Neutral Citation Number: [2021] EWHC 970 (Comm)

Case No: CL-2020-000477

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2021

Before :

THE HONOURABLE MR JUSTICE BUTCHER

- -

Between :

THE REPUBLIC OF UGANDA	**Claimant**
- and -	
RIFT VALLEY RAILWAYS (UGANDA) LIMITED	**Defendant**
- and –	
(1) RVR INVESTMENTS (PTY) LIMITED	
(2) KU RAILWAYS HOLDINGS LIMITED	
	Additional Parties

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Mark Handley and Sena Tsikata (instructed by **Curtis, Mallet-Prevost, Colt & Mosle LLP**) for the **Claimant**
Wendy Miles QC and Harris Bor (instructed by **Alston & Bird LLP**) for the **for the Defendant (as represented by its pre-liquidation management) and Additional Parties**

Hearing dates: 16 February 2021

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE BUTCHER

Mr Justice Butcher :

1. The Claimant ('the Republic') seeks, under s. 67 Arbitration Act 1996 ('AA 1996') the setting aside of a decision of the arbitral panel in a London-seated arbitration. It also seeks declarations as to the lack of standing of what it describes as the former management of the Defendant company ('RVRU') to manage and control that company.

The background and underlying dispute

2. The dispute arises out of a long term concession agreement dated 7 April 2006 ('the Concession Agreement') under which it was agreed that RVRU would provide freight services to the Republic. The Concession Agreement was between the Republic, Nalukolongo Railway Workshop Ltd, a state-owned corporation, and RVRU, a Ugandan company. It provided that the applicable law was Ugandan law, and also, as amended by a 'Direct Agreement' dated 30 October 2006, for London arbitration.

3. The relevant arbitration clause was in these terms:

> '6.02. *Arbitration*. Notwithstanding anything to the contrary herein or in the Concession Agreement or the Interface Agreement, any and all claims, controversies, disputes or causes of action arising out of or relating to this Agreement, the Concession Agreement or the Interface Agreement, or the performance, breach, validity, interpretation, application or termination hereof or thereof ('Disputes'), shall be finally resolved by arbitration in accordance with the then current United Nations Commission on International Trade Law Arbitration Rules (the 'UNCITRAL Rules'), with the London Court of International Arbitration acting as the appointing authority if so required, and judgment on the award shall be entered in any court having jurisdiction thereof. The seat of arbitration shall be London, England, and the language of the arbitration shall be English. The Dispute shall be heard by an arbitral tribunal consisting of three (3) arbitrators, each of whom shall be independent and impartial.'

4. It is the Republic's case that RVRU's performance of the Concession Agreement was very inadequate, and that, in the face of 'RVRU's non performance and its declarations that it could not and would not continue performance under the existing concession terms', the Republic had accepted RVRU's repudiation, bringing the Concession Agreement to an end, on 25 January 2018.

5. The Republic contends that, in addition to failing to fulfil its obligations under the Concession Agreement, RVRU failed to pay routine debts to suppliers and service providers. What is not in dispute is that a number of default judgments were entered against RVRU. Further, on 12 September 2017 one of RVRU's commercial suppliers, Hass Petroleum (Uganda) Ltd ('Hass') issued a statutory demand for just over US$ 1 million. That was not paid and on 13 October 2017 Hass commenced insolvency proceedings before the High Court of Uganda seeking the winding up of RVRU.

6. On 31 January 2018, RVRU commenced an arbitration in accordance with the arbitration provision applicable to the Concession Agreement, which I have quoted above, claiming damages for breach of contract and/or expropriation arising from

what it contended was the Republic's wrongful repudiation of the Concession Agreement. On 28 February 2018 the Attorney General of the Republic replied to the Notice of Arbitration. This letter identified the Claimant as RVRU, 'represented by M/s MMAKS Advocates'. It intimated that the Republic would bring a counterclaim against RVRU. It stated that the Republic did not agree to the appointment of a single arbitrator, but each party should appoint its own arbitrator and the two arbitrators should appoint a third. In the event, it took some considerable time for the arbitral tribunal to be constituted.

