Neutral Citation Number: [2022] EWHC 2998 (Comm)

Case No: CL-2021-000583

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

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

Date: 25/11/2022

Before :

MR JUSTICE JACOBS

- -

Between :

Wael Buheiry

Claimant

- and -

VistaJet Limited

Defendant

- -
- -

Timothy Higginson and Ian Chai (instructed by **Edwin Coe LLP**) for the **Claimant**
Karen Maxwell (instructed by **Clyde & Co LLP**) for the **Defendant**

Hearing dates: 21 November 2022

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Approved Judgment

This judgment was handed down remotely at 9:30am on Friday 25th November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives
(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE JACOBS

Mr Justice Jacobs :

A: Introduction

1. The Claimant ("Mr Buheiry") challenges an LCIA arbitration award dated 9 September 2021 by which the tribunal awarded to the Defendant ("VistaJet") the sum of € 1,050,653.86 plus interest. Mr Buheiry's challenges are brought under the Arbitration Act 1996 sections 67 and 68.

2. VistaJet's claims in the arbitration were debt claims for instalments alleged to be due under an agreement signed in April 2014 ("the 2014 Agreement"). That agreement was between Mr Buheiry and a company called VistaJet Luftfarhtunternehman GmbH ("VJLU"). VJLU was a company within the same overall group as the Defendant, VistaJet. VistaJet was an assignee of the rights of VJLU.

3. Mr Buheiry's principal argument, on his section 67 challenge, concerns the effectiveness of this assignment. The precise relationship between VistaJet and VJLU is relevant to the argument advanced. Mr Buheiry contends that the tribunal lacked jurisdiction because there could be no valid assignment by VJLU to VistaJet because of the limitations in clause 7.7 of Schedule C to the 2014 Agreement. The 2014 Agreement comprised a Term Sheet and Schedules A, B and C. Schedule C contained "Miscellaneous Provisions" including clause 7.7:

> "7.7 VistaJet may novate, assign, sub-contract and transfer this Agreement and all or any of its rights and obligations under it to (a) its holding company, (b) any subsidiary of its holding company, and (c) any company purchasing the business and undertaking of VistaJet. The expressions "holding company" and "subsidiary" shall have the meaning given to them in section 1159 of the Companies Act 2006. In the event of such novation, assignment, sub-contracting or transfer, (a) VistaJet shall inform the Member thereof in writing within a reasonable time thereafter and (b) the Member will re-execute a fresh agreement for the unexpired Term of this Agreement with the novatee/assignee/sub-contractor/transferee, if VistaJet requires the Member to do so…"

4. In relation to this ground of challenge under section 67, Mr Buheiry contends that the assignee from VJLU was not "any subsidiary of its holding company". The challenge under section 68 raises essentially the same point.

5. The second ground of challenge, again raised under both sections 67 and 68, concerns a question of whether appropriate notice had been given in respect of the arbitration proceedings commenced by VistaJet. Mr Buheiry's argument was based upon a different provision within Schedule C to the 2014 Agreement, clause 7.11. This provided as follows:

> "7.11 All notices hereunder will be in writing, in English, and deemed to have been given on the date of dispatch if faxed (with transmittal confirmation), and 5 days after posting, if sent by registered post (excluding Saturdays, Sundays, and public

> holidays), in each instance to the address specified on the first page of this Program"."

6. Mr Buheiry contended that notice of the commencement of the arbitration was given by e-mail, and that this was ineffective.

7. The Defendant raised three principal points in response.

8. First, neither ground of challenge was properly to be regarded as a challenge to the tribunal's substantive jurisdiction within section 67. This is because a section 67 jurisdictional challenge must relate to one of the matters set out in the Arbitration Act 1996 section 30. It did not do so here.

9. Secondly, even if either ground of challenge did come within section 67, there was no merit in the points advanced.

10. Thirdly, if the challenge failed under section 67, there was no separate point which arose in relation to section 68. In particular, Mr Buheiry had a full opportunity to argue these two points before the tribunal, and indeed did argue them to some extent and had the opportunity of making additional submissions, for example in response to written questions which the tribunal asked. There was no procedural irregularity, and in any event nothing which caused substantial injustice, so as to come with section 68.

B: The parties' contractual dealings

11. In April 2014, Mr Buheiry and VJLU entered into the 2014 Agreement. The commercial subject-matter of the agreement was the provision of private aircraft services. VJLU is an Austrian company which operates and provides such services to its customers through a membership program scheme. The material terms of the 2014 Agreement, in the context of the arguments advanced, are the assignment provision (Clause 7.7) and the notice provision (Clause 7.11) quoted above. The 2014 Agreement provided for English law and the jurisdiction of the English courts, rather than arbitration. The start date for the agreement was 1 May 2014. This was set out in a Term Sheet signed by the parties, and this incorporated various other provisions.

12. The tribunal's award describes certain correspondence between the parties in 2014 and early 2015. In April 2015, a Maltese lawyer, Dr Micallef, put forward a number of complaints on behalf of his client, Mr Buheiry. The complaints concerned the quality of services provided by VJLU. The details of those complaints do not matter for present purposes. However, they led to negotiations for a new agreement, which was signed by Mr Buheiry on 4 August 2015 and by both VJLU and the present Defendant, VistaJet, on 20 August 2015 ("the 2015 Agreement").

