregularity in the Award, causing substantial injustice, and that it should be remitted to the Tribunal for correction with the $US 4 million figure substituted. On the other

hand the defendants contend that the challenge to the Award under section 68 fails since the Tribunal's mistake was an error of fact and that, in any event, the mistake has not caused the claimants substantial injustice because it did not materially affect the outcome of the arbitration. If the matter is remitted, they contend, the Tribunal should be able to recalculate all, or a number of the important components comprising the calculation of loss.

Background

4. The background to the Tribunal's determination, as set out in much greater detail in the Award, is that the second claimant, Mr Alexander Bogatikov, is a Russian citizen who co-founded a Russian haulage and logistics business in 2001, the Business Lines Group. At all material times, he owned 100 percent of the shares in Doglemor Trade Limited, the first claimant ("Doglemor"), which in turn owned 100 percent of the shares in DL Management Ltd, the third claimant ("DLM"). DLM is the holding company for the Business Lines Group. In the judgment the claimants are referred to collectively as the Doglemor Parties.

5. The Business Lines Group serves the Russian domestic market. The Award records that it employed around 20,000 people, operated around 4000 vehicles and had some 670,000 square meters of storage space. Mr Bogatikov described it as one of the largest domestic businesses operating in the LTF (less than full truckload) sector.

6. Mr Mikhail Khabarov, the second defendant, is also a Russian citizen and businessman. He is the beneficial owner as to 74.9 percent of the first defendant, Caledor Consulting Ltd ("Caledor"). It also was incorporated in

Cyprus. In the judgement the defendants are referred to collectively as the Caledor Parties.

7. In 2014, Mr Khabarov joined the Business Lines Group to perform senior managerial functions. Part of the arrangement was that he would have an option to acquire an ownership stake in the business. The option was granted by a Call Option Deed dated 27 February 2015. The option was exercisable in respect of 30 percent of the shares of DLM, at a price of US$ 60 million. It was exercisable in a two year period commencing at the end of February 2018. The Call Option Deed was governed by English law and contained a London Court of International Arbitration ("LCIA") arbitration clause with a London seat.

8. Mr Bogatikov and Mr Khabarov had a falling out during 2017. Mr Bogatikov had begun to negotiate with other individuals, whom he ultimately invited to join the business. In August 2017 Mr Khabarov was excluded from the Business Lines Group.

9. Consequently, Mr Khabarov alleged that the Call Option Deed had been repudiated and that he had, on 14 February 2018, accepted that repudiation. On 19 February 2018 the Caledor Parties began an arbitration. They sought a declaration that the Call Option Deed had been validly terminated along with damages for its breach. In their defence in the arbitration in December 2018, the Doglemor Parties admitted repudiation and termination of the Call Option Deed.

10. Accordingly, the only substantive issue for the arbitration was the quantification of the Caledor Parties' loss as a result of the Doglemor Parties' breach of the Call Option Deed.

11. In accordance with the LCIA Rules a panel of three arbitrators was appointed ("the Tribunal"). Its final award ("the Award") is dated 21 January 2020 and runs to 644 paragraphs (over 275 pages).

The Award

Introduction

12. In the first section of the Award headed "Introduction", the Tribunal stated that the dispute concerned the proper valuation of the option shares, the subject of the Call Option Deed, and that since the date when the option first became exercisable was 1 March 2018, both sides had adopted that as the valuation date for the shares: para. [4].

13. The Tribunal recorded that the Caledor Parties' case was that the Business Lines Group was worth approximately $US 599 million as at March 2018, corresponding to a valuation of $US 180 million for the option shares. In stark contrast, as the Tribunal put it, the Doglemor Parties' case was that the Business Lines Group was effectively worthless in light of its potential tax liabilities. The gulf between the cases was extreme, the Tribunal said, in part because of significant differences in the valuation of the Business Lines Group, and partly because of significant differences in the respective counterfactual assumptions proposed by the parties for calculating damages: paras. [10]-[12].

Course of hearing and Agreed Model

14. Early in the Award, in the section headed "Course of hearing and Agreed Model", the Tribunal explained how, at the conclusion of the hearing, it directed the parties to produce an agreed valuation model ("the Agreed

Model"), which would enable it "to determine the numerical effect of resolving the many disputed points of quantum and assess the value of the Option Shares in light of such determinations": para. [28]. The Tribunal canvassed the delay to producing the Agreed Model, including an email it had sent the parties where it had said that it considered that it was not the object of the model to present it with a series of binary outcomes, but

> "in as simple a vehicle as possible, to set out the substance of the parties' respective positions and to enable us (if we are so minded) to select and apply alternative figures insofar as we consider that to be appropriate": para. [28(d)].

15. The Tribunal then observed that the Agreed Model "has proved to be an indispensable tool" for enabling it to place a value on the business and in turn the option shares. The Tribunal continued:

> "That said, it remains a tool to assist us in the assessment of damages and is not something which can mechanistically dictate either the process or the result of the relevant assessment": para. [28(n)].

