Case No: HT-2021-000103

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2021] EWHC 2015 (TCC)

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

Date: 16 July 2021

Before :

MR ALEXANDER NISSEN QC
(SITTING AS A JUDGE OF THE HIGH COURT)

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Between :

SURREY COUNTY COUNCIL	**Claimant**
- and –	
SUEZ RECYLING AND RECOVERY SURREY LIMITED	**Defendant**

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- -

Adam Constable QC and Paul Buckingham (instructed by Gowling WLG (UK) LLP) for the **Claimant**
Simon Hargreaves QC and David Sheard (instructed by Addleshaw Goddard LLP) for the **Defendant**

Hearing dates: 24 June 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.

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 16th July 2021 at 2pm"**

MR ALEXANDER NISSEN QC:

Introduction

1. The application before the Court is for a stay of proceedings in accordance with s.9 Arbitration Act 1996 and/or in accordance with the Court's inherent jurisdiction to stay proceedings. This is one of those cases where the parties have entered into a number of contracts and it is necessary to determine what they ultimately agreed should be the appropriate forum for dispute resolution.

2. The procedural background to this application can be stated quite shortly. On 24 March 2021, the Claimant, Surrey County Council ("Surrey"), issued a Claim Form against the Defendant, Suez Recycling and Recovery Surrey Ltd ("Suez"). Particulars of Claim accompanied the Claim Form. In the proceedings, Surrey claims declaratory relief against Suez arising out of a Waste Disposal Project Agreement entered into between the parties. The declarations concern the identification of the Target Facility Completion Date; the passing of the Longstop Date; the failure by Suez to meet the requirements for an Acceptance Certificate; and that, in consequence, Surrey has an entitlement to issue a Notice of Termination under Clause 35.1 on the basis of an Event of Default under Clause 34.1.6. Suez acknowledged service stating its intention to dispute the Court's jurisdiction and, on 22 April 2021, issued the application presently before the Court. The application was supported by one witness statement of Jonathan Tattersall, solicitor for Suez, and was responded to by one witness statement of Frank Smith, the Commercial Programme Director for Surrey. The application itself was heard (remotely) over a full day. Suez was represented by Mr Simon Hargreaves QC and Mr David Sheard. Surrey was represented by Mr Adam Constable QC and Mr Paul Buckingham. I am grateful to all counsel for their assistance.

Background

3. The relevant factual and contractual background to this dispute is quite extensive and involves no less than four connected agreements.

   <u>The Waste Disposal Project Agreement dated 22 June 1999</u>

4. Surrey and Suez entered into a Waste Disposal Project Agreement ("WDPA") in respect of the disposal of waste in the County of Surrey. It was a long-term PFI contract due to last 25 years. The stated objective was to secure the most economically advantageous long-term solution for the disposal of all waste by Suez for Surrey, for which Surrey is otherwise responsible as the waste disposal authority. Pursuant to the WDPA, Surrey was to be responsible for waste collection and delivery. Suez was to run the recycling centres, waste transfer stations, subcontract haulage, materials recycling, food waste, black bag and green waste disposal. Part of the works provided for under the WDPA included the development, construction and operation of two mass burn EfW (energy from waste) facilities.

5. At this stage I observe that it is a contract only between Surrey and Suez. It has 23 attached schedules. Most relevant for present purposes are: (a) Schedule 2 which contains the Service Specification, together with its four appendices; and (b) Schedule 14, which contains the Service Delivery Plan with four annexes.

6. I will refer to the dispute resolution terms of the WDPA in due course but, in summary, the provisions operated as follows. Certain types of identified disputes were referrable for Expert Determination pursuant to Clause 51. A decision of an Expert reached under this process was to be final, conclusive and binding. A party in receipt of a Clause 51 notice who believed that the dispute in question was not within Clause 51 or which involved other issues can, pursuant to Clause 51.14, give a notice to that effect, in which case the dispute will be determined in accordance with Clause 52. Pursuant to Clause 52, any dispute arising out of or in connection with the WDPA, not being a Clause 51 dispute, was to be resolved initially by conciliation and then by arbitration pursuant to the Rules of the LCIA. Clause 63 stated that the WDPA would be governed by the laws of England and that the parties submitted to the exclusive jurisdiction of the courts of England and Wales.

7. Due to planning objections, it was not possible for either of the two mass burn facilities to be constructed. Further planning applications were made but they also failed or were not pursued. An arbitration took place between Suez and Surrey in July 2005 to determine responsibility for the delay caused by the planning issues.

Deed of Variation No.1

8. In light of the planning difficulties in respect of the construction of the mass burn facilities, the parties reached agreement on a way to resurrect that aspect of the project using different sites. This agreement, dated 6 March 2007, was called a Deed of Variation and Clarification of the WDPA and is described by the parties to this application as "DOV1". Recital 1.4 stated that:

> *"The parties have agreed following the arbitral award and in light of certain legislative and strategic developments in the waste sectors (such as Waste Strategy 2000) and the passage of time that there should be a variation in accordance with the terms of the WDPA and clarification of a number of matters in the WDPA."*

9. DOV1 created a two-stage enabling process, contained within a new Schedule 24, to progress EfW projects that required both planning consents and third-party finance to be procured. Stage 1 comprised the issue of a Council Variation requesting Suez to work with it to produce a Stage 1 Report containing an outline solution for the development project, which Surrey would then either accept or reject. If Surrey accepted it, Stage 2 would comprise the further development of the scheme, including detailed costings leading to a Stage 2 Report. This phased approach mitigated the risk of wasted effort and third-party costs until full planning permission was obtained.

