Neutral Citation Number: **[2022] EWHC 2470 (Comm)**

Case No: **CL-2022-000065**

**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: **16 September 2022**

**Before** :

**Mr Justice Andrew Baker**

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**Between :**

| | |
|---|---|
| **EGF** | **Claimant** |
| **- and -** | |
| **(1) HVF** | **Defendants** |
| **(2) HWG** | |
| **(3) TOM** | |
| **(4) DCK** | |
| **(5) HRY** | |

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**Paul Downes KC and Gaurav Sharma** (instructed by **LXL LLP**) for the **Claimant**
**Stephen Houseman KC** (instructed by **Allen & Overy LLP**) for the **First and Second Defendants**
**Tom Sprange KC and Kabir Bhalla** (instructed by **King & Spalding International LLP**) for the **Third to Fifth Defendants**

Hearing dates: **15, 16 September 2022**

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# JUDGMENT
# (Approved Transcript)

**Mr Justice Andrew Baker** **Friday, 16 September 2022**
(**14:08** pm)

Judgment by **MR JUSTICE ANDREW BAKER**

**Introduction**

1. This Claim concerns an arbitration seated in London in which what was then intended to be a single final hearing on the merits took place over four days in September 2021, "the September Hearing".

2. The claimant company is the respondent in the arbitration and I shall refer to it as "the claimant". The first and second defendant companies are the claimants in the arbitration and I shall refer to them as "the defendants". The third to fifth defendants are the arbitrators and I shall refer to them as such. In the arbitration, the third defendant was appointed to chair the tribunal and I shall on occasion refer to the third defendant as "the chair".

3. References to "the Act" will all be to the Arbitration Act 1996.

4. There will now be a further merits hearing in the arbitration, presently fixed with the arbitrators for up to eight days in December 2022. Accordingly, not only are the merits of the parties' substantive claims or defences not a matter for this court, but also, they have not yet been finally argued and determined in the arbitration. Therefore, I shall aim to be especially circumspect in anything I say that might be capable of being thought to express or imply a view, even very provisional, about any prospective argument on the merits.

5. I note, though, that on one aspect I shall set out an analysis of how a particular disputed issue of fact might in point of logic have the capacity to bear upon the merits. That cannot be avoided given the nature of a claim the claimant has advanced under section 24 of the Act.

6. I am giving this judgment in public because a claim the claimant has advanced under section 67 of the Act, alternatively section 68(2)(b), raises what may be an important point on the extent of the arbitrators' powers as regards interim remedies, albeit as will be seen it will not be necessary finally to resolve the point.

7. I have ordered anonymity in the listing of this hearing and in respect of this judgment, including as regards any reporting, to protect the confidentiality of the arbitration. In saying what I need to say about the arbitration and the issues arising in it, I shall describe things in ways that aim to preserve that anonymity.

**The December Ruling and the Partial Award**

8. The further merits hearing now fixed in the arbitration arises from a one-page written ruling dated 21 December 2021, "the December Ruling", sent to the parties by the chair following a hearing before the arbitrators the previous day.

9. By the December Ruling, the chair on behalf of the arbitrators ordered that:

    (i) a second arbitration that had been commenced by the claimant against the defendants following the September Hearing was to be consolidated with the arbitration with which I am concerned such that -- and this was made explicit -- the claims advanced in the second arbitration would be heard and decided by the arbitrators. The second arbitration may strictly have comprised more than one reference, but nothing turns on that and I shall use the singular;

(ii) the claims intimated by the claimant in the second arbitration were to proceed in the consolidated proceedings before the arbitrators, to the extent the claimant wished to pursue them, without the need for any further permission from the arbitrators;

(iii) the arbitrators would make timetabling directions to accommodate the consolidation if such directions were not agreed between the parties by 7 January 2022;

(iv) the claimant was to pay the first defendant US$250 million by 31 January 2022 by way of "Interim Payment Order";

(v) costs were reserved, the arbitrators would give reasons for the December Ruling as soon as possible in 2022, and there was liberty to apply.

10. The December Ruling set out the relief the arbitrators had decided to grant upon a written "Application for Urgent Post-Hearing Relief" dated 12 October 2021, "the Application". The Application was made by the defendants to the arbitrators in response to the commencement by the claimant of the second arbitration.

11. The first main part of the Application concerned what should be done about the second arbitration. The consolidation order was the relief granted as to that. It may deserve a word of further explanation. Underlying the arbitration are three separate but related commercial agreements all containing arbitration clauses. One of those includes a term to the effect that where more than one arbitration comes to be commenced, any of the appointed arbitration tribunals will have power to order consolidation. The arbitration with which I am concerned is itself a consolidation of what were originally three arbitrations, one under each arbitration clause, in all of which the arbitrators had been appointed as the tribunal. The second arbitration commenced by the claimant got no further than the appointment of an arbitrator by the claimant and the service on the defendants of notice of arbitration. That arbitrator has been stood down by the claimant, since it respects the consolidation order in the December Ruling.

12. The second main part of the Application was a submission by the defendants that come what may, at least about US$300 million would be found to be due from the claimant to the first defendant as of 30 September 2021. The Application gave a more precise figure with a supporting calculation, but that detail does not matter for my purposes.

13. The amount claimed was dubbed by the defendants the "Undisputed Debt" and the arbitrators were asked to grant, as it was put in the Application, "a Partial Award for the Undisputed Debt". In a written reply submission in the Application, the defendants added in the alternative a claim for relief by way of: "... an *interim order* for the payment of the undisputed debt ... [which] would grant the tribunal the power to revisit and modify any sums owing ..." (original emphasis).

14. The defendants argued in that regard that the arbitrators had power "to make an interim order for payment as part of its power to order provisional relief pursuant to section 39 of the Act and Article 26 of the UNCITRAL Rules". They said, and it was also their argument before me, that Article 26 and section 39 of the Act read together empowered the arbitrators "to grant on an interim basis any relief [they] would have power to order on a final basis".

15. Against that background, it was tolerably clear that the interim payment order requiring the claimant to pay the first defendant US$250 million by 31 January 2022 was intended to be an interim remedy having the same effect in the arbitration as an order for interim payment under CPR 25.1(1)(k) would have if the substantive proceedings were in this court.

16. That was confirmed beyond any possible doubt by a document dated 17 January 2022 provided to the parties by the arbitrators, "the Partial Award". The Partial Award was signed at the end by all three arbitrators below a final section in the following terms:

> "***DECISION***
>
> For the reasons set out above in elaboration of the December Ruling issued upon the conclusion of the hearing of the Application, the Tribunal hereby makes this Partial Award pursuant to Article 34 of the UNCITRAL RULES:
>
> 1. Arbitration A2 shall be consolidated with this present Arbitration.
> 2. By way of an Interim Payment Order, [the claimant] shall pay [the first defendant] the sum of US$250 million ... by 31 January 2022.
> 3. The costs of the Application shall be costs in the Arbitration."

17. Thus the Partial Award satisfied the formalities required by the Act for and purported to be an award. In my judgment – not, I think, that this was in dispute -- the Partial Award is an award susceptible in principle of being challenged under section 67 or section 68 of the Act (or for that matter of being appealed under section 69 of the Act if the right of appeal were not excluded as in fact it has been in this case). The claimant says in one of its claims that the arbitrators should not have issued an award granting a merely interim remedy but that goes to the merits of that challenge to the Partial Award, it does not mean it is an incompetent challenge because there is no award to challenge.

18. The front page of the Partial Award gives it this title:

> "***REASONS FOR DECEMBER RULING***
>
> ***PARTIAL AWARD GRANTING AN INTERIM PAYMENT ORDER.***"

19. Prior to concluding with the un-numbered "***DECISION***" paragraph I have already quoted, the body of the Partial Award takes up 35 pages and comprises 89 numbered paragraphs under a series of headings. It is written much as a reserved judgment from this court might be written in respect of a heavy interlocutory application where the outcome has been pronounced at the end of the hearing and an order drawn up accordingly, but with written reasons to follow later.