16. The Tribunal added that when the model was provided in December 2019 it was at last able to proceed to place a value on the option shares. It stated that the arithmetical outputs derived from the Agreed Model were consistent with those from a version provided the previous November, confirming (it said) that it had applied the Agreed Model correctly: para. [28(o)].

Evidence and correct approach to the assessment of damages

17. In the section of the Award entitled “Evidence”, the Tribunal observed that Mr Bogatikov had not provided the full picture in his evidence; that it was a matter of legitimate comment that there was no evidence from the chief finance officer of the Business Lines Group; and that the Doglemor Parties had failed to provide financial evidence about the value of the business after March 2018 from “a desire to avoid undermining [their case] on what it sought to depict as the depressed valued of [Business Lines Group]”: paras. [36], [39] and [46].

18. After sections on the factual background and the Call Option Deed, the Award contained a section entitled “The correct approach to the assessment of damages”. That section concluded, in short, that damages should be calculated by taking the value of the option shares and deducting the option price; that the relevant enquiry involved placing a value on the 30 percent shareholding which the Caledor Parties should have acquired in March 2018; and that the purchase price under the option was to be deducted from the valuation: paras. [197], [201], [202].

Valuation of the option shares

19. There then followed a section in the Award headed “The valuation of the option shares”. Both sides had engaged experts, the Doglemor Parties, Mr Benjamin Sacks, and the Caledor Parties, Mr Philip Haberman. The “introduction” to this section explained that the experts agreed that the option shares should be valued as 30 percent of what they called the “equity value” of the underlying business; that both used the discounted cash flow method as their primary method of valuation and agreed it was the principled and appropriate method to adopt; but that while their methodologies were

"essentially the same" the valuations were strikingly different - Mr Sacks asserting that the "enterprise value" of the business was $US 98 million and that the option shares were worthless, Mr Haberman, that the "enterprise value" of the business was $US 638 million and that the option shares were worth $US 174 million: paras. [215]-[217], [219]. These differences, the Tribunal stated, followed from different assumptions made by the experts, as well as a number of different opinions.

20. The Tribunal listed what it said were the relevant issues or sub-issues which it had to determine, which would dictate their ultimate assessment of the value of the business. These included the EBITDA margin – a profit/revenue ratio - noting the percentage margins of the two experts - Mr Sacks using a 7.1 percent margin, Mr Haberman, 13.5 percent; the appropriate WACC – the weighted average cost of capital - noting again the different percentage figures of the two experts - Mr Sacks using a 10.9 percent figure, Mr Haberman, 15.5 percent; and the business's historic tax liabilities, where there was a "big difference between the parties…": para. [220].

21. The Tribunal then explained that there were a host of minor issues that it had to determine. It added that the Agreed Model enabled it to quantify the effect of its determination on the various points of principle or fact which divided the parties but left these matters for it to determine. Therefore, said the Tribunal, it had, in several instances, been forced to do the best it could: para. [221].

22. The Tribunal noted that there were various cross-checks, such as market comparables and contemporaneous valuations, but these had not greatly assisted: paras. [222]-[223].

EBITDA margin

23. After considering how six additional companies were to be treated in the valuation, the Award continued with a lengthy analysis of the EBITDA margin (paras. [266]-[349]).

24. In a section on 'Basic Methodology' under this heading, the Tribunal explained that it would adjust the actual EBITDA margin in light of the most recent year's figures for the business: para. [274]. It noted that the Agreed Model left no room for it to input figures for the EBITDA margin other than those derived from its determination of the specific line items set out in the model, although in principle it was open for it to depart from this: para. [275]. The Tribunal continued at paragraph 276 that both parties accepted that even at the micro level it was not a precise exercise of mathematics but a question of assessing the evidence and arriving at a reasonable figure for the EBITDA margin. It added:

> "And looking at matters more broadly, we still consider that in principle (and notwithstanding the line by line methodology of the Agreed Model) it is less important for us to have absolute confidence in each part of the calculation (so much of which involves an element of speculation on inadequate evidence) than it is for us to be satisfied that the overall results of the exercise produce figures which we consider are a reasonable assessment of the [Caledor Parties'] loss. Whilst we do not (and, in light of the parties' agreed position, cannot) shirk the evidential challenges posed by the myriad of micro issues raised on this and other detailed sub-issues, there is an element of missing 'the wood for the trees' in the

detailed exercise which follows. Hence, we shall address the detail of the normalisation issues canvassed in evidence, but we shall then stand back and try and 'sense check' the calculated EBITDA margin more broadly in the light of all the evidence, at least insofar as we are able to in the absence of any relevant inputs into the Agreed Model for such general matters": para. [276].

