Neutral Citation Number: [2019] EWHC 2539 (Comm)

Case No: CL-2018-000806

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

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION
AND IN THE MATTER OF A CHALLENGE UNDER S. 68 OF THE ARBITRATION ACT 1996

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/10/2019

Before :

THE HONOURABLE MRS JUSTICE CARR

- -

Between :

(1) OBRASCON HUARTE LAIN SA (trading as OHL INTERNACIONAL)
(2) CONTRACK (CYPRUS) LIMITED

Claimants

- and -

QATAR FOUNDATION FOR EDUCATION, SCIENCE AND COMMUNITY DEVELOPMENT

Defendant

- -
- -

Mr Joe Smouha QC, Mr Roger ter Haar QC and Mr Siddharth Dhar (instructed by **Shearman & Sterling LLP**) for the **Claimants**
Mr Simon Lofthouse QC and Mr Zulfikar Khayum (instructed by **Quinn Emanuel Urquhart & Sullivan LLP**) for the **Defendant**

Hearing dates: 16 and 17 July 2019

- -

Approved Judgment

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

....

MRS JUSTICE CARR

Mrs Justice Carr :

Introduction

1. This is a challenge by the Claimants ("the JV") under s. 68(2)(a) of the Arbitration Act 1996 ("the Act") in respect of a Fourth Partial ICC Award dated 21 November 2018 ("the Award") issued by a tribunal consisting of the Right Honourable Sir Stanley Burnton (as President), Mr Richard Wilmot-Smith QC and Mr Richard Fernyhough QC (as party appointees) ("the Tribunal").

2. The challenge relates to the Tribunal's finding that the Defendant ("QF") had validly terminated (by notice) a contract for the design and construction of a substantial hospital complex in Doha, Qatar ("the Contract"). The JV has very recently abandoned other challenges to the Award (under s. 68(2)(d) and (f)) of the Act), but a separate challenge to an Addendum to the Award dated 5 March 2019 remains outstanding and is to be heard at a separate hearing on a later date.

3. Following some refinement of its position, the JV seeks remission of the issue of whether QF had validly terminated the Contract in circumstances where termination was effected by service of a notice and not court (or arbitral) order ("the Termination Issue") on the basis of serious irregularity. It is said that the Tribunal decided the Termination Issue (in QF's favour) on the basis of a legal analysis which was not explored fairly or properly with the parties.

Background

4. The JV entered into the Contract with QF in 2009 for the construction of a state-of-the-art hospital complex in Doha. The original Contract Price was approximately £1.9billion. The Contract was governed exclusively by Qatari law and provided for disputes to be resolved via arbitration under the Rules of Arbitration of the International Chamber of Commerce ("ICC").

5. Clause 19 of the Contract ("Clause 19") provided materially as follows:

> "ARTICLE 19 – TERMINATION
>
> 19.1 QF shall have the right, by giving notice to CONTRACTOR, to terminate the CONTRACT or all or any part of the WORK at such time or times as QF may consider necessary for any or all of the following reasons:
>
> 19.1.1 to suit the convenience of QF;
>
> 19.1.2 subject only to Article 19.2, in the event of any default on the part of CONTRACTOR; or …
>
> 19.2 In the event of default on the part of CONTRACTOR:
>
> 19.2.1 under provisions of Article 33 (Conflict of Interest and Business Ethics), QF shall have the

right to issue a notice of termination in accordance with the provisions of Article 19.1, without the need for issuance of a notice of default.

19.2.2 under the CONTRACT other than the provision of Article 33 (Conflict of Interest and Business Ethics), before the issue by QF of a notice of termination QF shall give notice of default to CONTRACTOR giving the details of such default. If CONTRACTOR upon receipt of such notice does not diligently commence and thereafter continuously proceed with action satisfactory to QF to remedy such default, QF may issue a notice of termination in accordance with the provisions of Article 19.1."

6. In July 2014, following service of Notice of Default in May 2014, QF (through ASTAD, its project manager,) served Notice of Termination of the Contract under Clause 19.2.2 on the basis of default by the JV under Clause 19.1.2. QF went on to call on a performance and advance guarantee, together worth some £190million, both of which have since been drawn down.

The Qatari Civil Code ("the QCC")

7. Using the translation adopted by the Tribunal, relevant provisions in the QCC include the following:

"Article 171(1): The contract is the law of the parties. It is not permissible to breach or amend the contract unless there is agreement between the parties or a good reason determined by law….

Article 172(1): A contract shall be enforced in accordance with its provisions and in such manner consistent with the requirements of good faith.

Article 172 (2): A contractual (sic) not be limited only to binding a party to its provisions but shall also cover whatever is required by law, customary practice and justice in accordance with the nature of the obligations.

Article 183(1): In contracts binding on both parties and imposing reciprocal obligations (synallagmatic contracts), where one of the parties fails to perform his obligation, the other party may, upon formal notice to the former, demand performance of the contract or its rescission, and may claim damage caused by such failure to perform.

Article 183(2): The judge may, mutatis mutandis, determine a period of grace within which the obligator shall perform his

> obligation. The judge may also reject the application for rescission if the obligation not performed was insignificant compared with the obligations considered in their entirety.
>
> Article 184(1): It is permissible to agree that the contract be considered terminated, automatically, without need for a court judgment when failing to perform the obligations arising from it.
>
> Article 184(2): Such condition and the agreement would not be applicable to limit the authority of the Judge for the termination, unless the expression of the contract is clear to indicate that this is the intention of the parties to that."

8. Article 184(3) does not appear in terms in the Award itself (though it was referred to by QF's Qatari law expert, Mr Abu Shaikha, and Mr Lofthouse QC for QF in submission) but provides:

> "(3): Other than in commercial matters, the clause considering the contract to be automatically terminated does not exempt from serving notice. Any contrary agreement by the parties shall not be considered."

9. References below to Articles 171, 183 and 184 are references to those Articles in the QCC. Both parties have referred to Article 184(1) as "the Automatic Termination Condition" (even though they differ as to what it means or requires) and Article 184(2) as "the Contracting Out Condition".

10. It was common ground at all material times that under Qatari law the Contract could only be terminated by QF for breach by application to a court (or tribunal) unless Clause 19 met the requirements of Article 184.

The arbitral proceedings and the Award

The arbitral proceedings in overview

11. QF commenced arbitral proceedings against the JV in July 2014 claiming damages estimated at over £1billion on the basis that it had validly terminated the Contract when Notice of Termination was served. In response, amongst other things, the JV disputed the validity of QF's termination of the Contract. Albeit late in the day, the JV contended that Clause 19 did not satisfy either the Automatic Termination Condition or the Contracting Out Condition in Article 184. This was an argument not aired by the JV until November 2016 (and then only as a footnote), more than two years after the JV's Answer and Counterclaim to the Notice of Arbitration. At no stage prior to this (on the many occasions when addressing the lawfulness of QF's termination of the Contract) had the JV taken this objection, including in 2014 at the time of Notice of Default and then Notice of Termination. Indeed, and as the Tribunal pointed out in paragraph 113 of the Award, the suggestion that there could not be valid termination of the Contract under Clause 19 without recourse to court (or tribunal) was directly at odds with the position taken by the JV in correspondence in June 2014 with one of its major subcontractors, Kentz-Voltas Consortium, by reference to a materially identical contractual clause. There the JV had positively asserted that Article 183 and 184 of the

QCC did *not* require the contractor to apply to the court before exercising its rights under (the equivalent of) Clause 19.