20. The first section, an introduction, identifies the Application as the subject matter of the document, sets out the relief sought by the defendants as ultimately pursued on the Application, rehearses briefly the immediate procedural history culminating with the December Ruling, which is quoted in full, and concludes at [7] with the statement that, "These are the Reasons for the December Ruling".

21. That introduction is followed by sections headed "*BACKGROUND*", "*THE RIVAL CASES AT THE DECEMBER HEARING*" and "*THE PRINCIPAL ISSUES*". The last of those is a single paragraph [32] stating that two principal issues required determination, the first of which concerned what was to be done about the second arbitration and the second of which was: "Are the [defendants] entitled to either a Partial Award or an Interim Payment Order and, if so, which?"

22. The next section, [33] to [62], considered the first of those principal issues. The claim for an order requiring the claimant to make a large immediate payment to the first defendant was then considered in two sections:

    (i) a lengthy section, [63] to [85], headed "*ISSUE II: PARTIAL AWARD OR INTERIM PAYMENT ORDER*", the material conclusions of which were that:

(a) since the arbitrators were not determining finally any merits issue at that stage, in their view "no Partial Award *as such* (see further on the form of relief below) can be made" (original emphasis),

(b) Article 26 of the UNCITRAL Rules, read with section 39 of the Act, empowered the arbitrators to make an interim payment order; and

(c) in the circumstances of the case as they then stood, it was just to make such an order in the amount of US$250 million.

(ii) a short section, [86] to [88], headed "*THE FORM OF RELIEF*" as follows (original formatting throughout):

"86. For the reasons already given we have decided to make an IPO in the amount indicated and declined to make a Partial Award *final* as to the amount to be paid.

87. There remains, however, a question as to the *form* of the interim relief granted to [the first defendant]. This is discussed in Jan Paulsson's and Georgios Petrochilos's commentary: *UNCITRAL Arbitration* (Kluwer Law International 2017), *UNCITRAL Arbitration Rules Section III, Article 26 [Interim Measures]*, at paras. 28 – 31, under the heading "*Order or Award*". The learned authors there say that it is "*'generally accepted' that under the 2010 Rules a tribunal may frame a decision on interim measures as an award*." In practice, tribunals have done both, i.e., orders and awards. The attraction of adopting the form of an *award* is enforceability. The potential downside is the risk of confusion between what is *interim* and what is *final.*

88. Having regard to the vagaries of enforcement, we prefer to frame the relief in the form of an award. Accordingly, our Ruling constitutes a Partial Award under Article 34 of the UNCITRAL Rules final as to the making of an IPO. To reiterate, the IPO is itself an interim measure susceptible to adjustment as already explained."

23. The final numbered paragraph, [89], is a "*POSTSCRIPT*" spelling out that though the arbitrators had made "strong findings" about the claimant's conduct, "... we have neither expressed nor implied any views and we have made no findings on the merits of the Issues before us at the Hearing or of the Fraud Allegations. Those are for another day." The strong findings in question concern the claimant's attempt to put before a different arbitration tribunal matters that in the arbitrators' view properly belonged, if they were to be pursued, in the arbitration they were conducting. Pursuant to the arbitrators' consolidation decision, those matters are now before them as if an application to amend the claimant's case to introduce them after the September Hearing had been made and succeeded, and the claimant's attempt to pursue them in a different arbitration or set of arbitrations failed. The claimant does not complain to the court about any of that. However, it does allege that, notwithstanding the arbitrators' express reassurance that they have not prejudged any of the merits, a procedural ruling they made at the September Hearing created and creates an appearance that they may have done so.

24. I shall copy the claimant in calling the procedural ruling "the Witness Statement Ruling" although there was more to it than just a question about witness statements. Specifically, then, the allegation is that a reasonable observer might think on the basis of the Witness Statement Ruling that the arbitrators may have closed their minds on one particular issue that may go to the merits, so as to have prejudged that issue.

25. The claimant has been at pains throughout to emphasise that it does not claim that any of the arbitrators is in fact biased against it. The complaint is exclusively that the arbitrators' conduct

in respect of the Witness Statement Ruling was such as to create an appearance that there might be bias on the arbitrators' part against the claimant.

**The Claim**

26. By its Arbitration Claim Form dated 14 October 2022, as amended under an order of Foxton J dated 18 July 2022, the claimant claimed:

    (i) The removal of the arbitrators, with consequent directions for the appointment of a fresh panel in their stead, under section 24(1)(a) of the Act, on the ground (as alleged) that the Witness Statement Ruling creates justifiable doubt as to the arbitrators' impartiality.

    (ii) Alternatively, the removal and replacement of the arbitrators under section 24(1)(d) of the Act on the ground (as alleged) that the arbitrators' subsequent decision not to set out their reasons for the Witness Statement Ruling separately from and prior to any future final award amounts to a refusal to conduct the arbitration proceedings before them properly and fairly such that substantial injustice has been or will be caused to the claimant.

    (iii) Further or alternatively, an order under section 68 of the Act setting aside the interim payment order, or declaring it to be of no effect, on the ground (as alleged) that the arbitrators demonstrated apparent bias against the claimant by making the Witness Statement Ruling and subsequently refusing to set out their reasons for it.

    (I say immediately that there has been no such refusal, nor in truth does the claimant suggest there has been. The arbitrators have though decided not to say anything more about the Witness Statement Ruling than was said on the day when it was made, separately from and prior to any future final award, and it is that to which the claimant is referring, i.e. a refusal to say anything more about the Witness Statement Ruling, or set out any more fully reasons for it, otherwise than when the arbitrators come to write up their final award at the end of the arbitration).

    (iv) An order under section 67 or section 68(2)(b) of the Act setting aside the interim payment order made by the arbitrators, on the ground (as alleged) that the arbitrators had either no jurisdiction (section 67) or no power (section 68(2)(b)) to make such an order because, so it is said, the UNCITRAL Rules "do not provide a power for arbitrators to make a provisional award and ... in the circumstances, pursuant to section 39 of the ... Act, the Tribunal had no such power"; further or alternatively, a declaration that the interim payment order made by the arbitrators is of no effect because they lacked substantive jurisdiction or power to make such an order.

27. I put the claims in that order, which differs slightly from their order in the claim form, to emphasise the different nature of the fourth claim from the rest of the claims. The fourth claim raises a short, important point, on the nature and extent of arbitrators' powers under Article 26 of the UNCITRAL Rules, where they apply. The other claims all complain about the Witness Statement Ruling and the arbitrators' decision to say nothing more about that ruling until the end of the arbitration. Noting that the fourth claim in fact asserts a primary claim under section 67 of the Act and an alternative claim under section 68(2)(b), and without prejudice to the implications of that, I shall refer to it by way of shorthand as the "arbitral powers claim".

28. Having read into the papers for the hearing, I directed that I would take first the argument on both sides on the arbitral powers claim, before hearing argument on the other claims, and that is how the hearing proceeded. During the course of Mr Downes KC's submissions to open the other claims, on the basis of which I did not consider it necessary to hear from Mr Houseman

KC or Mr Sprange KC on those claims, I explored *inter alia* whether any claim was pressed other than upon the basis, if the claimant could establish it, that the arbitrators had created an appearance of bias. Having had the chance to reflect on that element of the discussion and take instructions over the short adjournment, Mr Downes KC confirmed that indeed it was "apparent bias or bust" (as I had put it during the discussion). In other words, leaving the arbitral powers claim always to one side as different in kind, no claim was pursued, to whatever extent any further or different claim may have been pleaded, other than that the arbitrators had so conducted themselves as to create justifiable doubt as to their impartiality.

29. Mr Downes KC also made clear, which helpfully focuses matters still further, that he did not say that the arbitrators' decision, strictly as I shall explain two separate and successive decisions, about how much to say and when in relation to the Witness Statement Ruling, creates an appearance of bias if the Witness Statement Ruling as delivered at the September Hearing did not do so.