10. I will set out the dispute resolution terms of DOV1 in due course. At this stage, I can summarise some of the other characteristics and ingredients of DOV1. Clause 3 set out conditions following which, pursuant to Clause 4, the WDPA was to be varied and clarified in various respects. The WDPA was otherwise to remain in full force and effect. The variations related to a number of original clauses within WDPA and introduced some new ones. Amongst the amended clauses, the parties made various changes to Clause 51 dealing with Expert Determination. However, neither Clause 52 of the WDPA, dealing with arbitration, nor Clause 63, dealing with jurisdiction, was amended. Under Clause 6 of DOV1, Surrey acquired a new right to terminate the entire

WDPA if it was unwilling or unable to provide funding for the first EfW plant. If Surrey was entitled to terminate for that reason but decided not to do so, the WDPA was to continue in full force and effect but without the obligation to construct any EfW plant. The parties agreed a wholesale replacement to Schedule 2 (Service Specification) and Schedule 14 to the WDPA (Service Delivery Plan). As I have said, a new Schedule 24 (Development Project Process) was introduced. This contained a Project Approvals Process with two stages, leading to Stage 1 and Stage 2 Reports respectively. A feature of this newly created Schedule was that it included reference to Expert Determination under Clause 51 of the WDPA for certain disputes arising out of it.

11. At Clause 15.2, DOV1 provided its own governing law and jurisdiction clause which provided for the Courts of England to have exclusive jurisdiction over any claim, dispute or difference concerning it or any matter arising therefrom.

12. I would also add that, unlike the WDPA, DOV1 was a tri-partite agreement since Suez Environnement S.A, a company incorporated in France, was named as the SE Guarantor. The SE Guarantor was a guarantor of obligations imposed on Suez under the WDPA and, by DOV1, agreed to the changes made and ratified and confirmed that the guarantee continued in full force and effect, applying to the WDPA as varied and clarified by DOV1. Clause 5 of DOV1 was in those terms.

13. The earlier planning problems persisted and, as a result, in late 2009 Surrey decided forever not to proceed with the construction of the original mass burn EfW facilities.

The August 2010 DOV

14. On 2 February 2010, Surrey proposed and approved a new strategy which abandoned the development of large EfW facilities for residual waste treatment and instead proposed much smaller facilities in a way that was seen to be more politically acceptable. Working with Suez, Surrey concluded that a gasification process delivered within the existing WDPA would be the most beneficial overall solution taking into account technology assessment, legal risk and financial cost. This led to a proposal for what became known as the EcoPark at Charlton Lane. This was already an existing waste facility within the WDPA but which was to be upgraded to have a Community Recycling Centre, a new Refuse Bulking Facility and, most significantly, a new Anaerobic Digestion Facility and EfW Facility.

15. To reflect this, the parties entered into a third agreement, dated 13 August 2010, bearing the title of "Ecopark Development Project - Deed of Variation". In these proceedings, it is described as the "August 2010 DOV". The Recitals set out the explanation for the Deed and included the following:

> *"1.4: The Council now wishes to procure a Development Project under the terms of the WDPA to establish an Ecopark at Charlton Lane, Shepperton, Surrey. The proposed Ecopark will incorporate anaerobic digestion and gasification technologies in each case to divert waste away from landfill and recovery energy together with the development of a bulking facility as more particularly described in Annex 1 to this Deed (together the "Ecopark Development Project"). The proposed Ecopark Development Project is intended to deliver a waste management solution consistent with the objectives of the WDPA."*

> *"1.7: The Council proposes to develop the Ecopark Development Project and additional infrastructure as set out in the summary World Class Waste Solutions document attached at Schedule 2. This Deed sets out the services to be provided at the Ecopark Development Project in the form of the updated services specification attached at annex 1. A further deed of variation will be entered into to implement the Ecopark Development Project if it achieves Stage 2 Approval. Further deeds of variation may be entered into between the parties to implement other elements of the additional infrastructure identified in Schedule 2."*

16. Mr Tattersall's evidence is that the August 2010 DOV was agreed so as to set the foundations for the new EcoPark Development Project, which would then supersede the Original Facilities. I agree. Its title refers to the Ecopark Development Project. It is a curious feature of the evidence that Mr Smith barely mentions the August 2010 DOV, and then only in the context of DOV2, to which I will subsequently refer.

17. As before, I will set out the dispute resolution provisions in the August 2010 DOV in due course. By way of summary of its remaining provisions, Clause 2.4 provided that, except as expressly modified by the Deed, the WDPA and DOV1 were to remain in full force and effect. Clause 51, concerning Expert Determination, and Clause 52, concerning arbitration, were unchanged. New clauses were introduced into the WDPA. Amongst them, Clause 4.1 provided for the parties to develop the Ecopark Development Project in accordance with the process established under Schedule 24 (itself introduced in DOV1). A new Clause 4.4 confirmed that, following approval and implementation of the Ecopark Development Project in accordance with the process, that Project would be delivered by completion of the construction, installation and operation at the Charlton Lane site of the AD facility, the gasification waste to energy plant and the materials bulking facility in accordance with the Services Specification set out at Annex 1. Annex 1 contained an entirely new Services Specification (which was Schedule 2 to the WDPA). This introduced requirements for the new facilities in additional appendices. For example, a new Appendix 6 included provision for the construction and operation of the AD Facility at Charlton Lane; and Appendix 7 included the provision for the development and operation of the Waste to Energy Facility.

