Neutral Citation Number: [2024] EWHC 635 (Comm)

Case No: CL-2020-000253

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

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

Date: 25/03/2024

Before :

DAME CLARE MOULDER DBE
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

Mordchai Ganz	**Claimant**
- and -	
(1) Petronz FZE	
(2) Abraham Goren	**Defendants**

- -
- -

Alexander Goold (instructed by **DMH Stallard LLP**) for the **Claimant**
Elliot Lister (of **Asserson Law Offices**) for the **Second Defendant**

Hearing dates: 27-28 February 2024

- -

Approved Judgment

This judgment was handed down on 25 March 2023 during a consequentials hearing conducted via MS Teams, by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Dame Clare Moulder DBE :

Introduction

1. This is an arbitration claim brought by the Claimant, Mr Mordchai Ganz ("Mr Ganz") against the First Defendant, Petronz FZE ("Petronz") and the Second Defendant, Mr Abraham Goren ("Mr Goren"). Mr Ganz brings this arbitration claim against Petronz and Mr Goren under both Section 67 (challenge to substantive jurisdiction) and Section 68 (serious irregularity causing substantial injustice) of the Arbitration Act 1996 ("the Act").

Background

2. Mr Ganz is a citizen of and ordinarily resident in Israel.

3. Petronz is a Dubai Airport Free Zone Enterprise in the United Arab Emirates.

4. Mr Goren is also a citizen of and ordinarily resident in Israel.

5. Mr Goren and Mr Ganz owned shares in Gi3 Holdings Limited ("Gi3"), a company registered in the Republic of Cyprus. (There was an issue as to whether the shares of Mr Goren which were held by Mrs Goren were owned beneficially by Mrs Goren but nothing turns on this).

6. Gi3 in turn held (convertible preference) shares in a Chennai-registered company, Seder Housing Private Limited ("Seder"), which, through subsidiaries, owned land in India, and which it was believed would be capable of development for housing (the "Project"). Parrot Grove Private Ltd ("Parrot Grove") held the ordinary shares.

7. The dispute centres on a share purchase agreement in writing dated "*as of*" 20 May 2015 ("the SPA") pursuant to which it is alleged that Mr Ganz and Mr Goren agreed to sell their shares in Gi3 to Petronz for the US$ equivalent of 420 million Indian Rupees, completion to take place on 30 July 2015 (or earlier by agreement). The SPA also provided for an advance of the US$ equivalent of 130 million Indian Rupees to be paid by 30 June 2015.

8. The substantive law of the SPA is English law.

9. The SPA also makes express provision for the final and binding resolution of future disputes in respect of it by arbitration pursuant to the rules of the London Court of International Arbitration ("LCIA") ("the Arbitration Agreement").

10. Petronz did not pay the purchase price for the shares pursuant to the SPA and by a request for arbitration made initially on 21 December 2017, Mr Ganz referred the dispute with Petronz to arbitration pursuant to the Arbitration Agreement.

11. On 6 February 2018, the LCIA Court appointed Ms Marie Berard as sole arbitrator in the arbitration ("the Tribunal").

12. On 21 June 2018, in her Procedural Order No.2, the Tribunal, amongst other things,

joined Mr Goren to the arbitration.

13. In a letter to the LCIA of 24 January 2018 and its letter to the Tribunal of 15 February 2018, Petronz challenged the Tribunal's substantive jurisdiction. It did so on the basis that it had not signed an agreement with Mr Ganz or anyone else concerning the shares of a Cypriot company, the signature was not its and the SPA was a forgery. Save for also challenging Mr Goren's joinder, thereafter Petronz took no part in the arbitration.

14. Following a procedural hearing by telephone on 4 September 2018, attended by representatives on behalf of Mr Ganz and Mr Goren, the Tribunal gave directions for a preliminary issue on substantive jurisdiction described as follows:

> "*…the authenticity of the SPA, the validity of the agreement to arbitrate contained within it and the Tribunal's jurisdiction (the "Jurisdiction Issue")…*".

15. Following statements of case limited to the preliminary issue, requests for documents, witness statements and expert evidence (as to the authenticity of the attachment to an email), and following exchange of opening notes/skeleton arguments, there was an evidentiary hearing of the preliminary issue between 5 and 7 November 2019 at which Mr Ganz and Mr Goren were represented and both Mr Ganz and Mr Goren gave evidence and were cross examined. Mr Swirsky, a Chartered Accountant, who was retained initially to assist Mr Ganz's company Motiganz in the resolution of its indebtedness with Standard Chartered (referred to below) and subsequently to conduct a review of the Project, also gave evidence.

16. Thereafter the two parties submitted written closing submissions and submissions in reply.

17. On 31 March 2020, the Tribunal published her final award on substantive jurisdiction ("the Award").

18. In the Award, the Tribunal declared that:

> "*(1) the SPA is not an authentic and concluded agreement binding on all three Parties to it;*
> *(2) the agreement to arbitrate contained within the SPA is accordingly not valid;*
> *(3) therefore the Tribunal has no substantive jurisdiction over the Parties; and*
> *(4) the Tribunal retains jurisdiction over the Parties solely for the purpose of awarding costs incurred in connection with these arbitration proceedings*."

19. Mr Ganz requested an Additional Award as against Mr Goren alone on 28 April 2020, the same date that he issued these proceedings. Mr Ganz invited the Tribunal to uphold the Arbitration Agreement in the SPA as between Mr Ganz and Mr Goren only.

20. The Tribunal responded to the request for an Additional Award on 8 July 2020 in Procedural Order No.5. The Tribunal stated that that the Additional Award requested had already been expressly determined in the Award of 31 March 2020, referring to paragraphs 247 and 248 of the Award, in particular.

Chronology of arbitration

21. On 28 April 2020 the arbitration claim form was issued.
22. By an order of 23 June 2022 I refused on paper the Claimant's application for an extension of time to serve Petronz and extend the validity of the claim form.

23. By application notice dated 18 January 2024 Mr Goren applied for the arbitration claim to be dismissed without a hearing and for the hearing listed for 27-29 February 2024 to be vacated.

24. Foxton J responded through the Court Listing office in the following terms:

> "*The Judge has refused the current spate of correspondence in this long running matter, in which the hearing of 27-29 February was fixed as long ago as 21 April 2023. Given the imminence of the hearing, the time it would take to determine what on any view is a substantial paper application, and the fact that a party whose claim is struck out on paper has a right to a short oral hearing before the Judge in any event, I am not persuaded that it would be a proportionate use of the court's time to proceed with a request for summary dismissal on paper when this application was not made until 18 January 2024, just over one month and one week before the hearing. This is particularly the case when the AOS was filed on 28 August 2020, and the relevant section of the Commercial Court Guide published on 3 February 2022.*
> *However, it seems to me that it should be open to the Defendants to rely upon the matters raised in support of the strike out application including delay at the hearing, it being for the hearing Judge to determine if they wish to hear that as a preliminary point*..." [emphasis added]

Grounds of challenge and relief sought

25. Mr Ganz's primary challenge to the Award is made under Section 67(1)(a) of the Act, in that he challenges the Tribunal's conclusions as to her substantive jurisdiction and seeks from the Court, following a re-hearing of the question of substantive jurisdiction, variation of the Award or the setting aside of the Award in whole or in part, pursuant to Section 67(3)(b) and (c).

26. Mr Ganz also challenges the Award under Section 68(2)(a) of the Act i.e. that the Tribunal failed to comply with her general duty under Section 33 of the Act to act fairly and impartially as between the parties and/or adopt procedures suitable to the circumstances of the particular case so as to provide a fair means for the resolution of matters referred to her.

27. Originally Mr Ganz sought a finding that the SPA is a valid and binding agreement on all three parties to it; and/or the Arbitration Agreement is a valid and binding agreement on all three parties to it. Mr Ganz not having been successful in serving Petronz with these proceedings prior to the expiry of the validity of the claim form on 29 April 2021, nor in extending its validity thereafter, by consent order 12 February 2024, his claim is now limited to the relief he seeks in paragraphs 48 (ii) (c) and (e) of his claim form, namely: a) the Arbitration Agreement is a valid and binding agreement between Mr Ganz and Mr Goren; b) the Tribunal has substantive jurisdiction over Mr Ganz and Mr Goren.

Preliminary issue: Delay

28. I deal first with Mr Goren's application to dismiss the claim. The application was supported by the second witness statement dated 17 January 2024 of Mr Elliot Lister, a Partner of Asserson Law Offices acting for Mr Goren.

29. Mr Ganz responded to the application with a witness statement dated 24 January 2024 from Ms Beatrice Bass of DMH Stallard LLP acting for Mr Ganz, and Mr Lister made a third witness statement dated 30 January 2024 in response.

Submissions for Mr Goren

30. In his written submissions Mr Lister for Mr Goren acknowledged that the application to strike out was "*somewhat superseded by the hearing in respect of which this skeleton is prepared*". However, he submitted that he remained of the view that Mr Ganz's case does not have real prospects of success. Mr Goren relied on the two witness statements filed in support of his application to show the delays and referred in particular to my order refusing Mr Ganz's application for an extension of time to serve Petronz and extend the validity of the claim form. It was submitted that Mr Ganz then took a further three months to do anything about arranging a hearing in respect of Mr Goren.

31. In his oral submissions Mr Lister submitted that the Court, in accordance with the Commercial Court Guide, can dismiss the claim where the challenge leads the Court to consider that the claim has no real prospect of success and, even though this is supposed to be a rehearing, the Court can dismiss this claim as summary matter and look at this "*in the round*".

32. It was further submitted that the issue of delay was relevant in "*the wider context*" and should be relevant to the Court's unwillingness to intervene.

Submissions for Mr Ganz

33. In response Mr Goold for Mr Ganz submitted that:

    33.1. In *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 the Supreme Court rejected the proposition that the Court should accord respect for the arbitrator; there are no thresholds for the Court to intervene; the Court is exercising a supervisory role over arbitration.

    33.2. The paper procedure in the Commercial Court Guide at paragraph O8.6 is to triage cases at an early stage. Even though that paper process did not exist in the early stages of this claim, Mr Goren could have sought to avail himself afterwards and in the alternative, he was free to make an application under CPR 3.4.