30. Before going further, I should say that I do not agree with the claimant's characterisation of those decisions as to reasons. The Witness Statement Ruling as delivered to the parties was not unreasoned. The later decisions to which the claimant makes reference are therefore strictly decisions as to whether anything *further* is to be set out by the arbitrators, and if so when, as to why the Witness Statement Ruling was made. It is an overstatement to say that the Witness Statement Ruling as delivered gave no reasons so that what is awaited is a set of reasons for that ruling.

31. With matters helpfully focused as I have described, those later decisions in relation to the Witness Statement Ruling come into play if at all only indirectly in two ways:

    (i) Firstly, *ex hypothesi* the court has nothing from the arbitrators beyond what was said on the day in delivering the Witness Statement Ruling that might be capable of dispelling any justifiable doubt as to the arbitrators' impartiality otherwise created by that Ruling.

    (ii) Secondly, Mr Downes KC argued that the fact that (as he submitted) reasons for the Witness Statement Ruling were not provided at the September Hearing or set out subsequently by the arbitrators, and how that was in turn dealt with by the claimant and the arbitrators between the September Hearing and the Partial Award, and indeed immediately following the Partial Award, mattered to the question whether the claimant had failed to make objection "forthwith", i.e. as soon as reasonably possible, so as to have lost any right to seek the removal of the arbitrators under section 24 of the Act by operation of section 73 of the Act.

**The Apparent Bias Claims**

32. There was no material dispute between the parties as to the test for apparent bias or justifiable doubt as to impartiality under section 24(1)(a) of the Act. I shall not take up time summarising or discussing the authorities.

33. On the facts I am not persuaded that the Witness Statement Ruling gives rise to any justifiable doubt as to the arbitrators' impartiality, as alleged by the claimant. The claims other than the arbitral powers claim made before the court all fail *in limine* and will be dismissed. It will not be necessary to deal with other issues potentially raised by those claims had there been some initial foundation for them, and I shall not do so.

34. I take first the question of the absence of (further) reasons to explain why for my part I endorse Mr Downes KC's concession that, upon analysis, it does not itself give rise to any claim as opposed to having possibly a more indirect relevance. Put shortly, the arbitrators have made

two separate and successive decisions to defer saying anything more about the Witness Statement Ruling until the end of the arbitration. Each was and is readily explicable in its prevailing circumstances if the Witness Statement Ruling itself, as communicated to the parties on (Friday) 10 September 2021 during the September Hearing, does not give rise to any cause for concern.

35. The arbitrators first so decided on 13 September 2021, the working day after the Witness Statement Ruling had been given. The claimant solicitors wrote to the arbitrators on (Saturday) 11 September 2021 saying that a question from the chair during closing argument, which had followed the Witness Statement Ruling the previous day, had troubled them. They asked, in the light of the asking of that question, for specific confirmation from each of the arbitrators whether they had read and fully considered the contents of the witness statements that had been admitted under the Witness Statement Ruling, before giving that ruling.

36. Thus, the suggestion was that the chair's question created an appearance that the chair at least may not have done so. I do not agree that it created any such appearance. Be that as it may, on behalf of the arbitrators the chair replied by email on 13 September acknowledging the claimant solicitor's letter and saying that, "The tribunal will deal with the matter in the award".

37. It was implicit in that response that the arbitrators intended to refer to and might say something more about the Witness Statement Ruling in their final award. At that time, the scheduled final merits hearing had been completed. No further pre-award process had been directed and so the next and only further event expected in the arbitration was the production of a final award, once the arbitrators had conferred, reached their conclusions, and done the necessary drafting.

38. There could be no sensible concern or complaint about a decision by the arbitrators to say anything more they wanted to say about the Witness Statement Ruling in that award and not before.

39. On 1 October 2021, in parallel with the commencement of the second arbitration, the claimant's solicitors wrote to the defendant's solicitors, not copying their letter to the arbitrators, saying they regarded it as "inconceivable that our client has succeeded given the way that the hearing unfolded and the manifestly one-sided orders that the tribunal made". The Witness Statement Ruling was said to be the "most egregious example" of this and the suggestion was repeated that "there are grounds to believe that this ruling was made without the tribunal having read and fully considered the impact of those statements." They said that the Witness Statement Ruling was "such a manifestly unfair ruling" that they would not develop other supposed complaints about the conduct of the September Hearing at that point. They continued that, "Given the stage that the proceedings have reached, we do not believe that there is any point in an application being made to court under section 24 of the ... Act ... especially since it is obvious that the tribunal would continue with the preparation of the award pursuant to section 24(3)."

40. That letter came before the arbitrators a little later, with the Application, as it was relied on in support of the defendants' complaint that the claimant was acting abusively by seeking to commence the second arbitration rather than, if it wished to raise or develop new points, making a post-hearing application to amend its case before the arbitrators.

41. The Application generated its own process, culminating in the hearing on 20 December 2021 and the December Ruling. Promptly following the December Ruling, on 23 December 2021, the claimant's solicitors wrote to the arbitrators asking them to clarify the jurisdictional basis of the interim payment order in the December Ruling and whether the December Ruling was an order or an award, and asking whether, when the arbitrators gave their reasons for the December Ruling, they would address the question they had asked on 11 September 2021, i.e.

whether the witness statements in question had been read and considered before the Witness Statement Ruling was made.

42. That prompted the arbitrators' second decision as to when they might say anything further about the Witness Statement Ruling. By email on 24 December 2021, the chair on behalf of the arbitrators said that: "As previously indicated, the Tribunal's response to the ... letter of 11 September 2021 will be given in the Final Award."

43. The Partial Award followed after the Christmas break, on 17 January 2022. It reconfirmed that decision in that at [19] the arbitrators identified the Witness Statement Ruling as one of two case management rulings in respect of which they noted that the claimant was dissatisfied and said that: "In our Final Award on the merits, we shall say more of these Rulings; it is unnecessary to do so here." Unarguably, the arbitrators were correct to say that it was not necessary to any of the decisions made by or explained in the Partial Award to say more than in fact they did about the Witness Statement Ruling or the other case management ruling.

44. With the Partial Award came directions for the arbitration, as amended by the consolidation order, through to what is now scheduled to be the second and final merits hearing in December 2022. The claimant's solicitors wrote again to the tribunal on 25 January 2022 asserting that it would therefore be a further year or so before the parties received the arbitrators' reasons for the Witness Statement Ruling and asking the arbitrators to reconsider their decision as to when to say something more about that Ruling.

45. By email dated 29 January 2022, the chair on behalf of the arbitrators responded as follows: "The Tribunal has carefully revisited its decision that reasons for the 10 September 2021 Ruling will be given in its Final Award rather than before. Having done so, the Tribunal remains of the same view and is not persuaded to alter that decision."

46. The directions for the remainder of the arbitration to which I have just referred make clear that all merits issues remain open for argument in December 2022 with nothing determined. They provide that, "the arbitration should now proceed in a manner as closely analogous as appropriate to the position which would have arisen had [the claimant] applied for permission to amend to introduce the Fraud Allegations and had that application succeeded." They spell out that in consequence of the nature of the new elements of the claimant's case thus introduced, as if by amendment, in principle: (a) previous rulings refusing disclosure requests might be revisited; (b) some witness evidence might need to be revisited; (c) cross-examination in December 2022 might legitimately go back over ground covered at the September Hearing; and (d) submissions may address all matters, while understandably asking the parties to avoid repetition where that can properly be avoided.

47. In those circumstances and from the perspective of the arbitration, which is the arbitrators' proper focus, it is in my view unsurprising and not arguably untoward that the arbitrators should prefer to say anything more that they judge needs to be or should be said about the Witness Statement Ruling as part of their final award at the end of the proceedings. I do not suggest that is the only view the arbitrators might reasonably have taken. What matters for my purpose is that the view they came to on that point does not arguably give any appearance of possible bias against the claimant.