7. In the meantime, on 22 November 2018, no payment to Hass having been made, RVRU was ordered by the Ugandan High Court to pay the debt within 30 days or be wound up.

8. By February 2019 the arbitral tribunal ('the Tribunal') had been constituted. It comprised Mr Klaus Reichert SC, Mr Barton Legum and Prof. Muna Ndulo. On 12 February 2019, Terms of Engagement were agreed in the arbitration. These were signed by the Tribunal, RVRU (which was acting under the direction of its management), and Curtis Mallet-Prevost, Colt & Mosle ('Curtis') on behalf of the Republic. The Terms of Engagement provided in part:

'I.

1. The Parties confirm their acceptance that the Tribunal comprises the Arbitrators: Klaus Reichert, Barton Legum, and Muna Ndolo, with Klaus Reichert as Presiding Arbitrator, and that the Tribunal has been duly and validly constituted.
…

4. The Parties waive any objection to the appointment of the Tribunal on the ground of any conflict of interest, lack of independence or impartiality in respect of matters known to them at the date of signature of these Terms of Engagement.
…'

9. On 22 March 2019 Curtis raised with Alston & Bird, and MMAKS Advocates, who were acting for RVRU in the arbitration, concerns as to how RVRU was funding the proceedings and how it would be able to fund any adverse costs order. In this context Curtis referred to the fact that there had been the Hass Petition for Winding up, and to what was said to be 'an unfortunate and lengthy track record [on the part of RVRU] of ignoring judgments, ignoring court orders and of refusing to satisfy judgment debts'. The conclusion of the letter was to ask RVRU to disclose whether there was a third party funder, and if there was not, how an adverse costs order would be met. On provision of this information, Curtis said, the Republic would consider whether to seek security for costs.

10. On 26 April 2019 the Tribunal issued Procedural Order No. 1. This included the following provisions of some significance:

(1) In paragraph 2.2, it was stated 'The parties have confirmed that the Tribunal was properly constituted and that no party has any objection to the appointment of any Member of the Tribunal or to the manner of its constitution.'

(2) In paragraph 6.3 it was provided that the President was authorised to issue Procedural Orders on behalf of the Tribunal.

(3) In paragraph 8.1, it was stated that 'each party' would be represented by its respective counsel. Those counsel were then named: and included Alston & Bird and MMAKS Advocates for RVRU.

(4) A lengthy and detailed procedural timetable was laid down, leading to a main hearing in September 2021.

(5) In paragraph 20.2 it was provided that transcripts should be made for any hearing or session 'other than sessions on procedural issues.'

11. On 23 May 2019 RVRU was ostensibly placed into involuntary liquidation by the Ugandan High Court and Mr Nelson Nerima was appointed as RVRU's liquidator. Without intending to pass any judgment one way or the other as to the validity of his appointment, I will call Mr Nerima for convenience 'the Liquidator'. On 20 June 2019 RVRU's direct shareholder, RVR Investments (PTY) Ltd ('RVRI') issued proceedings in the Ugandan High Court to set aside the liquidation order and the appointment of the Liquidator, on the grounds that they had been made without proper notice or due process.

12. On 22 July 2019, RVRU submitted its Statement of Claim in the arbitration. That Statement of Claim named the Claimants not only as RVRU, but also as KU Railways Holdings Ltd ('KURH') and RVRI. RVRI and KURH are, respectively, RVRU's direct and indirect parent entities, together holding 100% of its share capital. One matter sought in the Statement of Claim was the joinder to the arbitration of RVRI and KURH, in order for them to seek 'to vindicate their rights as third-party beneficiaries of the Concession Agreement and as protected investors under the Ugandan Investment Law' (paragraph 7).

13. On 13 August 2019 the Republic submitted an application to stay the arbitration pending the decision of the Liquidator whether to continue the arbitration. The precise request was 'that the Tribunal declare that there be a stay of the Arbitration with respect to RVRU, pending confirmation of RVRU's liquidator's intention to move forward with the case'. The Republic also opposed the joinder of RVRI and KURH and asked the Tribunal to dismiss the claims of these entities. Curtis repeated the application for a stay on 26 August 2019.