13. The structure of the 2015 Agreement is broadly similar to that of the 2014 Agreement. It again consists of a Term Sheet and Schedules A to C. The Term Sheet identifies VistaJet and Mr Buheiry at the top of the page, and it then provides that its terms (together with those in the Schedules) "together form the basis on which VistaJet shall provide [Mr Buheiry] with flight services and additional services". The start date was 1 July 2015. There were 10 "Special Terms" in the Term Sheet. These included the following:

> "1. In the event of conflict or inconsistency between these Special Terms and any other terms set out elsewhere in this Program, these Special Terms shall take precedence.
>
> 2. VistaJet Luftfahrtunternehmen GmbH ('VJLU'') and the Member are parties to a Program Partnership Agreement dated April 2014 with a Start Date of 1 May 2014 (the "Old Program"). The parties agree that following the execution of this Program and payment by the Member of (i) EUR 15,653,86 to VJLU and (ii) the first Quarterly Payment of US$ 150,000 to VistaJet, the Old Program terminates and is replaced by this new Program. The security deposit held by VJLU under the Old Program shall then be transferred to VistaJet and held as the Security Deposit payable under this Program.
>
> …
>
> 10. Section 9.2 of Schedule C is deleted and substituted by the following wording. Any dispute or claim arising out of or in relation to this Program shall be submitted to the London Court of International Arbitration (LCIA) under and in accordance with the Arbitration Act 1996 and the rules of the LCIA at the date of such submission, which rules are deemed to be incorporated by reference within this Clause. The Tribunal shall consist of three arbitrators and each litigating party shall select one arbitrator. The arbitrators selected by the parties shall select the Chairman from amongst themselves. In the absence of selection by the Parties, the arbitrators including the Chairman shall be appointed by the LCIA. The Parties hereto acknowledge that service of any notices in the course of such arbitration at their addresses as given in this Agreement shall be sufficient and valid. Proceedings shall be held in camera, in the English language and in London."

14. At the end of these Special Terms were completed signature blocks for Mr Buheiry, VistaJet and VJLU, preceded by the words:

> "IN WITNESS WHEREOF, the parties hereto have executed this Program consisting of this Term Sheet, the Program Fundamentals, the Service Area Rules and the Miscellaneous Provisions on the dates set out below".

15. Special Term 2 provided, as set out above, that the previous program (i.e. the subject of the 2014 Agreement) would be terminated and replaced by the new program (i.e. the subject of the 2015 Agreement) following execution of the new agreement and the payment of certain sums to VJLU and VistaJet. There was no dispute that (leaving aside the arbitration clause) the 2015 Agreement did not come into effect, because the payment conditions were not fulfilled. There was also no dispute, either in the arbitration or in Mr Buheiry's case as set out in the Claim Form, that the arbitration agreement contained in Clause 10 of the Special Conditions was nevertheless binding; on the basis that it was separable (see the Arbitration Act 1996, section 7) and therefore

survived the invalidity of the "matrix" agreement in which it was contained. There was therefore no argument that the ineffectiveness of the matrix agreement, pursuant to Special Term 2, resulted in the ineffectiveness of the arbitration agreement. Indeed, in correspondence between Mr Micallef and Clyde & Co ("Clydes") on behalf of VistaJet in September 2020, shortly before the commencement of the arbitration proceedings, Mr Buheiry took the position that any dispute between the parties should be resolved pursuant to Clause 10, relying upon the separability principle.

16. It is also clear that there are 3 parties to the 2015 Agreement, and therefore to the arbitration clause within it. The signature page provides for signature by all three parties (Mr Buheiry, VistaJet and VJLU) and was indeed signed by them. Mr Higginson did not submit otherwise in his argument.

17. The award describes some dealings between the parties in 2018/2019 and in July 2020, but again these are not material to the parties' arguments. On 14 July 2020, VJLU assigned its rights under the 2014 Agreement to VistaJet. VistaJet explained, during the course of the arbitration, that the reason for the assignment was VJLU's impending liquidation. Notice of this assignment was sent to Mr Buheiry later in July 2020.

C: The procedural history of the arbitration

18. The procedural background to the arbitration is set out in some considerable detail in the award. Generally speaking, a genuine jurisdictional issue raised under the Arbitration Act 1996 section 67 will not require the court to explore the procedural history of an arbitration. This is because challenges under section 67 are by way of re-hearing. It is for the court to determine whether the tribunal lacked jurisdiction, and the tribunal's own views on the issue are not binding. Equally, the process which led to a tribunal accepting jurisdiction (as it did in this case) will generally not matter for the purpose of a section 67 application.

19. However, where a challenge is made under section 68, the position is different, because a claimant is there complaining about aspects of the procedural conduct of the arbitration. In the present case, however, the complaint under section 68 is not that the tribunal failed to give Mr Buheiry a full opportunity to participate in the arbitration process, but rather that the tribunal's conclusions in respect of the two points outlined in section A above (assignment and notice) were flawed. Mr Buheiry's section 68 case was raised, as I understood Mr Higginson's argument, in order to deal with the possibility that his two arguments did not fall within section 67. In that event, if either of them had merit, he submitted that they could be raised in the context of section 68.

20. Against this background, I do not think that it is necessary to set out the full procedural history, which is dealt with exhaustively in the tribunal's award. Instead, I shall summarise the overall position, and concentrate in particular on the events which concern the "notice" argument.