    33.3. It was too late in the day for strike out when the parties were here for a final hearing.

Discussion

34. In my view the approach contended for by Mr Goren must be rejected.

35. The procedure under the Commercial Court Guide was not intended to operate once the stage of a hearing had been reached and the evidence put before the Court. Further it is a procedure which allows for dismissal of an arbitration challenge without a hearing but subject to the right to challenge such a dismissal and seek a hearing. The relevant provisions state:

> "*O8.6 The Court has power under rule 3.3(4) and/or rule 23.8(c) to dismiss any claim without a hearing. It is astute to do so in the case of challenges to awards under section 67 or 68 of the Act where the nature of the challenge or the evidence filed in support of it leads the Court to consider that the claim has no real prospect of success. If a respondent to such a challenge considers that the case is one in which the Court should dismiss the claim on that basis:*
> *(a) the respondent should file a respondent's notice to that effect, together with a skeleton argument (not exceeding 15 pages) and any evidence relied upon, within 21 days of service of the proceedings on it;*
> *(b) the applicant may file a skeleton and/or evidence in reply within 7 days of service of the respondent's notice.*
> *O.8.7 Where the Court makes an order dismissing a section 67 or section 68 claim without a hearing pursuant to O8.6, whether of its own motion or upon a respondent's notice inviting it to do so, the applicant will have the right to apply to the Court to set aside the order and to seek directions for the hearing of the application. If such application is made and dismissed after a hearing the Court may consider whether it is appropriate to award costs on an indemnity basis.*"

36. An application under Section 67 proceeds as a rehearing and having now had that rehearing with the evidence adduced and submissions made, it would be inappropriate to determine the issues on any form of summary basis.

37. As to delay there was delay in failing to progress the case but I do not accept that (absent any abuse of process which has not been advanced or shown) the issue of delay in the proceedings is relevant to the determination of this application under Section 67 and Section 68.

Evidence

38. As referred to above, the parties agreed that the hearing would be conducted on the basis of the documents already put before the Tribunal. In the case of the Section 67 challenge those documents were agreed to be the following:

a) the parties' list of issues;
b) the parties' statements of case;
c) disclosed documents;
d) witness statements of fact;
e) skeleton arguments;
f) closing submissions.
g) the transcripts of the evidence given at the evidentiary hearing between 5 and 7 November 2019 inclusive;
h) Mr Ganz's request for an additional award dated 28 April 2020 and the Tribunal's

refusal of that request in her procedural order no. 5 dated 8 July 2020;

39. In relation to the challenge pursuant to Section 68 of the Act, the parties agreed that it would be determined in addition together with:

a) Mr Ganz's note and proposed directions for the Procedural Hearing on 4 September 2018;
b) the Official Transcript of the said hearing;
c) the Tribunal's directions dated 13 September 2018;
d) Mr Ganz's note and proposed directions for the Procedural Hearing on 15 February 2019;
e) the Tribunal's directions dated 15 February 2019;
f) the parties 'Redfern Schedules' as to disclosure;
g) the Tribunal's Procedural Order No. 4 dated 25 March 2019; and
h) the Award.

40. Additionally, the parties agreed (in relation to both the re-hearing and the challenge) that the issues should be determined by reference to the parties' witness statements in these proceedings: the first witness statement of Mr Timothy Ashdown, partner in DMH Stallard LLP acting for Mr Ganz, dated 28 April 2020 and the first witness statement of Mr Lister dated 16 October 2020.

41. It was further agreed in relation to the re-hearing under Section 67 of the Act, the Court would not entertain any new grounds of objection, or any new evidence on the substantive issues, and the parties' witness evidence would not be re-heard. The evidence contained in the parties' witness statements of fact, together with the transcripts of the evidence given at the evidentiary hearing, would be the parties' evidence on those substantive issues and the hearing before the Court would take place by way of argument and submission based on the above.

42. Given the volume of evidence referred to above, the Court made it clear at the outset of the hearing that it was for the parties' representatives to take the Court to the relevant evidence in the course of their submissions.

Relevant law

The Arbitration Act

43. Section 67 of the Act provides (so far as relevant):

> "*67. — Challenging the award: substantive jurisdiction.*
> *(1) A party to arbitral proceedings may (upon notice to the other parties and to the Tribunal) apply to the court—*
> *(a) challenging any award of the arbitral Tribunal as to its substantive jurisdiction; or*
> *(b) for an order declaring an award made by the Tribunal on the merits to be of no effect, in whole or in part, because the Tribunal did not have substantive jurisdiction.*
>
> *A party may lose the right to object (see section 73) and the right to apply is*

subject to the restrictions in section 70(2) and (3).

…

(3) On an application under this section challenging an award of the arbitral Tribunal as to its substantive jurisdiction, the court may by order—

(a) confirm the award,

(b) vary the award, or

(c) set aside the award in whole or in part.

…".

44. Section 68 provides so far as relevant:

"*68.— Challenging the award: serious irregularity.*

(1) A party to arbitral proceedings may (upon notice to the other parties and to the Tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the Tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

(a) failure by the Tribunal to comply with section 33 (general duty of Tribunal);

…

(3) If there is shown to be serious irregularity affecting the Tribunal, the proceedings or the award, the court may—

(a) remit the award to the Tribunal, in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the Tribunal for reconsideration."

45. Section 33 provides that:

"*33. — General duty of the Tribunal.*

(1) The Tribunal shall—

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The Tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

Approach of the Court on a Section 67 challenge

46. The approach of the Court on a Section 67 challenge is as set out by the Supreme Court in *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* by Lord Mance at [26]:

> "*26. An arbitral Tribunal's decision as to the existence of its own jurisdiction cannot therefore bind a party who has not submitted the question of arbitrability to the Tribunal. This leaves for consideration the nature of the exercise which a court should undertake where there has been no such submission and the court is asked to enforce an award. Domestically, there is no doubt that, whether or not a party's challenge to the jurisdiction has been raised, argued and decided before the arbitrator, a party who has not submitted to the arbitrator's jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction before the English court, on an application made in time for that purpose under s.67 of the Arbitration Act 1996…*
>
> *30. …The Tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the Tribunal had any legitimate authority in relation to the Government at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion. It is also so whatever the composition of the Tribunal – a comment made in view of Dallah's repeated (but no more attractive for that) submission that weight should be given to the Tribunal's "eminence", "high standing and great experience" …*
>
> *This is not to say that a court seised of an issue under Article V(1)(a) and s.103(2)(b) will not examine, both carefully and with interest, the reasoning and conclusion of an arbitral Tribunal which has undertaken a similar examination. Courts welcome useful assistance. The correct position is well-summarised by the following paragraph which I quote from the Government's written case:*
>
> *"233. Under s.103(2)(b) of the 1996 Act / Art V.1(a) NYC, when the issue is initial consent to arbitration, the Court must determine for itself whether or not the objecting party actually consented. The objecting party has the burden of proof, which it may seek to discharge as it sees fit. In making its determination, the Court may have regard to the reasoning and findings of the alleged arbitral Tribunal, if they are helpful, but it is neither bound nor restricted by them."*"" [emphasis added]

47. The same approach was stated by Lord Collins at [96]:

> "*96. The consistent practice of the courts in England has been that they will examine or re-examine for themselves the jurisdiction of arbitrators. This can arise in a variety of contexts, including a challenge to the Tribunal's jurisdiction under section 67 of the 1996 Act, or in an application to stay judicial proceedings on the ground that the parties have agreed to arbitrate. Thus in Azov Shipping Co v Baltic Shipping Co [1999] 1 Lloyd's Rep 68 Rix J decided that where there was a substantial issue of fact as to whether a party had entered into an arbitration agreement, then even if*

> *there had already been a full hearing before the arbitrator the court, on a challenge under section 67, should not be in a worse position than the arbitrator for the purpose of determining the challenge. This decision has been consistently applied at first instance (see, eg, Peterson Farms Inc v C&M Farming Ltd [2004] EWHC 121 (Comm), [2004] 1 Lloyd's Rep 603) and is plainly right.*"

Test for authentic agreement/ valid agreement to arbitrate

48. It was submitted for Mr Ganz (skeleton 41) that the test, both as to whether the SPA was an authentic agreement made between the parties or whether there was a valid agreement to arbitrate, is an objective test depending on what was communicated between the parties by words or conduct and not upon their subject state of mind: Lord Clarke, giving the judgment of the court, in *RTS Flexible Systems Ltd v Molkerei Alois Muller* [2010] UKSC 14 at paragraphs [45] to [50]:

> "*45. The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement.*" [emphasis added]

49. Mr Goold for Mr Ganz relied on the following underlined statements in a passage from the judgment at [50]:

> "*Before the judge much attention was paid to the Percy Trentham case, where, as Steyn LJ put it at page 26, the case for Trentham (the main contractor) was that the sub-contracts came into existence, not simply from an exchange of contracts, but partly by reason of written exchanges, partly by oral discussions and partly by performance of the transactions. In the passage from the judgment of Steyn LJ at page 27 quoted by the judge at para 66 he identified these four particular matters which he regarded as of importance. (1) English law generally adopts an objective theory of contract formation, ignoring the subjective expectations and the unexpressed mental reservations of the parties. Instead the governing criterion is the reasonable expectations of honest sensible businessmen. (2) Contracts may come into existence, not as a result of offer and acceptance, but during and as a result of performance. (3) The fact that the transaction is executed rather than executory can be very relevant. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations and difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in*

negotiations as inessential. This may be so in both fully executed and partly executed transactions. (4) If a contract only comes into existence during and as a result of performance it will frequently be possible to hold that the contract impliedly and retrospectively covers precontractual performance."

50. Mr Ganz also relied on *Dresdner Kleinwort Ltd & another v Attrill & others* [2013] EWCA Civ 394 at [61] to [64] where Elias LJ set out the analysis of the judge at first instance:

> "*61. I will first set out the analysis of the judge on this point. He started from the following three premises. The first was that the question whether there is an intention to create legal relations must be considered objectively. He referred to the following passage from the judgment of Lord Clarke in RTS Flexible Systems Ltd v Molkerei Alois Mueller GmbH and Co KG (UK) Productions [2010] UKSC 14; [2010] 1 WLR 753, para 45:*
>
> > *"Where there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formulation of legally binding relations."*
>
> *62. To similar effect is the observation of Lord Bingham CJ as he then was in Edmonds v Lawson [2000] All ER 31, at para 21 when he said:*
>
> > *"Whether the parties intended to enter into legally binding relations is an issue to be determined objectively and not by enquiring into their respective states of mind. The context is all important."*
>
> *63. Second, <u>the judge held that the onus of proving that there was a lack of intention to create legal relations would be on the Bank since they were asserting that no legal effects were intended.</u> He relied for this proposition on certain observations of Megaw J in Edwards v Skyways [1964] 1 WLR 349 at 355, and Aikens J in Mamidoil Jetoil Greek Petroleum: SA v Okta Crude Oil Refinery AD [2003] 1 Lloyd Rep 554.*
>
> *64. Third, he emphasised what Lord Bingham CJ had said in Edmonds v Lawson, namely that "<u>the context is all important</u>".* [emphasis added]

51. It was submitted for Mr Ganz (skeleton 43) relying on this authority that:

    51.1. the onus of proving that there was a lack of intention to create legal relations would be on the party asserting that no legal effects were intended and that the onus was a heavy one. Here that onus is on Petronz and Mr Goren; and

    51.2. that the context was all important.