14. In Procedural Order No. 2, dated 3 September 2019, the Tribunal declined to decide either the stay application or the joinder issue at that stage. In relation to the former, Procedural Order No. 2 stated:

'[19] The Tribunal notes that there has been a disputed change in control over the Claimant, in relation to which there is ongoing litigation between the Parties in Uganda. Further, the Tribunal notes that the Parties are divided about whether the Claimant, following the disputed change of control, must reach an internal decision regarding the Claimant's continuation of this arbitration. The Tribunal understands that there is a pending application in Uganda to set aside the Liquidation Order, which has a hearing date of 11 September 2019.

[20] In light of the ongoing proceedings in Uganda challenging the Liquidation Order, the Tribunal does not consider it appropriate at this time to make a ruling on the Respondent's request to stay these proceedings. The Tribunal would prefer to wait for the Parties' further submissions, which would allow the Tribunal to benefit from a more complete record (including the result of the Claimant's challenge to the Liquidation Order). The Tribunal considers that the above approach would avoid unnecessary inefficiencies and meet the objectives of Article 17(1) of the 2013 UNCITRAL Arbitration Rules. The Parties are accordingly advised to continue to follow the procedural schedule established in Procedural Order No. 1.

[21] The Tribunal emphasises that neither Party should view the Tribunal's decision not to rule on the Respondent's application for a stay of this arbitration as a fact that might support its position in the ongoing domestic proceedings.'

Procedural Order No. 2 was signed by the President of the Tribunal (alone) and dated.

15. On 29 February 2020 Uganda submitted its Statement of Defence and Counterclaims in the arbitration. This was a substantial document of 345 paragraphs. Amongst other things, it referred to the liquidation of RVRU, and pleaded that 'the existing management and shareholders of RVRU have lost their corporate powers, which have vested in the liquidator', and 'any already-commenced proceedings cannot be continued, as it is the responsibility of the newly-appointed liquidator to assess whether continuation of the proceedings would be in the interests of the company's creditors' (para. 84)'. It contended (para. 87) that RVRU's claim should be dismissed unless representatives of RVRU provide evidence that the liquidator has authorised the continuation of these proceedings.

16. In early May 2020, Uganda applied in the arbitration for injunctive relief against RVRI and KURH arising out of a separate arbitration which they had commenced. There was then correspondence in which the Tribunal was addressed as to the issues on which it could make a ruling. As part of this, a message was sent on behalf of the Tribunal on 25 May 2020. This stated in part:

'… the Tribunal understands that the Parties agree that there may be some limited question(s) that the Tribunal may decide at this stage of the proceedings that would allow the Parties to resolve any potential conflict between the present arbitration and the arbitration initiated by KURH and RVRI. The Parties are advised that the Tribunal is not minded at this time to address any issue that implicates the merits of this case or requires substantial additional factual or legal development by the Parties.'

17. In response, Mr Kahale of Curtis on 27 May 2020 wrote:

'Therefore, we propose that the Tribunal determine the following issues now, as they have been fully briefed and do not "implicate the merits of this case or require substantial additional factual or legal development by the Parties":
1 Whether RVRU may continue to maintain the claims in this Arbitration without the consent of the liquidator; and

2 Whether RVRU may request the joinder of KURH and RVRI without the consent of the liquidator.'

18. On 28 May 2020 a message was sent on behalf of the Tribunal which said that the Tribunal was prepared to make rulings on the following issues proposed by the parties:

'1 Whether RVRU may continue to maintain the claims in this arbitration without the consent of the liquidator,
2 Whether the claims of KURH and RVRI are properly joined to this arbitration:
a. Whether the joinder request pertaining to KURH and RVRI is timely pursuant to Article 17(5) of the UNCITRAL Arbitration Rules;
b. Whether RVRU may request the joinder of KURH and RVRI without the consent of the liquidator.'