12. The relevant procedural chronology can be summarised as follows. Notice of Arbitration was served in July 2014. The JV filed an Answer and Counterclaim in October 2014, to which QF responded with a Reply in November 2014.

13. Terms of Reference signed on 12 November 2014 provided that the issues to be determined by the Tribunal should be "those resulting from the parties' submissions" and that "…those issues included …[w]as the termination of the Contract by [QF] lawful and valid?"

14. In May 2015 the JV submitted a Defence and Counterclaim, including its then case on the (un)lawfulness of QF's termination of the Contract. In the light of that Defence, a preliminary issue hearing was held in October 2015 to determine whether or not the parties had reached a binding agreement to settle some of their claims prior to termination. The Tribunal issued its First Partial Award in December 2015, concluding that they had not.

15. In May 2016 QF requested a preliminary issue hearing on the question of the validity of its termination, an application which the JV successfully resisted. In July and November 2016 the JV issued supplemental and amended supplemental pleadings on delay. Footnote 6 of the Amended Supplemental Pleading on Delay stated:

> "This is without prejudice to the various other legal arguments that the [JV] rel[ies] on that are relevant to the legitimacy of the QF's purported termination, such as the requirement under Qatari law that termination be sanctioned in advance by a court of arbitral Tribunal in order to be lawful (Article 184 of the [QCC])."

16. Further, in December 2016 the JV filed a submission entitled the JV's "Consolidated Pleading on Delay". Footnote 306 in that document, referring to wrongful termination on the basis of delay the responsibility of QF, again stated:

> "This is without prejudice to the various other legal arguments that the [JV] reli[es] on that are relevant to the legitimacy of the QF's purported termination, such as the requirement under Qatari law that termination be sanctioned in advance by a court or arbitral Tribunal in order to be lawful (Article 184 of the [QCC])."

17. In February 2017 QF served its Reply and Defence to Counterclaim. It responded to Footnote 306 at paragraph 143 by highlighting that the alleged requirement for sanction by a court or arbitral tribunal was not something said to invalidate termination in the JV's Defence and Counterclaim. It went on to state:

> "143.2 Article 19 of the Contract provides that "QF shall have the right by giving notice to the Contractor, to terminate the Contract or all or any part of the WORK at such times as QF may consider necessary for any or all of the following reasons".

> Article 171(1) provides that the Contract is the law of the parties, and as such, the mechanism for termination is as agreed under Article 19 of the Contract.
>
> 143.3 Article 184(1) permits the parties to agree a mechanism for termination without recourse to the Courts. In any event, Article 184 does not require a Court order to validate a party's termination of a contract, however Article 184 does reserve powers for the Qatari courts to order termination of a contract, whether or not the parties have provided for termination under the contract…."

18. The JV submitted its Reply to QF's Defence to Counterclaim in May 2017.

19. Following various procedural orders, the Tribunal issued two further Partial Awards (in May 2017 and February 2018) relating, amongst other things, to defects and potential variation claims.

20. In April 2017 the parties exchanged lists of issues to be considered by the experts, including Qatari law experts. The JV recorded that the latter would consider the extent to which QF's entitlement to issue a notice under Clause 19.2.2 was affected by any "statutory principles under Qatari law relevant to the issuance of a notice such as that provided for in Article 19.2.2".

21. In May 2017 the JV filed a submission of "Further Particulars of [JV's] case as to Unlawfulness of Termination". It asserted:

> "19. QF was not entitled to unilaterally terminate the Contract without a prior order from the court or tribunal. It is clear that Article 19.1 of the Contract does not provide for automatic termination (as regulated under Article 184 of the [QCC].
>
> 20. Article 184 only allows for automatic termination, without recourse to the court/tribunal, if there is express wording in the termination clause clearly stating that the parties need not have recourse to a tribunal. There is no such wording in Article 19.1. Article 19.1 simply provides for a right to termination (ie not automatic termination) with notice, which necessitated QF requesting termination from the court or Tribunal..
>
> …
>
> 144. Qatari law required that QF request and obtain a judgment ordering termination from the court of Tribunal in order to terminate its Contract with the JV. Having failed to do so, QF's termination remains invalid and unenforceable."

22. In May 2017 the Qatari law experts signed a joint statement setting out areas of agreement and disagreement (in advance of their reports, in the usual way). Professor Dr Wahab for the JV opined that the Contract did not appear to provide for automatic

termination without recourse to a court or arbitral tribunal. Unilateral termination without a court order or arbitral tribunal decision would not be consistent with Qatari law.

23. In July 2017 the Tribunal directed that the question of whether or not QF had been entitled to terminate the Contract would be determined at an evidentiary hearing in April and May 2018.

24. In November 2017 the JV filed a further submission setting out its "Consolidated Case as to Unlawfulness of Termination". It repeated that, absent a court or tribunal order, QF's termination of the Contract was unlawful.

25. In December 2018 Professor Dr Wahab (for the JV) served his third expert report and Mr Abu Shaikha (for QF) served his fourth. In February 2018 Mr Abu Shaikha served a fifth report.

26. Written openings for the April/May 2018 hearing were served on 26 March 2018. QF set out its case on the Termination Issue at paragraphs 396 to 399 of its skeleton, supplemented by oral submissions by Mr Lofthouse for QF on day one.

27. The hearing then took place between 9 April and 11 May 2018. All issues of Qatari law were treated as questions of fact based on the expert evidence. Professor Dr Wahab gave evidence on day 15, Mr Abu Shaikha on day 24.

28. The JV and QF lodged written closing submissions on 4 and 5 June 2018 respectively. QF addressed the Termination Issue in its written closing submissions at paragraphs 609 to 611 (and orally). The JV's written closing included submissions that Clause 19 was not an "express termination clause" amongst other things because it did not provide for automatic termination of the Contract upon the occurrence of a breach. It submitted that there would be automatic termination upon some obligation or obligations not being performed:

> "The significance of this point is illustrated by Qatari Court of Cassation decision 219 of 2011. This is an important case for present purposes as it was one of two Qatari cases referred to by Mr Abu Shaikha on this topic…"

29. Oral closings were delivered between 12 and 14 June 2018 (and, not unusually, under pressure of time).

30. The Award, running to 285 pages (plus an appendix), was then published on 21 November 2018. The JV issued 21 applications for clarification of the Award (pursuant to Article 35 of the ICC Rules) some 3 days after the commencement of these proceedings, though none are relevant for present purposes.

31. By the time of the Award, the Tribunal had sat for some 89 days of hearing in total (including case management conferences).

The Award

32. In broad terms, the Tribunal found that the JV was entitled to certain (but not all claimed) extensions of time; that the JV had acted in default in many respects and on

occasion in bad faith; (centrally for present purposes) that QF had lawfully exercised the termination provisions for default under the Contract; that QF had been entitled to make its calls on performance and advance payment guarantees. For the purpose of making its findings, the Tribunal expressly preferred the evidence of Mr Abu Shaikha over that of Professor Dr Wahab.

33. In section 5 of the Award the Tribunal identified the principal issues between the parties, the first of which was whether QF was entitled to terminate the Contract for fault.