21. The procedural history of the arbitration broadly falls into three periods.

    (1) Between October 2020 and March 2021, Mr Buheiry challenged the tribunal's jurisdiction, but nominated an arbitrator and participated in the arbitration without prejudice to that challenge.

(2) Between March 2021 and June 2021, there was an unsuccessful application by Mr Buheiry to bifurcate the proceedings; i.e. for the jurisdictional application to be dealt with first. This was followed by unsuccessful application for the recusal of the tribunal on the grounds of bias. Bias does not, however, form any part of Mr Buheiry's present grounds of challenge.

(3) In June and July 2021, Mr Buheiry adduced further evidence and made further submissions, again without prejudice to his challenge to jurisdiction.

22. The important events within these periods are as follows.

October 2020 – 14 January 2021: Request leading to appointment of the tribunal

23. On 28 October 2020, VistaJet commenced the arbitration pursuant to the arbitration agreement contained in the 2015 Agreement. The arbitration was commenced shortly after a new set of LCIA Rules had come into force on 1 October 2020 ("the LCIA Rules"). The LCIA Rules provide for the making of a written request for arbitration described therein as the "Request" but commonly referred to as the "Request for Arbitration" (I shall simply refer to the "Request").

24. In the present case, the Request was filed with the LCIA, and it was sent by e-mail to two e-mail addresses associated with Mr Buheiry. One was a gmail address and the other was a hotmail address. It was also sent to the e-mail address of Mr Micallef. The covering e-mail, sent by Mr Robert Trower of Clyde and Co ("Clydes"), attached the Request and offered to provide hard copies upon request. The Request attached various documents, including the 14 July 2020 assignment.

25. On 9 November 2020, Mr Micallef wrote to the LCIA reserving Mr Buheiry's rights in full in relation to the tribunal's jurisdiction. One of the points taken in the letter concerned the sufficiency of the process by which arbitration had been commenced. Mr Micallef said as follows:

> "There is no contractual basis between Mr Trower's client [VistaJet] and mine which stipulates that notice of any form of dispute and communications arising between them may be given by electronic means. On the contrary, the Agreement (clause 7.11 of Schedule C thereof) refers to notice to be given by fax or registered mail to be sent to the address specified on the first page of the Agreement. Email or other electronic means is not an agreed method of notification. Accordingly, my client is not served or otherwise notified or advised in terms of law by the contents of the email dated 28th October 2020 sent by Mr Robert Trower of Clyde & Co on behalf of his client and referred to as Request in your letter of the same date. My client's rights are reserved in full."

26. Accordingly, Mr Buheiry took (what has been described as) the "notice" point right from the start. The tribunal noted that Mr Buheiry made similar reservations or rights and objections to jurisdiction in subsequent communications with the LCIA and the tribunal itself. There is no suggestion, therefore, that there has been any waiver by Mr Buheiry affecting his ability to advance the present jurisdictional arguments.

27. On 10 November 2020, VistaJet wrote to the LCIA, stating that the Request had been validly served on Mr Buheiry by e-mail in accordance with the LCIA Rules and the 2015 and 2014 Agreements, and asked the LCIA to confirm that the Request had been validly served. VistaJet copied Dr Micallef and Mr Buheiry's e-mail addresses to that communication.

28. On 11 November 2020, the LCIA Registrar wrote to the parties, stating:

> "I confirm that [Vistajet] has provided documentary proof of actual delivery [of the Request] in accordance with Article 4 of the Rules, as required by Article 1.1 (vii) of the Rules.

I set out in Section D below the terms of these, and other relevant, LCIA Rules.

29. On 19/20 November 2020, Mr Micallef wrote to the LCIA as follows:

> "[T]he time for a formal Response (if any) should not start to run until [Mr Buheiry] is properly served with notice of the arbitration.... [A]s already stated, no notice has been properly provided to date to Mr Buheiry.... Mr Buheiry entered into two contracts, one in 2014 and another in 2015. The former was entered into with a company named [VJLU] and the latter was entered into with a company named [VistaJet]. Neither contract provides for service or notification by electronic means...."

30. VistaJet's response, on 23 November 2020, was to submit that – in light of the LCIA Registrar's email of 11 November 2020 – the Request was deemed served on 28 October 2020, and that therefore the arbitration was deemed commenced on that date. The LCIA was requested to confirm that Mr Buheiry's "Response" to the Request was due by 25 November 2020. Article 2 of the LCIA Rules provides for the delivery of a "Response" within 28 days of the "Commencement Date" of the arbitration. That Response should contain various matters, including the name of a respondent's party nominated arbitrator in the case of arbitration agreements which (as here) provided for party nomination.

31. On 24 November 2020, Mr Micallef reiterated that Mr Buheiry's position was that he had not been served with or notified of the Request in accordance with "the contractual method". No Response was therefore required "until such proper notification has taken place". The point was described as being "fundamental going to the jurisdiction of any arbitral Tribunal and the ultimate enforceability of any award".

32. An extension of time for service of a Response was granted by the LCIA to 4 December 2020. On that day, Mr Buheiry nominated Mr Michael Black QC as arbitrator, but without prejudice to the issue of service and to all jurisdictional arguments that may be raised.