18. Clause 13 of the August 2010 DOV contained an exclusive jurisdiction provision which, unlike that contained in DOV1, now encompassed contractual or non-contractual obligations arising from or connected to it, together with any claim, dispute or difference concerning the Deed or any matter arising therefrom.

19. Unlike DOV1, there were no other parties to the August 2010 DOV than Surrey and Suez.

20. The parties undertook the two-stage process contemplated by DOV1 and Schedule 24. There were still some planning difficulties but, in the end, approval was given in March 2012. The chosen EPC contractor then went into administration but, in October 2013, a new one was appointed. This resulted in a need to change the gasification technology and a yet further planning application. Financial changes were also required for

affordability reasons and to ensure the PFI grant support was maintained. Eventually the Stage 2 Report contemplated by Schedule 24 was agreed.

Deed of Variation No.2

21. Finally, I can turn to the fourth relevant agreement between the parties. This is titled "Ecopark Development Project - Second Ecopark Deed of Variation". In these proceedings, it has been called "DOV2", which might be thought confusing in light of the fact that it is the third relevant agreement after the WDPA in this narrative. However, it is the second agreement which relates to the Ecopark Development Project since the August 2010 DOV was the first of them. That may explain why it is called the Second Ecopark Deed of Variation (my emphasis).

22. Unsurprisingly, the Recitals refer to each of the original WDPA, DOV1 (referred to as the Deed of Variation and Clarification) and the August 2010 DOV (referred to as the EcoPark Deed of Variation). The Recitals also include the following:

> *"1.7 The Council and the Contractor entered into the Ecopark Deed of Variation in order to commence the Project Approvals Process for the Development Project to establish an EcoPark at Charlton Lane. The Council and the Contractor have complied with the requirements of Schedule 24 (Development Project Processes) following execution of the first EcoPark Deed of Variation.*
>
> *1.8 The Council and the Contractor wish to enter into a second deed of variation to confirm the completion of the requirements of Schedule 24 (Development Project Processes) and in particular the procedures set out in Part A of Schedule 24 (the Project Approvals Process) noting the approval of the Stage 2 Report for the Development Project to establish an EcoPark at Charlton Lane (as described in the Stage 2 Report), (**the EcoPark Development Project"**) and the commitment, following satisfaction of the conditions precedent referred to in Clause 6.4 below, to implement the EcoPark Development Project in accordance with the terms of the Deed of Variation and Clarification and the WDPA as varied and clarified by this Deed."*

23. Once again, I will refer to the dispute resolution provisions of DOV2 in due course. In terms of its form and style, DOV2 resembles the August 2010 DOV. In respect of the other aspects, Clause 2.3 provided that, except as expressly modified by the Deed, the WDPA, DOV1 and the August 2010 DOV were to remain in full force and effect. The effects of this included that the substituted Schedule 2 (Service Specification) contained in the August 2010 DOV, with its Appendices 6 and 7, and the newly created Schedule 24 (borne in DOV1) remained applicable[1]. Schedule 1 to DOV2 comprised a refresh of the WDPA.

24. Clause 2.4 of DOV2 provided:

> *"In the event of any inconsistency and/or conflict:*

[1] I have not undertaken a comparison to see if there were any internal changes to these documents but it would make no material difference to the outcome of the application if there were.

(A) between the provisions of this Deed (including its Schedules) and those of the WDPA (including its Schedules and any documents that are supplemental or collateral to it), the provisions of this Deed (and its Schedules) shall prevail; and

(B) between the provisions of this Deed and those of its Schedules, the provisions of this Deed shall prevail."

25. Clause 3.1 stated that the Deed was to be immediately effective. Clause 3.2 expressly stated that the Deed constituted the Stage 2 Approval and appended, at Schedule 2, the Stage 2 Report. That Report provides helpful background and refers to the Service Specification in various places. Clause 5.1 of DOV 2 obliged Suez to implement the EcoPark Development Project as a single project in accordance with the Deed and the WDPA as varied by the Deed. Clause 5.2 confirmed the delivery by completion of the construction, installation, commissioning and commencement of operations at the Charlton Lane site of the new facilities. Of course, these steps had already been largely agreed in the August 2010 DOV at Clause 4.4. Two steps of Notice to Proceed were introduced in Clause 6 with provision for termination of the WDPA in certain circumstances.

26. As regards dispute resolution, further changes were made to Clause 51 of the WDPA, concerning Expert Determination. Minor clerical changes were made to Clause 52 concerning arbitration. Clause 63 remained unchanged. Clause 15 of DOV2 contained a jurisdiction clause which was in identical form to the version used in the August 2010 DOV.

27. There were no other parties to DOV2 than Surrey and Suez.

Summary of Agreements

28. At this stage, it is helpful to summarise the position. The WDPA is a long-term agreement in which Suez was to provide various facilities and Services for Surrey. Subsequent to the WDPA, the parties concluded three further agreements, each of which amends the WDPA in various respects. The WDPA remains in full force and effect and is to be read and understood subject to the new provisions which apply to it. The concept of the Ecopark arose first in the August 2010 DOV and was then re-affirmed in DOV2. Whilst the creation of the Ecopark, including its construction and the subsequent provision of Services in respect of it is, in one sense, a discrete project, it falls to be implemented and operated within the over-arching machinery of the WDPA.