34. Section 11 of the Award contains the Tribunal's findings that are directly relevant for present purposes. The Tribunal considered the law of Qatar, and specifically the question of whether QF's termination of the Contract was lawful by reason of its failure to obtain a court order as required by Article 184 of the QCC. Having recorded the experts' agreement that the QCC is largely derived from the Civil Code of Egypt and the importance of the writing of Abd el-Razzak el-Sanhuri ("Sanhuri"), an Egyptian jurist and academic, the Tribunal went on to make the following findings:

> "82. As was the case in relation to the First Partial Award, there was no conflict between Mr Abu Shaikha and Professor Dr Wahab as to the relevant provisions of the law of Qatar. Their differences were in the application of those provisions. Where they differed, we preferred the opinions of Mr Abu Shaikha. As we stated in the First Partial Award, he is highly qualified and was a member of the committee that drafted Law 22 of 2004 regarding promulgating the Civil Code ("the QCC"). His opinions were consistent with the sensible and practical application of the terms of the Contract. On the other hand, we found it impossible to reconcile some of Professor Dr Wahab's opinions with the clear terms of the Contract, as appears below."

35. The Tribunal then considered the nature of the Qatari civil law jurisdiction, noting that there is no doctrine of binding precedent under Qatari law, before turning to the principal legal issues relating to the termination of the Contract. The first of those issues was whether, assuming the contractual requirements for termination by QF were satisfied, QF could lawfully terminate the Contract without obtaining an order of the arbitral tribunal terminating the Contract or authorising its termination. The Tribunal rehearsed the relevant provisions of the QCC (including Articles 172, 183 and 184(1) and (2)) and recorded that there was very little difference between the experts in relation to the interpretation of the Contract. But where there was, the Tribunal generally preferred the evidence of Mr Abu Shaikha.

36. The Tribunal then moved to address the first legal issue on termination under the heading "**Was QF's termination of the Contract unlawful by reason of its failure to obtain a Court order as required by Article 184 of the QCC?"**. Having recited Clause 19, the Tribunal went on (at paragraphs 96 to 106) to prefer Mr Abu Shaikha's evidence as to the translation of Article 184(2) and the application of Articles 184 and 171(1). The experts were agreed that Article 184 was not mandatory and could be excluded by an appropriate contractual provision. They differed as to what was required. Professor Dr Wahab translated Article 184 as requiring an express provision to exclude the compulsory jurisdiction of the court. The Tribunal accepted Mr Abu

Shaikha's evidence that it was sufficient if the contractual provision was sufficiently clear so as to be inconsistent with the requirement of an application to and order of the court; and that Clause 19 of the Contract was sufficiently clear (as set out in paragraph 3.10 of his Fourth Report). In addition to its general preference for the evidence of Mr Abu Shaikha, the Tribunal relied on the following matters:

i) It was difficult to reconcile Professor Dr Wahab's conclusion with his statement that it was not necessary for the parties to use specific wording in the termination clause;

ii) Most importantly, the provisions of Clause 19 were "unequivocally and unambiguously" inconsistent with a requirement to obtain a court or arbitral order;

iii) The JV's contention would be quite impractical; for example, a tribunal would not be able to determine if QF was entitled to terminate without an exhaustive investigation of the facts. Faced with such practical difficulties, Professor Dr Wahab's position changed significantly to a position which effectively reflected the position under the Contract as the Tribunal construed it.

37. The Tribunal also identified Professor Dr Wahab's view that the application which he said was mandatory had to be made to the arbitral tribunal (by reference to the arbitration agreement in Article 29 of the Contract). Yet Article 184 refers to a court application. The Tribunal commented that he thus accepted a significant departure from the application of Article 184 based on the provisions of the Contract which did not in terms exclude recourse to the courts. The JV suggests that here the Tribunal either forgot or overlooked the experts' agreement that there was no inconsistency between the reference in Article 184 to a court, which would read as a reference to a tribunal, and Article 29. That is not accepted by QF: the Tribunal was correctly noting that what the experts had agreed was different to what Professor Dr Wahab had said was a mandatory term in Article 184, consistent with the Chairman's remarks in the course of the JV's oral opening submissions.

38. Having disposed of this argument for the JV, the Tribunal went on to deal with the further matters relied upon by the JV to support its case of unlawful termination by reason of a failure on the part of the QF to obtain a court (or arbitral) order. Given the nature of the issues raised on this challenge, it is necessary to set out in terms the relevant passages in the Award (from [107] to [114]):

> "107. The JV relied on the judgment of the Qatari Court of Cassation in Challenge number 219 for the year 2011. In that case the termination clause of the contract provided that "If the second party breaches any of the terms of this contract, the first party (the petitioner) may terminate the contract after warning the second party without the need for judicial order and the two contracting parties shall return to their status before the contract was concluded". The petitioner had claimed the termination of the contract in its application to the court. The judgment is translated as stating that the termination clause of the contract:

"…does not lead to the necessary and automatic termination of the contract inevitably upon the failure of the first respondent to perform its obligations, as its wording specifically granted the petitioner the right to terminate the contract, which is the same right that it has under the law in bilateral contracts, which means that is merely a restatement of the implicit termination clause. The confirmation of the petitioner's right to terminate does not exempt it from resorting to the courts to request a termination under order constitutive thereof, which is possible in the cases of both termination by agreement or by judgement."

108. We wonder whether the word "exempt" is a mistranslation of the original Arabic, and should read "exclude", since in fact the petitioner had applied to the Court for termination, and the argument for the respondent seems to have been that termination by the court was itself excluded. This would be consistent with the principle stated by the Court:

"It is established that even though the Civil Code in its Article 184 granting the contracting parties the freedom to agree that termination is to take place by virtue of the agreement upon the occurrence of the breach without the need to resort to the courts to obtain a termination order. For the intention of the contracting parties to result in termination taking place by virtue of the agreement, the wording of the clause must clearly and categorically indicate that termination necessarily and automatically takes place upon the occurrence of the breach requiring it."

109. We note that the Court may well have been referring to a provision to the effect that on a breach the contract automatically terminates, without any decision required of the innocent party. Be that as it may, in the present case the operation of Article 19 of the GCC does "clearly and categorically" and unequivocally provide that the termination is effected by service by QF of a termination notice, provided the contractual requirements have been satisfied. The requirement of Article 184 is satisfied.

110. Some of the other judgments to which we were taken, as well as the extract from Sanhuri's commentary, referred to contract provisions providing for automatic termination on breach, i.e., without any decision or action by the innocent party. We do not think that these authorities are helpful or applicable to provisions such as those in Article 19, which do not provide for automatic termination, but require service of notices by QF (and implicitly a decision by QF) if the contract is to be lawfully terminated for breach. Some of these authorities refer to the termination provision in question as being "merely a restatement of the implicit termination clause provided by law": see e.g.

Dubai Court of Cassation Challenge No. 92 of 2008. Article 19 of the GCC cannot be so described.

111. The JV also rely on the judgment of the Court of Cassation number 110 of 2007. That case concerned a lease contract in which the termination clause was: "In the event the Lessee defaults in payment of the rent for three consecutive months, the Lessor shall be entitled to terminate the Contract without any need for serving a notice or obtaining a court ruling." The Court held that this provision was effective. It does not however follow that a clause that does not specifically exclude a court ruling would be ineffective. The Court simply referred to the wording of the termination clause in this case as "straightforward", as indeed it clearly was.

112. The JV also contended that the need to apply to the Court (or Arbitral Tribunal) could be excluded if the contract provided for automatic termination on breach, but not if the innocent party was given an option whether or not to terminate it. That suggestion implies an irrational distinction in the law of Qatar, and is inconsistent with the opinion of Professor Dr Wahab. We reject the JV's contention.