48. Thus, if the Witness Statement Ruling, as given to the parties at the September Hearing, creates no justifiable doubt as to the arbitrators' impartiality, nothing that has happened since it was given changes the position. On the other hand, as I have already noted, if the Witness Statement Ruling as given did create justifiable doubt as to the arbitrators' impartiality, the practical upshot is that I have nothing further from the arbitrators to take into account in considering

whether any appearance of possible bias might have been dispelled, and I would have to proceed on that basis when considering the claimant's claims.

49. What then was the Witness Statement Ruling, and does it create any justifiable doubt as to the impartiality of the arbitrators? A little detail is required to deal adequately with the first part of that question. Once that is done, the second and dispositive part is to my mind clear cut.

50. The arbitration was commenced by the defendants to pursue what they say is the claimant's indebtedness of something like US$400 million pursuant to long-term commercial contracts. The claimant has paid very substantial amounts for supplies it has received. The US$400 million or so is claimed by way of aggregate alleged underpayment. This is not a case of a total payment default. Indeed, as I understand it, supplies and substantial payments, albeit said by the defendants to be underpayments, have continued throughout.

51. One key element in calculating the amounts that have been invoiced to the claimant over the years, and therefore in calculating the amounts claimed in the arbitration, is a certain unit tariff denominated in US dollars for supplies to the claimant. By contract, that tariff was index linked to a well-known US dollar denominated price index. The tariff stated in the contract, which by contract was then to apply initially but subject to that indexation over time, was given close attention in the commercial negotiations, which were in the summer of 2011. It was also subject to a certain regulatory approval requirement.

52. For both negotiations with the claimant and obtaining regulatory approval, the first defendant produced narratives and spreadsheets relating to the tariff. The narratives included *inter alia*:

    (i) statements in the form, "The competitive Tariff result [*sic.*] in the returns indicated below:", above a table that included percentage figures for "Project IRR" and "Equity IRR", IRR being of course internal rate of return;

    (ii) statements about financial modelling such as, "The financial model for the Tariff and the returns in [*sic.*] carried out in excel sheet and is enclosed in the form of CD ...".

53. By a rejoinder submission in the arbitration served in mid-July 2021, the claimant alleged for the first time a breach of what it said were implied duties of good faith in the commercial contracts. The essential allegation was that by operation of the contractual indexation mechanism, the first defendant's invoices demanded payment that would generate an Equity IRR for the first defendant substantially higher than indicated to the regulator. This was said to be a breach of the alleged implied duty of good faith, giving the claimant a defence. As clarified by an amended version of the rejoinder served in late August 2021, very shortly before the September Hearing, the claimant's contention was that, "… the 'approval' of the [regulator] to the ... tariffs was on the basis of a false IRR Equity figure ... meaning that [the first defendant] had no right to charge [the claimant] based on that tariff; alternatively that [the claimant] has a defence by way of set-off to the extent to which the ... tariffs were inflated by the false IRR Equity figure."

54. In its allegation that the regulatory approval was based upon a "false" IRR figure, what the claimant had in mind is that the Equity IRR percentages stated by the first defendant in its pre-contractual and regulatory narratives were generated by a spreadsheet calculation that took the tariff to be constant, i.e. did not allow for the index linking that would be in the contract, whereas, so the claimant said, the regulator would have taken those percentages, as stated by the first defendant, to have allowed for contractual indexation of the tariff over the life of the proposed contract.

55. The alternative line in this new defence -- contending for a set-off to the extent that the amounts for which the first defendant had voiced were, as it was put, "inflated by the false IRR Equity figure" -- was identified for the September Hearing as worth something like US$60 million for the claimant. That is to say, if the claimant succeeded only on that line of the defence, it would reduce the claim by about that amount, to something like US$340 million.

56. The primary line of defence however, as thus now formulated, was that there was no valid debt claim under the contracts at all. If that were the position, which was hotly disputed, the defendants contended, so that this was also before the arbitrators as an alternative claim raised in response, that the claimant would be bound on a *quantum meruit* to pay a fair and reasonable price for what it had received. The claimant may have accepted the principle of such an alternative claim if the premise for it arose. I do not need to make a finding on that. On any view, the claimant did not concede that any such claim would yield the defendants a monetary award after allowing for the amounts that had in fact been paid over the years.

57. As an aside at this stage that will save me coming back to this later, the Partial Award in substance justifies the interim payment order on the basis that the arbitrators were persuaded to a provisional view that it is sufficiently likely the first defendant will prove an entitlement even on the claimant's best case to a monetary award substantially in excess of US$250 million that justice is best served by ordering the claimant to pay the first defendant that amount by way of interim remedy. Except for the specific point towards which I am working and on which the claimant asserts that the arbitrators have given it to appear that they may have a closed mind, the claimant does not seek to challenge any of that before the court if (which is the subject of the arbitral powers claim) the arbitrators had power to order a payment on account of the claim by way of interim relief at all.

58. That may mean only that the claimant accepts there is no basis on which the court could interfere, rather than that the claimant necessarily agrees with all of the arbitrators' reasoning. In particular, Mr Downes KC's observations on the arbitrators' reasoning suggested a possible argument that the arbitrators erred in their analysis of the impact of the claimants' pleaded defences, were they to succeed. But such an argument has no place in the claims put before the court for determination.

59. I return to the main explanation I was giving.

60. There was thus an issue in the arbitration, and it remains an issue, whether the contractual tariff received regulatory approval upon the basis of a mistake on the part of the regulator induced by the first defendant's tariff narrative about the return, expressed as an Equity IRR, that the proposed tariff would provide. It is important to note that the case before the arbitrators at the September Hearing included no allegation of fault, let alone dishonesty, on the part of the first defendant in respect of the regulator being misled, if it was. The case was that the regulator had been inadvertently misled by the first defendant as to the projected financials and that that was sufficient to give the claimant a total or partial contractual defence.

61. As regards the spreadsheet provided to the regulator in support of what was said by the first defendant in its narrative about the tariff, the CD sent to the regulator back in 2011 was not in evidence in the arbitration. Nor was any CD retained by the first defendant that might have contained a copy of that spreadsheet or a spreadsheet derived from it. Neither side had any witness who was involved in the submission of material to the regulator or the tariff approval process at the regulator to provide first-hand testimony as to exactly what the regulator received and what impact it had (even if, 10 years later, any such witness would be in any real position to assist).

62. There were in evidence two spreadsheets that may have been derived from the spreadsheet a copy of which was put on to CD for the regulator. By their exhibit numbers in the arbitration, those spreadsheets were C-180 and R-23.

63. The metadata show that both derive from the same original spreadsheet, a spreadsheet created on 22 September 2010 and last printed on 4 December 2010. The metadata for R-23 show it to have been last modified on 18 February 2020 by an identified individual at the regulator who was not a witness in the arbitration, Mr X. The metadata for C-180 show it to have been last modified on 23 February 2020 by an employee of the first defendant, who was one of its witnesses in the arbitration, Mr Y.

64. R-23 was one of the claimant's exhibits in the arbitration. The claimant had obtained it from the regulator by email on 20 February 2020, forwarded via a colleague but ultimately coming from Mr X. That was in response to a request that day by email from a chief financial analyst (business development) at the claimant stating that in the context of tariff review discussions, it had come to the claimant's attention that neither it nor the first defendant had a copy of the financial model sent to the regulator for tariff approval and asking for a copy of that model if the regulator still had it in its records. That financial analyst forwarded the regulator's email with attached R-23 to various others.

65. C-180 was one of the defendant's exhibits in the arbitration, last saved as it was by Mr Y. One of the addressees of the email on 20 February 2020, by which the claimant's financial analyst forwarded the regulator's email with R-23, was a colleague of Mr Y's at the first defendant and he, the colleague, in turn forwarded that email to Mr Y and others at the first defendant, also on 20 February 2020. That detail is relevant to what happened with Mr Y's evidence at the September Hearing, which in turn is the immediate background to the Witness Statement Ruling.