52. However this authority has to be read in context and in light of the broader proposition as to the burden of proof to establish one's case.

53. It was submitted for Mr Ganz (skeleton 46) that:

> "*The burden of proof lies upon the party who substantially asserts the affirmative of the issue –see Phipson, ibid. paragraph 6-06. Regard must be had to the substance of the issue not merely its grammatical form. Where an allegation forms an essential part of a party's case, the proof of such allegation rests on him…*"

54. It was further submitted for Mr Ganz (skeleton 47) that:

> "*The burden of proving the existence of the contract is on the claimant, while the defendant has the onus of facts pleaded in confession and avoidance. Accordingly, it is for Mr Ganz to prove the existence of a valid agreement to arbitrate/an authentic SPA but for Petronz/Mr Goren to prove its invalidity/inauthenticity."* [emphasis added]

55. It seems to me that there is a risk that these submissions do not properly reflect the test as set out in *Phipson on Evidence* (20th edition) at 6-06 which states that:

> "*…Where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegations rests on that party. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him.*" [emphasis added]

56. The relevant passage in *Phipson* is as follows:

> "*So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issue. Where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegations rests on that party. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. This is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. The service of a notice to prove documents pursuant to CPR r.32.19 does not shift the burden of proof.*
> *This rule is adopted principally because it is just that he who invokes the aid of the law should be the first to prove his case; and partly because, in the nature of things, a negative is more difficult to establish than an affirmative. The burden of proof is fixed at the beginning of the trial by the state of the pleadings, and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleadings place it, and never shifting.*
> *In deciding which party asserts the affirmative, regard must be had to the substance of the issue and not merely to its grammatical form; the latter the pleader can frequently vary at will. Moreover, a negative allegation must not be confused with the mere traverse of an affirmative one. The true meaning of the rule is that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on him. An alternative test, in this connection, is to strike out of the record the particular allegation in question, the onus lying upon the party who would fail if such a course were pursued.*
> *In all but the simplest cases, the burden of the issues will be divided, each party having one or more cast upon him.*

> *However not every decision made by a judge during or in preparation for a trial is susceptible to analysis in terms of the burden and standard of proof. Many decisions in and before trials involve weighing competing factors and the judge exercising evaluative judgment.*" [emphasis added]

57. Thus it is clear that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegations rests on that party. It is Mr Ganz who asserts that the SPA and the Arbitration Agreement (at least as between Mr Ganz and Mr Goren) is authentic and binding and it is therefore Mr Ganz who bears the burden of establishing on the balance of probabilities the existence of an authentic and legally binding SPA (or at least a valid Arbitration Agreement).

58. I am not entirely clear whether Mr Goren maintained his position as set out in the Rejoinder that "*the line of cases cited by the Claimant on intention to create legal relations and setting out an objective test of establishing such intention, are irrelevant. In circumstances where the document is purported not to be genuine, the test is different as established in Snook v London and West Riding Investments Ltd. [1967] 2 QB 786 at p.802.*"

59. In that passage, Diplock LJ said this:

> "*As regards the contention of the plaintiff that the transactions between himself, Auto-Finance, Ltd. and the defendants were a "sham", it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. One thing I think, however, is clear in legal principle, morality and the authorities (see Yorkshire Railway Wagon Co. v. Maclure ((1882) 21 Ch D 309) ; Stoneleigh Finance, Ltd. v. Phillips ([1965] 1 All ER 513, [1965] 2 QB 537) , that for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.*" [emphasis added]

60. It was submitted for Mr Ganz (skeleton 58) that the dispute between the parties is not about whether the SPA/Arbitration Agreement was intended by them to create one set of rights and obligations but give third parties the appearance of creating different rights and obligations but whether any rights and obligations were created at all. Further it was submitted that there is no evidence of common subjective intention and Mr Ganz's evidence challenged the idea that the SPA or Arbitration Agreement was not intended to be binding and was only ever a draft.

61. In my view I do not need to resolve this issue in circumstances where the evidence was that there was no "common intention" that the acts or documents were not to create the legal rights and obligations which they give the appearance of creating. The test which I propose to apply is the test in *RTS Flexible Systems* referred to above.

Ground 1: challenge as to the substantive jurisdiction of the Tribunal

Submissions for Mr Ganz

62. It was submitted for Mr Ganz (skeleton 14) that Mr Ganz not having been able to serve Petronz with these proceedings, Mr Ganz has had to accept that their outcome will not be binding on it. Accordingly the relief he now seeks is limited to an order that the arbitration agreement is valid and binding as between Mr Ganz and Mr Goren and the arbitrator has substantive jurisdiction over Mr Ganz and Mr Goren.

63. It was submitted however that the Court will also have to consider, if not reach conclusions on, the validity of the SPA and the adherence of Petronz to the SPA.

64. It was submitted for Mr Ganz that applying the principles of separability in Section 7 of the Act, it is enough to prove that the Arbitration Agreement was valid: in *Premium Nafta Products Ltd v Fili Shipping Company* [2007] UKHL40 (the *'Fiona Trust'* case), Lord Hoffman made clear, at paragraphs [17] & [18] that:

64.1. the invalidity or recission of the main contract did not necessarily entail the invalidity or recission of the arbitration agreement;

64.2. there might be cases in which the ground on which the main contract was invalid was identical with the ground on which the arbitration agreement was invalid e.g. where the main contract and arbitration agreement were contained in the same document and one of the parties claimed that he never agreed to it and his signature was forged;

64.3. even an allegation that there was no concluded agreement, would not necessarily be an attack on the arbitration agreement; and

64.4. if the arbitration clause had been agreed, the parties would be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.

65. The relevant passages of the judgment in *Fiona Trust* relied on by Mr Ganz are as follows:

> *17. The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a "distinct agreement", was forged. Similarly, if a party alleges that someone who*

purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement.

18. *On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorized or for improper reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to enter into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.*
19. *In the present case, it is alleged that the main agreement was in uncommercial terms which, together with other surrounding circumstances, give rise to the inference that an agent acting for the owners was bribed to consent to it. But that does not show that he was bribed to enter into the arbitration agreement. It would have been remarkable for him to enter into any charter without an arbitration agreement, whatever its other terms had been. Mr Butcher QC, who appeared for the owners, said that but for the bribery, the owners would not have entered into any charter with the charterers and therefore would not have entered into an arbitration agreement. But that is in my opinion exactly the kind of argument which section 7 was intended to prevent. It amounts to saying that because the main agreement and the arbitration agreement were bound up with each other, the invalidity of the main agreement should result in the invalidity of the arbitration agreement. The one should fall with the other because they would never have been separately concluded. But section 7 in my opinion means that they must be treated as having been separately concluded and the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement.*" [emphasis added]

66. Counsel for Mr Ganz stated (skeleton 61) that Mr Ganz does not challenge the Tribunal's findings of fact but challenges her application to them of the relevant legal principles and the conclusions she reached from them as a result. In its written submissions Counsel for Mr Ganz devotes a substantial part of his submissions (paragraphs 124-154) to "*The Arbitrator's reasoning and why it was wrong.*"

67. As noted above, the authorities are clear:

> "*The Tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the Tribunal had any legitimate authority … at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion*".

68. I do not therefore propose to address directly Mr Ganz's submissions in this regard but to adopt the approach stated by Lord Collins in *Dallah*, referred to above:

> "*96. The consistent practice of the courts in England has been that they will*

examine or re-examine for themselves the jurisdiction of arbitrators."

The SPA

69. There are 3 versions before the Court:

69.1. One version bears a signature of Mr Goren. The metadata shows that it was created on 31 May 2015. It appears that Mr Goren may have used as a base a template from "FindLegalForms.com". Mr Goren's evidence was that he did not know if he used the template (Day 2 p112) and that he took several agreements and put them together (Day 2 p116). However in my view nothing turns on this.

69.2. A second version appears to have been sent to Mr Ganz by Mr Goren as a PDF attachment to an email from Mr Goren on 31 May 2015. The email had no covering message. This version had a signature of Mr Goren on the execution page and what appears to be a further signature of Mr Goren on the page headed Exhibit A Seller's bank account details. It also had a signature on the execution page next to the name of one Siraj Marakkar ("Mr Marakkar") purportedly for the purchaser (Petronz).

69.3. The third version appears to be signed by all parties and bears the additional signature of Mr Ganz. This is a version which was kept by Mr Ganz (in addition to the PDF version). Mr Ganz's evidence is that he received the version by email with the signatures of Petronz and Mr Goren, that he printed it out and then Mr Goren came to his office, Mr Ganz signed and he gave the SPA to him (Day 2 p112). Mr Goren said in his evidence that he could not recall this.

Was the SPA an authentic agreement

70. Mr Ganz's case as set out in the statement of case for the arbitration was that the SPA "*has been, on the face of it, signed by all three parties to it, including himself, is authentic and an executed and concluded agreement that is binding on all three of them*."

71. It was accepted for Mr Ganz (skeleton 44) that extrinsic evidence is admissible to show that what appears to be a valid and binding contract is in fact no contract at all: *Chitty on Contracts* 35th Edition Volume 1 paragraph 16-033. It was also accepted for Mr Ganz that the admissible extrinsic evidence includes conduct after the event said to constitute the contract, in order to see whether an agreement was, in fact, made: *Bottrill v Harling* [2015] EWCA Civ 564, per Longmore LJ at paragraphs [12] and [14].

Submissions for Mr Ganz

72. It was submitted for Mr Ganz (skeleton 53) that "*such burden as there is on him*" as to the status of the arbitration agreement if not the SPA, is discharged by the following:

72.1. The factual context of the prospective sale to the affiliate of Falcon and its terms as set out in Gi3 letter and Falcon letter against which the SPA was produced.

72.2. The SPA on its face was binding and unqualified, not expressed to be draft.

72.3. What are on the face of it signatures from or on behalf of each of the parties to the SPA.

72.4. The email from Mr Goren with the PDF attachment received by Mr Ganz and sending the SPA with Mr Goren's and Mr Marakkar's signatures.

72.5. Mr Goren's evidence that he did not think Mr Ganz had forged the SPA.

72.6. Mr Goren's failure to account for the presence of Mr Marakkar's signature on the SPA or his choice of Petronz and Mr Marakkar as party and signatory respectively.

72.7. Mr Goren's deception in his preparation of the Procurement Agreement and the other documents consequent upon that.

72.8. The payments made to Mr Ganz totalling US$1m.

Submissions for Mr Goren

73. It was submitted for Mr Goren that:

73.1. Petronz made it clear that it was not a party to the SPA (skeleton 11).

73.2. Mr Goren's intention was to create a document so that his friend could let his bank understand the type of deals that Mr Goren was trying to achieve and this would have helped him to obtain more time to overcome the financial crisis he was facing (skeleton para 11).