19. An oral hearing – which lasted about 2 ½ hours – to address these points took place on 16 June 2020. It was transcribed. The relevant issue was framed by Mr Kahale on behalf of the Republic as one of the authority of those purporting to represent RVRU to do so. At 56-57 there was the following exchange with a member of the Tribunal:

'[Mr Legum] If I understand correctly, there is no objection to the party being a party to this arbitration, that is to the Claimant being a party to the arbitration, the objection concerns the representatives of the Claimant –
[Mr Kahale] That's correct, it's a question of authority, not the question of RVRU being here, but of who represents RVRU.
[Mr Legum] Excellent….'

20. It is also to be noted that the argument put forward on behalf of the Republic concentrated solely on what it alleged was the effect of the appointment of a liquidator by the liquidation order (pp. 33, 35). It was mentioned by counsel for the Republic that the liquidation petition had preceded the commencement of the arbitration, but he said: 'Not that it matters, because once the liquidator comes in it's his decision to continue the case…' (p. 48). In response to questions from Mr Legum as to why, given that the liquidation petition had preceded the commencement of the arbitration, an objection to Alston & Bird's acting for RVRU had not been taken at the time of the Terms of Engagement, counsel for the Republic did not state that the fact of the petition's having preceded the arbitration was a matter of significance to the jurisdiction of the arbitrators.

21. The power point slides prepared by RVRU's counsel for that hearing were entitled 'Claimants' Opposition to Respondent's Jurisdictional Challenges'. However, the point about RVRU's being in liquidation was not said by the Republic's counsel to raise an issue of the jurisdiction of the arbitrators. The word 'jurisdiction' does not appear to have been mentioned in that context; and there was no contention that the arbitrators had not been validly appointed.

22. On 13 July 2020 the Tribunal issued Procedural Order No. 5. It is this which the Republic seeks to set aside under s. 67 AA 1996. It is therefore necessary to refer to it in some detail.

(1) The document is signed by the President of the Tribunal (only) and dated. Other than in the formal title it does not refer to the seat of the arbitration.

(2) It is called a 'Procedural Order', and para. 1 reads 'This Procedural Order concerns certain issues that the Parties have agreed that the Tribunal should resolve on a preliminary basis.'

(3) Having referred to the Republic's argument as being that 'it is for [RVRU] to show why the Tribunal should proceed with the arbitration in the absence of the Liquidator's permission, it cannot be presumed that the Liquidator provided implied consent to the conduct of this arbitration' (para. 29), the Tribunal proceeded to its analysis. This included, at [47]-[48] the following:

'[47] Section 97(1)(c) of the Ugandan Insolvency Act states that at the commencement of liquidation, "proceedings, execution or other legal process shall not be commenced or continued and distress shall not be levied against the company or its property." As a matter of statutory interpretation, this provision prohibits the commencement or continuation or proceedings *against* a company in liquidation. The legislation treats proceedings commenced or continued *by* a company in liquidation quite differently. Section 97(1)(a) states that at the commencement of liquidation, "the liquidator shall take custody and control of the company's property," which, according to the definition of "property" in Section 2 of the Ugandan Insolvency Act, would include "things in action" such as the claims in this arbitration. A plain reading of Section 97(1)(a) indicates that there is no statutory stay on claims brought by a company in liquidation. Therefore, in the Tribunal's view, the Liquidation Order, the appointment of the Liquidator, and his ongoing consideration (without expressing a view one way or the other) of the proceedings do not automatically pose an impediment to the continuation of these proceedings.

[48] The Tribunal recognises that, by virtue of Section 97(1)(a), the Liquidator may take custody or control over these proceedings. The record (as summarised above) shows that the Liquidator is aware of this arbitration, but has not yet taken a decision on whether or not to sanction the continuation of the arbitration. In the absence of any contrary direction from the Liquidator, the Tribunal considers that RVRU may continue to pursue these proceedings. The Tribunal does not consider it necessary to speculate as to what might be the position if the Liquidator does, in due course, express a view one way or the other.' (emphasis in original)

(4) The Tribunal went on to rule that the application to join KURH and RVRI was timeous, within Article 17(5) of the UNCITRAL rules, but reserved a decision on whether RVRU could request the joinder of KURH and RVRI without the consent of the Liquidator.