25. Under a heading 'The normalisation of the FY2017 EBITDA margin', the Tribunal then considered in detail various adjustments to be made to the actual EBITDA margin: paras. [277]-[343]. In its conclusion on normalisation, the Tribunal expressed its concern about applying "too mechanistic or arithmetical an approach": para. [345]. After referring to other comparables, it stated that there were difficulties of using these along with the figures produced by the Agreed Model, and continued:

> "[348]…On the face of it, the Agreed Model has produced lower figures for the adjusted EBITDA margin than those other sources. To that limited extent, the exercise certainly does not appear to overcompensate the [Caledor Parties] at this stage of the evaluation. But we are not in any position to conclude, at least with any degree of confidence, that the exercise undercompensates [them] either at all or to such an extent that it should call into question the results produced by the Agreed Model; although the results appear lower than the Damodaran or other market comparables or management's target EBITDA, we cannot say that they are so much lower as to call into doubt the validity of the exercise".

26. The Tribunal then noted that disclosure of the FY 2018 accounts may have resulted in higher figures for the Caledor Parties, recalled the adverse inference it had drawn about non-disclosure, and continued:

> "Nonetheless, on the evidence before us, we are quite unable to substitute our own (higher) EBITDA margin for that produced by the Agreed Model, nor do we believe that such a process is ultimately justified, even if (as we infer) further and updated financial results might have shown the group in a better economic position. In the final analysis, we do not believe that the ultimate valuation placed on the Option Shares which is derived from the Agreed Model would (even if recoverable in full) under-compensate the [Caledor Parties]. Furthermore, given our conclusion that the limitation of liability clause applies, our application of the Agreed Model demonstrates that any further increase in EBITDA margin would not ultimately produce any significantly higher recovery in damages": para. [349].

The WACC

27. The WACC - a short point as the Tribunal characterised it - was discussed at paragraphs [350]-[365] of the Award. The Tribunal spelt out the differences between the experts, which had yielded the different percentage figures - 15.8 percent from Mr Haberman, 19.9 percent from Mr Sacks. It then observed that the view of this particular valuation was necessarily subjective, and that it was not an exercise in precision. Doing the best it could, as it put it, it then identified a 17.5 percent figure which in its view was likely to be of the right order: paras. [357], [364].

Historic tax liabilities

28. The Tribunal analysed the business's historic tax liabilities in detail at paragraphs [366]-[578] of the Award. There were wide differences between the parties and the Tribunal's task, as it described it, was to determine the single figure which in its view represented the most likely outcome of an objective assessment of the back tax risk as at 1 March 2018. It described this as a two-stage process, calculating the actual amount of back tax liabilities, and then making an adjustment for the probability of assessment: para. [375]. Having regard to various factors, the Tribunal derived a figure at paragraph [574]. It then said that it sought to "stand back and reassess whether or not our valuation of the overall likely tax liability is realistic, when viewed against the broader realities of the case": para. [576]. After further discussion it concluded that it was satisfied, when viewed against the realities and evidential issues, that the figure was credible: [578].

Application of the Detailed Input Figures into the Valuation

29. Under this heading the Tribunal recalled that the Agreed Model

> "set out various stages of the detailed calculation and allowed us to input our conclusions on the detailed matters set out above, so as to allow us to derive an enterprise value for the group": para. [605].

30. It was impossible to replicate the Agreed Model and its inputs in the Award, the Tribunal said, but it proceeded to set out "our calculation, taking into account the individual conclusions which we have reached as set out above": para. [606].

31. The Tribunal then set out what it called the "building blocks" of the Agreed Model, which were the various line items it contained. Line items 1-20 of the model went to the enterprise value for the Business Lines group. At line item 20, it said, the result was an enterprise value of US$ 305 million: para. [607(t)].

32. The Tribunal then stated its figure for historic tax liabilities of $US 90 million (line item 23) – a "deduction" as it noted and for – other adjustments which netted out to $US 3 million (paras. [607(w)-(y)]. Line items 21-26 were debt items by which the enterprise value was to be adjusted to produce the equity value. In practice that meant a deduction of these values. By mistake the Tribunal did not enter line item 23 as deductions but added it to the previous figures.

33. Taking these further matters into account, the Tribunal found a cumulative effect at line item 27 of a value - the equity value of the group - at US$392 million. That meant a value of the option shares (30 percent of that equity value) of US$118 million. That, the Tribunal added, was precisely where it would have got to on the earlier 11 November 2019 iteration of the model: para. [607(cc)].

Cross-checks

34. The Tribunal said that it would deal with this briefly since it did not, on analysis, derive much assistance from them. It examined various specific matters which were said to support or corroborate the parties' cases, concluding that there was nothing to lead it to question its valuation of the business: paras. [608]-[617].

Conclusion on value of the group and value of option shares

35. In the one paragraph under this heading, the Tribunal stated that for the above reasons it concluded that the equity value was $US 392 million, and the option shares were worth $US 118 million. Giving credit for the option exercise price of $US 60 million, which the Caledor parties would have had to provide to obtain the option shares, the loss was $US 58 million: para [618].