73.3. Mr Goren had no obligation to sell the property but was prepared to forego the substantial profit in the Project and incur losses to help his friend.

73.4. There was no relevant contextual material against which the validity and binding nature of the alleged SPA could be determined (skeleton 13); Mr Ganz produced no documents referring to the SPA in response to the document request (skeleton 15 and 16); it was not referred to until it reappeared in the letter of demand sent to Petronz on 27 October 2017.

73.5. Mr Ganz mischaracterises loan repayments as advance payments pursuant to the SPA (skeleton 17).

73.6. There is no suggestion in the initiatives reviewed (by Mr Swirsky) and attempted that Petronz should perform the SPA (skeleton 18).

Weight to be given to evidence of Mr Goren-Procurement Agreement

74. Before considering the evidence I have to deal with the weight to be given to the evidence of Mr Goren in light of the issue of the Procurement Agreement, an agreement in writing dated 25 May 2015, pursuant to which Mr Goren, on behalf of Gi3 had, ostensibly, entered into an agreement with a Siraj Marakkar on behalf of Petropas

Middle East FZE ("Petropas"), for Gi3 to procure corn/maize on Petropas' behalf in return for a commission ("the Procurement Agreement").

75. Ostensibly pursuant to the Procurement Agreement, Gi3 invoiced Petropas on 4 June 2015 for an advance payment of US$500,000. Mr Goren accepted in his evidence that there would have been a second such invoice.

76. When being cross-examined, Mr Goren said of the Procurement Agreement, (Day 2 p244-247):

> "*I wouldn't call it a fake document. The document is genuine. I signed it (inaudible) signed it. And it's not a fake document. It's a document that was not intended to be performed the way it's written.*
> *Q: No. Let us put it another way. It is a sham document.*
> *No it's not.*
> *Q: But it's not intended to be performed the way it is written.*
> *Correct.*
> *...*
> *Q: This document was dressed up for the authorities in the UAE, was it not?*
> *You know my (inaudible) [English] is not so great. You can find many names to it. It's synonyms. I don't know what to say. Sham. I don't know what to tell you. I said exactly what it was. Whatever name is the name. This was the reason it was done; in order to give Petropas the ability to transfer the money out*."

77. It was submitted for Mr Goren that it would be wrong as a matter of law to reject all the evidence of Mr Goren by reason of his evidence in relation to the Procurement Agreement. Mr Goren relied on the authority of *Slocom Trading Ltd v Tatik Inc* [2012] EWHC 3464 (Ch) at [21]-[26].

78. I note in particular the following from the judgment in *Slocom Trading*:

> "*23. On many occasions, Mr Haener said in his evidence that he did things that "with hindsight" should not have been done. That is a considerable understatement and I have no doubt that some of Mr Haener's conduct was not only discreditable but dishonest. However, that does not necessarily mean that all his evidence in this case is to be rejected. The fact that an individual has acted dishonestly does not mean that he is therefore dishonest in all that he says or does. Having observed Mr Haener under intensive cross-examination, and assessing his answers against the numerous contemporary documents, I do not find that he is someone who is lacking in all credibility. Rather, he is, in my view, an individual for whom the end very often justified the means. Hence, although the episode regarding Mr Towers was nothing short of disgraceful, I find that Mr Haener created those documents because Mr Kruglov had stressed to him at the outset that the Kruglov money should be invested in a way that protected his identity and, knowing that Mr Kruglov had had nothing to do with the misuse of Derbent in the Sibir fraud, Mr Haener felt he should do anything possible to prevent Mr Kruglov's name emerging in the investigation. That is not, of course, a good excuse for the deceit, but I accept that it was the explanation. And as regards the fictitious Derbent*

> *invoices, I accept also that Mr Haener was under strong pressure from Mr Tchigirinski to execute these documents, and that he would in all likelihood have lost his lucrative position as Mr Tchigirinski's advisor if he had done what he should have done and refused to go along with what was proposed.*
>
> …
>
> *26. As result, I do not reject Mr Haener's evidence as such, but treat it with great care. That means that I examine his evidence against the contemporaneous documents and other evidence directed to the relevant issues, and of course the inherent plausibility and consistency of his answers. As will become clear, on some matters I find his evidence was less than frank or is to be rejected altogether. But on other matters I find that, on the balance of probabilities, Mr Haener was telling the truth…*". [emphasis added]

79. It was submitted for Mr Ganz (skeleton 68-70) that:

79.1. Mr Goren was reluctant to accept the Procurement Agreement was a sham transaction or (to use the Arbitrator's own words during an intervention in the course of Mr Goren's cross-examination) a deception and prevaricated about them whenever they were used, although, (Mr Ganz submitted), that they were all appropriate descriptions of what he had done.

79.2. It was further to the detriment of Mr Goren's evidence, and the weight and credibility that may be given to it that he continued to seek to avoid acknowledging, frankly, what he had done and its import, instead seeking to justify it or seeking to blame Mr Swirsky.

79.3. In the absence of candour and a proper acceptance of responsibility by him, the Court could not be confident that it knows the extent of Mr Goren's deceit.

80. It was submitted for Mr Goren (by reference to his closing submissions to the Tribunal) that:

80.1. Mr Goren answered questions concerning the Procurement Agreement with candour and full acceptance of responsibility. He was clear as to what the agreement was and why it came into being. He described it as something he had done once in his life and he was very sorry for it. He explained why he did it: "*only to help -- to help my friend in need which I thought he is going to be taken under with, you know, all of these life achievements are going to be taken away. And he was telling me on the phone that he's -- he's putting them-- his house on the market and his father told me that he's going to get a heart attack. So, I was willing -- yes I'm willing to do it*."

80.2. Whilst the Procurement Agreement itself may have been a sham, or a piece of window dressing or a deception, it was done with the Mr Ganz's interest at its heart and at Mr Ganz's behest. He needed money. He was under enormous pressure and Mr Goren wanted to help his friend. That is fundamentally different to the witness in the *Slocom Trading* case cited above. Mr Goren's evidence was not false. On the contrary, he made admissions. He was not a witness acting only for his own financial gain. On the contrary, he did it for Mr Ganz and to his own

detriment.

81. I did not have the opportunity to see Mr Goren giving his evidence before the Tribunal and I note the submission that English is not his first language. I therefore hesitate to form any adverse view of his evidence from the manner in which some of his answers were given, in circumstances where my view is necessarily derived solely from the written transcript. On occasions however during the cross examination he does appear to have been evasive in his responses although ultimately in relation to the Procurement Agreement Mr Goren admitted to the Tribunal that it was "*not intended to be performed the way it's written*".

82. It is clear therefore that the Procurement Agreement was a sham transaction. Mr Goren said that the banks knew that, but whether or not that was the case, he admitted it was to deceive the UAE authorities. Thus whilst this is not a witness who has been shown to have lied to the Tribunal, he has acted in a way which was dishonest.

83. Even if I accept that Mr Goren was seeking to help Mr Ganz through the Procurement Agreement (and there is no evidence to suggest that he stood to benefit personally by the Procurement Agreement and the payments under it), his actions in creating and implementing a false transaction raise significant questions as to the weight which I should give to his evidence in relation to the SPA where the key issue before this Court is whether the SPA is genuine and binding or whether despite its appearance, it is not what it appears on its face.

84. In line with the authorities such as *Slocom Trading,* I do not reject Mr Goren's evidence in its entirety but in relation to the various points raised, evaluate his evidence having regard to the extent to which it is consistent with the contemporaneous documents and other evidence directed to the relevant issues, as well as the inherent plausibility and consistency of his answers. Where in my view his evidence is consistent with the other evidence and/or inherently plausible, I accept his evidence can properly be given weight.

Assessment of evidence and inferences to be drawn from the evidence

SPA

85. Firstly I accept that on its face there is evidence of an agreement which is signed.

86. It was submitted for Mr Ganz that the SPA on its face was binding and unqualified, not expressed to be draft and was signed on its face.

87. I note that there were errors in the SPA (such as its description of Gi3 as an Indian rather than a Cyprus company) and the Tribunal was of the view that they were indicative of its "*rushed genesis*" and that no great care was taken in its creation and the Tribunal was of the view that they were "*another clue"* to the fact that it was not intended to be a true and binding document by its author (paragraphs 210 to 211 of the Award). However in my view these errors are of little weight to the issue of whether it was a binding agreement.

88. It was submitted for Mr Ganz (skeleton 62-64) that the fact that the document contains

Mr Goren's electronic signature does not suggest it was a draft and is consistent with being a binding agreement.

89. I agree that on its face the fact that the SPA had the electronic signature of Mr Goren does not suggest it was a draft.

90. However the presence of the electronic signature on the SPA has to be considered in the light of the evidence of Mr Goren. Mr Goren's evidence was that he routinely used an electronic signature to sign documents when there was a document that he was producing and needed to sign it and send it immediately and that sometimes he signed manually. In cross examination Mr Goren's evidence was that he should probably have put draft and should not have put his electronic signature but that Mr Ganz told him that he needed to show something to the bank and he wanted to help in any way he could:

> "*Yes, I should have put probably draft inside, I should have put -- I probably should. But I did not, what can I tell you? And surely I should not have. I mean the signature, I figured out about an hour later that the signature was there, my signature.*
> ...
> *Because it was on an electronic signature that was there. And I said to myself, "Never mind, it's Morti. What's the big deal"? And I know what it's going to. I thought he was going to show it to the bank and say, "Guys, this is what's more or less there", that's it…*".

91. Given the issues going to Mr Goren's credibility I give little weight to this evidence of Mr Goren. However having regard to the absence of any other evidence concerning the electronic signature, in my view it seems to me that objectively the presence of the electronic signature is equally consistent with being carried over from a previous document or with the creation of a binding agreement.

92. As to the manual signature it was submitted for Mr Ganz (skeleton 90 and 91) that Mr Goren was unwilling to accept that signature was his hand-written signature, rather than electronic, as appeared at the end of the SPA, seeking to account for the difference between the two by saying that it was to do with the expansion of the electronic signature and that:

> "*Just by comparing the two signatures by eye, it is very obvious they are different and that the signature on exhibit A must therefore be a manual signature (it being common ground that the signature at the end of the SPA was Mr Goren's electronic signature).*"

93. I do not think that the Court is in a position to form a view as to whether the two signatures are different such that the Court can infer that it was a manual signature on Exhibit A. There is insufficient evidence from which such an inference can reliably be made.

The signature of Mr Marakkar

94. It was submitted for Mr Ganz that:

94.1. Mr Goren offered no explanation for how that document came on its face to have the signature on it of Mr Marakkar on behalf of Petronz and that in the light of Mr Goren's acceptance that Mr Ganz had not forged it, absent any other explanation, the likelihood is that Mr Goren obtained Mr Marakkar's signature from him on behalf of Petronz before sending it to Mr Ganz (skeleton 87 and 88).