113. Lastly, we point out that the JV's contention that an order of the Tribunal is required for the Contract to be lawfully terminated is a recent suggestion. The same contention was raised by KVC, a subcontractor of the JV, in the course of the Work. Article 19 of the subcontract between the JV and KVC was, *mutatis mutandis*, identical to Article 19 of the GCC of the Contract. In its letter to KVC dated 1 June 2014 [H/15.631] Mr Martinez, on behalf of the JV, stated:

> *"The Contractor would also advise the Subcontractor that its contentions of unlawful termination are also unsupported. Articles 183 and 184 of the Qatar Civil Code do not require the Contractor to apply to the court before exercising its rights under Article 19 of the Subcontract.*
>
> *Article 184 permits the operation of termination clauses, and stipulates that a contract may be considered terminated for breach without the need for a court order if the wording of the contract clearly evidences the parties' intentions. By reference to the wording of Article 19 of the Subcontract… It is clear that the Parties have expressly agreed that the Contractor has the right to terminate on the grounds of breach, and it is also noted that this right extends to any breach."*

114. It is also noteworthy that the JV's contention did not appear in their original Answer and Counterclaim drafted by leading and junior counsel, although the JV were aware of the

> argument, having rejected it earlier in the year when it was put forward by KVC."

39. The Tribunal then considered the further legal issues arising on the question of lawful termination, including as to the meaning of "default" in Article 19 and whether or not any conduct on the part of QF precluded lawful termination of the Contract. As already indicated, the Tribunal's overall conclusion was that QF had lawfully terminated the Contract for default under Clause 19.2.

Future progress in the Arbitration

40. As matters currently stand, the future arbitral programme envisages a hearing in mid-October 2019 to address Qatari law issues in connection with QF's claim for liquidated damages, a two week hearing commencing in February 2020 to deal with the merits and quantum of that claim, alongside the JV's prolongation costs claim, and a three week hearing commencing in October 2020 to deal with the merits of QF's cost to complete claim.

The Law

41. S. 68 of the Act provides materially as follows:

> "(1) A party to arbitral proceedings may… apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award….
>
> (2) Serious irregularity means an irregularity of one 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."

42. S.33 sets out the 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 failing 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."

43. Thus, in order to make out a case for the court's intervention under s. 68(2)(a) the applying party must show a breach of s. 33 of the Act which has given or will give rise to substantial injustice.

44. S. 68 imposes a high threshold for a successful challenge, reflecting the purpose of the Act which is to reduce the extent of court intervention in the arbitral process. It is not to be used simply because one of the parties is dissatisfied with the result, but rather as a longstop in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice "calls out for it to be corrected" (see Lawrence Collins LJ in *Bandwidth Shipping Corporation v. Intaari* [2007] EWCA Civ 998 (The Magdalena Oldendorrf) at [46]). As a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults. The approach is to read an award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault (see *Zermalt Holdings SA v Nu Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 at p. 14F; *Latvian Shipping Company v The People's Insurance Company OEJSC* [2012] EWHC 1412 (Comm) at [30] to [34]).

45. Determining whether or not the duty of fairness has been breached will always be a question of fact and sometimes degree. However, the relevant broad legal principles are uncontroversial and can be summarised for present purposes as follows:

    i) There will generally be a breach of s. 33 of the Act where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. It is not right that a decision should be based on specific matters which the parties have never had the chance to deal with, nor is it right that a party should first learn of adverse points in the decision against him;

    ii) If a tribunal considers that the parties have missed the point and/or contemplates a completely different basis for a decision, the parties need to be given notice and a proper opportunity to consider the position and respond. This does not mean that every nuance or inference which the tribunal wishes to draw needs to

be put to the parties if it differs from that which has been precisely contended for in the arbitration;

iii) A tribunal does not have to set out each step by which they reach their conclusion or deal with each point made by a party to an arbitration and a tribunal can deal with a number of issues in a composite disposal rather than address each issue seriatim;

iv) (Save possibly in exceptional cases) s. 68(2)(a) in referring to the general duty of fairness in s. 33 does not allow a party to contend that the tribunal has disregarded or overlooked a particular piece of evidence since that amounts to an assertion that the arbitrators made mistakes in their findings of primary fact or drew unsustainable inferences from the primary facts;

v) In determining whether there has been substantial injustice, the applicant does not need to show that the result would necessarily or even probably have been different. He simply has to show that the tribunal might well have reached a different view and produced a significantly different outcome. It is enough for the applicant to show that the arbitrator reached a conclusion unfavourable to him which, but for the irregularity, he might well never have reached, provided always that the opposite conclusion is reasonably arguable.

(See Terna Bahrain Holding Co v Al Shamsi [2013] 1 Lloyd's Rep 86 at [85]; Zermalt Holdings SA v Nu Life Upholstery Repairs Ltd (supra) at p. 15M; RJ v HB [2018] EWHC 2833 (Comm) at [27]; Vee Networks v Econet [2005] 1 Lloyd's Rep 192 at [90]; Northern Shipping v Remol [2007] EWHC 1821 at [25]-[26]; K v A [2019] EWHC 1118 (Comm) at [37]; ZCCM Investments Holdings Plc v Kansanshi Holdings plc [2019] EWHC 185 (Comm) at [49] to [63]; Petrochemical Industries Company (K.S.C.) v The Dow Chemical Company [2012] EWHC 2739 (Comm) at [27]); Sonatrach v Staoil [2014] EWHC 875 at [13] to [18].)

46. For the sake of completeness on the question of fairness, I record the JV's submission that the comments relied on for proposition (iii) above are to be found in a part of the judgment in *Petrochemical Industries Company (KSC) v The Dow Chemical Company* (supra) dealing not with s. 68(2)(a) but rather s. 68(2)(d) of the Act, and so not applicable. However, I can see no good reason as a matter of logic or principle why the proposition should not be sound in both contexts.

The JV's challenge

The JV's pleaded case

47. In the summary of its claim the JV pleaded as follows:

> "4(5) The Tribunal did not decide the question of whether clause 19 was an automatic termination provision satisfying the Automatic Termination Condition; but appears to have decided that there is no such requirement under Qatari law. In that conclusion the Tribunal acted in breach of its duty under s. 33 of the ..Act; and deprived the [JV] of a reasonable opportunity of

> putting its case on the Automatic Termination Condition. In particular:
>
> > (a) In its Award, the Tribunal asked itself the question: "Was QF's termination of the Contract unlawful by reason of its failure to obtain a Court order as required by Article 184 of the QCC?" The Tribunal answered that question by addressing the Contracting Out Condition as if it were the only requirement, but then appears to address the Automatic Termination Condition in a later single paragraph of the Award, which appears to reject the [JV's] case by rejecting the existence of the Automatic Termination Condition…"

48. By way of remedy the JV sought the setting aside and/or variation of those parts of the Award by which the Tribunal declared and/or found that QF had lawfully terminated the Contract for default and had been entitled to make its calls on performance and advance payment guarantees.

49. Later, in relation to paragraph 112 of the Award, the JV pleaded:

> "23(1) The Tribunal appears to reject the existence of the Automatic Termination Condition, despite having set out the… wording of Article 184(1); or, at least, appears to reject the [JV's] case as to what satisfied the Automatic Termination Condition. (However, if that is wrong, and this paragraph was intended to address a different point, it follows that the Tribunal has failed to deal with the Automatic Termination Condition question at all.)"

<u>The JV's case as crystallised at hearing</u>

50. The JV now seeks only remission, a request made "strictly without prejudice" to the separate question of whether the issue ought to be remitted to the Tribunal as presently constituted or to a different tribunal. That question is not before me, but for the JV to progress (if so advised) before the ICC (see s. 24(2) of the Act). However, QF makes the point that it appears from materials previously lodged by the JV that, if remission is secured, the JV has every intention of seeking the recusal of the Tribunal if successful in this challenge.