Limitation of liability

36. The Tribunal determined that a limitation of liability clause in the Call Option Deed applied so that damages were limited to $US 60 million.

The LCIA correction application: The "Response"

The application to correct

37. Under Rule 27(1) of the LCIA Rules, a party may request an Arbitral Tribunal to correct in the award "any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature". If it considers the request to be justified, the rule continues, the Arbitral Tribunal "shall make the correction by recording it in an addendum to the award within 28 days of receipt of the request. If, after consulting the parties, the Arbitral Tribunal does not consider the request to be justified it may nevertheless issue an addendum to the award dealing with the request…"

38. On 23 January 2020, the Doglemor parties requested that the Tribunal correct the mistake resulting from its failure to make a deduction through overlooking the instruction in the Agreed Model to enter the tax liabilities figure as a one to

be subtracted rather than added, and making consequential corrections to the resulting valuation and damages figures. This would have resulted in a business valuation of $US 212 million, rather than $US 392 million; a valuation of the option shares of $US 64 million, rather than $US 118 million; and an award of damages of $US 4 million, rather than $US 58 million.

39. On 14 February 2020 the Tribunal issued what it called a Response to the application.

The Response

40. In its Response, the Tribunal conceded that "focussing purely on the Agreed Model, it is clear to the Tribunal that it made an 'error of computation', or a 'clerical or typographical error' or a 'mistake of a similar nature' when it inputted its figure for Tax Risk ($US 90m) into line item 23 of the Agreed Model as a positive rather than a negative figure." It acknowledged that the Agreed Model (but not the earlier iteration) contained an express instruction "to enter a negative value" which the tribunal unfortunately overlooked: para. [17]. If it were simply to correct the input for tax, from a purely mathematical point of view the adjusted value of the Option shares would be $US 64 million: para. [18].

41. However, the Tribunal said, it was of the clear view that notwithstanding the error, the Award should not be corrected. In terms of Rule 27.1 the correction was not justified. The application was not to correct the single figure at line item 23 of the Agreed Model, but the figure awarded by way of damages. The Tribunal explained its approach:

> "[E]ven allowing for the fact that we did not intend to make the mistake in line item 23, it does not follow that (barring such a mistake) we intended to value the group and the Option Shares and award damages in the recalculated and very much reduced sums proposed by the [Doglemor Parties]. On the contrary, we consider that if we made the corrections sought…this would not result in giving effect to our true intentions, as expressed in the Award, of awarding substantial damages to the [Caledor Parties]. The corrected award…would be a radically different award, not one which we intended to make and not one which it could be said we would have intended to make, even if we had spotted and corrected the error at line item 23 at the time": para. [20].

42. After quoting from paragraphs [28(n)] and [276] of the Award as the first point of explanation for its position, the Tribunal said as the second point that the assessment of loss as set out in the Award

> "was not in fact performed by a mechanistic, step by step application of the Agreed Model. On the contrary, the assessment was an iterative process in which the tribunal went back and forth and in which the output of the Agreed Model was itself a driver which was itself taken into consideration at earlier stages of the tribunal's determination on individual issues. That is not to say that the whole process was 'results-driven' or 'reverse engineered'; rather, that the tribunal subjected much of its micro-analysis on individual issues to an overall sense check of how our initial conclusions on those individual issues fitted into the overall calculation and where, as a result, that overall calculation came out…": para. [24].

43. The third point in explanation was, as the Tribunal put it in paragraph [31] of the Response, that its award of damages provided reasonable compensation which neither over-compensated nor under-compensated the Caledor Parties. After referring to the gulf between the parties' valuations the Tribunal said that it was obvious to it, and was apparent from the analysis in the Award, that there was an overstatement on the Caledor side and an understatement on the Doglemor side, coupled with the Doglemor Parties "withhold[ing] documents which would have shown that to be the case". With that background the actual sum awarded of US$58 million was, in its view, consistent with a reasonable assessment of the loss at a point somewhere between the two extremes of the parties' respective positions: para. [30].

44. Fourthly, the Tribunal said, it was apparent from this that it did not intend to fix the damages mechanistically but in a more holistic and more subjective, evaluative exercise: para. [31].

45. The fifth point of explanation was that for the purposes of the application it could not be assumed that all other inputs into the Agreed Model, other than the erroneous entry for tax at line item 23, should be treated as "cast in stone" and would have remained unaltered had it not made the error at line item 23. On the contrary, as it had explained, and as the Award made clear, the iterative process meant that any significant adjustment to one line item and any consequent alteration to the output of the Agreed Model as a result would have entailed ongoing evaluation of other inputs, particularly those which involved a high degree of subjective assessment such as the EBITDA margin: para [32].