The emergence of the dispute

29. In outline, Surrey complains that the construction and commissioning of the new facilities at the EcoPark have suffered from considerable delay. The Independent Certifier has not issued an Acceptance Certificate for either the AD Facility or the EfW Facility. It is said that the Longstop Date for both has long since passed. Suez challenges Surrey's version of events. It contends that an extension of time is due to it. It also contends that it only has to pass the Minimum Performance Tests and not the Reliability Tests in order to obtain an Acceptance Certificate.

30. These positions manifested themselves in correspondence during 2019 and 2020. On 17 September 2019, Mr Frank Smith of Surrey notified Suez that an Engineering Dispute (as defined by Clause 51 of the WDPA) had arisen and should be referred for Expert Determination. The issue was the nature of the Acceptance Tests required in relation to the AD Facility and the EfW Facility. Mr Smith referred to Clause 51.14 and said that if Suez considered that the Dispute did not fall within Clause 51.1 or involved other issues, it should provide a notice to allow Surrey to consider whether the matter ought to be resolved by arbitration pursuant to Clause 52. This letter is of note because it is now Surrey's case that a notice under Clause 51.14 would require determination by litigation so far as it related to the EcoPark. Mr Smith explained that his letter was sent at a time when no detailed attention had been paid to the dispute resolution procedures. Suez responded to the letter on 23 September 2019, contending that the notice was not valid, but saying that there was a dispute suitable for resolution by arbitration under Clause 52. In this application, Suez attaches no legal significance to Mr Smith's letter but forensically points to its inconsistency with Surrey's present position.

31. On 25 November 2020, Suez wrote to Surrey about the dispute as to what constitutes Acceptance under the WDPA and explaining its position by reference to the Stage 2 Report. It will be recalled that this Report was appended to DOV2. Suez re-asserted the application of Clause 52 (arbitration) for the resolution of the dispute.

32. On 10 December 2020, Gowling WLG (UK) LLP, solicitors for Surrey, issued a Letter of Claim pursuant to the Pre-Action Protocol and to act by way of response to the letter of 25 November 2020. It asserted a claim which arises out of the WDPA as amended by DOV1 and DOV2. The disputes concerned the requirements for Acceptance, whether the Target Facility Date had passed and whether, in light of the history, Surrey was entitled to issue a Notice of Termination. Gowling expressed its disagreement with the proposed reference by Suez to arbitration and asserted that the Courts have jurisdiction over the dispute by reference to Clause 15 of DOV2. Gowling contended that the choice of forum in Clause 15 was intended to "supersede" the previous choice of arbitration in the WDPA. Agreement to litigation was invited.

33. After an initial holding letter, Addleshaw Goddard LLP replied on 20 January 2021, disputing the jurisdiction of the Courts and the application of Clause 15 of DOV2 to the identified dispute, thereby setting the stage for this application.

34. On 29 January 2021, it nonetheless responded to what it called the "purported" Letter of Claim on a without prejudice basis. In respect of the substantive dispute, Suez complained that delays to the construction and commissioning of the Facilities were caused by the EPC Contractor and that, pursuant to its contractual interpretation of the Stage 2 Report, it was entitled to a commensurate extension of time. Suez contended that the Facilities had passed the Acceptance Tests and appropriate certificates to that effect ought to have been issued by the Independent Certifier. It said it was entitled to an extension to the Target Facility Date and the Project Period. The right to terminate was disputed. Other matters that were in dispute were identified.

The Dispute Resolution Provisions

35. Although I mentioned them in outline, I must now set out the key provisions for dispute resolution arising out of each of the four agreements. Ultimately, I must construe Clause

15 of DOV2, for it is upon that provision which Surrey relies in justification of the legal proceedings, but it is right to see how that provision fits within the prior history.

WDPA

36. Clause 51 of the WDPA was amended, twice by DOV1 and DOV2 respectively. I have here set out the clause in its amended form.

> "**51. DISPUTE RESOLUTION - EXPERT**
> *51.1 If a dispute arises out of or in connection with the provisions referred to in (a) to (d) below, during or after the termination of the Project Period, it shall be determined in accordance with this Clause. The parties will attempt in good faith to resolve any dispute promptly through negotiations between the Contractor's Representative and Council's Representative and if this fails to resolve the issue in dispute between the respective senior executives of the parties having the power to the same. If such dispute is not resolved within 14 days from its arising then either party may refer such dispute to an Expert in accordance with this Clause. A Dispute referred:*
>
> *~~(a)~~ 51.1.1 under Clause ~~20.7~~ 20 shall be referred to as an "**Engineering Dispute**";*
>
> *~~(b)~~ 51.1.2 under Clause 28.4, 28.5 or 29.7 or, ~~paragraph 9.3 or 10.3 of Schedule 7, or paragraph 3 of Part V of Schedule 9~~ Schedule 7, paragraph 3 of Part ~~V~~ 5 of Schedule 9, paragraph 9.2 of Part B of Schedule 24, paragraph 10.2 or 10.6 of Part C of Schedule 24 or paragraph 1.5(b) of Part D of Schedule 24 shall be referred to as an "**Accounting Dispute**";*
>
> *~~(c)~~ 51.1.3 under Clause 8.5, 21.3.6 or 41.4, 41.8 or 41.12, or paragraph 4 or 5 of Schedule 3 or paragraph 5 of Schedule 6 or paragraph 4 of Schedule 11 shall be referred to as a "**Waste Dispute**"; and*
>
> *~~(d)under Clause 7.2.5 shall be referred to as a "**Planning Dispute**".~~*
>
> *~~(e)~~ 51.1.4 under Schedule 4 or paragraph 4.2, 4.3 or 4.10 of Part A of Schedule 24 shall be referred to an expert appointed by the President for the time being of the Chartered Institute of Purchasing and Supply.*
>
> *51.2 Either Party may initiate the reference by notice in writing to the other Party proposing to the other party the appointment of an expert (the "**Expert**").*
>
> *51.3 The Expert shall be an engineer in the case of an Engineering Dispute, an accountant in the case of an Accounting Dispute, a waste engineer in the case of a Waste Dispute and a member of the Royal Town Planners Institute or a member of the Royal Institute of Chartered Surveyors in the case of a Planning Dispute …*
>
> …