33. On 12 January 2021, the arbitrator previously nominated by VistaJet (Mr Adrian Lifely) and Mr Black QC advised the LCIA of their nomination of Ms Lucy Martinez as presiding arbitrator. On 14 January 2021, the LCIA Registrar notified the parties that, pursuant to Article 5 of the LCIA Rules, the LCIA Court had appointed all three members of the tribunal. The Registrar also reminded the parties that, in accordance

with Article 4.2 of the LCIA Rules, and save with prior written approval or direction of the tribunal, any written communication in relation to the arbitration should be delivered by email or any other electronic means of communication that provides a record of its transmission.

January – 28 February 2021

34. Following its appointment, on 19 January 2021 the tribunal circulated a proposed procedural order, Procedural Order 1. On the same day, Mr Buheiry requested that the tribunal make a preliminary award on jurisdiction and the validity of service of process, prior to any engagement with the substance of the dispute. The parties and the tribunal thereafter corresponded, including on the question of whether jurisdictional issues should be bifurcated and dealt with as a preliminary issue, as requested by Mr Buheiry.

35. On 26 January 2021, without prejudice to its position that the Request had been validly delivered by email, VistaJet sent the Request by registered post to the PO Box identified in the 2014 and 2015 Agreements. It was eventually returned to sender because the address was insufficient/incomplete. Paragraph 119 of the award indicates that the tribunal's attempted postal communications to that address met with a similar fate, being returned as undeliverable or unclaimed. However, all e-mail communications to the two e-mail addresses of Mr Buheiry, and to Mr Micallef, were successful.

36. On 4 February 2021, Mr Buheiry said that his legal team was not instructed to make submissions going beyond a time-table for proceedings leading to an award on the jurisdictional issue of the invalidity of the notice given.

37. On 5 February 2021, a procedural hearing was held by Zoom. Both parties were legally represented – Mr Buheiry by counsel (Ms Angharad Parry). The tribunal reserved judgment on the question of whether to bifurcate so as to deal with the issues of jurisdiction and service first.

38. Following the hearing, VistaJet provided to Mr Micallef Royal Mail tracking information showing that the Request had been sent by registered post to the PO Box address, and noting that delivery was deemed to have taken place on 2 February 2011 in accordance with clause 7.11 of Schedule C of the 2015 Agreement.

39. On 11 February 2021, the tribunal denied Mr Buheiry's request for bifurcation, and sought comments on Procedural Order 1. On 18 February 2021, Mr Buheiry requested the tribunal to recuse itself on grounds of bias/procedural unfairness in breach of section 33. The request was refused on 23 February 2021. The tribunal also refused Mr Buheiry's renewed request for bifurcation.

March 2021- June 2021

40. On 10 March 2021, Mr Buheiry indicated that he would not participate in the arbitration.

41. In the second half of March 2021, the Tribunal circulated Procedural Order No. 2, and directed Mr Buheiry to comment, in particular as to whether (in view of the fact that the Request had by now been returned undelivered) correspondence should continue to

be sent to the PO box address, or whether an alternative address should be used. No response was received.

42. In view of these developments, the tribunal's approach was to circulate written questions for response by both parties. The tribunal circulated two sets of questions to the parties. VistaJet provided answers but Mr Buheiry did not.

June – July 2021

43. On 3 June 2021, Mr Micallef on behalf of Mr Buheiry raised two issues relating to the validity of the assignment and delay in commencement of proceedings. In relation to the second, he indicated that Mr Buheiry "would require time, at the appropriate juncture and before the appropriate forum, to put together a properly documented and cross-referenced witness statement".

44. On 9 June 2021, Mr Buheiry sought permission to adduce witness evidence and submissions relating to the assignment. On 10 June 2021, the tribunal acceded to Mr Buheiry's request, and gave directions relating to the two issues raised by Mr Micallef.

45. On 24-25 June 2021, the parties submitted evidence and submissions on the two issues, and the tribunal invited further comments in reply. On 9 July 2021, VistaJet submitted further comments in reply. Mr Buheiry did not do so.

The Award

46. The award was published on 9 September 2021. In its detailed and lengthy award, the tribunal dealt with the arguments about notice and assignment as well as with the merits of VistaJet's claim. The arguments on notice and assignment were rejected.

47. On 6 October 2021, Mr Buheiry served a request for correction. In its decision on the notice issue, the tribunal had observed that there was no time bar issue between the parties. Mr Buheiry invited the tribunal to amend paragraph 190 of the award. The tribunal declined to do so.

D: The LCIA Rules

48. The correspondence set out in Section C above referred to various provisions within the LCIA Rules. However, the argument advanced by Mr Higginson for Mr Buheiry was not based upon the interpretation of the LCIA Rules. The LCIA Rules did not feature in the arguments of either party on the assignment issue. They did, however, feature in the argument of Ms Maxwell on the notice issue.