23. On 28 July 2020 the Republic issued its Arbitration Claim Form, seeking 'the setting aside of an award by the tribunal as to its own substantive jurisdiction dated 13 July 2020' (ie Procedural Order No. 5).

24. On 3 August 2020 the Liquidator wrote to the Tribunal stating that he had not 'sanctioned the commencement or continuation of the above arbitration proceedings'.

On 6 August 2020, the Republic requested the Tribunal to dismiss the arbitration in the light of that communication. The Tribunal had correspondence with the Liquidator in which, effectively, he reiterated his position.

25. On 14 September 2020, in order, as they said, primarily to guard against any prejudice which might arise as a result of the Republic's contention that those acting for RVRU were not entitled to do so, KURH and RVRI applied to be joined as parties to the s. 67 AA 1996 proceedings which the Republic had commenced.

26. On 28 September 2020 the Republic issued an application in its s. 67 AA 1996 proceedings, seeking a declaration (which at that stage was sought as an interim declaration only) that the former management of RVRU 'have no standing to take any action on behalf of RVRU, including in purported response to [the Republic's] application under s. 67 [AA 1996]'. I will call this 'the Standing Application'.

27. On 30 September 2020 the Tribunal issued Procedural Order No. 6. This was, again, signed by the President (only), and dated. It stated (paragraph 1) that it would deal with the Republic's application for a dismissal of the arbitration proceedings or alternatively a stay pending the s. 67 proceedings, and also with the application for the joinder to the arbitration of KURH and RVRI. It set out the history in some detail. At paragraph 26 it recorded the position of RVRU that the issues decided in Procedural Order No. 5 did not implicate a question of substantive jurisdiction, but only procedural questions concerning Alston & Bird's power of attorney; and RVRU's observation that at the hearing on 16 June the Republic had not objected to the substantive jurisdiction of the Tribunal.

28. The Tribunal's analysis commenced at paragraph 30. That and the following paragraph read:

'[30] The Tribunal notes that the Respondent [ie the Republic] is requesting a dismissal of this case, which can only mean that such a dismissal is made with *res judicata* effect. For the reasons outlined below, the Tribunal denies this request. The Tribunal has decided to issue this decision as a Procedural Order rather than an award because the issues associated with the liquidation of the Claimant may evolve further and therefore, the Tribunal's ruling is not a final disposition of the issues relating to the liquidation.

[31] The Tribunal will begin by identifying the precise issue before it. During the 16 June 2020 Hearing, an exchange between the Respondent and the Tribunal made clear that the Respondent was not questioning the Tribunal's jurisdiction over the claims made by RVRU against Uganda, but rather whether Alston & Bird had the right to represent the Claimant in this arbitration. [A footnote referred to pp. 56-57 of the transcript]. Therefore, the Tribunal understands that there is no dispute between the Parties as to the Tribunal's jurisdiction over this dispute. Rather, the Parties are divided over whether Alston & Bird has the authority to prosecute the claims in this arbitration on the Claimant's behalf.'

29. The Tribunal then considered the communications with the Liquidator. At paragraph [44] the Tribunal concluded:

'[44] In light of the fact that the Liquidator has not stated that this Arbitration should be withdrawn or halted, and the pending proceedings in Uganda challenging the appointment of the Liquidator continue (insofar as the Tribunal is aware), the Respondent's application to dismiss the case with *res judicata* effect is denied. Further, taking into account the nature of all of the answers given by the Liquidator to the specific questions posed by both the Tribunal and the Respondent, the Tribunal does not consider that a dismissal of the case (which would be for all purposes) to be appropriate. For the avoidance of doubt, the Tribunal's decision has been made based on the record before it as at the date of this Procedural Order, including the Respondent's letter of 29 September 2020.'

30. Procedural Order No. 6 continued with the Tribunal's refusal to stay the arbitration pending the s. 67 AA 1996 proceedings in this court; and also declined to make any ruling, at that stage, on the joinder of RVRI and KURH to the arbitration.