51.9 The Expert is not an arbitrator and shall render its decision as an Expert and the Arbitration Act 1996 (or any re-enactment or amendment thereof) and the law relating to arbitrators and arbitrations shall not apply to the Expert or its decision or the procedure by which it reaches its decision.

51.10 The Expert's decision shall be final conclusive and binding on the parties to this Contract and the parties shall not be entitled to refer any decision of the Expert to any Court of law or arbitration save in the case of fraud.

…

51.14 In the event that following receipt of a notice under Clause 51.2, a party believes that the dispute in question does not fall within Clause 51.1 or involves other issues it shall notify the other party within seven (7) days of receipt of the notice with evidence supporting this belief and the dispute shall instead be determined pursuant to Clause 52. Where any provision of this Agreement does not specify the use of Expert determination any dispute in relation to that provision shall be resolved in accordance with Clause 52."

37. Clause 52 of the WDPA was amended, once by DOV2. I have here set out the clause in its amended form.

"52. ***DISPUTE RESOLUTION - ARBITRATION***

52.1 If a dispute arises out of or in connection with this Agreement during or after the termination of the Project Period, not being a dispute to which Clause 51.1 applies, it shall be determined in accordance with this Clause.

52.2 If the parties agree, a dispute may be referred to conciliation in accordance with the Institute of Civil Engineers' Conciliation Procedure (1994) (the "Conciliation Procedure") or any modification being in force at the date of such referral. The conciliator shall make his recommendation in writing and give notice of the same within one calendar month of the referral.

52.3 Where:
~~(i)~~ 52.3.1 the parties do not agree to refer the dispute to the Conciliation Procedure; or

~~(ii)~~ 52.3.2 one of the parties is dissatisfied with any recommendation of a conciliator appointed under this sub-clause; or

~~(iii)~~ 53.3.3 the conciliator fails to give such recommendation for a period of one calendar month after the date of referral,

then either party may within one calendar month after receiving notice of the conciliator's recommendation or within one calendar month after the expiry of the one month period referred to in paragraph (iii) above (as the case may be) refer the dispute to arbitration in accordance with Clause 52.4 below.

52.4 Disputes shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration ("LCIA"), which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be one (who shall be an English barrister or solicitor who has practised as such for at least 15 years), unless the LCIA Court determines that in view of all the circumstances of the case a three-member tribunal is appropriate. The place and seat of arbitration shall be London, England.

52.5 Clause 52.6 shall apply if any dispute to be referred to arbitration under Clause 52.4 raises issues which, in the reasonable opinion of either party, are substantially the same as or connected with issues raised in a related dispute between the Council and Contractor (and their successor in title and permitted assigns) and if that related dispute has already been referred for determination to an arbitrator in accordance with arbitration provisions identical (with the necessary changes) to Clause 52.4.

52.6 In the circumstances described in Clause 52.5:

~~(a)~~ 52.6.1 the dispute under this Agreement shall be referred to the arbitrator appointed to determine the related dispute; and

~~(b)~~ 52.6.2 the arbitrator shall have power to make such directions and awards in the same way as if the rules applicable in the English courts as to joining one or more defenders or third parties or conjoining actions were applicable to the parties and to him~~,~~.

52.7 Performance of this Agreement shall continue during Expert determination, conciliation or arbitration unless the parties agree to a suspension or if such continuation is impossible on account of the nature of the dispute.

52.8 Notwithstanding anything else to the contrary in this Agreement, if the Housing Grants, Construction and Regeneration Act 1996 applies to any dispute under this Agreement, then the parties will comply with the minimum procedural requirements of resolving any dispute set out in such Act."

38. Clause 63 of the WDPA remained unchanged. It provided:

"This Agreement shall be governed by and construed in accordance with the laws of England and the parties hereby submit to the exclusive jurisdiction of the courts of England and Wales."

DOV1

39. Clause 15 was in the following terms:

"15.1 This Deed shall be governed by and construed in accordance with English law.

15.2 The Courts of England shall have exclusive jurisdiction in relation to any claim, dispute or difference concerning this Deed and any matter arising therefrom.

15.3 Each party irrevocably waives any right that it may have to object to an action being brought in those Courts, to claim that the action has been brought in an inconvenient forum, or to claim that those Courts do not have jurisdiction."

August 2010 DOV

40. Clause 13 was in the following terms:

"13.1 This Deed shall be governed by and construed in accordance with English law.

13.2 The Courts of England shall have exclusive jurisdiction in relation to this Deed and any contractual or non-contractual obligations arising from or connected with it together with any claim, dispute or difference concerning this Deed and any matter arising therefrom.