49. In her argument on the notice issue, Ms Maxwell submitted that, applying the LCIA Rules, the tribunal was validly appointed by the LCIA. I did not understand Mr Higginson to dispute the proposition that, if the LCIA Rules stood alone, the tribunal was indeed validly appointed. Indeed, Mr Higginson in his skeleton argument accepted that the LCIA Rules provide for service by electronic means. His argument was that, in the present case, the LCIA Rules did not stand alone. The parties had agreed a notice provision in clause 7.11 of the 2014 Agreement. He submitted that this was a "service" provision, and that it was strict. It did not permit service by electronic means. There was, therefore, a conflict in that respect between the service provisions in the 2014

Agreement and those in the LCIA Rules. That conflict, he submitted, had to be decided by clear terms expressly agreed in writing between commercial parties, and these must prevail over standard terms merely imported in an agreement as a whole. As Mr Higginson submitted in his oral argument: the court was thrown back as to service matters onto the rigours of clause 7.11.

50. Since there was no substantial dispute as to the effect of the LCIA Rules, if they stood alone, it is not necessary to analyse them in great detail. I set out the relevant details below, adding my comments where appropriate on the effect of particular rules.

51. The Preamble provides as follows:

> "Where any agreement, submission or reference howsoever made or evidenced in writing (whether signed or not) provides in whatsoever manner for arbitration under the rules of or by the LCIA, the London Court of International Arbitration, the London Court of Arbitration or the London Court, the parties thereto shall be taken to have agreed in writing that any arbitration between them shall be conducted in accordance with the LCIA Rules or such amended rules as the LCIA may have adopted hereafter to take effect before the commencement of the arbitration and that such LCIA Rules form part of their agreement (collectively, the "Arbitration Agreement"). These LCIA Rules comprise this Preamble, the Articles and the Index, together with the Annex to the LCIA Rules and the Schedule of Costs as both from time to time may be separately amended by the LCIA (the "LCIA Rules")."

52. Accordingly, the Preamble provides for the application of the LCIA Rules where (as here in Special Term 10) the parties have agreed to LCIA Arbitration. The preamble also defines "Arbitration Agreement" so as to encompass the LCIA Rules as part of the parties' agreement. It is clear from the Preamble that the applicable LCIA Rules are those which entered into force on 1 October 2020, notwithstanding that here the parties' arbitration agreement was made some years earlier. Indeed, this is also clear from the terms of the arbitration clause in Special Term 10.

53. Article 1, headed "Request for Arbitration" provides in Article 1.1 for the commencement of arbitration by delivery to the Registrar of the LCIA Court of a written request for arbitration (thereafter defined as the "Request"). Sub-paragraphs (i) – (vii) identify matters which the Request should contain or be accompanied by. Sub-paragraph (vii) provides:

> "(vii) confirmation that copies of the Request (including all accompanying documents) have been or are being delivered to all other parties to the arbitration in accordance with Article 4 by one or more means to be identified specifically in such confirmation, to be supported then or as soon as possible thereafter by documentary proof satisfactory to the LCIA Court of actual delivery (including the date of delivery) or, if actual delivery is demonstrated to be impossible to the LCIA Court's

> satisfaction, sufficient information as to any other effective form of notification."

54. A number of features of sub-paragraph (vii) should be noted. First, there is no requirement for service on the opposing party of any demand, or notice, or indeed the Request itself, prior to submission of the Request to the Registrar. Thus, the party serving the Request must simply provide confirmation that it either has been delivered, or that it is being delivered, to all other parties. Secondly, the delivery that has taken place, or is to take place, must be "in accordance with Article 4". Thirdly, confirmation of delivery, by documentary proof satisfactory to the LCIA, is to be provided to the LCIA either with the Request or "as soon as possible thereafter". This, too, contemplates that the Request may only be delivered to the opposing party subsequent to its submission to the LCIA. Fourthly, the sub-paragraph contemplates that "actual delivery" may be demonstrated to be impossible, and it then identifies what is required in those circumstances.

55. Article 1.4 defines the "Commencement Date", and thus provides for the date when the arbitration shall be treated as having commenced:

> "1.4 The arbitration shall be treated as having commenced for all purposes on the date upon which the Request (including all accompanying documents) is received electronically by the Registrar (the "Commencement Date"), provided that the LCIA has received the registration fee. Where the registration fee is received subsequently the Commencement Date will be the date of the LCIA's actual receipt of the registration fee."

56. Article 1.4 may therefore be relevant for limitation purposes. The relevant date is the date of delivery to the LCIA, rather than the date of delivery to the opposing party.

57. Article 2 provides for a party, against whom the arbitration proceedings are brought, to provide a "Response" within 28 days of the Commencement Date. That date can be extended or abridged by the LCIA Court. In the present case, as described above, the LCIA Court did extend time to 4 December 2020. The Response is to contain various matters, including the Respondent's contact details (including email address, postal address and telephone number) for the purpose of receiving delivery of all documentation in the arbitration in accordance with Article 4.

58. Article 4 is headed "Written Communications and Periods of Time". Article 4.1 provides for the delivery to the LCIA of both the Request and the Response by e-mail:

> "4.1 The Claimant shall submit the Request under Article 1.3 and the Respondent the Response under Article 2.3 in electronic form, either by email or other electronic means including via any electronic filing system operated by the LCIA. Prior written approval should be sought from the Registrar, acting on behalf of the LCIA Court, to submit the Request or the Response by any alternative method."

59. Article 4.2 provides generally for the use of e-mail or other electronic means of communication:

> "4.2 Save with the prior written approval or direction of the Arbitral Tribunal, or, prior to the constitution of the Arbitral Tribunal, the Registrar acting on behalf of the LCIA Court, any written communication in relation to the arbitration shall be delivered by email or any other electronic means of communication that provides a record of its transmission."