66. C-180, when opened, displays an error message warning of one or more circular references with "OK" and "Help" buttons. Clicking the "Help" button opens a Microsoft support webpage giving explanations and tips on solving circular reference errors. Clicking the "OK" button or closing the error message box takes the user into the spreadsheet. Once opened, and in the case of C-180 after clicking the "OK" button or closing the error message to go into the spreadsheet, C-180 and R-23 are identical, save for one thing. In Excel, at "File / Options / Formulas", there is a check box for "Enable iterative calculation". In R-23 that box is ticked, i.e, the iterative calculation functionality is enabled. In C-180 it is not, i.e. that functionality is disabled.

67. The active tab when the spreadsheets have been opened, entitled "Input- Output", includes a table of figures, like that included in the first defendant's tariff narratives, stating *inter alia* the Equity IRR figure that is the subject of contention in the arbitration. Towards the top left corner of that active tab, box B3 can be set to read "TRUE" or "FALSE", and that appears to go with box A3, "Escalation Switch". When the spreadsheets are opened, box B3 is set at "FALSE". The defendants say that signifies that the IRR figures stated have been calculated without applying indexation to the tariff. Whether that is correct may be an issue in the arbitration. Whether, if correct, it was or would probably have been appreciated by those at the regulator who dealt with this tariff approval definitely is.

68. Now, the impact of the unchecked "Enable iterative calculation" box is this. With iterative calculation enabled, as the claimant says in the arbitration it ought to be for this spreadsheet, given what it was attempting to show, when the escalation switch is set at TRUE, indexation is applied to the tariff and the IRR figures are instantly updated. Specifically, the Equity IRR figure upon which the claimant's defence focused, which was 13.52%, becomes 17.40%. With

iterative calculation disabled however, setting the escalation switch to TRUE does not change anything.

69. In addition, if iterative calculation is enabled, as it is in R-23, the error message seen when opening C-180 is not generated. Further in addition, I should note this: if C-180 is opened in Excel on a computer on which another spreadsheet is already open in Excel and that spreadsheet has iterative calculation enabled, then C-180 as opened will also have it enabled, the error message will not appear, and toggling the escalation switch to TRUE will recalculate the equity IRR to 17.40%.

70. For the claimant, Mr Downes KC sought to explore the disabled iterative calculation quirk of C-180 through cross-examination of Mr Y. The gist of Mr Y's evidence in cross-examination was that C-180 was his document, in the sense that it was the spreadsheet as saved by him, amending its file name as he did so for his own convenience after he had received it from someone in the first defendant's corporate department, possibly Mr Z, another witness in the arbitration. Mr Y said that anything he did with it to cause the metadata to record him as having modified it would not have changed the content of the spreadsheet as received by him, and while he did not know how, by whom or why iterative calculation had been disabled in C-180, that was not him.

71. His evidence to that effect suggested recollection of not having opened the spreadsheet without seeing the circular references error message.

72. That cross-examination was on the second day of the September Hearing, 8 September 2021. It became apparent thereafter that Mr Downes KC had in mind to submit that there had been a deliberate decision by someone at the first defendant to withhold from disclosure in the arbitration the email and spreadsheet as sent to Mr Y by someone in corporate, possibly Mr Z, of which Mr Y had spoken.

73. One might be forgiven for thinking that a sense of perspective was being lost on the claimant's side. The claimant was advancing no case of deliberate wrongdoing in relation to the tariff approval process, and the disabled iterative calculation functionality in C-180 was peripherally relevant at most, coming in, if at all, only at the margins of the question whether the regulator approved the tariff on a mistaken basis as the claimant had alleged. On the case being heard at the September Hearing, in particular on the basis of the claimant's case as pleaded, a disabled iterative calculation functionality had the potential to be of some relevance if:

    (i) the first defendant's narrative for tariff approval conveyed to the regulator that an Equity IRR of 13.52% was being sought, allowing for tariff indexation as per contract in the calculation of that IRR;

    (ii) the regulator considered the spreadsheet provided by the first defendant, and in doing so took the FALSE setting for the escalation switch to indicate at first sight that the calculated 13.52% Equity IRR did *not* allow for indexation;

    (iii) the regulator therefore toggled to TRUE to see what would happen;

    (iv) the spreadsheet received by the regulator from the first defendant had iterative calculation disabled, and no other spreadsheet with iterative calculation enabled was open on screen at the time, so that toggling to TRUE rather unexpectedly changed nothing; and

(v) the regulator therefore took it that in fact the 13.52% Equity IRR figure *did* allow for indexation after all, rather than that something was wrong with the spreadsheet, given that switching the escalation switch to true would be expected to change the outputs.

74. Meanwhile, Mr Y's evidence in cross-examination as to how C-180 came into existence and as to the iterative calculation disablement in that spreadsheet was one part only -- albeit the totality of it was relatively limited -- of the available evidence going to whether the spreadsheet as received by the regulator had iterative calculation disabled.

75. The claimant was directed to set out in writing any allegation of dishonesty in relation to disclosure in the arbitration that it wished to pursue. It did so by an email from its solicitors on the evening of 9 September 2021, at which point all that remained for the final day of the September Hearing the next day was a brief cross-examination of an expert witness being called by the claimant, to be followed by closing argument.

76. One element of this last-minute, and as things stood somewhat peripheral, allegation of deliberate wrongdoing in respect of disclosure in the arbitration was to submit that there had been no explanation as to how an email from corporate to Mr Y attaching a version of the spreadsheet could have been lost without trace. In response, the defendants served the following morning, 40 minutes before the hearing was to resume, a short second statement from Mr Y and a very short statement from a new witness, the CFO of the first defendant's indirect majority owner.

77. The CFO said he had been closely involved in the arbitration generally and spoke of urgent searching that had been done for the email Mr Y had said in his evidence he had received from corporate. Mr Y's second statement spoke to that as well, and said in summary that, the search having found nothing and he having seen the emails on 20 February 2020 to which I have referred, he believed his recollection of having received the spreadsheet from corporate was mistaken and that he received it from his colleague on 20 February 2020. He also said that he does not recall seeing any error message when opening the spreadsheet as sent to him on 20 February 2020, and maybe he did after all change the settings in the file before saving it, although he does not recall doing so. He said he had understood throughout the importance of disclosure in the arbitration and he rejected any allegation, if made against him, of dishonesty in that regard.

78. Finally, then, the Witness Statement Ruling. The transcript I have in evidence of the final day of the September Hearing, 10 September 2021, does not time stamp the conclusion of the cross-examination of the expert. But at what I estimate must have been c.11.20 am, proceedings that day having resumed at 11 am to assist the parties to be ready for closing argument, Mr Downes KC asked to "mention the status of these witness statements that we were served with this morning". He said that the claimant's "simple position is if these are to be relied upon we wish to cross-examine these witnesses". That of course would have meant recalling Mr Y and requiring the defendants to call the CFO for the first time.

79. In fact, as then became apparent, Mr Downes KC was seeking either the exclusion of the new statements or an adjournment, in that his position was that they ought not to be allowed in unless he was permitted to cross-examine on them *and* that he would not be able to cross-examine on them that day. Mr Downes KC developed the claimant's position on that and the chair tested, searchingly but fairly, the ramifications for the proceedings of various options. In the course of that, Mr Downes KC indicated that serious consideration was being given on the claimant's side, in the light of Mr Y's evidence, to accusing the first defendant of fraud, knowingly misleading the regulator.

80. However, an adjournment was not sought on that basis, i.e. simply that the claimant ought to be given further time, even though that would mean adjourning part heard what was supposed to be the final hearing, in which to complete that consideration, and either drop the point or make an application to amend to plead fraud, as the case may be. I do not mean by that to suggest that such an application should have been made or that it would or should have succeeded if made. The point for my purposes is that by the way Mr Downes KC put forward the claimant's position, what was before the arbitrators for a procedural ruling was an argument that the fair completion of the case as it stood, with the claimant's defence limited to an allegation of mistake by the regulator innocently induced by the first defendant, demanded either the exclusion of the new evidence or, in the alternative, a direction that there be cross-examination on it, although that would necessitate an adjournment. Any possible application to introduce a new and different case alleging fraud against the first defendant was for another day, if and when it was concluded on the claimant's part that such an allegation could and should be put forward.