94.2. if, as the Arbitrator concluded, the email and PDF attachment is the copy of the SPA that Mr Ganz received from Mr Goren, the PDF attachment is consistent with having been sent to Mr Marakkar, printed and signed by him, scanned back in and sent to Mr Goren (who then signed manually on the exhibit page and sent it to Mr Ganz) (skeleton 64).

95. However Mr Goren did provide an explanation in his evidence before the Tribunal: Mr Goren's evidence was that he probably took Mr Marakkar's signature from a previous document and that Mr Marakkar was never at Petronz but was at Petropas and that Petropas was a different entity from Petronz. Further in cross examination Mr Goren agreed with the proposition that was put to him that Mr Marakkar was an "*unfortunate victim of drafting*".

96. The highest that Mr Ganz is able to put his submissions in this regard (skeleton 115) is that the "*timing*" of Mr Goren's production of the SPA and the sending of the PDF to Mr Ganz is consistent with Mr Goren having produced the SPA and sending it to Mr Marakkar who signed it and returned it.

97. Accepting the premise that the PDF attachment was the copy received by Mr Ganz from Mr Goren, this submission concerning execution of the SPA by Mr Marakkar has no evidence to support it and is purely speculative. The cross references that are included in Mr Ganz's written submissions to Mr Goren's evidence do not amount to evidence which provides any substance to this theory.

98. However the explanation of Mr Goren is in my view a plausible explanation and in any event it is not necessary for Mr Goren to prove how the signature of Mr Marakkar came to be on the SPA. It is for Mr Ganz to prove the existence of a valid agreement and I do not accept that Mr Ganz has established on the evidence the likelihood that Mr Goren obtained Mr Marakkar's signature from him on behalf of Petronz before sending it to Mr Ganz as a PDF attachment.

Letters from Petronz in response to proceedings

99. Further in relation to the issue of the authenticity of the SPA as far as Petronz is concerned, I note the correspondence from Petronz in response to the arbitration proceedings.

100. In its letter to DMH Stallard of 28 November 2017 Petronz wrote that the agreement: "*which was supposedly signed by Petronz FZE is a forgery. Petronz FZE never signed or otherwise entered any agreement for the acquisition of any shares of the company mentioned in the forged document…*".

101. I also note a further letter from Petronz dated 24 January 2018 to the LCIA in which it wrote:

> "*We are writing this letter to you since we feel we have been forced into a part in a Kafkaesque story that we have been maliciously dragged into.*
> …
> *The facts of the matter are that we do not know the claimant and hence never discussed with him any transactions of any type let alone agreed to buy any shares from him or anybody else. Naturally we never signed any contract with him. The signature that purported to be ours on the allegedly executed agreement was merely a scribble with no company seal and without any attestation as is customary in the UAE. Needless to say that we never paid the claimant any money whatsoever.*
> …
> *We considered enlisting legal representation in the UK but it quickly became clear to us that the cost of such representation would be enormous. We felt that it is an absurd to spend hundreds of thousands of Pounds defending against a fictional claim under a fictional agreement. All this without having any assurance that we will be reimbursed by the claimant when the case will be dismissed…*". [emphasis added]

102. There was then a further letter from Petronz dated 15 February 2018 directly to the Tribunal:

> "…
> *As we made very clear in our correspondence with the LCIA, we never signed any agreement with the Claimant. Nor have signed any agreement with anyone else regarding shares of any Cypriot company. The signature claimed to be ours on the document presented is not ours and is a forgery….*
> *We have filed a formal criminal complaint with the United Arab Emirates authorities. We were advised by our counsel that the Dubai Public Prosecution Department has commenced a criminal investigation against the claimant…*". [emphasis added]

103. In line with the correspondence Petronz did not participate in the arbitration proceedings. Further Petronz has not been served with these proceedings.

104. It was submitted for Mr Ganz that Petronz did not state that Mr Marakkar was not a director and the burden should be on Petronz to establish that the agreement was a forgery.

105. It was submitted for Mr Ganz (skeleton 52) that:

    105.1. "*It cannot be right that simply by making that bare assertion* [that the agreement is a forgery/not binding] *but adducing no evidence in support of it, whether by way of documents produced or witness statement, effectively taking no part in the arbitration, Mr Ganz is faced with the task of proving the contrary, at least if that is said to entail things such as Mr Marakkar's identity, employment by or directorship of Petronz at the relevant time, his authentic signature and whether that corresponds with the signature said to be his on the SPA.*"

    105.2. The correspondence is not evidence: it is not clear who wrote them on its behalf,

> or the knowledge or authority with which the author did so; they contain no statement of truth and they are untested and self-serving statements after the fact.

106. Although I accept that the letters referred to above are not sworn evidence and the statements of Petronz in those letters have not been tested by cross examination, it seems to me that that when assessing whether Mr Ganz has proved his case that it is an authentic agreement, the Court is entitled to give some weight to these letters. It was submitted for Mr Ganz that the letters are "*self-serving*" but there is no apparent reason why letters would be sent to the LCIA and the Tribunal purporting to be from Petronz and alleging that the agreement was a forgery (not binding). (This is not a case where there has been part performance of the contractual bargain on one side and a failure to pay the consideration on the other.)

107. Mr Goren wrote in an email to the LCIA dated 16 January 2018 that the SPA:

> "*was prepared by me in consultation with Mr Ganz when we were trying to sell a land of which GI3 Holdings…was a beneficial owner. This document was only a draft and to my knowledge Petronz has never even seen it.*
> *Since any contact with Petronz was done by me…I hereby confirm that the "agreement" was never concluded or agreed to, let alone signed by Petronz…*".

108. In light of my assessment of the evidence of Mr Goren I am cautious about giving weight to this evidence of Mr Goren. However it seems to me that his evidence is consistent with the correspondence from Petronz.

109. In order to establish its case that there was a was a valid Arbitration Agreement between Mr Ganz and Mr Goren, Mr Ganz does not need to prove Mr Marakkar's identity, employment by or directorship of Petronz at the relevant time, his authentic signature and whether that corresponds with the signature said to be his on the SPA as I do not need to form a concluded view on the binding nature of the SPA vis a vis Petronz. However I am entitled to take into account and give some weight to this evidence as relevant to the issue which I do have to determine namely whether there was a valid Arbitration Agreement between Mr Ganz and Mr Goren and that evidence supports Mr Goren's case

Extrinsic evidence of email with PDF attachment

110. One of the matters relied upon by Mr Ganz is the email from Mr Goren to Mr Ganz with the PDF attachment. However that email does not say why the SPA was sent and thus of itself the email provides no support for Mr Ganz's case. The significance of the attachment with respect to the signature of Petronz is dealt with above. The email cast no light on the circumstances in which Mr Goren's signature came to appear on the SPA.

111. Mr Ganz also relies on Mr Goren's evidence that he did not think that Mr Ganz had forged the SPA. However accepting that Mr Ganz did not forge the SPA, there is another equally plausible explanation which was the evidence of Mr Goren that the SPA was to be shown by Mr Ganz to his bankers.

> "*Let me explain how this whole thing worked. We started off with the letters. Morti said, "Listen, I need to show something to the bank", and I said, "Very well", because first of all I felt bad because of the delay of two years. Like if I was to blame but I was not. But never mind. Second I felt very bad because he was in a tough position … I wanted to help in any way I could. He asked me for something to show to the bank, I prepared for him the Gi3 letter. Then as I said before they will feel that we are committed and then I changed it and gave it the other one. Then he said, "No, it's not enough because it's from you and they know it's from you", they know it's my company so it's not enough…*
> *Then he came to me and said, "Listen, this is I'm not going to show that to the bank and that to the bank. I want to show them that we are prepared and this is what's going to happen and this more or less the terms of it". I said, "Okay, what do you want, what do you need"? He said, "I need some sort of to see that I'm -- we are serious, we are ready and that there is an agreement". So I went down, I sat down with my computer and hammered out very fast some, you know, put things together…*".

112. This evidence has to be weighed in light of the other evidence on this issue. It goes not to the subjective intention of one party but to the rationale of the SPA.

The payments made to Mr Ganz

113. There was a loan agreement dated 7 November 2011 entered into between Ganz Properties Ltd ("Ganz Properties") and Gi3 Holdings pursuant to which Mr Ganz (through Ganz Properties) lent Gi3 US$4.63m for Gi3's investment in "*a project in Chennai, India*" for a term of 5 years. The transfer documentation on their face described the payments on 23 June 2015 and 9 July 2015 as "*partial repayment of loan facility*".

114. It was submitted for Mr Ganz that:

    114.1. the two US$ 500,000 transfers made by Gi3 to Mr Ganz (via Moti Ganz Ltd) were not part repayments of the loan (which were payable to Ganz Properties) and that "*on a balance of probabilities they may well have been part payment under the SPA*" (skeleton 75 and 76).

    114.2. the descriptions in the transfers were false, the descriptions being procured by Mr Goren (skeleton 72).

    114.3. it would make little commercial sense for the payment to be made other than in part payment pursuant to the SPA (skeleton 82). In this regard Mr Ganz relied on the email chain between Mr Goren and Mr Swirsky in October and November 2015 and it was submitted (skeleton 80) that Mr Goren's email of 5 November 2015 implied to an extent in its use of the word "*formally*" that there was a connection between the development land and the payment received.

115. The evidence of Mr Goren to the Tribunal was:

> "*…The company owed him [4.63m]. We gave him a million back*".

116. It was put to Mr Goren in cross examination that the descriptions on the transfers were "*deceptive*" and that the transfers were in fact part payment for Mr Ganz's shares. Mr Goren replied:

> "*Absolutely not. Part payment by whom? A company cannot buy shares.*"

117. Further I note that Mr Ganz's evidence to the Tribunal was that the payments were recorded in the books of Mordchai Ganz Limited as "*return loan*".

118. As to the emails in October/November 2015, Mr Swirsky sent an e-mail to Mr Goren headed "Property in Chennai" in which he said:

> "*The auditors of ICICI have asked us for following information. Item 4, I was thinking of seeing if the deal does not go through if we have a business plan to develop the site ourselves*."

119. Underneath Mr Swirsky had apparently set out the questions from the auditors:
> "*Regarding the property I need to know the following:*
> 1. *Is the Indian company holds the entire land. (sic) pl send me the Memorandum and Articles and certificates of incorporation of the Indian company…*
> 2. *The shares of the Indian company is held by Cyprus company as per your mail...*
> 3. *…*
> 4. *In India foreign enterprises are prohibited to do real estate business without specific approval. What is your business plan if you want to run thru?*
> 5. *You have received $1 million from Indian company, can I have the agreement and correspondence from them.*" [emphasis added]

120. Mr Goren responded to that email and the detailed points raised. In relation to the question concerning the payment of $1 million he replied that this was an amount received by Gi3 from a UAE company and was paid as an advance for purchase of agricultural produce.