13.3 Each party irrevocably waives any right that it may have to object to an action being brought in those Courts, to claim hat (sic) the action has been brought in an inconvenient forum, or to claim that those Courts do not have jurisdiction."

DOV2

41. Clause 15 was in the following terms:

"15.1 This Deed shall be governed by and construed in accordance with English law.

15.2 The Courts of England shall have exclusive jurisdiction in relation to this Deed and any contractual or non-contractual obligations arising from or connected with it together with any claim, dispute or difference concerning this Deed and any matter arising therefrom.

15.3 Each party irrevocably waives any right that it may have to object to an action being brought in those Courts, to claim hat (sic) the action has been brought in an inconvenient forum, or to claim that those Courts do not have jurisdiction."

42. It will therefore be noted that Clause 15 of DOV2 is in identical form to that agreed in Clause 13 of the August 2010 DOV, including the typographical error in sub-clause 3, and is in more expansive form than provided for in DOV1 in that it encompasses disputes over contractual or non-contractual obligations.

The Parties' Contentions

43. Suez contends that the disputes in these proceedings are subject to the arbitration provision contained in Clause 52 of the WDPA, which continues to be applicable. It is possible that the dispute in respect of Acceptance Tests (being a subset of the legal proceedings) could be within Clause 51 of the WDPA but that would be subject to Clause 51.14 and, therefore, capable of being referred to arbitration. On its case, each of the DOVs provided that the WDPA remained in full force and effect save as expressly varied by the DOV. None of the subsequent DOVs expressly varied the WDPA so as to exclude Clauses 51 and 52. On the contrary, DOV1 and DOV2 made amendments to Clauses 51 and 52, thereby re-asserting their application. In the case of each DOV, the clause concerning the governing law and jurisdiction, should be regarded as reconcilable with the continued existence of the arbitration clause by reference to the line of authorities starting with Paul Smith Ltd v H&S International Holding Inc [1991] 2 Lloyd's Rep 127 i.e., that it can be read as a provision dealing with the law governing the arbitration and/or the enabling, supervisory and enforcement jurisdiction of the Courts relating to the arbitral process. This approach is permissible even if the drafting of the clause is not felicitous. The result is that all disputes (save, perhaps, for those within Clause 51) fall within the remit of arbitration, which is consistent with the Court's generous approach to arbitration. The same submissions are relied upon to invoke the inherent jurisdiction of the Court.

44. Surrey disputes this entirely. Whilst Surrey accepts that disputes arising within the original scope of the WDPA and which have nothing to do with the subject matter of DOV2 are still subject to arbitration pursuant to Clause 52, it submits that any dispute concerning the construction of the EcoPark (i.e., the EfW gasifier, the AD plant and the Waste Transfer Station, all of which are provided for within the scope of DOV2) is subject to Clause 15 thereof. It says the EcoPark was only initiated through the execution of DOV2 and that DOV2 should be regarded as a discrete subset of obligations relating to the construction of the EcoPark. It is therefore understandable that the parties should wish to have those matters resolved in Court if they so provide. There is no conflict with Clause 52 of the WDPA because arbitration still applies for all other disputes and should now be construed in that light. Clause 51 (Expert Determination) also continues to apply, in its amended form, but the reference within Clause 51.14 to arbitration should now be regarded as a reference to litigation if the dispute concerns the EcoPark.

45. Surrey submits that Clause 15 of DOV2 is a wide-ranging provision, applying to claims arising from DOV2 and claims connected with or concerning it and any matter arising therefrom. The suggestion that Clause 15 can merely be regarded as a clause about the Court's interaction with the arbitral process (based on Paul Smith and subsequent cases) is not tenable because this clause, on its face, expressly encompasses disputes about substantive matters (unlike many of the cases, including Paul Smith). To construe Clause 15 as Suez suggests would not merely make it an example of infelicitous drafting but would render it directly contrary to Clause 52. Clause 15.3 endorses the exclusive nature of the jurisdictional clause.

46. Surrey explained that its case means that two regimes operate simultaneously, and the existence of one does not render the other inoperative for all purposes. If, however, Clause 15 of DOV2 is irreconcilable with Clause 52 of the WDPA, then the position is resolved by the hierarchy clause contained in Clause 2.4 of DOV2, pursuant to which Clause 15 of DOV2 prevails. The presumption in favour of all disputes being

determined in the same forum, identified by Lord Hoffmann in Fiona Trust & Holding Corp v Privalov [2008] Lloyd's Rep 254, meant that all disputes arising from the legal relationship for the construction of the EcoPark should be determined in litigation, which is what rational businessmen would be expected to agree. All the issues raised by the pleaded case relate to the EcoPark provided for in DOV2. They concern provisions introduced by DOV2 including a new Clause 6 and the interpretation of the Stage 2 Report. There is therefore no jurisdiction to grant a stay under s.9. The exclusive jurisdiction agreement in DOV2 is a contractual right which binds both parties to their chosen forum of litigation, in respect of contractual disputes relating to the EcoPark.