81. In the event, that is what has happened; and Mr Y's oral and written evidence in September 2021 is relied on as part of particulars now put forward in support of an alleged inference of fraud. But that has nothing to do with the Witness Statement Ruling and whether, as and when made, it was in any way troubling so far as the arbitrators' apparent impartiality is concerned.

82. Having heard Mr Downes KC, Mr Freeman of the defendant's solicitors for the defendants, and Mr Downes KC in reply, over what must have been 20 to 25 minutes, the arbitrators rose to consider the position. The substance of Mr Downes KC's submission in truth was little more than this, as he put it in reply to the arbitrators, namely that: "We don't criticise [the first defendant] for putting in evidence on this point but we say it is axiomatic that we are entitled to test that evidence", by which in context he meant test it by cross-examination.

83. Having taken ten minutes to consider their position, the arbitrators resumed the hearing and the chair delivered the Witness Statement Ruling in the following terms:

    "Very briefly. Number one, the witness statements produced overnight are admissible. It is inconceivable, when allegations of the sort made last night have been made, that statements adduced overnight should not be admitted into evidence. That would seem wholly wrong and unfair.

    Number two, we do not order cross-examination of the witnesses.

    Number three. Both sides, Mr Downes and Mr Freeman, can, against that background, comment as they wish on the weight to be attached to the statements flowing from the absence of cross-examination. We will then consider those comments in our award and the ramifications which may or may not flow from them.

    Number four. We are about to embark on the closing speeches, and those will be considered on the case as it is and has been presented before us."

84. The procedural position that confronted the arbitrators was that on a specific, narrow point of fact, of possible but marginal relevance to the case then before them, a very late allegation had emerged that there had been dishonesty on the part of the first defendant in relation to disclosure in the arbitration. The Witness Statement Ruling was a rational and reasonable response to that procedural circumstance within the range of case management solutions that an impartial tribunal might consider would provide the claimant a fair opportunity to pursue that new allegation and the defendants a fair opportunity to respond to it. Nothing was predetermined by the Witness Statement Ruling.

85. Read sensibly, and with knowledge of the procedural context and the submissions the parties had made to the arbitrators about what they should do, the Witness Statement Ruling communicated to the parties that in the arbitrators' view, it was fair to allow the new allegation to be pursued but only if the defendants could ask the arbitrators to consider the short responsive witness statements, and that cross-examination on those statements, for which there was no time unless they were to adjourn the merits hearing part heard, was not required for the claimants to have a fair opportunity to pursue any contention that the responsive evidence should be discounted. The claimant was reassured explicitly that it would be entitled to rely on the fact that in the circumstances there had not been time for cross-examination on that evidence.

86. No reasonable observer of this arbitration could have come away thinking, because of the Witness Statement Ruling, that the arbitrators were or might be partisan towards the defendants. I acknowledge the implication that to the extent the claimant or its representatives came away thinking otherwise, that will be because they *are* partisan, not detached like the court, or because they were being unreasonable. In the hope that it might assist to do so, I would add this. Though the focus of the apparent bias submission was ultimately quite narrow, from what Mr Downes KC asked me to read and showed me of these arbitration proceedings, and assessing all of that from the detached position the court occupies, I see only a conscientious and experienced tribunal acting conspicuously even-handedly.

87. The arbitrators are plainly aware -- they could not fail to be -- that by the nature of the case, the defendants will propose that it is a simple matter of debt collection, whereas the claimant's resistance to the claim is somewhat complex and faces a number of hurdles to be surmounted, as to the facts and as to the legal analysis. What I then see in the way in which the arbitrators have conducted the proceedings to date is a diligent and effective effort to ensure, precisely because it can be seen in context that the claimant's case may not be a straightforward one, that the claimant is given every reasonable opportunity to make it good, and that an open mind is kept throughout as to whether ultimately it will be able to do so.

88. I said the focus of the apparent bias allegation was ultimately quite narrow. Mr Downes KC confirmed that the only issue on which it is contended that the Witness Statement Ruling suggests the arbitrators might not have kept an open mind is the question whether the spreadsheet as saved on the CD sent to the regulator had iterative calculation disabled. In my judgment, nothing about the Witness Statement Ruling would cause any reasonable observer to think that might be the position, that is to say that the arbitrators were not keeping an open mind on that factual question.

89. In Mr Freeman's submissions to the arbitrators in respect of what became the Witness Statement Ruling, he did invite them to take the view for the purpose of deciding the case management issue that it was now inevitable they would find that the first defendant's spreadsheet as sent to and received by the regulator in 2011 had iterative calculation enabled. If the claimant or its representatives put that with the fact that the Witness Statement Ruling went against them and arrived at a concern that the arbitrators were no longer keeping an open mind on that issue, then, with respect, they were adding 2 and 2 to make 22, and doing the arbitrators a serious injustice.

90. By the third and fourth points of the Witness Statement Ruling, the chair took care to state, so it was made explicit, that the arbitrators had not determined any disputed question of fact, rather they were about to take final argument on all issues raised by reference to the evidential record as it then stood.

91. The claimant has a right to freedom of opinion such that it can choose if it wishes to think that proceeding in that way without more cross-examination did not give a reasonable opportunity for each side's case as it stood at the time to be put and to be dealt with by the other side (section 33(1)(a) of the Act), or did not constitute a suitable procedure that would have resulted in a fair determination on the merits (section 33(1)(b)). I do not consider there to be any real basis for such a view, and the point would be moot now anyway since the claimant succeeded on other grounds, i.e. through what became in effect its successful post-hearing application to amend, to keep everything open such that the merits are now still for another day. Come what may, however, there was in my judgment never any reasonable basis for the suggestion that the arbitrators' handling at the September Hearing of the late raised allegation by the claimant of dishonesty on the part of the first defendant in respect of disclosure in the arbitration might indicate a closed mind on the question whether the regulator received an iterative calculation enabled spreadsheet, or for that matter on any other issue going to or that might go to the merits.

92. Mr Downes KC referred me to, amongst others, the well-known case of *Porter v Magill* [2002] 2 AC 357. In particular he reminded me, describing it as one helpful guide to cases of this kind, of something said by Schiemann LJ in the Court of Appeal, which was as follows (*ibid* at 399H to 400A):

    "Having looked at the material it seems to me that the auditors' conclusions at either stage in relation to that material are not so odd that they lead one to suspect that the explanation for the oddness might be bias. To express that differently, the conclusions are ones which while they can be the subject of rational attack are ones to which there is an understandable path."

93. Mr Downes KC in his submissions articulated what is in substance a rather different test, namely that whereas he forensically could imagine reasoning which, if it had been the reasoning of the tribunal, would have been untoward and biased reasoning, unless the court can determine that it is impossible that that was the reasoning, there has been established the appearance of bias and a justifiable doubt.

94. As it seems to me, that is to invite a conclusion based upon simple speculation. The gist of Schiemann LJ's *dictum*, which I agree with Mr Downes KC is a helpful guide, is clear enough: is that which the decision-maker has done, considering it fairly in its context, including whatever the decision-maker has said at the time to explain the decision, by nature or by effect such an odd thing to have done in the circumstances that a reasonable person, seeing that, might think the explanation might be bias?

95. Applying that test to this procedural ruling on the last morning of what was supposed to be the final merits hearing in this arbitration, by reference to the case as it then stood and the way in which the procedural ruling had become necessary, I have no doubt at all that the answer to such a question is no.