121. Mr Swirsky continued the email exchange and in relation to the $1 million payment asked:

> "*…so although the US d 1 mill is a deposit on the purchase it's been "disguised" as an advance on produce. What ramifications does this have if the deal falls through?*"

122. Mr Goren then replied:

> "*…Formally there is no connection between the land holding and the US$ 1M payment. The payment is NOT an advance against the sale of land and the parties are different. In fact the 1M payment was arranged by our partner in order to help Moti who needed the funds. The deal that was on planned at [that] time is no longer proposed and now there's another possible buyer with whom we are dealing. Thus if A (not THE) deal does not go through, there will be an open*

> *debt to the payor of the 1M with no pressure to settle it. Actually this payment JUST replaced a debt to Moti of 1M with a debt to Petropas Middle East FZE.*" [emphasis added]

123. In cross examination it was put to Mr Goren that:

> "*the implication is in fact there is a connection between the landholding and the million dollar payment*".

124. However Mr Goren rejected this. His evidence was that he did not intend to imply such a connection but was annoyed as he was being asked the question three times by Mr Swirsky.

125. Whatever Mr Goren may have intended by the word "*formally*" and I note that English is not his first language, in my view this is a contemporaneous document, albeit from Mr Goren, which supports Mr Goren's case that the payments under the Procurement Agreement were used to repay Mr Ganz part of his loan and the payments to Mr Ganz were not advances under the SPA.

126. It was submitted for Mr Ganz that even if this was a method of getting payment to Mr Ganz, it was consistent with payments under the SPA. It was submitted for Mr Ganz (skeleton 76) that the payment of US$1m in total represented "*approximately 50% of the sum due*" ie Mr Ganz's share of the advance payment.

127. In his Defence (paragraph 31) in the arbitration Mr Goren raised the amount of the payments as inconsistent with the amount of the advance due under the SPA:

> "*The Claimant offers no explanation as to how payments dated 23 June 2015 and 10 July 2015 and totalling $1 million bear any resemblance to the advance supposedly due on 30 June 2015 under the terms of the SPA, which is recorded as "a minimum amount in US dollars equal to one hundred and thirty million Indian Rupees". The US$ equivalent at 30 June 2015 of the advance, at the Bank of England rate for that date of 63.5798 INR per US$, is $2,044,675, more than double what was sent. There is no correspondence seeking payment of the balance or referring to the shortfall.*"

128. In my view it would make little commercial sense for the payment to be made for "*approximately 50% of the sum due*" rather than the exact amount due and there is no evidence which provides an explanation for the discrepancy.

129. Mr Ganz also relied on the comments made by Mr Goren on the draft "Due Diligence Report" of Mr Swirsky in November 2015.

130. In the draft report under a heading "*Sale*" Mr Swirsky wrote (Bold text represents comment inserted by Mr Goren into the draft):

> "*I have just been informed that the sale to Falcon has fallen away, however there are other buyers who have approached Rami (Rami to confirm names if possible and the new price levels 15% higher 1.2 Crore?).* ***No. The price offered for a quick sale is still the same 420 – 430 Mil. I cannot give names as of now can***

> ***only say they are respectable companies.*** *The USD1mill advance payment will thus have to be returned and this must be factored into the banks expectation in the money flows.*
> *In addition the developers contract with Castle was terminated in order facilitate the sale of the property. We had always looked at the income stream from this agreement for the financing but we have been assured that this contract can be reestablished very quickly and this problem solved (Rami to confirm)* ***we believe so. I would not use "assured" "very quickly" etc. tone it down a bit.***
> *Due to the lack of knowledge about the structure by MG, we were unaware of the 5% outside shareholder in Seder and thus the sales proceeds to GI3 would have be reduced by 5%. We have been assured that that this will not create an issue.*"
> [Emphasis added]

131. It was submitted for Mr Ganz (skeleton 120) that there is no mention by Mr Goren in his comments on the draft of the USD 1m payment being part repayment of the Loan and not being an advance payment of the purchase price. It was submitted for Mr Ganz that there could only have been one agreement pursuant to which the payments had been made-the SPA.

132. The evidence of Mr Goren (Day 3 p178) to the Tribunal was that this was a reference to the advance payment on account of maize (corn); it went to Gi3 and Gi3 needed to give it back to Petropas.

133. The only agreement for sale that is mentioned in the draft report is the agreement with Falcon (discussed further below). In addition, as is apparent from the section reproduced above, it appeared to contemplate a sale by Gi3 and not, as the SPA provides, a sale of the shares of Gi3. It would therefore be consistent with this for the "*advance payment*" to be (as Mr Goren stated) a reference to the payment that was made to Gi3 under the Procurement Agreement (albeit that this was a device or sham transaction to get money to Gi3).

134. It seems to me that Mr Goren's evidence denying that these payments by Gi3 to Mr Ganz were part payment for Mr Ganz's shares is supported by the following:

    134.1. There was an outstanding loan by Mr Ganz and thus monies were owing. It was accepted for Mr Ganz that the Loan could have been repaid early and that Mr Ganz's case is that Mr Goren had originally said it would be.

    134.2. The bank transfer documents stated that the transfer was a loan repayment and even if this should be accorded little weight, this accorded with the treatment in the books of Mr Ganz's company.

    134.3. The payments were (as Mr Goren pointed out) made by Gi3 to Mr Ganz and yet the SPA was an agreement for the sale of the shares in Gi3 and it is difficult to see why an advance would be paid through the entity whose shares were being sold.

    134.4. There would have been no need for the Procurement Agreement to get funds into Gi3 if the funds came from the purchaser of shares as an advance under the SPA.

134.5. The amounts paid did not match the amounts due by way of an advance under the SPA.

134.6. The draft report of Mr Swirsky does not support the existence of the SPA nor, for the reasons set out above, does it support an inference that the reference to "*an advance payment*" was to a payment under the SPA.

135. For all the reasons discussed, I find that these payments were not an advance under the SPA.

The documentary evidence of the GI3 letter and the Falcon letter

136. Mr Ganz relied (skeleton 53) in support of his case that the SPA was authentic and binding on what he termed "*the factual context of the prospective sale to the affiliate of Falcon and its terms as set out in GI3 letter and Falcon letter against which the SPA was produced*."

137. There are 2 versions of the letter dated 27 May 2015 (the "Gi3 Letter") to Mr Ganz before the Court. It was accepted that the letters were sent by Mr Goren to Mr Ganz. The first version appears to have read, so far as material, as follows:

> "*Re Damal Real Estate Project, Chennai, India.*
> *This letter is intended to provide you, together with the other shareholders of the company, with an update regarding the transaction for the sale of the subject project.*
> *1. As you know the board of directors of the company resolved to sell the entire project to an Indian logistics group for a net payment of INR 430 million (43 Crore Indian Rupees).*
> *2. The buyer undertook to pay the full purchase price in one payment to be made into our bank account on May 20, 2015.*
> *3. On May 20, 2015, the buyer informed us that due to previously unexpected circumstances it is forced to delay the payment date.*
> *4. Today we were informed by the buyer that the payment will be made by June 30, 2015...*
> ...
> *6. Our representative in India, and our local Indian partner who actively participated in the discussions with the buyer, feel assured that the buyer has the full intention to complete the transaction in the time stated by it...*". [emphasis added]

138. The second version of the Gi3 Letter was sent with a covering email from Mr Goren to Mr Ganz and said, in Hebrew, words to the effect that Mr Ganz should use the attached letter. The second version had the following additional sentence at the end of paragraph 6:

> "*It should be noted, however, that the company has no obligation whatsoever to the buyer and, therefore, if in the meantime another deal will arise which the company will view as more beneficial, we can always go for it with no delays.*"

139. It was submitted for Mr Ganz (Skeleton 102) that the transaction referred to in the Gi3 Letter was one with an affiliate of Falcon as set out in its letter of 27 May 2015 (the "Falcon letter"). It appeared to be common ground that, as stated by Mr Goren in his evidence, he travelled to India to attend a completion meeting for the sale which had been due to take place on 20 May 2015 but Falcon did not attend the meeting and completion did not occur. Mr Goren's evidence was that he was waiting in the office with all the documents prepared and Falcon called and said they were not coming and wanted to wait 15 days. (Day 2 296) His evidence was that Falcon then sent an email saying that they wanted a 15% discount so he cancelled the deal. (Day 2 p301).

140. The Falcon letter was sent by Falcon Logistics India Limited to Mr Ganz and is headed "*Oragadam Project-Chennai India*". The evidence of Mr Goren in cross-examination was that the letter was written by Falcon but he asked them what to write in general terms. [A347]

141. The Falcon letter commenced by expressing apologies and regret for the "*delay in the completion of the subject transaction*". It continued:

> "*As you know, in the beginning of April, we agreed with your good selves that we (through one of our affiliates) will acquire from you all of the shares of your company owning the subject project for a net payment of INR 430 million (430 million Indian rupees).*
> *We committed to pay the full purchase price to your bank account in one payment to until May 20, 2015....*
> *Unfortunately, unrelated to ourselves, at the very last moment prior to the actual transfer, our bank received from the Reserve Bank of India a requirement for documentation for a somewhat similar transaction of another client which included many additional documents....*
> *Due to this, and as was confirmed to your Indian representative by the GM of our bank, we were forced to halt the payment and restart the process for applying for and obtaining the requested approvals and documentation.*
> *We cannot know with absolute certainty how long this process will last and we are reluctant to state a date if we are not 100% sure we can adhere to it. Therefore we are forced to ask you for your indulgence until July 15, 2015. By such time our foreign subsidiaries will have sufficient funds on their hands to enable the payment of the purchase price regardless of the RBI approval process. Naturally if the approval process will prove to be quick we will be happy to pay you before the said date…*" [emphasis added]

142. The key points I note from the Falcon letter are:

    142.1. there had been an agreement (although Mr Goren's evidence was that it was not binding) that Falcon through one of its affiliates would acquire "*the shares of your company owning the subject project*" for 430 million Rupees. This is consistent with the Gi3 Letter.

    142.2. the explanation for the transaction not proceeding was that there was a late requirement from the Reserve Bank of India to provide documentation and obtain approvals.

142.3. (contrary to the Gi3 Letter which stated that payment would be made by 30 June 2015) Falcon sought a delay until 15 July 2015 with the intention that by that date a foreign subsidiary would have sufficient funds to enable the payment of the purchase price.

143. It was submitted for Mr Ganz (skeleton 104) that the reference in the letter to shares logically could only refer to shares in Gi3 as the letter was addressed to Mr Ganz and it was only the shares of Gi3 that Mr Ganz and Mr Goren between them could sell as the shares in Seder were held in part by Parrot Grove.