51. The JV's case is that the Tribunal rejected the existence of the Automatic Termination Condition without having put that suggestion (which was not advanced by QF) to the parties and:

    i) Without discussion of Article 184(1);

    ii) By approaching a key passage in the principal Qatari law authority relied upon by the JV in support of its case on the Automatic Termination Condition on the basis that it had been mistranslated without having given the JV the opportunity to address such a suggestion;

iii) By asserting that the consequences of the existence of the Automatic Termination Condition would be to introduce an irrational distinction under Qatari law which was not supported by the JV's own expert. It reached this conclusion without the points having been raised with the JV's expert.

52. The net result is said to be that the JV has been unjustly deprived of a proper opportunity to put its case on the validity of QF's termination of this high value contract, in breach of the Tribunal's general duty under s. 33 of the Act. In circumstances where the consequences of the finding of termination are so drastic, the JV is entitled to have these key issues swiftly remitted so that they can be addressed fairly.

53. The JV emphasises that the court should have no reservations about making such a finding, despite the quality of the Tribunal. This was multi-layered, highly complex litigation involving 1000s pages of submissions and only short oral closings resulting in a huge award itself running to almost 300 pages. It is readily understandable how such an error could have been made. It points to the schedule of cases summarised in *RJ v HB* (supra) and other further recent examples of successful remission applications (such as *Fleetwood Wanderers v AFC Fylde Ltd* [2018] EWHC 3318; *K v A* [2019] EWHC 1118 (Comm) and *P v D* [2019] EWHC 1277 (Comm)).

54. In more detail, Mr Smouha QC for the JV identifies the following key steps for the purpose of the JV's challenge: to identify the parties' position on the issue; to look at the decision; and then to ask if the basis of the decision was one advanced by the parties or new.

55. It was common ground that the issue was whether under Qatari law QF could validly terminate the Contract without making an application to the court or tribunal for a determination that the contract be terminated, and that such an order was required unless Clause 19 met the requirements of Article 184. Furthermore, relying amongst other things on QF's responses to a Request for Information under CPR 18 in these proceedings, the JV submits that it was common ground that Article 184 was presented and addressed as having two separate conditions, namely the Automatic Termination and the Contracting out Conditions. The JV's case that an option to terminate would not meet the requirements of the Automatic Termination Condition was an issue in the arbitration with which the Tribunal had to deal.

56. Thus, whether or not the point was raised late, it was clearly in play by the time of the hearing in April and May 2018, and accepted as such by QF. This can be seen clearly from the JV's written opening and closing submissions (in particular at paragraph 5 and Section II Part A of its closing submissions). In closing the JV devoted 10 pages of submissions as to why Clause 19 did not satisfy the Automatic Termination Condition. Those submissions identified the Qatari Court of Cassation decision of 219 or 2011 ("Decision 219") as an important case, since it was an authority referred to by Mr Abu Shaikha. The relevant clause in Decision 219 provided:

> "If the second party breaches any of the terms of this contract, the first party may terminate the contract after warning the second party without the need for a judicial order and the two contracting parties shall return their status before the contract was concluded…"

The court decided that this clause did not comply with Article 184:

> "The stipulation in clause (11) of the contract…does not lead to the necessary and automatic termination of the contract inevitably upon the failure of the first respondent to perform its obligations, as its wording specifically granted the petitioner the right to terminate the contract, which is the same right it has under the law in bilateral contracts, which means that it is merely a restatement of the implicit termination clause.
>
> The confirmation of the petitioner's right to terminate does not exempt it from resorting to the courts to request a termination order constitutive thereof, which is possible in the cases of both termination by agreement or by judgment and does not apply to one without the other. Therefore, whereas the judgment characterised the clause included in the contract as an implicit termination clause, it has properly applied the law, which renders its challenge on this ground baseless."

57. The JV suggested that Mr Abu Shaikha had no explanation as to how this decision fitted in with his position on Clause 19, which he had accepted was in materially similar terms. The JV also relied on a series of authorities and Sanhuri commentary said to be consistent with Decision 219. It pointed to the fact that QF had not taken the opportunity to provide any further material in response to these submissions.

58. These written submissions were supplemented by the oral submissions of Mr ter Haar QC for the JV which emphasised that, to comply with Article 184, two conditions had to be satisfied. Moreover, the JV repeatedly made the point that QF had not articulated its case on the validity of termination fully or properly. QF's written (and oral) closing submissions addressed only the Contracting Out Condition (save where it addressed the Automatic Termination Condition in oral submissions in reply).

59. In short, the JV submits that it was never suggested that the Automatic Termination Condition did not exist; QF made no submissions on Decision 219 (which provided unequivocal support for the JV's position on Article 184) or the other authorities referred to in that context; and there was no suggestion of any mistranslation of Decision 219.

60. Against this background, the JV turns to the Award. It submits that paragraphs 96 to 106 of the Award can only have been addressing the Contracting Out Condition. Then at paragraphs 107 to 109 the Tribunal addressed Decision 219. There the Tribunal effectively rejected the JV's case by reference to an asserted mistranslation of the original Arabic; it suggested that the word "exempt" in the relevant paragraph of Decision 219 should read "exclude". This was not something proposed by either party or raised for comment with the parties by the Tribunal at any stage. The JV contends that this has a compounding effect on what is said to be the fundamentally unfair rejection of the existence of the Automatic Termination Condition to be found in paragraph 112 and considered further below.

61. As for paragraph 110, the JV submits that the Tribunal there made the outright finding that Clause 19 did not provide for automatic termination. From this it follows that, but

for a finding that the Automatic Termination Condition did not exist, the Tribunal would have been bound to find that Article 184(1) was not satisfied. In paragraph 111 the Tribunal was focussing again on the Contracting Out Condition.

62. The JV describes paragraph 112 as the "key" paragraph for its purposes. It makes six points:

i) The word "also" shows that the Tribunal appreciated that it was dealing with a separate issue;

ii) The reference to "automatic termination on breach" shows that the Tribunal can only have been referring to the Automatic Termination Condition issue;

iii) The only fair reading of the second and third sentences is that the Tribunal was rejecting the existence of any such requirement;

iv) The suggestion that the existence of the requirement was inconsistent with the opinion of Professor Dr Wahab is not referenced or explained;

v) There is no reference to Mr Abu Shaikha's evidence or any submissions by QF;

vi) The only ground identified for the rejection of the existence of the Automatic Termination Condition is that it would produce an irrational distinction in the law of Qatar.

63. In summary, the JV submits that this is a simple case of procedural irregularity where something has gone seriously wrong. The Tribunal rejected the JV's position on a basis which does not fit or reflect the issues or argument on the Automatic Termination Condition. It came to a conclusion that ran counter to the parties' common position (that there were two separate conditions in Article 184) and which was not ventilated with the parties. In doing so it relied on reasoning which the parties were not given an opportunity to consider or comment on. This irregularity was compounded by the Tribunal's re-interpretation of Decision 219 by reference to a suggested mistranslation which was never advanced by either party. The JV was therefore deprived of the opportunity of addressing the Tribunal's view.