60. Article 4.3 contains more detailed provision relating to the service of materials, including the Request and the Response, on the parties. It provides as follows:

> "4.3 Delivery by email or other electronic means of communication shall be as agreed or designated by a party for the purpose of receiving any communication in regard to the Arbitration Agreement. Any written communication (including the Request and Response) delivered to such party by that electronic means shall be treated as having been received by such party. In the absence of such agreement or designation or order by the Arbitral Tribunal, if delivery by electronic means has been regularly used in the parties' previous dealings, any written communication (including the Request and Response) may be delivered to a party by that electronic means and shall be treated as having been received by such party, subject to the LCIA Court or the Arbitral Tribunal being informed of any reason why the communication will not actually be received by such party including electronic delivery failure notification. Notwithstanding the above, the LCIA Court or the Arbitral Tribunal may direct that any written communication be delivered to a party at any address and by any means it considers appropriate."

61. It was common ground that, in the present case, the parties had not themselves made any agreement or designation, concerning the provision of documents by e-mail, within the meaning of the first two sentences of Article 4.3. However, the third sentence makes provision for the situation where the parties have made no agreement or designation. In that case, there can be effective delivery using electronic means which "has been regularly used in the parties' previous dealings". In the present case, there was evidence from Mr Iain Rubli of VistaJet as to prior regular use of email in the dealings between the parties, and he exhibited e-mail correspondence with Mr Buheiry himself and with his representative Mr Micallef. Although it appeared at one stage that there might be a dispute about the regularity of prior e-mail correspondence, this was ultimately not a point that was advanced by Mr Higginson on Mr Buheiry's behalf. As I have said, he accepted that the LCIA Rules, standing alone, provided for service by e-mail. He did not suggest that there was some reason why the particular e-mail addresses used by VistaJet in the present case, for notification of the Request, were inappropriate. Rather, as previously described, his argument related to the alleged inconsistency between the LCIA Rules and the parties' agreement in clause 7.11.

62. Article 5 is headed: "Formation of Arbitral Tribunal". Article 5.1 provides as follows:

> "5.1 The formation of the Arbitral Tribunal by the LCIA Court shall not be impeded by any controversy between the parties

> relating to the sufficiency of the Request or the Response. The LCIA Court may also proceed with the arbitration notwithstanding that the Request is incomplete or the Response is missing, late or incomplete."

63. This provision therefore enables the LCIA to proceed with the arbitration notwithstanding any argument that, for example, information required by Articles 1 or 2 has not been provided. Article 5.6 provides for the timing of the appointment of the tribunal by the LCIA Court. As described in Section C above, this was accomplished on 14 January 2021.

E: The assignment issue

The parties' arguments

64. On behalf of Mr Buheiry, Mr Higginson submitted that there was no effective assignment by VJLU to VistaJet in accordance with clause 7.7. This is because the only potentially applicable part of clause 7.7 was sub-paragraph (b). But this was not applicable because VistaJet was not "any subsidiary of [VJLU's] holding company". Accordingly, the wrong party (VistaJet) had started an arbitration. If the court was persuaded that this was so, then it would go to the root of the jurisdiction of the tribunal. The tribunal's jurisdiction would be so fundamentally flawed as not to exist, and this would come within the concept of "substantive jurisdiction" described in each of the sub-paragraphs of the Arbitration Act 1996 section 30.

65. On behalf of VistaJet, Ms Maxwell submitted that there was a binding arbitration agreement between the parties, contained in Special Term 10 of the 2015 Agreement. The argument on assignment did not concern any aspect of the tribunal's substantive jurisdiction as set out in the Arbitration Act 1996 in section 30. It was an argument that VistaJet lacked title to sue, because there had been no valid assignment of rights. However, the tribunal's decision, upholding VistaJet's ability to make a claim pursuant to the July 2020 assignment, could only be challenged under the Arbitration Act 1996 section 69. No such challenge had been made.

66. Ms Maxwell also submitted that there was no merit in the argument based on clause 7.7: VistaJet was a subsidiary of VJLU's holding company, and therefore a valid assignment could be made to VistaJet.

Discussion

67. I agree with both of the submissions made by Ms Maxwell, as summarised above.

68. A challenge under s 67 must be a challenge to a tribunal's "substantive jurisdiction". Section 30 of the Arbitration Act 1996 sets out an exhaustive list of substantive jurisdictional matters: see e.g. *Union Marine Classification Services LLC v The Government of the Union of Comoros* [2015] EWHC 508 (Comm) (Eder J) followed in *C v D1 and others* [2015] EWHC 2126 (Comm) paras [127] – [135] (Carr J). The three matters set out in the list in section 30 are:

> "(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."

69. In the present case, the argument advanced by Mr Buheiry on assignment, even if correct, does not come within any of these matters.

70. As to (a): there is clearly a "valid arbitration agreement" between Mr Buheiry and VistaJet. This was contained in Special Term 10 of 2015 Agreement, and it was common ground that this arbitration agreement survived the ineffectiveness of the substantive terms of the 2015 Agreement. Accordingly, this is not a case where an assignee is seeking to rely upon the terms of an arbitration clause which was originally contained in an agreement with the assignor, and to which the assignee was not originally a party. VistaJet can rely upon an arbitration agreement contained in a document signed by the parties themselves.