46. Thus, said the Tribunal, its mistake did not undermine its conclusion that damages of $US 58 million was a reasonable assessment of loss. Had it appreciated the result of the subtraction of the tax liabilities sum – a loss of $US 4 million, not $US 58million – it would carefully have reviewed its EBITDA analysis "so as to give effect to our stated view that the mechanistic line by line approach to the Agreed Model should not have the effect of producing an ultimate valuation which in our view would under-compensate…": paras. [33], [37], [39]. It was not appropriate to speculate what the process would produce: [41]. Nor was it appropriate to speculate in relation to the WACC and other matters of speculative assessment: paras. [42]-[43].

47. In conclusion the Tribunal stated that to correct the mistake would undermine rather than give effect to it true intentions, as reflected in the Award, without further correction or without an additional award. What it would need to do, both in principle and in fairness, would be to reopen matters relating to the EBITDA margin since they would have been dealt with on mistaken premises.

Status and character of Response

48. For the Doglemor Parties, Mr Dunning QC submitted that as a matter of principle, although he could rely on the Response to establish an admitted irregularity under section 68(2)(i) of the 1996 Act, it had no legal status, was not binding, was not part of the Award and did not contain further reasons for the Award. Moreover, the Caledor Parties were precluded from relying on the Response to contradict the Award.

49. In that regard Mr Dunning contended that the word "iterative" used in the Response did not appear in the Award. There was no indication in the Award

that the Tribunal was sense checking or cross checking any specific input against the result generated by the Agreed Model. Mr Dunning accepted that the Tribunal was not bound to accept one side or the other's views on particular issues – indeed, it ultimately adopted its own approach and figures with particular line items – but the Award showed that it understood its task as following the methodology reflected in the Agreed Model. The sequence expressed there was linear, with the Tribunal determining issues which would dictate its assessment of the value of the business.

50. Mr Harris QC's case for the Caledor Parties on the status of the Response was that it contained a detailed explanation of certain aspects of the Tribunal's reasoning process, and of the impact on that process of the computational mistake in relation to the tax liabilities. That explanation came (as he put it) "straight from the horse's mouth" and bore directly on matters such as substantial injustice and the scope of any remission. He highlighted the contradiction, as he saw it, in the Doglemor Parties' position, that they relied on the Response to establish an admitted error but were attempting to suppress reliance on it when adverse to their own interests.

51. As to the character of the Response, there was no inconsistency, Mr Harris contended, between it and the Award. In particular he highlighted paragraphs [28(n)] and [276] of the Award, quoted earlier in the judgment, as demonstrating that the Tribunal had not adopted a mechanistic approach in applying the Agreed Model, rather an iterative approach, where it stood back and "sense checked" the assessment of damages with the overall position.

52. As to the status of the Response, Mr Dunning is in my view correct: it is not part of the Award, does not contain further reasons for the Award and is not binding. It has no status under the 1996 Act or Article 27.1 of the LCIA Rules. Notwithstanding that, I accept Mr Dunning's submission that he can rely on it to establish there is an "admitted" irregularity (in the words of section 68(2)(i) of the 1996 Act) in the Award. As he put it, it is unlikely that an award will itself contain an admission of an irregularity; the tribunal's admission will typically be extrinsic to the award, so it is necessary to venture outside the award to find an admitted irregularity.

53. None of this means that the Response is without legal effect as to other matters. In my view it constitutes admissible evidence from the Tribunal not only about the mistake but also its consequences for the Award. That was what Robert Goff LJ said in *The Montan* [1985] 1 WLR 625. There the arbitrator had written to the parties accepting his mistake, which had resulted in the award being made in favour of the wrong party. The arbitrator was not asked to give reasons for his award but, in accordance with the practice of London maritime arbitrators at the time, he had provided separate reasons which enabled the charterers to discover that he had mistakenly attributed the evidence of the owners' expert witness to them and vice versa. Robert Goff LJ said the best course for the arbitrator to take in such cases, which meant he did not have to refer to the document called his reasons, was simply "to explain the nature of his mistake, and its effect upon his award; and his own evidence (which would normally be on affidavit) would supply the best evidence of his mistake and its consequences": at p. 638.

54. In my view the Response can therefore be used in this case to identify the Tribunal's admitted mistake in adding rather than subtracting the figure for historic tax liabilities, and also its conclusion that the consequences of simply correcting the mistake would undermine rather than give effect to its true intentions, which was that the sum awarded of $58m was consistent with a reasonable assessment of the loss at a point somewhere between the two extremes of the parties' respective positions on valuation. But the Response cannot function to rewrite the Award. In as much it seeks to contradict, reinterpret or supplement the reasoning of the Award, it is inadmissible. That seems confirmed by section 70(4) of the 1996 Act, empowering the court to order a tribunal to provide further reasons for an award. If one could look outside the four corners of an award for a tribunal's reasons, the statutory power would seem unnecessary.