64. The JV rejects what it says is an entirely new suggestion by QF to the effect that the two conditions in Article 184 can be "rolled up" into one. QF puts it thus in its skeleton argument in these proceedings:

> "16. In understanding the JV's application it is therefore <u>essential</u> to appreciate that neither QF nor its experts ever agreed that the word "automatic" in Article 184(1) meant "without the need to serve a notice of termination". That was an issue which divided the parties. This appear to be accepted by the JV at [5] of its skeleton recording that QF's expert merely accepted that Article 184 contained 2 conditions both of which had to be satisfied in order for termination to be valid. That is no more than the Article states at 184(1) and (2). Article 184(1) requires the parties to have agreed that the contract be terminated automatically without the need for a Court order. Article 184(2)

> of the QCC then sets out what "[s]uch condition" requires. It follows that whilst there are 2 conditions, answering…the second in QF's favour necessarily determines the first in the same way because Article 184(2) defines what is required by "[s]uch condition", namely that referred to in Article 184(1). This is why QF's case has been consistent throughout that it is a matter of construction as to whether the expression of the contract is sufficiently clear to indicate the intention of the parties is to terminate without need for a court judgment."

65. The JV submits that this is not what was argued before the Tribunal. It is not an argument supported by any evidence, nor is there any evidence to show that it was considered by the Tribunal.

66. As for substantial injustice, Mr ter Haar for the JV submits that upon remission the JV would have at the very least a real prospect of persuading the Tribunal that Clause 19 did not meet the Automatic Termination Condition and that QF's termination of the Contract was therefore invalid. The financial consequences for the JV of the Tribunal's finding that the termination was valid are said to be huge. In particular, QF's cost to complete claim – valued at about US$1billion – is premised on lawful termination. That claim would fall away. Further, QF's calls on the JV's bonds would (at least arguably) be shown to have been unfounded. There would also be further potential consequences to liquidated damages claims.

67. As for the suggestion by QF that, even if the Tribunal was wrong in its conclusion on Article 184, the only effect would be that the Tribunal would have to consider whether or not termination was justified as at 2014, then again the JV submits that it is at least arguable that under Article 183 the application for immediate termination would have been rejected as a matter of discretion and/or proportionality (for example because the JV's works were 95% complete at the time of termination). Further, because termination only takes effect only at the time or court or arbitral order, QF had no right to eject the JV from site, to move in and complete the works itself. It would be limited to a claim for cost to complete after the date of order.

Analysis

Irregularity

68. I bear in mind at the outset the scope and nature of this challenge which is limited to s. 68(2)(a) of the Act. This is not a primary challenge under s. 68(2)(d) of the Act (where it is said that a tribunal has failed to deal with all the issues that were put to it); nor was any alternative case for remission advanced on that basis. Nor is it the function of this court to engage in an analysis of whether the Tribunal's conclusions were right or wrong.

69. I am not assisted one way or the other by the submission that the sheer size and complexity of the arbitration, involving very lengthy written (and only compressed oral) arguments, make it more (as the JV submitted) or less (as QF submitted) likely for a procedural irregularity of the type alleged to occur. What is clear from the transcripts and the Award itself is that the Tribunal approached its task with care and diligence, fully engaged with the issues.

70. Despite the skilful and determined manner in which the JV's case has been advanced, I am unable to accept it. The position both in the evidence, submissions and the Award on Article 184 was more nuanced than the JV's stark presentation of the issues suggests.

71. A useful starting point is a precise identification of the relevant issue on Article 184: the parties were divided on whether or not the Automatic Termination Condition precluded lawful termination if termination was by way of service of a notice (as provided for in Clause 19). The JV's position was that it did, supported by Professor Dr Wahab. QF's position, advanced through Mr Abu Shaikha, was that it did not. Whilst QF (and Mr Abu Shaikha) accepted that Article 184(1) required a provision for automatic termination, it was not accepted (and Mr Abu Shaikha never accepted) that a contractual requirement for termination by notice meant that the contract could not be terminated without a court order. As the Tribunal made clear, it preferred Mr Abu Shaikha's evidence to that of Professor Dr Wahab, an unimpeachable conclusion for present purposes.

72. I do not accept the crux of the JV's case, namely that in paragraph 112 of the Award the Tribunal made the outright finding that the Automatic Termination Condition did not exist. As the JV's submissions themselves highlight, the existence of the Automatic Termination Condition (and the JV's reliance on it) was squarely before the Tribunal. The issue of whether the parties needed to obtain a court or arbitral order before termination was the subject of detailed consideration, including in the parties' written and oral submissions. It is apparent, including from exchanges during the hearing itself, that the Tribunal understood that there were two conditions in Article 184, with all three members contributing to issues and debate surrounding the Automatic Termination Condition. Thus the Tribunal had very well in mind the question of whether Article 184(1) operated so as to preclude termination based on notice.

73. In those circumstances it would have been extraordinary for the Tribunal to reject the *existence* of the Automatic Termination Condition in anything but the clearest and most explicit of terms (and without giving the parties the opportunity to comment on its intention to do so).

74. Paragraph 112 of the Award is no such rejection. Rather, and as paragraph 23 of the JV's Grounds of Claim admits at least as a possibility, the Tribunal was there rejecting the JV's *construction* of the Automatic Termination Condition, namely that the Automatic Termination Condition precluded lawful termination without recourse to the court where there is a requirement for notice. The parties are agreed that the first sentence of paragraph 112 accurately reflected the JV's case (though the word "only" could usefully have been added after the word ("could")). The Tribunal rejected that case, holding that the existence of a requirement for notice, as contained in Clause 19, did not preclude lawful termination of the Contract without recourse to the court. That this was what was being considered and rejected by the Tribunal in paragraph 112 (as opposed to the rejection of the existence of any requirement in Article 184(1)) is supported by the next immediate paragraph (113) of the Award where the Tribunal referred to "the JV's contention that an order of the Tribunal is required for the Contract to be lawfully terminated".

75. The Tribunal did not find that the Automatic Termination Condition did not exist. Rather it found that that the Automatic Termination Condition as defined by the JV did not exist. It was rejecting the submission that, where termination requires a notice, the

terminating party must seek a court or arbitral order. Rather, Article 184(1) permits termination without recourse to a court or tribunal where a notice is to be served, as confirmed by the Tribunal in paragraph 109 of the Award where it held that Clause 19 clearly, categorically and unequivocally provided that termination is effected by service by QF of a termination notice, provided that the contractual requirements have been satisfied. This, found the Tribunal, satisfied Article 184.

76. Any complaint about a lack of clarity in paragraph 112 falls far short of the type of irregularity required for a successful challenge under s. 68 of the Act. QF also points to the fact that it would have been open to the JV to make an application for interpretation under Article 35 of the ICC Rules (as it was doing on other matters at the very same time as it issued these proceedings).

77. Absent a finding by the Tribunal that the Automatic Termination Condition did not exist at all, the gravamen of the JV's challenge under s. 68(2)(a) of the Act falls away.

78. For the avoidance of doubt, I do not consider that the JV can find any useful support for its construction of paragraph 112 in the comment in paragraph 110 of the Award. There the Tribunal was addressing the further Egyptian authorities and Sanhuri's commentary relied on by the JV in relation to the Automatic Termination Condition. The Tribunal indicated that it did not find that additional material helpful or applicable to provisions such as those in Clause 19 "which do not provide for automatic termination". In context, and by reference to the immediately ensuing phrase ("but require service of notices by QF…if the contract is to be lawfully terminated for breach"), that can fairly be read as a comment to the effect that Clause 19 did not provide for automatic termination as contended for by the JV ie without notice. The distinction being drawn between automatic termination with and without notices.

79. Thus, there is no basis for saying that the Tribunal reached the conclusion that it did on the issue of lawful termination on an unheralded basis that was not argued.