71. As to (b): the argument on assignment does not seem to me to have anything to do with the question of whether the tribunal was properly constituted. Mr Buheiry's argument is that VistaJet acquired no rights from VJLU. That is not an argument based upon the constitution of the tribunal.

72. As to (c): this requires focus on the matters which have been referred to arbitration, and the question of whether those are within the scope of the parties' arbitration agreement – see e.g. *NWA v NVF* [2021] EWHC 2666 (Comm) paras [70] – [73] (Calver J). Mr Buheiry's argument does not concern the scope of the arbitration agreement.

73. Since the section 67 application is not concerned with the tribunal's substantive jurisdiction, the application under that section must necessarily fail. In reality, and as is often the case with section 67 challenges, Mr Buheiry is actually alleging an error of law on the part of the tribunal which would only be susceptible to challenge under the Arbitration Act 1996 section 69. Unlike challenges under section 67, however, there is a requirement to obtain leave to appeal under section 69. This has not been sought.

74. I also cannot see how Mr Buheiry's argument can fit within the concept of "serious irregularity" as defined in the Arbitration Act 1996, section 68. Mr Buheiry had a full opportunity to argue the assignment point, and put in some submissions directed towards the assignment issue. Mr Buheiry may disagree with the tribunal's conclusion, but the appropriate method of challenge is section 69.

75. These conclusions mean that it is not necessary to address the question of whether the assignment to VistaJet was in accordance with clause 7.7. I will, however, briefly state my conclusions and reasons on that question.

76. Clause 7.7 in the 2014 Agreement identifies three categories of potential assignees from VJLU, including "(a) its holding company" and "(b) any subsidiary of its holding company".

77. Clause 7.7 goes on to provide that the expressions "holding company" and "subsidiary" have the meaning given in section 1159 of the Companies Act 2006. That section provides as follows:

> "(1) A company is a "subsidiary" of another company, its "holding company", if that other company-
>
> (a) holds a majority of the voting rights in it, or
>
> (b) is a member of it and has the right to appoint or remove a majority of its board of directors, or
>
> (c) is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it,
>
> or if it is a subsidiary of a company that is itself a subsidiary of that other company."

78. The corporate structure of the overall group, of which VJLU and VistaJet form part, is undoubtedly complex. However, if one focuses on the relationship between the two companies, it is relatively simple: in family terms, they do not share an immediate parent, but their grandparent is the same.

79. Thus, VJLU's immediate parent company is VistaJet Group Holding SA ("SA"). VistaJet's immediate parent company is VistaJet Operations Holding Ltd ("Operations Ltd"). The immediate parent company of both of those parents (SA and Operations Ltd) is VistaJet Sub Group Holding Limited.

80. The question is therefore whether, in the light of clause 7.7 and the definition in section 1159, this was an assignment by VJLU to "any subsidiary of its [i.e. VJLU's] holding company" within (b). It was clearly not an assignment by VJLU to "its holding company" so as to fall within (a).

81. Section 1159 defines "subsidiary" and "holding company" by reference to the relationship between them. Sub-paragraphs (a), (b) and (c) contemplate an immediate or "parent/ child" relationship, whereby the holding company either (a) holds the majority of the voting rights in the other company, or (b) is a member and can appoint a majority of the board, or (c) is a member of it and controls alone the majority of voting rights in it. Applying these definitions alone, the holding company of VJLU was its immediate parent (SA), and the holding company of VistaJet was its immediate parent (Operations Ltd). Those provisions alone would not enable the assignment to be made in the present case under Clause 7.7 (b); because VistaJet was not a subsidiary of VJLU's holding company, namely SA.

82. However, section 1159 goes on to provide for another situation where, for the purposes of that section, there is a relationship of subsidiary and holding company. That is where a company is "a subsidiary of a company that is itself a subsidiary of that other company". The effect of this section is that there may be a relationship of subsidiary and holding company where the relationship is (in family terms) grandparent/ child. Applied in the present case, VJLU is a subsidiary of a company (SA) which is itself a subsidiary of a holding company (VistaJet Sub Group Holding Ltd). Similarly, VistaJet is a subsidiary of a company (Operations Ltd) which is itself a subsidiary of the same holding company (Vistajet Sub Group Holding Ltd).

83. It follows that the assignment in this case, by VJLU to VistaJet, was an assignment to a subsidiary of VJLU's holding company, namely VistaJet Sub Group Holding Ltd. It was therefore permissible under Clause 7.7 (b).

84. Mr Higginson emphasised that the wording of Clause 7.7 was in the singular: "its holding company". This meant, as he submitted, that only one port of call was available. It was only permissible to look at one holding company, but no more. The movement was therefore restricted to a relationship with a single and immediate holding company. It was not permissible to consider a relationship moving up a chain of parent companies. In the present case, VistaJet could therefore assign to SA, its immediate parent. It would also have been possible, in theory, to assign to any subsidiaries of SA. However, SA in fact had no subsidiary companies: VJLU was its only subsdiary.

85. I reject this argument. Whilst it is true that Clause 7.7 is indeed in the singular, it must clearly be read in conjunction with the definition in section 1159. That definition provides that there may, for the purposes of that section, be a relationship of subsidiary/holding company involving two "holding companies" of the subsidiary: its parent and grandparent.