Application of section 68

55. An award may be challenged under section 68 of the 1996 Act if there has been a serious irregularity in the tribunal, the proceedings, or the award of a character falling within one of the categories specified in section 68(2), and the serious irregularity is one that the court considers has caused or will cause substantial injustice to the applicant. Merkin and Flannery comment that demonstrating an irregularity may not be too difficult, but proving that it is serious enough to warrant being regarded as out of the ordinary, such that it may be said to have caused or be likely to cause substantial injustice, is very much harder: R Merkin and L Flannery, *Merkin and Flannery on the Arbitration Act 1996*, 6th ed, London, Informa, 2019, para. 68.3.

56. Mr Dunning advanced the Doglemor Parties' application to challenge the Award's mistake as a serious irregularity primarily under section 68 (2)(i), "any irregularity in the conduct of the proceedings" – what I will call the first limb – "or in the award" – the second limb – "which is admitted by the tribunal …". He also adduced section 68 (2)(c), "failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties", and 68 (2)(a), "failure by the tribunal to comply with section 33". In his submission the irregularity caused substantial injustice, since on the basis of the detailed reasons for each of the inputs the Tribunal had adopted, and its conclusions on the face of Award, damages should have been $US 54 million lower than the amount awarded.

57. Citing Lord Steyn's speech in *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2006] 1 AC 221, at [27], Mr Harris responded that the Tribunal's mistake was an error of fact, which was not the failure of natural justice or due process capable of amounting to a serious irregularity under the categories of serious irregularity set out in section 68(2). Rather, the mistake was an error of fact, which was outside the court's ambit of review. In any event, he submitted, the mistake had not caused the Doglemor Parties substantial injustice because, as the Tribunal explained in the Response, it did not materially affect the outcome of the arbitration in terms of what damages were justified as a result of the repudiation of the Call Option Deed.

Section 68 (2)(i) – admitted irregularity

58. As Butcher J put it in *Xstrata Coal Queensland Pty Ltd v Benxi Iron and Steel (Group) International Economic & Trading Co Ltd* [2020] EWHC 324 (Comm), [2020] 1 Lloyd's Rep. 436, serious failure by a tribunal to comply with due process is the paradigm case in which there can be a successful application under section 68. Albeit in a different context from this case, he continued that the section "is not…confined exclusively to cases in which the tribunal has gone wrong in its conduct of the arbitration, if that is understood to mean that the tribunal has done something which it should not have done in the circumstances which were presented to it": at [46]. In my view section 68(2)(i) is one of these exceptional cases. As a matter of statutory interpretation, the plain words of the subsection apply to an irregularity in an award which is admitted by the tribunal and there is nothing to indicate that the type of irregularity in the sub-section is confined to a due process breach.

59. There is little authority on section 68(2)(i) and none on the meaning of the second limb, irregularity in the award. In *obiter* remarks in *Gannet Shipping Ltd v Eastrade Commodities Inc* [2002] 1 Lloyd's Rep 713, at [29], Langley J said that it could apply to an inadvertent failure to adjust an award of costs, and in *New Age Alzarooni 2 Limited v Range Energy Natural Resources Inc* [2014] EWHC 4358 (Comm), at [62], Cooke J held that it could apply to an admitted failure to take account of evidence.

60. In my view section 68(2)(i) covers the type of admitted mistake in this case. This was not an error of fact (or for that matter of law). It fell into a different category, an error of implementation, not doing what the Tribunal stated on the face of the Award it intended to do, with the mistake of adding rather than

subtracting the adjustment in relation in particular to historic tax liabilities. That led to differences in computation in the Award from what otherwise would have been the case. As Hamblen J observed *obiter* in *Cadogan Maritime Inc v Turner Shipping Inc* [2013] EWHC 138 (Comm), [2013] 1 Lloyd's Rep. 630, there has long been a jurisdiction to remit an award in the case of an admitted mistake, and section 68(2)(i) of the 1996 Act reflects that: at [55]. The important, and limiting qualification in the subsection, which means that cases will be rare, is that the Tribunal must admit the mistake; it is not for the court to identify it. There is no undermining of the arbitral process, as Mr Harris submitted; rather the opposite, since the tribunal acts as the gatekeeper. In this case the Tribunal has admitted its mistake in its Response to the Article 27.1 application to have the Award corrected under the LCIA Rules. There is a serious irregularity.

61. Given my view that the admitted mistake in this case falls under section 68 (2)(i), there is no need for me to address Mr Dunning's case on sections 68 (2)(c) and 68 (2)(a).

Substantial injustice

62. A serious irregularity under section 68(2) must be one which the court considers has caused or will cause substantial injustice to the applicant. In *Sonatrach v Statoil* [2014] EWHC 875 (Comm), [2014] 2 Lloyd's Rep. 252 Flaux J recalled what the Departmental Advisory Committee [DAC] Report, and numerous cases after have reiterated, that the section is designed as a long-stop, available only in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected: [11].

63. However, in determining whether there has been substantial injustice the court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. In *Terna Bahrain Holding Co WLL v Al Shamsi* [2012] EWHC 3283 (Comm), [2013] 1 Lloyd's Rep. 86, Popplewell J put the point thus: "The applicant does not need to show that the result would necessarily or even probably have been different. What the applicant is required to show is that had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome": para. [85(vii)].