80. That the Tribunal did not reject the existence (but rather the JV's construction) of the Automatic Termination Condition is consistent with its approach during the hearing itself, where the Tribunal clearly acknowledged its presence: for example, in its questions during the evidence of Professor Dr Wahab on day 15 (transcript pp. 18 to 21 and 80 to 81).

81. It is important to remember, as already indicated, that Mr Abu Shaikha never agreed that "automatic" in Article 184 meant "without the need to serve a notice of termination". QF's case (namely that "automatic" in the context of Article 184 meant no more than "without the need for a court order") was offered for comment by the Tribunal to Mr ter Haar during the course of Professor Dr Wahab's evidence in re-examination and raised with Professor Dr Wahab. Professor Dr Wahab's oral evidence was that service of a notice precluded termination being "automatic". (In his third report (at paragraphs 65 and 66) he appeared to accept that automatic termination with notice was possible). In his oral evidence in re-examination Professor Dr Wahab stated:

> "So "automatic" under the doctrine and the precedents means that upon materialisation of a certain event, the contract comes to an end or is rescinded or terminated. And that is the meaning of the levels mentioned by Al Sanhuri, and that is quite distinct

> for a situation where a party has the right to exercise and how he procedurally exercises that right by virtue of a notice or not, and when is the notice effective, it's a different situation."

QF points to the fact that a consideration of Sanhuri's different levels of termination (set out in material before the Tribunal) in fact demonstrates that automatic termination is contemplated both with and without service of a notice. But whatever the merits of the argument, it can be seen that the possibility of automatic termination in circumstances where notice is to be served was explored in the evidence and argument.

82. The JV's case relies heavily on the proposition that whenever the parties or the Tribunal addressed the question of clarity of language, only the Contracting Out Condition was under consideration. I do not consider this to be a fair reading of the position when set against the background identified above. Whilst the Automatic Termination and Contracting Out Conditions were always accepted as being separate questions, they overlapped: the Contracting Out Condition specified the content of (i.e. the need for clarity in) the Automatic Termination Condition. The Contracting Out Condition referred expressly back to the Automatic Termination Condition. The conditions were always the subject of the single overarching question of whether or not Clause 19 satisfied Article 184. This is reflected in the intermingling by the Tribunal of its consideration of the two conditions, for example in paragraph 110 (dealing with automatic termination) and paragraph 111 (dealing with contracting out) and in its analysis in paragraphs 101 to 104 of the Award (which considered, amongst other things, the consequences of a requirement for a court order for termination in the context of the need for clarity in contracting out).

83. Whilst it is possible that the parties' English lawyers were at cross-purposes on QF's position, perhaps due to the late evidential development of the "notice" point by the JV, I do not accept that the taking of a composite (or as the JV puts it, a "rolled up") approach to Article 184 in this way is some bright new argument, as the JV submits. It is right to say that QF never put its case in this way in explicit terms; it is how QF, including through Mr Abu Shaikha, approached it.

84. As the JV itself points out, Mr Abu Shaikha always accepted the existence of the Automatic Termination and the Contracting Out Conditions in Article 184. Thus, in cross-examination, he gave the following evidence:

> "Q. …Can you agree with me that in cases to which article 184 applies it will only apply if two conditions are satisfied? Firstly there must be a provision of the contract which provides for automatic or ipso facto termination. Do you agree with that?
>
> A. Yes.
>
> Q. Secondly, there must be a sufficiently clear or express or categorical exclusion of the court's jurisdiction to exclude that of the court's intervention?
>
> A. Yes."

85. Yet time and again, he stated that Clause 19 satisfied Article 184. By way of example:

i) In his fourth report under the heading "Termination" he stated:

> "3.5 In the joint statement, in relation to QF's Notice of Termination dated 22 July 2014, and termination of contract more generally, Dr Wahab and I agreed that Article 184(1) of the QCC provides that: "*the parties may agree that, in the case of a failure to perform the obligation arising from the contract, such contract shall be deemed to have been rescinded without a court order"*.
>
> 3.6 In the joint statement I said that: *"the parties are free to agree a mechanism for termination of a contract. Following Article 171(1), the Contract is the law of the parties. This includes any provisions which deal with termination of the Contract. Where there is an agreed mechanism under the Contract for termination, Qatari law does not place any specific requirements on the parties in order to exercise their rights and obligations under such provisions."* I also said that: *"[u]nder Article 184(1), parties are not required to obtain a Court order permitting termination of a contract, where termination is provided for under the Contract"*…
>
> 3.8 Further Dr Wahab said that: "*the Contract does not appear to provide for automatic termination [rescission] without recourse to a court or an arbitral tribunal. Thus, any unilateral termination or recission of the Contract absent a court or arbitral tribunal decision would not be consistent with Qatari law.*" I disagree with Dr Wahab's view. In my opinion this Contract provides for termination without recourse to a court or arbitral tribunal…."

ii) In his fifth report under the heading "A court order" he stated:

> "4.23 In summary…Article 184(1) permits the parties to "*agree that the contract be considered terminated, ipso facto, without need for a court judgment"*. Article 184 allows the parties to provide for termination under their contract, without any need for an order by the applicable court or tribunal. Article 184 does not require the parties to expressly say that the provision[s] excludes the court or tribunal. It is sufficient if the contract provides a clear and straightforward mechanism for termination. Article 19 is sufficiently clear and straightforward in that it provides a mechanism for termination of the contract. There is no requirement for an order of a court or tribunal under Article 19 and the QCC does not otherwise impose this requirement. Provisions such as Article 19 are commonplace and enforceable in construction contracts in Qatar."

86. This last sentence (that provisions such as Clause 19 are commonplace and enforceable in construction contracts in Qatar) was never challenged.

87. Given Mr Abu Shaikha's recognition of the presence of the two conditions it is not possible to read that evidence as evidence that Clause 19 satisfied only Article 184(2) but not Article 184(1). Indeed, Mr Abu Shaikha expressly referred to Article 184(1). For example, paragraph 4.23 of Mr Abu Shaikha's fifth report expressly referred to Article 184(1) in the context of a section dealing with the necessity or otherwise of a court order. Mr Abu Shaikha confirmed his reports to be accurate in his oral evidence and at no stage resiled from his position, even in the context of the JV's case on the Automatic Termination Condition being fully developed.

88. Professor Dr Wahab also appears to have understood this presentation: thus in cross-examination, having been taken through a translation of Article 184(1) and (2), he gave the following evidence:

> "Q. "I am suggesting that what divides you and my clients is whether the construction of the contract that we have just been going through is sufficiently clear to indicate that it is the intention of the parties that the contract can be terminated without needing to go to court first. That is what divides us, isn't it?
>
> A. Yes."

89. In similar vein, QF's position that the question was whether Clause 19 was sufficiently clear to preclude the need to go to court was expressly put to Professor Dr Wahab in cross-examination, specifically in the context of the Automatic Termination Condition. He agreed that in order to determine whether the parties had agreed in the case of non-performance that a court order was unnecessary, one needs to ask whether that is clear from how it was expressed in the contract.