31. On 11 December 2020 Cockerill J heard the application by RVRI and KURH to be joined as parties to the s. 67 AA 1996 proceedings. At that hearing the Republic developed the argument, which was put at the forefront of its arguments before me, that as a matter of Ugandan insolvency law, the winding up had commenced with the petition, and that from that date the former management had had no power to act, including to commence the arbitration (see transcript pp. 45-49). It is to be observed that this point was now clearly made, and how differently presented the case was from how it had been put before the Tribunal prior to Procedural Order No. 5.

32. Cockerill J gave permission for RVRI and KURH to be joined as parties to the present proceedings. One of her reasons for doing so, expressed in paragraphs [45]-[46] of her judgment, was in order that there could be someone at the hearing of the s. 67 application, who could make submissions in opposition to the Republic's case, even if the Republic's standing application in relation to RVRU were successful.

33. On 22 January 2021 the Ugandan High Court set aside the Liquidation Order, under which Mr Nerima had been appointed Liquidator, on the basis that notice of the hearing of the winding up petition had not been validly served. On 28 January 2021 Alston & Bird wrote to the Tribunal saying that the orders for liquidation were void *ab initio* and there was no Liquidator.

34. On 3 February 2021 Hass served RVRU's counsel with a hearing notice for the hearing of its application in the Ugandan High Court to wind up RVRU. RVRI opposed the application on the basis that it was premature as the underlying debt was disputed. On 11 February 2021 the Ugandan High Court issued a fresh order for RVRU to be placed under liquidation, and for Mr Nerima to be appointed as liquidator. It is the position of RVRU, RVRI and KURH that this order was made without affording RVRI an opportunity to be heard. RVRI has apparently prepared an application to review this order and to reinstate its application to remove Mr Nerima.

35. These last events had occurred very shortly prior to the hearing before me on 16 February.

The Present Applications: Overview

36. As I have said, the proceedings before this court are an arbitration claim for relief under s. 67 AA 1996. The Court has no jurisdiction over the parties or the dispute other than that afforded by reason of its being the supervisory court for the arbitration. It is also pertinent to observe, at the outset, that the position as to the liquidation of RVRU in Uganda is, at least in some respects, in a state of some uncertainty and apparent flux. Furthermore, it is the position of both parties, as I understood it, that issues of the effect of the RVRU winding up petition on who could represent that company were matters, at least in the first instance, for the Tribunal.

37. These considerations indicate to me that the Court should be careful on these applications not to overstep the role which it has under AA 1996. In this context, it appeared to me that, if the Court was of the view that the application under s. 67 AA 1996 itself was ill-founded, that would be a relevant consideration in relation to the Standing Application because, on that hypothesis, the only basis on which the Court's jurisdiction was being invoked would be one which could not succeed. For that reason, it appeared to me appropriate to hear the s. 67 AA 1996 application for the setting aside of Procedural Order No. 5 together with the Standing Application. As a result of the joinder of RVRI and KURH to the proceedings, and the fact that Alston & Bird, Ms Miles QC and Dr Bor undoubtedly validly represented those entities, there could be no objection to this on the basis that there was no one authorised to make arguments contrary to the Republic's applications. Having heard both matters, I consider that I should deal in this judgment first with the s. 67 AA 1996 application to set aside Procedural Order No. 5.

Section 67 AA 1996 and related provisions

38. Section 67 AA 1996 provides in part as follows:

> '(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court –
> (a) Challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
> (b) For an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.
>
> A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).'

39. Section 67 has to be read in conjunction with ss. 30 and 82(1). Those sections provide, in relevant part:

> '30. Competence of tribunal to rule on its own jurisdiction.
> (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to-
> (a) Whether there is a valid arbitration agreement,
> (b) Whether the tribunal is properly constituted, and
> (c) What matters have been submitted to arbitration in accordance with the arbitration agreement.
> (2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

…
82. Minor definitions.
(1) In this Part –
…
"substantive jurisdiction", in relation to an arbitral tribunal, refers to the matters specified in section 30(1)(a) to (c), and references to the tribunal exceeding its substantive jurisdiction shall be construed accordingly.'