144. Mr Goren's evidence was that the letter was addressed to Mr Ganz because Mr Ganz needed to show it to the bank and that if they wanted to buy shares in Seder, Parrot Grove would have agreed to sell them the shares.

145. I do not need to resolve this issue. The key issue is whether the Falcon transaction and the Falcon letter provide evidence which supports Mr Ganz's case that the SPA was an authentic document.

146. Mr Ganz relied on the fact that the letter proposed that the transaction could be effected through a foreign subsidiary and submitted (skeleton 107) that the Falcon letter "*is consistent with what then happened*". It was submitted for Mr Ganz (skeleton 112) that "*it is likely that the SPA was the continuation of the same transaction that had been agreed with Falcon*".

147. However the terms of the SPA which Mr Ganz relied on in his written submissions (skeleton 108) as "*broadly consistent*" with the transaction outlined in the Gi3 Letter and the Falcon letter were as follows:

147.1. there was to be a purchase of shares "*now clearly identified as those of GI3*".

147.2. the purchase price was very substantially similar 420m Rupees instead of 430m Rupees.

147.3. the purchaser was a non-Indian entity.

147.4. it was possible to make provision for the payment of a substantial advance (because the purchaser would be an non-Indian entity).

147.5. There was an extension of time for completion until 30 July 2015.

148. In my view the terms of the SPA were inconsistent with the Falcon transaction in the following respects:

148.1. the Falcon letter is more naturally interpreted as a reference to the shares of Seder as the company owning the Project.

148.2. even if I were wrong on that, the purchase price in the SPA was different from the price referred to in the Falcon letter; Mr Goren's evidence was that Falcon tried to reduce the price by 15% at the completion meeting but he rejected that.

148.3. the date for completion in the SPA (30 July 2015) is different from the dates contemplated by the Gi3 letter and the Falcon Letter (30 June and 15 July 2015 respectively) which were written only a few days before the SPA was produced on 31 May and there is no evidence that a longer period was subsequently sought by Falcon.

148.4. the entity which purported to enter into the SPA (Petronz) was not an Indian entity but although there was a suggestion that it was linked to Falcon, the evidence does not establish that it was an affiliate of Falcon.

149. In his oral submissions counsel for Mr Ganz submitted that the fact that the SPA was apparently backdated to 20 May 2015, the date of the failed completion meeting for the Falcon deal, also suggested that the SPA was a continuation of that deal.

150. However, as submitted for Mr Goren in its closing submissions to the Tribunal, there is no explanation as to why the Gi3 letters or the Falcon letter were necessary to show to the banks if a deal under the SPA (whether a continuation of the Falcon deal or otherwise) had already been agreed and entered into with effect from 20 May 2015. Mr Ganz's evidence to the Tribunal (day 2 p4-10) was that he did not remember what he wanted to do with the letter but he wanted to know that they were selling the property. He denied that he wanted to show it to other people but he said he wanted it documented that they had sold the company. I note in this regard the submission for Mr Goren that these letters were in English and not in Hebrew so it is difficult to accept that Mr Ganz only wanted these for his own use given his own evidence to the Tribunal (Day 2 p26) that he does not read English.

151. I therefore reject the submission that the Falcon transaction and the Falcon letter support an inference that the SPA was a continuation of the Falcon transaction.

152. It was submitted for Mr Ganz (skeleton 112) that alternatively it was an agreement with a company that was owned by Mr Pharis or in which he had an interest or with which he had a connection or in the further alternative was an agreement with an unconnected third party. It was submitted that it is not necessary for Mr Ganz to prove which of the alternatives it was.

153. Whilst I accept that it is not necessary for Mr Ganz to prove whether the SPA was with a connected or unconnected party, it is for Mr Ganz to prove that the agreement which on its face was entered into with Petronz is authentic.

154. Mr Goren’s evidence was that Petronz was entirely separate.

155. In my view it seems unlikely and implausible that a new deal (on different terms) with a different entity would be made under the SPA on 20 May (or 31 May) 2015, before it was clear that the first deal with Falcon would not go ahead, in circumstances where the buyers were apparently seeking additional time to complete.

156. For all these reasons, in my view the Falcon transaction and the Falcon letter do not support Mr Ganz’s claim that the SPA was an authentic agreement with Petronz but rather tend to support a finding that there was no such binding agreement.

Other contemporaneous documentary evidence

157. Mr Goren submitted that there was "*a dearth of relevant material against which the alleged SPA is to be understood*". I understand the submission to be that one would have expected there to be more documents which fell to be disclosed (although Mr Ganz submitted that they may have been lost) but I also understand him to refer to the absence of any reference to the alleged SPA whatsoever between 31 May 2015 and the opening letter in the arbitration proceedings some two and a half years later on 27 October 2017. However, there are some documents before the Court which relate to the period from 31 May 2015 and 27 October 2017 which I now turn to consider.

Standard Chartered letter 30 June 2015

158. The Court has before it a letter from Standard Chartered dated 30 June 2015 (the "Standard Chartered Letter") to Mr Swirsky. It was accepted by Mr Ganz (skeleton 29 viii) that in 2015 Mr Ganz was coming under "*some pressure*" from Standard Chartered Bank Botswana Limited ("Standard Chartered") in relation to one of his business operations, Motiganz Botswana Limited ("Motiganz"), to minimise his borrowing and that Mr Ganz engaged Mr Swirsky to assist him in that regard.

159. In the Standard Chartered Letter the bank referred to a conference call on 4 June 2015 with Mr Swirsky, representing Motiganz, and the actions which had been agreed that Motiganz would take with respect to settlement of an outstanding amount of approximately US$6.9m by 29 June 2015. These included:

> "*Remit proceeds of the sale of the India property to [Standard Chartered] on the 29th June 2015. It was also agreed that Motiganz would share the contract for the sale agreement with [Standard Chartered] for the property in question.*"

160. The Standard Chartered Letter noted that none of the obligations mentioned in the letter had been met. The letter concluded with a request that Motiganz settle all outstanding amounts.

161. In his submissions (skeleton 148) Mr Ganz does not address the inferences which can be drawn from the Standard Chartered Letter and says only that:

> "*The Arbitrator was right to find that there was no common intention between Mr Ganz and Mr Goren to show Mr Ganz's bankers a form of an agreement that had not in fact been agreed and was right, as far is it goes to the issue of common intention, to find that Mr Ganz entirely relied on Mr Goren to help him realise assets to repay his bank and that he thought a transaction had in fact been concluded.*"

162. I note that by the date of the conference call with Standard Chartered on 4 June 2015 the completion of the deal with Falcon on 20 May 2015 had failed and Falcon had written on 27 May 2015 indicating a delay until possibly mid-July. Although, according to the letter, during the conference call Mr Swirsky had agreed to remit the proceeds of sale of the Indian property on 29 June 2015 and to share a copy of the sale contract, it is clear from the Standard Chartered letter that the payment was not made and no

agreement was in fact shown to Standard Chartered.

163. The evidence of Mr Swirsky to the Tribunal was that he advised Mr Ganz to withhold details of the sale on the basis that he should not mix his properties with his trading business. In his evidence Mr Swirsky said that the call was an "*ambush*" and he did not recall whether he agreed to 29 June although he appeared to accept that he would have agreed to pay across any proceeds (Day 2 p129-132).

164. It is difficult to assess the evidence of Mr Swirsky. I note that he was said by the Tribunal to be independent and that his recall may have been affected by personal circumstances in the intervening period.

165. Taking Mr Swirsky's evidence at face value, the Standard Chartered Letter provides no support for Mr Ganz's case that there was a binding SPA.

Mr Swirsky's emails in October/November 2015 and his reports in November 2015 and April 2017

166. Mr Swirsky's evidence in relation to Standard Chartered was that he knew about the SPA but advised Mr Ganz to withhold details from the bank. However in the email exchanges with Mr Goren in October/November 2015 Mr Swirsky made no reference to the SPA. He does refer to a "deal" to which Mr Goren responded:

> "*The deal that was on planned at [that] time is no longer proposed and now there's another possible buyer with whom we are dealing.*"

167. In an email from Mr Swirsky dated 25 November 2015 to Mr Goren he proposed a mortgage of the property and a pledge of the shares and loan accounts. Mr Swirsky also stated that:

> "*The advance of USD1 mill will need to dealt with now.*"

168. Mr Swirsky produced 2 reports. The first was a draft "Due Diligence Report" dated 27 November 2015 with Mr Goren's comments marked. It was in the process of being written with a view to refinancing for the benefit of Motiganz.

169. In this first draft report Mr Swirsky wrote (Bold text represents comment inserted by Mr Goren):

> "*Earlier this year MG reported to us that the property had been sold and we received a letter from an Indian company Falcon Logistics Ltd apologizing for the delay in making the payment of INR 430mill (USD6,5) and requesting extra time till July 2015. We are all aware of the complications in dealing with India and extra time was granted to MG****???. This agreement is no longer valid. Was cancelled due to their playing games.***"

Further down the report under a heading "*Sale"* Mr Swirsky wrote:

> "*I have just been informed that the sale to Falcon has fallen away, however there are other buyers who have approached Rami (Rami to confirm names if possible*

> *and the new price levels 15% higher 1.2 Crore?).* ***No. The price offered for a quick sale is still the same 420 – 430 Mil. I cannot give names as of now can only say they are respectable companies****. The USD1mill advance payment will thus have to be returned and this must be factored into the banks expectation in the money flows.*
> *In addition the developers contract with Castle was terminated in order facilitate the sale of the property. We had always looked at the income stream from this agreement for the financing but we have been assured that this contract can be reestablished very quickly and this problem solved (Rami to confirm)* ***we believe so. I would not use "assured" "very quickly" etc. tone it down a bit.***
> *Due to the lack of knowledge about the structure by MG, we were unaware of the 5% outside shareholder in Seder and thus the sales proceeds to GI3 would have be reduced by 5%. We have been assured that that this will not create an issue.*" [emphasis added]

170. It was put to Mr Swirsky by the Tribunal that his sentence that "*other buyers ... have approached Rami*" was "*quite tentative*" as opposed to "*we've got a deal in our pocket and everything's signed already*".

171. Mr Swirsky's evidence was that the one million had already appeared but he would have liked it to have been done more clearly.

172. There was a second report produced by Mr Swirsky in April 2017 (Damal (India) Project Review of April 2017). It was written for a different purpose following his visit to India and the land in question, namely consideration of Mr Ganz's commercial options. The SPA is not mentioned in that report.

173. Mr Swirsky's evidence to the Tribunal was that he did not mention the SPA because he was concerned with what would happen with the land on the ground and not the level of the shares. He also initially said that he did not mention the SPA because he did not have to although later in his evidence he said he should have made reference to it.