90. It is also not right to say that QF at no stage addressed the Automatic Termination Condition directly in its submissions. Thus in oral closing in reply Mr Lofthouse addressed it by reference to Mr Fernyhough's interventions during the evidence of Professor Dr Wahab already referred to above. Mr Fernyhough had identified that the word "automatically" could be used in two different senses in two different situations: a) once the breach takes place, the parties by their agreement had agreed that breach would automatically terminate the contract without an action by either party and b) the agreement provides that one party may terminate the contract by, for example, serving a notice, then that automatically terminates the contract without having to go to court. Professor Dr Wahab tended to the first situation. Mr Lofthouse submitted that the position in Article 184 (because of Article 184(3)) was that service of notice was contemplated (other than in commercial matters). (Indeed, it is only in commercial matters that service of notice could be dispensed with). It anticipated the provision of a notice in circumstances of automatic termination (ie the second situation postulated by Mr Fernyhough). Mr Lofthouse went on to confirm, prompted by the Chairman, that QF's case in any event was that Professor Dr Wahab had accepted that a sufficiently clear provision would obviate the need to go to court. Mr ter Haar then intervened to add that Professor Dr Wahab did not accept that it would be sufficiently clear if it did not provide for automatic termination.

91. Perhaps pertinently for present purposes, the Chairman closed this particular debate with the words: "…we'll address it. Can we move on…."

92. Put bluntly, there were two differing views on whether or not Clause 19 satisfied (both conditions in) Article 184; the Tribunal preferred that of Mr Abu Shaikha. Whether it was right to do so is not a matter for this court.

93. The reasons that the Tribunal gave in paragraph 112 of the Award are the subject of criticism. Again, this is not the place for any substantive critique of its analysis. I do not identify any procedural irregularity in terms of unfairness either in the Tribunal's statement that the JV's case implied an irrational distinction in the law of Qatar or that it was inconsistent with the opinion of Professor Dr Wahab. The first observation as to irrationality flows from the parties' submissions, for example echoing paragraphs 606 to 608 of QF's written closing submissions and the Tribunal's concerns on the rationality of JV's case on automatic termination as put to Mr ter Haar in his oral closing submissions (day 2 transcript pp. 16 to 22). The Tribunal was troubled by the entitlement to terminate without court or arbitral order turning on whether not a notice of termination was required. And it cannot be said that the JV did not have an opportunity to address those concerns.

94. Whilst the Tribunal did not particularise its comment as to inconsistency with the opinion of Professor Dr Wahab, there was ample material on which it could have reached such a conclusion fairly in the light of the evidence and arguments advanced before it. It was an evaluative assessment properly open to the Tribunal on the materials before it. QF can point for example a) to Professor Dr Wahab's acceptance in cross-examination that Clause 19 was clear in saying that by issuing the notice of termination, QF could terminate the Contract and b) to Professor Dr Wahab's evidence that termination for convenience did not require a court order even though it did require a notice, whilst termination for breach did. Despite this apparent difference in treatment Professor Dr Wahab at the same time opined that Article 184 applied to all termination provisions. Equally, as set out above, Professor Dr Wahab's third report did not take any point to the effect that service of notice precluded automatic termination. In that report he countenanced automatic termination that involved service of notice. The JV had the opportunity to deal fully with Professor Dr Wahab's evidence before the Tribunal.

95. I turn next to the Tribunal's treatment of Decision 219, noting in passing only that the JV is not right to suggest that Mr Abu Shaikha did not have a position in response to his cross-examination on Decision 219 by the JV. In fact he gave the following evidence:

> "…even if we depend on this judgment, we still having to see that article 171 is the law of the parties. Our – the contract of the claimant is – which is signed with the respondent put a mechanism for termination. Even if all these judgments comes and say something differently, which I still insist that the contract the Tribunal discussing is completely different than those. It has a provision making a mechanism how to terminate."

He also did not state that the relevant contractual clause in Decision 219 was materially identical to Clause 19, something he was not in fact asked.

96. Turning to the relevant issue on Decision 219, I am not satisfied that that there was any compounding procedural irregularity arising out of the Tribunal's speculation in paragraph 108 of the Award as to a possible mistranslation of the judgment in Decision 219 which was never put to the parties. It would be most surprising for the Tribunal not to have given the parties the opportunity to comment on such a possibility had it been material to its decision. On a fair reading of the Award, the Tribunal was not relying on any finding that the word "exempt" should read "exclude". First, on the face of the Award, it made no such finding – it merely "wonder[ed]" whether the word "exempt" was a mistranslation. Secondly, the passage in Decision 219 containing the principle relied upon in paragraph 109 (as quoted by the Tribunal in paragraph 108) did not contain the mooted mistranslation, an issue expressly put to one side by the Tribunal's use of the phrase "[b]e that as it may". Whether or not the Tribunal was right to extract or apply the test as it did is again not the issue before the court.

97. The parties' submissions on both sides have involved a substantial amount of detail which I have duly considered in what are on any view complex and substantial proceedings with an already lengthy procedural history. I remind myself of the general approach of the courts to an arbitral challenge such as this and of the need to avoid an unduly legalistic or minute textual analysis of the Award.

98. My conclusion in summary is that the Tribunal did not dismiss the existence of the Automatic Termination Condition as the JV alleges; rather it rejected the JV's construction of Article 184 in a manner which reflected the evidence and arguments canvassed at the hearing in April/May 2018. There has been no irregularity for the purpose of s. 68(2)(a) of the Act.

<u>Substantial injustice</u>

99. In these circumstances, the question of substantial injustice does not arise. Had I found that there had been a failure by the Tribunal to comply with s. 33 of the Act, it would have been difficult to say that the JV's argument on Article 184 and lawful termination was hopeless, just as it would have been to conclude, as Mr Lofthouse seeks to persuade me for QF, that the JV would ultimately have suffered no substantial injustice as a result of the Tribunal's finding on lawful termination either because of the power to award compensation for wrongful termination or because there would be no prospect of the Tribunal finding (on proportionality grounds or otherwise) that termination was not justified, given its findings elsewhere in the Award on delay, defects and bad faith. Mr Lofthouse also submits that, even if the JV were correct that the costs to complete claim could only arise at the time of the arbitral decision on termination, QF's delay costs and costs to complete costs would then be higher, not lower. Nor, submits QF, could it sensibly be suggested that the JV would have completed the works. Equally, QF's call of the bond and guarantee did not depend on the finding of unlawful termination.

100. These may be powerful points on the merits. But, as I indicated at the hearing, I have my doubts as to the appropriateness of speculation as to the outcome of remission of the issue in question – see the remarks of Colman J in *Vee Networks* (supra) at [90]:

> "Above all, it is not normally appropriate for the court to try the material issue in order to ascertain whether substantial injustice has been caused. To do so would be an entirely inappropriate inroad into the autonomy of the arbitral process."

and of Goff LJ in *The Vimeira* [1984] 2 Lloyds Rep 66 at 76:

> "Where there is a breach of natural justice, as a general proposition it is not for the Courts to speculate what would have been the result if the principles of fairness had been applied…."

101. Even if it were legitimate to consider in any detail possible outcomes, an outright finding that there was no substantial injustice for the reasons identified by QF would involve an exercise far beyond the scope of this challenge and an evaluation of matters both factual and legal either too speculative and/or insufficiently explored before me.

Conclusion

102. For these reasons, the JV's challenge on the basis of serious irregularity falls to be dismissed. I recognise the potentially significant financial consequences for the JV of its defeat on the Termination Issue. However, I am unable to accept that this eminent and highly experienced Tribunal made a fundamental error of unfairness in breach of s. 33 of the Act as suggested. This is not a question of undue deference; I would have had no hesitation in remitting the matter had I been persuaded that there had been a breach of the Tribunal's duty under s. 33 of the Act causing substantial injustice. But I have not been so persuaded on a fair and proper reading of the Award. In summary, the JV has failed to overcome the high threshold for a successful s. 68(2)(a) challenge.

103. I invite the parties to reach agreement on all consequential matters, including costs, so far as possible. I conclude by thanking all counsel for the quality of their submissions and able assistance throughout this matter.