40. By section 31(4) of AA 1996 it is provided that:
'Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may-
(a) Rule on the matter in an award as to jurisdiction, or
(b) Deal with the objection in its award on the merits.
…'

Was there an award?

41. The Republic's s. 67 AA 1996 application, as I have already set out, is for the setting aside of Procedural Order No. 5 on the basis that it is an award of the Tribunal as to its substantive jurisdiction. For their part, RVRU, RVRI and KURH contended, by way of a preliminary objection, that Procedural Order No. 5 was not an award at all, and thus that the s. 67 AA 1996 application failed *in limine*.

42. In considering this issue it is necessary to have regard to the provisions of AA 1996 as to the form of an award. Section 52 AA 1996 provides

(1) The parties are free to agree on the form of an award.
(2) If or to the extent that there is no such agreement, the following provisions apply.
(3) The award shall be in writing signed by all the arbitrators or all those assenting to the award.
(4) The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.
(5) The award shall state the seat of the arbitration and the date when the award is made.'

43. Section 52(1) allows the parties to agree on the form of an award. It is therefore necessary also to have regard to the provisions of the UNCITRAL Arbitration Rules, which the arbitration clause provides should be applicable. Under Section IV of the relevant Rules appear the following provisions:

'Article 33
…
2 In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide alone, subject to revision, if any, by the arbitral tribunal.

Article 34
…
2 All awards shall be made in writing and shall be final and binding on the parties. …

4 An award shall be signed by the arbitrators and it shall contain the date on which the award was made and indicate the place of arbitration. Where there is more than one arbitrator and any of them fails to sign, the ward shall state the reason for the absence of the signature.
…'

44. The court does not have a general power to supervise the conduct of an arbitration prior to award: see Charles M Willie & Co (Shipping) Ltd v Ocean Laser Shipping Ltd (The 'Smaro') [1998] EWHC 1206 (Comm), per Rix J. As it was put by Steyn J in K/S A/S Bill Biakh v Hyundai Corporation [1988] 1 Lloyd's Rep 187 at 189:

'In the interests of expedition and finality of arbitration proceedings, it is of the first importance that judicial intrusion in the arbitral process should be kept to a minimum. A judicial power to correct during the course of the reference procedural rulings of an arbitrator which are within his jurisdiction is unknown in advanced arbitration systems…'

45. Consistently with this, in Fletamentos Maritimos SA v Effjohn International BV (No. 2) [1997] 2 Lloyd's Rep 302 Waller LJ said this, at 306:

'I have always understood the position to be that there are no circumstances which could give rise to a power to review an interlocutory direction not made in the form of an award. Basically, the position is, as I understand the authorities, that the Court has never had some general power to supervise arbitration and review interlocutory decisions. …'

46. The distinction between an award and a procedural ruling is therefore one of importance. In ZCCM Investments Holdings Plc v Kansanshi Holdings Plc [2019] EWHC 1285 (Comm), in the context of an application under s. 68 AA 1996, Cockerill J reviewed the authorities in the area and at [40] helpfully set out certain points which they suggested as helping to determine whether a ruling is or is not an award, as follows (citations omitted)

'a) The Court will certainly give real weight to the question of substance and not merely to form …
b) Thus, one factor in favour of the conclusion that a decision is an award is if the decision is final in the sense that it disposes of the matters submitted to arbitration as to render the tribunal *functus officio*, either entirely or in relation to that issue or claim …
c) The nature of the issues with which the decision deals is significant. The substantive rights and liabilities of parties are likely to be dealt with in the form of an award, whereas a decision relating purely to procedural issues is more likely not to be an award …
d) There is a role however for form. The arbitral tribunal's own description of the decision is relevant, although it will not be conclusive in determining its status …
e) It may also be relevant to consider how a reasonable recipient of the tribunal's decision would have viewed it
f) A reasonable recipient is likely to consider the objective attributes of the decision relevant. These include the description of the decision by the tribunal, the formality

of the language used, the level of detail in which the tribunal has expressed its reasoning …

g) While the authorities do not expressly say so I also form the view that:

i. A reasonable recipient would also consider such matters as whether the decision complies with the formal requirements for an award under any applicable rules.

ii. The focus must be on a reasonable recipient with all the information that would have been available to the parties and to the tribunal when the decision was made. It follows that the background or context in the proceedings in which the decision was made is also likely to be relevant. This may include whether the arbitral tribunal intended to make an award.'