Section 9 Arbitration Act 1996

47. Section 9 provides:

> *"(1)A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.*
>
> *(2)An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.*
>
> *(3)An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.*
>
> *(4)On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.*
>
> *(5)If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings."*

48. Surrey submits, and it was not disputed, that Suez has the burden of proving two elements[2]. First, that an arbitration agreement exists. Second, that the arbitration agreement is applicable to the disputes between the parties that are the subject of the legal proceedings. There is no dispute between the parties in this case that Clause 52 of the WDPA, which provides for arbitration, remains operative. The first element is therefore demonstrated. Accordingly, the sole question concerns the second element. This depends on the proper construction of Clause 15 of DOV2 and any impact it may have upon Clause 52 of the WDPA.

The law

49. Neither party referred me to the well-known cases on contractual interpretation. I need not refer to them but I have them well in mind. The object is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It is not a literalist exercise but requires consideration of the contract as a whole and the

[2] See China Expert & Credit Insurance Corporation v Emerald Energy Resources Ltd [2018] EWHC 1503 (Comm) at [43] and Sonatrach Petroleum Corp v Ferrell International [2002] 1 All ER (Comm) 627 at [42].

setting into which it is placed. Commercial common sense is a very important factor to take into account when interpreting a contract but should not lead to the rejection of what would otherwise be the natural meaning of a provision.

50. The issue of construction to which I have referred involves construing provisions from separate agreements. This raises the question as to whether and to what extent I should regard the later agreements, and DOV2 in particular, as self-standing and self-contained, or as a variation to the original agreement. This is relevant in the context of the case law about dispute resolution provisions. In many of the cases to which I will shortly refer, the process involved either a reconciliation, or a finding of irreconcilable conflict, between two clauses within a single agreement. However, in some of the cases, the process involved the construction of provisions in different agreements. Where successive agreements are involved, it is relevant to take into account the character of the later one and its relationship with the earlier one when determining the scope of the dispute resolution provisions. A later agreement which involves, say, the resolution of disputes under the earlier agreement or which provides for its wholesale termination may be regarded differently from one which contains amendments to the earlier agreement, which otherwise remains effective.

51. The many authorities (justifiably) cited to me revolved around four themes, not entirely divorced from each other. The first of these concerns the inclusion of two superficially inconsistent dispute resolution provisions within the same contract. The case advanced by Mr Hargreaves for Suez is that I should regard Clause 15 of DOV2 in the same way as Steyn J treated clause 14 of the contract before him in Paul Smith Ltd v H&S International Holding Inc [1991] 2 Lloyd's Rep 127, and as the Court has done in subsequent cases. In Paul Smith Steyn J, as he then was, rejected the submission that the exclusive jurisdiction provision in clause 14 was irreconcilable with the arbitration provision in clause 13. The language was not "felicitous" but treating it as an agreement which governed the law of arbitration was a better outcome than giving it no effect at all. In respect of this and many of the other cases relied on by Mr Hargreaves, Mr Constable submitted that the exclusive jurisdiction clause was "vanilla" by which I understood him to mean it did not expressly mention substantive disputes and so was capable of a strained but permissible interpretation. Had the exclusive jurisdiction clause referred to and encompassed the resolution of substantive disputes it would have put it into straight conflict with the arbitration provision. He contrasted Paul Smith with a case decided only a month or so later by Webster J, namely Indian Oil Corporation v Vanol Inc. [1991] Lloyd's Law Rep Vol 2 634. That case involved competing provisions in different documents within a single contract, one of which provided for arbitration and the other of which provided for the jurisdiction of the English Courts. Webster J concluded that the two clauses were irreconcilable, as they both went to the substance of the dispute, but that the conflict could be resolved by recourse to the canon of construction that general terms and conditions must give way to a specifically agreed English law and jurisdiction clause.

52. The case of Shell International Petroleum Co. Ltd v Coral Oil Co. Ltd [1999] Vol 1, Lloyd's Law Rep was decided along similar lines to that in Paul Smith. Moore-Bick J, as he then was, held that Article 13, which referred any disputes arising under it to the jurisdiction of the English Courts, was reconcilable with Article 14 which provided for disputes to be settled by arbitration. He considered that Paul Smith was a helpful example of how to approach the problem. He concluded that Article 13 was referring

disputes about the proper law to the English Courts and Article 14 referred substantive disputes to arbitration. He acknowledged that the arrangement was "untidy" but said that this was not a case in which the parties had expressed themselves so badly that the Court could not give any sensible meaning to the language they had used. Once again, Mr Constable submitted that Article 13 was far removed from Clause 15 of DOV2, which plainly encompassed the reference of substantive disputes to the English Court.

53. Moving forward, Gloster J, as she then was, had to deal with a similar issue in AXA Re v ACE Global Markets Ltd [2006] EWHC 216 (Comm). She reviewed both Paul Smith and Shell International and applied them to the provisions in the contract before her. Again, she concluded that the clauses could be reconciled in a harmonious manner. The reference to English jurisdiction operated in parallel with the arbitration proceedings by fixing the supervisory court of the arbitration. She distinguished Indian Oil as a case in which the two clauses were clearly mutually inconsistent.