64. Mr Harris submitted that the Doglemor Parties' challenge does not surmount the notoriously high substantial injustice hurdle of section 68(2). It is not one of those extreme cases, identified in the DAC Report, where the Tribunal went so wrong in its conduct of the arbitration that justice called out for it to be corrected. In its Response the Tribunal made clear that, despite the computational mistake, the Award did not depart materially from its underlying intentions as to what damages the Caledor Parties should recover. The Tribunal has said in terms that it did not intend to award damages in the sum of $US 4 million and that it would not have done so, even if it had appreciated its error at the time. In these circumstances, Mr Harris concluded, it is difficult to see how the claimants can be said to have suffered substantial injustice by reason of the irregularity.

65. In my view the serious irregularity in this case was one which under section 68(2) has caused or will cause substantial injustice to the claimants. There is an award enforceable in other jurisdictions containing a computation mistake

which, on its face, leads to a significant difference in the damages payable. If the Tribunal had had an opportunity to address the computational mistake, it might well have produced a significantly different award and outcome. I accept Mr Dunning's submission that, even if the Tribunal had, without more, a sound reason not to make the mathematical correction, that reason would not negate the existence of substantial injustice on the face of the Award.

66. In this regard I note that, in addressing the consequences in its Response, the Tribunal does not state that, if the error had not been made, its $US 58 million assessment would have been the same. What the Tribunal asserts at paragraph 20 of the Response is that its true intention was of awarding substantial damages to the Caledor Parties, but it does not speculate as to what these would be. Notwithstanding the Tribunal's views expressed in the Response, when calculating correctly how historic tax liabilities were treated in the Award it might still have produced a significantly different overall result in monetary terms of the damages awarded.

Remission

67. Both parties accepted that if there was a serious irregularity, which caused substantial injustice, the relief granted under section 68(3) should be remission of the Award. The difference between them was which were the relevant parts of the Award to be remitted for reconsideration.

68. Mr Dunning contended that remission had to be confined to what was necessary to deal with the computational error in the Award, and that meant those parts in which the error was made and affected by it. On its face the Award showed a process of reasoning whereby each of the disputed inputs in

the Agreed Model was decided one by one by reference to the evidence and submissions on each separately. Despite what the Tribunal stated in the Response, it did not adopt an iterative approach, nor did it engage in some type of sense check or cross check against some notional figure of the Caledor Parties' loss as it proceeded.

69. In Mr Dunning's submission, the Tribunal stated its non-iterative, step by step approach at various points of the Award, as in paragraph [28], that the Agreed Model would enable it to determine the numerical effect of resolving disputed points of quantum and in the light of such determinations to assess the value of the option shares, and in paragraph [220], that the individual findings on each of these would "dictate" the ultimate assessment of their value. The Award was binding between the parties and any objective reader would understand that its very lengthy analysis contained its reasoning. Thus, Mr Dunning submitted, there was no justification for remitting anything other than the admitted error.

70. By contrast, Mr Harris contended that if the section 68 challenge succeeded, remission should not be granted on the restricted basis Mr Dunning advanced, which would force the Tribunal to make a new award in terms that (as stated in the Response) it never had any intention of making and would regard as unjust. Rather, the scope of the remission should be sufficiently wide to enable the Tribunal to make the adjustments it considers necessary to reflect the impact of the error. If the court were not to remit the Tribunal's quantum analysis for reconsideration as a whole, it should remit such paragraphs relating to the potential adjustment of the EBITDA margin produced by the Agreed Model, those in relation to the WACC, and those concerning historic tax liabilities.

71. That was justified, in Mr Harris's submission, by one of the key principles underlying the 1996 Act, that it is for the arbitrators to decide all issues of fact or law within their jurisdiction, and that the court should interfere with the process only where strictly necessary and permitted under the legislation. The error relating to the figure for historic tax liabilities affected the Tribunal's assessment of the inputs into the valuation, some or all of which may well have been different if the Tribunal had correctly subtracted and not added that figure. In Mr Harris's submission that was an obvious consequence of the Tribunal's iterative approach.

72. In delivering the advice of the Privy Council in *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6, Lord Sumption referred to the remarks of Rix J regarding remission in *Glencore International A.G. v. Beogradska Plovidba* (The "Avala") [1996] 2 Lloyd's Rep. 311, 316, and then observed:

> "[17]…An arbitration award is prima facie conclusive. The Court has only limited powers of intervention. It exercises them on well-established grounds such as (to take the case arising here) the arbitrators' failure to deal with some matter falling within the submission. The reopening by the arbitrators of findings which there were no grounds for remitting and which they had already conclusively decided would therefore have been contrary to the scheme of the Arbitration Act."