96. For all the reasons I have thus given, the claimant's claims other than the arbitral powers claim are all dismissed.

**The arbitral powers claim**

97. I can take very shortly the primary claim that the Partial Award is or includes an award as to the arbitrator's substantive jurisdiction (section 67(1)(a) of the Act) or is of no effect as regards the interim payment order because the arbitrators did not have substantive jurisdiction (section 67(1)(b)). For that purpose, the arbitrators had substantive jurisdiction so long as they were properly constituted under a valid arbitration agreement and dealt with a matter that had been submitted to them in accordance with that agreement: see section 30(1) of the Act.

98. In other words, and as is well known, a challenge is only a challenge as to the arbitrators' substantive jurisdiction if the challenge being well founded would mean that there had not been a binding agreement between the parties for the challenged decision to be made by the arbitrators who had purported to make it. In this case, the arbitrators were duly appointed so as to be a properly constituted arbitration tribunal pursuant to valid agreements to arbitrate, and by the interim payment order they dealt with a matter that had been submitted to them.

99. The argument that the claimant's challenge is a section 67 challenge rather than a challenge under section 68(2)(b) is the false argument that if the arbitration agreement via the UNCITRAL Rules did not grant the arbitrators a power to order a provisional payment on account of a claim, then the application for such an order was not a matter submitted to the arbitrators in accordance with the arbitration agreement (section 30(1)(c)). That is a false argument because the relevant provisions of the UNCITRAL Rules, Articles 26 and 34, do not purport to delimit what matters may competently be submitted to arbitrators for decision. Moreover, the argument cannot be right for it would mean that section 68(2)(b) had no content. That subsection makes it an irregularity, and therefore a serious irregularity if substantial injustice has been or will be caused by it, for an arbitral tribunal to exceed its powers otherwise than by exceeding its substantive jurisdiction. But on the logic of the claimant's argument, whenever an arbitration tribunal exceeded its powers, it would exceed its substantive jurisdiction.

100. The arbitral powers claim as a claim under section 67 of the Act is dismissed. If there is any valid claim here, it has to be under section 68(2)(b).

101. The claimant says that the arbitrators exceeded their powers on the basis that:

    (i) Article 26 of the UNCITRAL Rules does not empower arbitrators to order a provisional payment on account of a money claim.

    (ii) Alternatively, Article 34 of the UNCITRAL Rules means that the arbitrators were not empowered to issue an award for an interim remedy.

102. Following proper procedure, the basis put forward by the claimant for its various claims was set out in the Claim Form and, more specifically, by a 15-page pleading annexed to and forming part of the Claim Form. Mr Houseman KC invited me to consider first whether any sustainable claim was even pleaded. He submitted to the contrary that there was none, for want of any or any arguable claim of substantial injustice. In my judgment, Mr Houseman KC is correct about that, given my dismissal of the claimant's apparent bias claims.

103. The section 68(2)(b) claim is pleaded in the claim form as follows:

    (i) at paragraph 2(b), references to section 68(2)(b) and to "power" rather than only "jurisdiction" appear as amendments, added to what was the summary paragraph asserting a section 67 claim. No allegation of substantial injustice is made;

    (ii) at paragraph 22, with sub-paragraphs (a) to (k), the claimant pleads its case that the arbitrators had no power an issue an award for a provisional payment. Although not separated into a primary and an alternative line of argument, that pleaded case encompasses both the contention that UNCITRAL Article 26 does not extend to provisional payment orders and the contention that UNCITRAL Article 34 excludes the making of such orders by way of award;

(iii) at paragraph 22A the claimant adopts paragraph 22 as justification for the conclusion that by the Partial Award, as regards the interim payment order, the arbitrators exceeded their powers;

(iv) paragraph 23 asserts that the Partial Award is "tainted with serious procedural irregularity" because the Witness Statement Ruling created an appearance of bias and because of the alleged "refusal to give reasons at this stage for the Witness Statement Ruling".

(v) paragraph 24 asserts that the appearance of bias is self-evidently a substantial injustice and paragraph 25 asserts that the refusal to give reasons is a substantial injustice because it has meant the claimant has had to make this challenge, based in part on the Witness Statement Ruling, without being able to assess the strength of that challenge with the benefit of the arbitrators' reasons for the Ruling.

104. All of paragraphs 23 to 25 fall away with the dismissal of the appearance of bias claims.

105. Mr Downes KC sought to meet that potential problem in argument by contending that to have an extant Partial Award potentially capable of being enforced against the claimant for payment of US$250 million was a substantial injustice if it was an award that should not have been made because the arbitrators lacked the power to make it. That is not the case pleaded and I do not regard it as self-evidently correct, at all events in the particular circumstances of this case. Suffice to say, since this judgment is in public, that:

(i) There is no evidence that any step has been taken or threated by way of enforcement save that the defendants made an application to the arbitrators for a peremptory order with a view potentially to an eventual final award in the arbitration founded upon the claimant's failure to comply with the interim payment order (see section 41 of the Act), but that application was refused.

(ii) There is no evidence, and the nature and location of the claimant mean that it would require evidence, upon which I could find that there is any real prospect of meaningful enforcement action against it prior to the publication of the arbitrators' final award after the hearing in a few months' time at the end of this year.

(iii) The claimant has not complied with the interim payment order and, though through its solicitors it has said it would do so if it could, but reserving the right to be repaid if the interim payment order were set aside, (a) it presently does not have the means to comply, and (b) if it is able to restructure other indebtedness so as to be able to comply, it is said it will do so if it can negotiate a satisfactory reassurance as to repayment if required.

(iv) the final hearing is now only three months away.

106. In my view, in those circumstances, it is not so clear that the claimant would be correct in an amended averment of substantial injustice that I should allow it to reinvent its case during argument in this way. A case of substantial injustice by reference to the effects in law and/or practice of the Partial Award, irrespective of the failed allegation of apparent bias so far as the Partial Award concerns the interim payment order, if it was to be pursued, should have been pleaded to allow a proper opportunity for it to be considered, for evidence going to it to be prepared and filed and for fully developed argument to be presented on it. I do not regard it as fair to the defendants to deal other than with the pleaded case on substantial injustice, and that case fails.

107. That is sufficient to dispose of the arbitral powers claim under section 68(2)(b) of the Act. It is also dismissed.

108. In those circumstances, I shall deal only briefly with the underlying point of potentially more general interest or importance, namely whether under the UNCITRAL Rules arbitrators do not have power to order a payment on account of a money claim, or alternatively do not have power to make an award for such a provisional remedy.

109. As regards the existence of the power at all, the arbitrators founded themselves upon Article 26 of the UNCITRAL Rules, and the defendants say rightly so. Article 26.1 states in general terms that. "The arbitral tribunal may at the request of a party grant interim measures." Article 26.2 provides that, "An interim measure is any temporary measure by which at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation to ..."; and Article 26.2, at (a) through (d), then sets out particular examples, stated to be without limitation, of interim measures that an arbitral tribunal may order:

> (a) refers to maintaining or restoring the *status quo* pending determination of the dispute;
>
> (b) refers to taking action to prevent or refraining from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself;
>
> (c) refers to providing a means of preserving assets for the satisfaction of a future award; and
>
> (d) refers to preserving evidence that might be relevant and material to the resolution of the dispute.

110. The high watermark of the argument to the effect that Article 26 does not grant power to order on a provisional basis the payment of money by a respondent to a claimant in respect of and thus effectively on account of a money claim by the claimant against the respondent, subject to adjustment or revision in light of the future final award, is to submit, as Mr Downes KC did, that there is a particular meaning of or magic to the adjective "temporary" in Article 26.2 that gives to the notion under the UNCITRAL Rules of interim measures a narrower scope than ordinarily the notion of interim remedy, relief or measures would convey.

111. In my judgment, the argument is not a good one. The substance of an order, by way of provisional remedy, to require that a payment be made on account is that it is, by nature, temporary because it is an adjustment of the financial position between the parties pending, and subject to adjustment as may be appropriate by reference to, the final decisions to be made at the end of the arbitration.