47. I have concluded that Procedural Order No. 5, in the present case, was clearly not an award. I say that for the following reasons.

(1) It is not called an award. It was called a Procedural Order. This experienced Tribunal could be expected to know and understand the difference. That it does so in fact is demonstrated by the terms of paragraph [30] of Procedural Order No. 6.

(2) It would not have been understood by a reasonable recipient as an award. This is in part because of what it was called. But it is also because it did not comply with the formal requirements for an award stated by the AA 1996 and the UNCITRAL Rules. Specifically, it was not signed by all the arbitrators. Instead, and in conformity with what is provided for by paragraph 6.3 of Procedural Order No. 1 in relation to procedural orders, it is signed only by the President. It also does not state the seat of the arbitration. While there is a mention of this in the title, it is not stated in the body of the document, as one would expect had there been intended compliance with Article 34.4 of the UNCITRAL Rules and s. 52(5) AA 1996.

(3) More specifically, it would not have been understood by a reasonable recipient as an award as to jurisdiction. The points raised by the Republic had not been put – certainly had not been intelligibly put – as issues going to the jurisdiction of the Tribunal. There had been no request for the Tribunal to make an award on jurisdiction. Consequently, Procedural Order No. 5 does not discuss the jurisdiction of the Tribunal, nor s. 30 AA 1996. Nor does it discuss possible issues of waiver of the points which the Republic now seeks to put forward based on the date of the original winding up petition, such as points by reference to the Terms of Engagement and Procedural Order No. 1. It is quite clear that the Tribunal did not think that an issue of jurisdiction had been raised, as indeed it expressly said in paragraph [31] of Procedural Order No. 6. This was reasonable given what had been said (and not said) before and at the hearing.

(4) The Order did not finally determine any issue or dispute between the parties, including as to the Tribunal's jurisdiction. The procedural and provisional nature of the ruling is clear from paragraph [48] of Procedural Order No. 5.

48. Given that I have concluded that Procedural Order No. 5 was not an award, the s. 67 application to set it aside must fail. It is accordingly neither necessary nor appropriate for me to consider what the fate of the s. 67 application would have been on the assumption that Procedural Order No. 5 was an award.

The Standing Application

49. As I have said, the Standing Application is made in the s. 67 AA 1996 proceedings. Mr Handley submitted that the Court retained a general jurisdiction to grant declarations, but accepted that this was a discretionary remedy, and that the Court would exercise that discretion in keeping with its limited role as the supervisory court for the arbitration.

50. In my judgment there are good reasons why I should not grant the declarations sought.

51. In the first place, for the reasons I have already given, the s. 67 AA 1996 set aside application fails, because there was no award. The fact that the proceedings in which the Standing Application is made are unfounded is, I consider, a strong factor against making a declaration in those proceedings. That would be for the court to exercise a jurisdiction which is not in keeping with the limited role of the Court under AA 1996.

52. In the second place, the issue on which the Republic now seeks that the Court should make a declaration is one which both the parties have accepted that the Tribunal can decide, at least in the first instance. This is implicit in the Republic's Statement of Defence and Counterclaim, and in what the Republic contends was decided by Procedural Order No. 5, and is also illustrated by the nature of the Republic's application of 6 August 2020 which led to Procedural Order No. 6. There is no good reason why the court should pre-empt a decision by the Tribunal on these matters.

53. In the third place, I consider that the position in relation to the Ugandan liquidation of RVRU to be uncertain by reason of the differing recent court orders. Even if I were otherwise minded to consider making a declaration, which I am not, I would not wish to do so at present as further developments in those proceedings seem likely, and might affect the declaration which could be made.

Conclusion

54. For those reasons, I refuse the Standing Application and dismiss the s. 67 set aside application and these proceedings.