Although Lord Sumption's observations were concerned with what issues had been remitted, rather than what issues should be remitted, and made in the context of different legislation – the Arbitration Act of Jamaica – the general principle expressed in the passage is authoritative, that an arbitration award is prima facie conclusive. There is no need to canvass the learning behind it; it speaks for itself.

73. In my view the Tribunal has already conclusively decided issues relating to the inputs in the Agreed Model. Consequently, it is not open to the court to remit to the Tribunal those inputs to enable it to adjust them (by an iterative process or otherwise) to reach what it considers overall to be a reasonable and just assessment of the respondents' loss. It is clear from the Award that the Tribunal carefully considered the parties' arguments in relation to each input and then, as one would expect, decided its own figures based on an analysis of the evidence. So I reject Mr Harris's submission that I should allow the Tribunal to reconsider the Award's quantum analysis as a whole. Nor can I accept his submission that in any event the WACC and historic tax liabilities should be remitted. As summarised earlier in the judgment, there were fully reasoned, self-contained decisions in relation to both matters in the Award.

74. That leaves the EBITDA margin. As regards that, my interpretation of paragraph [276] of the Award, together with paragraphs [348]-[349], is as follows:

(i) the Tribunal had in mind, when addressing it, being satisfied that the overall results produced figures which it considered a reasonable assessment of the Caledor Parties' loss.

(ii) what was calculated by the line by line methodology of the Agreed Model was less important than this.

(iii) there was an element of speculation involved because of inadequate evidence; its work on the EBITDA margin was not a precise exercise of mathematics; and it needed (in its language) to avoid missing "the wood for the trees" in its detailed calculations.

(iv) having undertaken that detailed work on the EBITDA margin, it was not confident that the Agreed Model had not undercompensated the Caledor Parties, and it had the residual concern that if the FY2018 accounts had been disclosed, these may well have led to a more favourable figure.

(v) however, to substitute its own, higher EBITDA figure was not justified on the evidence before it and because (a) the Tribunal did not believe that the "ultimate valuation" of the option shares undercompensated the Caledor Parties; and (b) in any event the limitation of liability clause in the Call Option Deed applied, placing a ceiling of $US 60 million on loss, so that a further increase in the EBITDA margin would not produce any significantly higher recovery.

75. Mr Dunning submitted that these paragraphs should receive what I would characterise as a narrow interpretation. I understood him to have two primary arguments. First, when the Tribunal indicated that it was concerned to stand back, for example not to miss the wood for the trees and to sense check figures, that was expressed in the context of adjustments to the EBITDA margin, not the overall figures for valuation and loss. In my view that submission overlooks the important passage in paragraph [276] beginning "And looking at matters more broadly…". I cannot accept Mr Dunning's suggestion that this

was an isolated passage, inconsistent with other parts of the Award, and that another member of the Tribunal might have inserted it into the draft by the main author. All parts of an award must be given effect, whatever their origin (which will rarely, if ever, be known), however difficult they might be to reconcile.

76. Secondly, Mr Dunning highlighted that the Tribunal in paragraph [349] accepted that the option of increasing the EBITDA margin was not available to it on the evidence. In my view, that statement must be read along with the concerns the Tribunal expressed about the evidence bearing on the EBITDA margin. For example, the Tribunal referred to “inadequate evidence” and “evidential challenges” in the context of discussing the margin, and also highlighted, at various parts in the Award, the absence of the FY2018 figures and the adverse inferences it drew about the failure to disclose these.

77. In summary, my judgment is that the EBITDA figure the Tribunal used was potentially affected by the computational mistake. The Tribunal did not conclusively decide that the figure it used was the correct figure. Rather it considered that it did not need to take the analysis further by deciding on a higher EBITDA margin because the overall figure it had mistakenly calculated for damages through use of the Agreed Model seemed a reasonable assessment of the Caledor Parties’ loss - and in any event, as it stated, was near the $US 60 million limitation on liability in the Call Option Deed, which it determined was effective.

78. In this context it will be recalled that near the outset of the Award the Tribunal had indicated a spectrum, with the parties’ quite different figures for the

valuation of the Business Lines Group (and hence of the share options) at either end, and the implication that the figure it thought appropriate would fall somewhere between the two. As the Tribunal indicated in its Response, if it had realised the consequence of its computational error it would have revisited the figure it used for the EBITDA margin. In my view the Award must be remitted to the Tribunal for it (i) to correct the computational error; (ii) to reach a concluded view in light of the evidence (such as it is) as regards the EBITDA margin; and (iii) to calculate a figure for the Caledor Parties' loss when that EBITDA margin is coupled with its other (unchanged) findings in the Award.

Conclusion

79. For the reasons given in the judgment, the following parts of the Award will be remitted to the Tribunal for reconsideration – paragraphs [344]-[349]; paragraphs [607(b)]-[607(h)], [607(k)]; paragraphs [607(p)], [607(r)] and [607(t)] for the purpose of any consequential amendment; and paragraphs [607(aa)], [607(cc)], [618] and [644(b)] – and for a corrected Final Award to be produced.