112. Mr Downes KC, in an attractively put linguistic submission, suggested that unless the relief in question could be articulated in the language of temporariness, such as "until ..." or "pending ...", it could not be temporary and could not therefore be an interim measure. Without indicating any final view as to whether that itself is a sound argument, there is no difficulty, if one wished to do it, about expressing a provisional payment order in such language. It can be expressed as, and is in substance, an order to the effect that the paying party is to make a payment on account of a money claim to the recipient party such that pending final determination of the claim by final award or other order of the tribunal in the meantime, there shall have been paid on account of the claim the amount thus ordered.

113. That linguistic response to the linguistic argument as it seems to me demonstrates or confirms the temporary nature, that is to say provisional nature in substance, of an interim remedy by way of payment on account.

114. That is sufficient for the conclusion that Article 26 does extend to a power to order by way of interim remedy a provisional payment on account of a money claim, subject to adjustment, in concept up to and including full repayment, at the end of the process in light of the final decision taken in the final award, without needing to consider arguments of Mr Houseman KC's to the effect that such an order can readily enough be fitted within the language at least of sub-paragraphs (a) to (c) of Article 26.2. But I shall say that while it has not been necessary to set out in full the arbitrators' reasoning as expressed in the Partial Award for the interim payment order, there is indeed at least some flavour of Article 26.2(b)(i) and (c) in the way they approached the application for an interim payment order.

115. For those reasons, my conclusion would have been that Article 26 of the UNCITRAL Rules, if it applies in a reference, does confer power on the arbitrators to order by way of interim remedy a provisional payment on account of money claims referred to them for determination in the arbitration.

116. However, I regard the alternative plea, that by reason of Article 34 of the UNCITRAL Rules any such remedy ought only to have been granted by way of order of the arbitrators and not by way of award, as more finely balanced. Article 34.1 provides that the arbitral tribunal may make separate awards on different issues at different times. Article 34.2 provides that, "All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay."

117. As a relevant aside, I note that in the terminology of the Act, it was common ground (and rightly so, in my view) that the Partial Award so far as concerns the interim payment order was a provisional award, as an award granting such interim relief is dubbed at all events by the heading to section 39 of the Act. By section 39(1) of the Act, parties are free to confer on arbitrators power to order on a provisional basis any relief which they would have power to grant in a final award. But for the avoidance of doubt, section 39(4) provides expressly that unless the parties have agreed to confer such power on their tribunal, it has no such power. Section 39(2) spells out, if it needed spelling out, that provisional relief of the kind contemplated by section 39 includes a provisional order for the payment of money between the parties.

118. In my judgment, although this point would not have arisen for final determination even if I had been having to decide finally the point on Article 34 of the UNCITRAL Rules, it is implicit in section 39 and the structure of the Act that, so far as the Act is concerned, a power as contemplated by section 39, if conferred by the parties on their arbitrators, may, all things being equal, be exercised by the publication of an award granting the relevant provisional relief.

119. Again, all things being equal, were a provisional relief power granted to arbitrators and were they to exercise it by the making of an award granting an interim remedy in an English-seated arbitration, that would not run counter to section 58(1) of the Act, which provides that an award made by a tribunal is "final and binding ..." on the parties, because that subsection begins with "unless otherwise agreed by the parties".

120. In my judgment, as far as the Act is concerned therefore, and I say again, all things being equal, an agreement by parties to confer a provisional relief power such as is contemplated by section 39 would carry with it an entitlement in the arbitrators that would be within section 58(1) to do so by way of award.

121. The difficulty in this case is that the UNCITRAL Rules do not provide in Article 34 for any standing exception to the unqualified provision at Article 34.2 that awards are to be final and binding on the parties. I agree with the submission of Mr Downes KC that, as it was put by Gloster J (as she was then) in *Shell Egypt West Manzala GmbH and another v Dana Gas Egypt Limited* [2009] EWHC 2097 (Comm), [2010] 1 Lloyd's Reports 109, at [38]:

> "... the expression 'final and binding', in the context of arbitration, and arbitration agreements, has long been used to state the well-recognised rule in relation to arbitration, namely that an award is final and binding in the traditional sense and creates a *res judicata* between the parties."

122. It is in my judgment no answer to the logic arising on the language of Article 34.2 that the arbitrators have stated that they intended the Partial Award to be "final as to the making of an IPO". That is to say, it is said to be their final decision in the matter of whether to grant relief that is by nature interim. On analysis, that cannot be true, in that, since the arbitrators went out of their way in the same breath to emphasise that they intended the relief they were granting, as to its substance, to be interim in nature, the decision they made on 21 December 2021, and made again or confirmed and restated on 17 January 2022, that there should be an interim payment of US$250 million by the claimant as respondent in the arbitration to the first defendant as one of the claimants, was *not* intended to be their final decision as to that. By its very nature as interim relief, the arbitrators' jurisdiction was and is reserved to revisit that, at any time, upon any basis that they might be persuaded, upon application of their own motion, is a sufficient basis to look at the matter another time.

123. Inconvenient though I apprehend it may be regarded in certain international arbitration quarters, in my view the language and the logic arising under Article 34.2 is clear. It does not contemplate or provide for, but to the contrary is inconsistent with, the notion that an award can be made the substantive relief granted by which is provisional or interim in nature.

124. I was referred to the writing of *Paulsson et al* from which the arbitrators also quoted. It speaks to a practice in the international arbitration community of expressing orders by way of interim remedy in UNCITRAL Rules arbitrations in the form of an award. There has been no plea, let alone evidence or developed argument, to the effect that there is any applicable and binding custom that might affect the proper interpretation of Article 34.2 and its effect. In those circumstances, and with great of respect to the very experienced and knowledgeable authors, I can say only that I disagree that if there is any such practice, it finds justification in the language of the UNCITRAL Rules.

**Conclusion**

125. Apart from the arbitral powers claim, which was different in kind, the claimant limited its claims as ultimately pursued to claims founded upon a contention that there is a justifiable doubt as to the arbitrators' impartiality. My conclusion is that there is no such doubt. Indeed, there was never any serious basis for proposing that such doubt existed. For that reason, the claimant's claims other than the arbitral powers claim are dismissed.

126. The arbitral powers claim, as a claim under section 67 of the Act, is dismissed on the ground that the claimant's relevant challenge does not go to the arbitrators' substantive jurisdiction so as to fall within section 67.

127. The arbitral powers claim, as a claim in the alternative under section 68(2)(b) of the Act, is dismissed on the ground that the court has not been satisfied on the claim pleaded that any substantial injustice has been or will be caused, even if the arbitrators exceeded their powers,

and it would be unjust to permit the claimant to put forward the different claim of substantial injustice suggested in argument.

128. For completeness, had I been satisfied as to substantial injustice, I would have upheld the section 68(2)(b) claim, but only on the narrow ground that by reason of Article 34 of the UNCITRAL Rules the arbitrators exceeded their powers by making an award for a merely interim remedy. I would have rejected the argument that they did not have power to order a payment on account of a money claim at all by way of interim remedy since in my judgment, Article 26 of the UNCITRAL Rules does confer such power on arbitrators.

129. The interim payment order, as an order of the arbitrators made by the December Ruling, would therefore have stood, and I would have refused any relief, if sought, declaring or suggesting that it was invalid or had no effect. What its effect was or would be, standing simply as an order of the arbitrators, would not have been a matter before the court.

130. However, I would have wished to discuss with counsel what relief ought to be granted to give effect to the conclusion that the interim payment order should not have been turned into an award. For example, I envisage it would have been wrong to contemplate setting aside the Partial Award or very large parts of it, as distinct from setting aside, striking through, restating, or remitting to the arbitrators, certain limited portions of it, with a view ultimately to leaving it as no longer an award but merely a set of written reasons provided by the arbitrators to the parties for the December Ruling with a reiteration by way of order not award of that ruling's orders for consolidation and an interim payment and an order (not an award) to the effect that the costs of the Application which the December Ruling had said were reserved were now to be costs in the arbitration.