86. Accordingly, even if I were wrong in my conclusion as to the inapplicability of sections 67 or section 68, Mr Buheiry's case on the invalidity of the assignment would in any event fail.

F: The Notice issue

The parties' arguments

87. Mr Higginson submitted the only provision to survive from the 2015 Agreement was the arbitration clause, and accordingly it was necessary to look at the terms of the 2014 Agreement. That agreement contained, in clause 7.11, an agreement as to service. What was required was service by fax or registered post, and this prevailed in circumstances where there was a conflict with the LCIA Rules which permitted service by electronic means. In the present case, there was no such service in accordance with the parties' agreement.

88. Ms Maxwell advanced a number of arguments. She submitted that Mr Buheiry's argument, even if well-founded, was not directed towards the tribunal's substantive jurisdiction as defined in the Arbitration Act 1996 section 30. Mr Buheiry had failed to identify, which sub-paragraph of section 30 applied. The only possible category was (b), which concerns whether the tribunal was properly constituted. This was inapplicable: the tribunal was properly appointed by the LCIA, in accordance with its rules, after each side had nominated an arbitrator and the arbitrators had selected the presiding arbitrator.

89. She also submitted that, in any event, service by e-mail was not in breach of clause 7.11. That clause did not require service by fax or post. Even if it did, it would be overridden by Special Term 10, which incorporated the LCIA Rules. In any event, the clause was complied with; because there was service by registered post in February 2021, albeit that the documents were returned as undeliverable.

Discussion

90. I start with the question, which is fundamental to Mr Higginson's argument, of whether there is a relevant conflict between clause 7.11 of the 2014 Agreement and the LCIA Rules to which the parties agreed in the arbitration agreement contained in the 2015 Agreement.

91. I do not consider that there is any such conflict. The reference to "notices" in clause 7.11 can readily and sensibly be applied to the various provisions of the 2014 agreement which provide for the service of written notices in various situations: Schedule A, clause 4 (minimum booking notice); Schedule A clause 6 (delays and cancellations, referring back to the minimum booking notice), and Schedule C, clause 6.1 (notice of default).

92. There is therefore no reason to construe "notices" so as to refer to the provisions concerning the commencement of arbitration under the LCIA Rules. "Notices" can be given a sensible meaning without that extension, by reference to the other provisions within the 2014 Agreement. Indeed, there are in my view good reasons why it is inappropriate to construe "notices" in the manner proposed by Mr Buheiry.

93. First, the 2014 Agreement itself contained no arbitration provision. Accordingly, when the parties agreed clause 7.11, they did not have LCIA arbitration in mind, but rather the other provisions within the 2014 Agreement.

94. Secondly, the provisions of the LCIA Rules concerning the commencement of arbitration do not use the concept of "notice", but rather they are concerned with "delivery". Thus, Article 1.1 requires delivery of the Request to the LCIA. Article 1.1 (vii) also refers to delivery: it requires confirmation that the Request has been or is being delivered to other parties. Delivery is also referred to in Articles 2, 4 and 5. The word "notice" does not appear in any of those articles.

95. There are additional reasons why there is no conflict between the relevant provisions.

96. First, Clause 7.11 does not, contrary to Mr Buheiry's submission, prescribe a method of service at all. It does require notices to be in writing and in English. There is nothing there which conflicts with the LCIA Rules. It then goes on to provide for a deemed date of service. However, it does not exclude other methods of service, but in such situations the serving party will not be able to take advantage of the deeming provisions. As Ms Maxwell submitted, clause 7.11 contains permissive deeming provisions, designed to avoid disputes as to the date of service where a party opts to adopt the specified methods of service.

97. Secondly, the parties in their arbitration agreement agreed to <u>all</u> of the rules of the LCIA at the date of the submission of a dispute to arbitration. The arbitration agreement, and the rules thereby incorporated, should therefore be regarded as a complete code concerning the arbitration, including its commencement and conduct. There is no reason to disapply aspects of those rules in favour of other provisions which are not directed towards the arbitration process at all.

98. Accordingly, I reject Mr Buheiry's argument that there is a conflict which has the effect that the provisions of the LCIA rules, which permit delivery by electronic means, are

in some way ineffective. As I have said, Mr Higginson's submissions did not challenge the validity of the commencement of the arbitration by VistaJet, or indeed the validity of the appointment of the tribunal, in the event that the LCIA Rules applied in full, which in my view they did. Had there been such challenge, by reference to the LCIA Rules, it would have failed. In the light of the scheme of the LCIA Rules described in Section D, and the facts described in Section C, it is clear that the arbitration was properly commenced, and the arbitrators properly appointed, in accordance with the LCIA Rules.

99. It follows that the challenge under section 67, and indeed section 68, which were based exclusively on the impact of clause 7.11, must fail.

100. Ms Maxwell advanced a number of other arguments in relation to the notice issue, in particular that: (i) this was not a challenge to substantive jurisdiction as defined in the Arbitration Act 1996 section 30; (ii) clause 7.11 had in any event been complied with in late January 2021; and (iii) there was no "substantial injustice" for the purposes of a section 68 challenge. It suffices to say that I thought that there was considerable force in all of these submissions, but it is not necessary for me to consider them in detail.

CONCLUSION

101. The applications under section 67 and 68 are therefore dismissed.