174. One of the options for going forward mentioned in the report was to sell it to a foreign entity. Mr Swirsky was asked whether he had in mind the SPA to which he responded:

> "*To be honest it is a universal word. I'm using both the SPA and anyone else. He hadn't been paid to date. It still remained his option to sell it the whole thing to someone else. That was an option that was already on the table*." [Day 2 page 216]

175. The report in April 2017 did refer to Falcon:

> "*RG claims that he had buyers for this land from a company called "Flacon" (sic) but for unexplained reasons it was cancelled*."

176. Mr Ganz was asked about in his evidence why the report referred to Falcon as the buyer and not Petronz. His answer was that his agreement was with Mr Goren and he did not care whether it was Falcon.

177. I did not have the benefit of hearing Mr Swirsky's evidence first-hand and have had to

rely on the transcript. However his explanations for why the SPA was not referred to in his reports appear confusing at best. In my view the absence of any reference to the SPA in his reports is difficult to reconcile with the existence of an authentic and binding SPA.

Conclusion on Ground 1: substantive jurisdiction

178. As discussed at the outset, the test, both as to whether the SPA was an authentic agreement made between the parties or whether there was a valid agreement to arbitrate, is an objective test depending on what was communicated between the parties by words or conduct and not upon their subject state of mind. It was accepted for Mr Ganz that extrinsic evidence is admissible to show that what appears to be a valid and binding contract is in fact no contract at all.

179. I have found above that the payments by Gi3 to Mr Ganz and relied on by Mr Ganz were not advances under the SPA. This is not therefore a case where the dicta in *RTS Systems* ("*The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations the transaction can be said to have been performed*") has any force.

180. In relation to the matters relied upon by Mr Ganz (other than the payments) the only evidence that supports his case is the SPA itself, with an electronic signature of Mr Goren and perhaps a manual signature and on its face executed for Petronz.

181. However the letters from Petronz to the LCIA and the Tribunal are some evidence that Petronz did not enter into a binding agreement and the proposition advanced by Mr Ganz that Mr Marakkar had time to sign the SPA before it was sent as a PDF attachment to Mr Ganz by Mr Goren is purely speculative and carries no weight.

182. There is a lack of documentation which may have been expected such as evidence of the negotiation of the SPA but leaving aside whether any inference should be drawn from such absence, the documentation that is before the Court does not support Mr Ganz's case. As discussed above, I do not accept that the "*factual context of the prospective sale to an affiliate of Falcon*" adds support to Mr Ganz's case in circumstances where the only documentation (the Gi3 letters and the Falcon letter) is inconsistent with the existence of a binding SPA. The Standard Chartered Letter, a contemporaneous document from an independent third party, is inconclusive in light of the evidence but is not evidence which supports Mr Ganz's case. The absence of any reference to the SPA in the reports of Mr Swirsky has not been satisfactorily explained.

183. It was submitted by Counsel for Mr Ganz that it was "*perfectly possible*" for the Court to be undecided as to whether there was a binding SPA but sufficiently satisfied that there was an agreement to arbitrate any dispute in relation to Mr Goren and Mr Ganz.

184. I accept that applying the approach laid down in *Fiona Trust,* section 7 of the Act means that even though the main agreement and the Arbitration Agreement were bound up with each other, they must be treated as having been separately concluded and the Arbitration Agreement can be invalidated only on a ground which relates to the Arbitration Agreement and is not merely a consequence of the invalidity of the main agreement. However in my view the matters discussed above which lead to the

conclusion that Mr Ganz had not proved his case that there was an authentic and binding SPA apply equally to the alleged Arbitration Agreement and there are no separate matters raised by Mr Ganz that would alter the conclusion in that regard.

185. For all the reasons discussed above, I find that the Arbitration Agreement is not valid and binding as between Mr Ganz and Mr Goren and the Tribunal has no substantive jurisdiction over Mr Ganz and Mr Goren.

Ground 2: Section 33 challenge

186. As referred to above, Mr Ganz also challenges the Award under Section 68(2)(a) of the Act i.e. that the Tribunal failed to comply with her general duty under Section 33 of the Act to act fairly and impartially as between the parties and/or adopt procedures suitable to the circumstances of the particular case so as to provide a fair means for the resolution of matters referred to her.

187. It was submitted for Mr Ganz that it was seriously irregular for the Tribunal to have decided that Mr Marakkar's alleged signature on the SPA was not his in the way she did and this has caused Mr Ganz substantial injustice. In essence the complaint is that there was discussion of the need for handwriting evidence at the Procedural Hearing in September 2018 and Mr Ganz's request for that evidence was not acceded to; it was accepted (in oral submissions) that the issue was left open at the Procedural Hearing but it was submitted that it was to be done on a responsive basis, that is that there was no need for Mr Ganz to produce his own evidence but if it was produced by Petronz then Mr Ganz would produce responsive evidence. It was submitted that Petronz did not take part in the arbitration proceedings and in those circumstances Mr Ganz did not renew his application for expert handwriting evidence. However it was then procedurally unfair and has caused substantial injustice that one of the key elements of the Tribunal's conclusion as to the binding nature of the SPA was that Petronz was not a party and this was based on lack of signature.

188. From the transcript of the Procedural Hearing (conference call) on 4 September 2018 I note the following passages:

> Mr Goold: "*...Well you will see, this is picking up on page 28, my point (iv), that what we have proposed is that there are handwriting experts instructed to address the question of the authenticity of the signatures of Mr Marakkar and Mr Goren. It seems to us that that is an inevitable consequence of the position that the Respondents have taken in relation to both signatures. I can't see that you will be able to determine that issue as to authenticity without assistance and so (iv) (v) and (vii) are all designed to ensure the production of that evidence, hopefully without any expert having to attend and be cross-examined. One knows from experience that handwriting experts instructed are of good quality, they will quite often come to the same conclusion and it would be unnecessary for them to have to attend and give live evidence. So that's what those proposals are directed to.*
> Arb: *I'm just interrupting for a second because as I understand the case, and Mr Lister will correct me if this is not correct, but I understand that what is being put to your client is that in fact those signatures may well have been the signatures of those individuals but they were taken from other documents, other templates, or*

> *that they were sort of carried across electronically on what ended up being the SPA. I think that's the case but perhaps Mr Lister can enlighten me?*

Having clarified Mr Goren's case the arbitrator continued:

> "*...So having heard that Mr Goold, do you want to let me know whether those directions are still being sought - whether they are still relevant for example vis-a-vis the Petronz signatory?*

Mr Goold responded:

> *Well I think they are still relevant vis-a-vis the Petronz signatory because, I am just trying to put my hand on where it is actually said but my understanding of the position is that it said that that is just a scribble by somebody, I am sure I have read that somewhere and it's also said in any event that Mr Marakkar is not a director of the company contrary to what is on the… but I can see in the light of Mr Lister's comments now and his letter of 11 June that it may be unnecessary to have expert handwriting evidence in relation to Mr Goren's electronic signature because it is his signature it's just an issue about the purpose for which it was present.* [emphasis added]

189. Mr Goold then confirmed that the issue about expert evidence was only relevant to Petronz:

> Arb: "…*Especially about the authenticity of the signature of the signatory on behalf of Petronz so, in which case as I understand it, the directions that you are seeking with regard to the expert reports, the signature experts, remain relevant*.
> AG: *They remain relevant so far as the First Respondent is concerned*."

190. The arbitrator noted that she would "*not give any decisions today*" although she indicated that she was not persuaded of the need for expert evidence in relation to Mr Pharis. She then noted that expert evidence might also need to be adduced around the validity as a matter of UAE law but Mr Goold rejected this as unnecessary in order to advance Mr Ganz's claim:

> "*...a point has been raised by Petronz and I appreciate that Petronz at the moment is not participating in the jurisdiction issue but the point has been made around the validity as a matter of UAE law and possibly the requirements for stamps and registrations and so on. So it is possible that expert evidence would also need to be adduced on that front as well. So without making any judgment on whether or not it would be required, possibly this could be at the same time as the signatures' experts. So other expert evidence can be adduced on other issues that the parties may want to bring up.*
> *AG: Well we, it does not seem to me that to advance Mr Ganz's claim that we need to adduce that evidence and get into that issue. That is an issue of foreign law under English law which a party wishing to raise it would have to take and prove by expert evidence and I don't understand anybody to be doing that beyond Petronz's ascertain that it is invalid under UAE law.*" [emphasis added]

191. The exchange between Mr Goold and the arbitrator concluded as follows:

> "*…What I am suggesting is that the expert evidence will not be limited solely to the signature issue,*
> *AG: Handwriting.*
> *Arb: Yes handwriting experts.*
> *AG: Well I think we would be content with that although there is an uncomfortable sense in which that is putting the burden the wrong way round because the way English law will approach the matter in the absence of expert evidence.*
> *Arb: I haven't said I would be requiring the Claimant to bring evidence of UAE law's validity of these agreements in the first place.*
> *AG: Right okay.*
> *Arb: The proposal is that there would be permission for the parties to adduce expert evidence and that expert evidence will be not limited to solely to handwriting experts but it would be open to the parties, and that would be an invitation to Petronz, should they want to, to adduce the UAE law expert evidence. There is no need for the Claimant to provide evidence in the first place, but if it is adduced, then your client would need to provide responsive expert evidence.*" [emphasis added]

192. When this transcript is read carefully, it is clear that Mr Goold was seeking permission for a handwriting expert in relation to Mr Marakkar's signature and the Tribunal without deciding it was minded to agree to this. The additional expert evidence in relation to UAE law was evidence which she said would be open to Petronz to adduce but that such evidence need not be provided by Mr Ganz but if adduced by Petronz would then be adduced in response.

193. I do not accept the submission that the Tribunal declined the request, or as orally submitted, left it open, on the basis that it would only be required from Mr Ganz as responsive evidence to evidence if and when adduced by Petronz. Mr Ganz in his submissions focussed on the final paragraph of the Arbitrator's remarks but this paragraph has to be read in the light of the preceding exchanges which clearly indicate that the remark about Mr Ganz providing responsive evidence referred only to the foreign law expert evidence and not to the handwriting evidence.

194. On 13 September 2018 the Tribunal issued directions following the Procedural Hearing which included the following:

> "*Further directions, regarding the need, procedure and timings for disclosure, expert and witness evidence will be issued following receipt of the above submissions, and further consultation with the Parties*."

The evidence is that on 21 January 2019, Mr Ganz proposed further directions for the resolution of the preliminary issue, together with a draft procedural order. The proposed directions make no reference to disclosure or experts, although there was clearly an opportunity for Mr Ganz to make such proposals.

195. It was therefore open to Mr Ganz to have pursued his application for disclosure and expert evidence on the issue of Mr Marakkar's signature when the directions were proposed by him and Mr Ganz cannot now complain of a lack of procedural fairness.

196. For these reasons the challenge based on section 33 must therefore be dismissed.

Substantial injustice

197. In the light of my finding above the issue of substantial injustice does not arise and I do not propose to address it.