54. The next case in this vein is Ace Capital v CMS Energy Corp [2008] 2 CLC 318 (Comm), a decision of Christopher Clarke J, as he then was. That case concerned a policy which, at Article VI of the General Conditions, provided for all disputes to be heard by way of arbitration but also which, in a Service of Suit Clause, provided for Underwriters to submit to the jurisdiction of a US Court. A factor which featured in the decision that the Service of Suit Clause did not exclude a money claim from arbitration was that such "infelicity" as there may be in the drafting was no worse than in Paul Smith and it produced a better outcome than disregarding the arbitration clause completely. At [83], Christopher Clarke J said:

> *"But the principle of liberal interpretation in favour of arbitration encourages, as it seems to me, not only an expansive reading of what an arbitration clause includes but also a restrictive reading of any other clause which is said, notwithstanding an arbitration clause providing for all disputes to be referred to arbitration, to exclude particular disputes from arbitration…without expressly saying so."*

55. Once again, Mr Constable sought to distinguish this case on the basis that Clause 15 of DOV2 was concerned with the Court's exclusive jurisdiction over substantive disputes and because, unlike the position in Ace Capital, DOV2 was a separate and subsequent agreement to the WDPA.

56. The next case to which I shall refer is Sul America Cia Nacional de Seguros SA & Others v Enesa Engenharia S.A. & Others [2012] 1 Lloyd's Rep 275. In that case a policy contained Condition 7, which provided that disputes arising out of or in connection with the policy would be subject to the exclusive jurisdiction of the courts of Brazil whereas Condition 12 provided for arbitration with a seat in London if the insurer and insured failed to agree the amount to be paid under the policy. At paragraphs [47] to [50], Cooke J said this:

> *"[47] I was referred to ACE Ltd v CMS Energy Corporation [2009] Lloyd's Rep IR 414 and in particular to paragraphs 68-86 where Christopher Clarke J discussed mandatory arbitration and exclusive English jurisdiction clauses and the difficulty in reconciling the two and giving meaning to both. Whereas Condition 11 of the policy appears permissive in allowing a party to refer a dispute to arbitration in the circumstances referred to, Condition 12 provides*

that such disputes "shall" be referred to arbitration. Whilst the Insurers argued that the contract gives rise to a permissive right to refer to arbitration, and that the only mandatory element requires that, if that permissive right is exercised, the arbitration must take place under ARIAS rules, for the purposes of this argument, I treat the arbitration clause as being mandatory. The question arises as to whether there is such inconsistency between the exclusive Brazilian jurisdiction clause on the one hand, and the arbitration clause on the other, that they cannot be reconciled. The courts have struggled with such matters in cases such as Paul Smith v H & S International Holding Inc., [1991] 2LLR 127 and SIPC Ltd v Coral Oil Co. Ltd, [1999] 1LLR 72, as well as the ACE decision. The cases illustrate the principle that the contract must be read as a whole and that every effort should be made to give effect to all of its clauses. A clause should not be rejected unless it is manifestly inconsistent with, or repugnant to, the rest of the agreement. It is only if such limited reconciliation cannot successfully be done that the court will treat a clause that has been specifically agreed as prevailing over an incorporated standard term.

[48] The English courts, when faced with an exclusive jurisdiction clause and an arbitration agreement, look to the strong legal policy in favour of arbitration and the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered to be decided by the same tribunal. Unless expressly provided otherwise, the parties must be taken to have agreed on a single tribunal for the resolution of all disputes. A liberal approach to the words chosen by the parties in their arbitration clause must now be accepted as part of our law. I follow in this regard the comments of Christopher Clarke J.

[49] In the present case, on the construction that I have held, all disputes or differences can be and must be referred to arbitration under the terms of Condition 12, but if that is so, what is left of the exclusive jurisdiction of the courts of Brazil under Condition 7? The answer is very little in practice - much the same as found by Christopher Clarke J in paragraph 82 of the ACE decision. It enables the parties to found jurisdiction in a court in Brazil to declare the arbitrable nature of the dispute, to compel arbitration, to declare the validity of the award, to enforce the award, or to confirm the jurisdiction of the Brazilian courts on the merits in the event that the parties agree to dispense with arbitration. It specifically operates to prevent the parties proceeding in another court on the merits. Use of the Condition 7 rights for these purposes does not detract from the arbitration clause but gives them meaning. Furthermore, enforcement in Brazil against Brazilian parties is self-evidently a realistic possibility.

[50] The effect is, of course, to give priority to the arbitration clause over the exclusive jurisdiction clause but there is no other way of reconciling the two. To give full width to the exclusive jurisdiction clause would be to exclude the right to arbitrate altogether. The only other option would be to allow both the right to litigate in Brazil and the right to arbitrate to run in tandem, with the potential for a race to judgment between the two. That, for the reasons already given, is a most unlikely construction of the parties' intentions, as all the authorities indicate."

57. I interpose to note that, before me, both counsel relied on para [50]. Mr Hargreaves submitted that it demonstrated, once again, the triumph of an arbitration clause over an exclusive jurisdiction clause whereas Mr Constable submitted that it showed Cooke J had reached his decision on policy grounds, rather than by way of application of the Paul Smith line of cases, because the clauses could not be reconciled. He makes this point because, in the present case, he would say that policy grounds were not relevant as the parties had expressed what should happen in the case of conflicting provisions.

58. The last of the authorities to mention in this theme is that recently decided in Melford Capital Partners (Holdings) LLP v Wingfield Digby [2021] EWHC 872 (Ch). It was another case involving a single contract with two clauses, one in respect of arbitration and another in respect of exclusive jurisdiction. The Judge followed the general trend identified in the earlier cases by upholding the efficacy of the arbitration agreement and giving effect to the exclusive jurisdiction clause for the purposes of providing supervisory jurisdiction over any arbitration. It is notable that the exclusive jurisdiction clause was less vanilla than the one in Paul Smith, since it included disputes about the legal relationships established by the agreement. Nonetheless, as in other cases, the Judge concluded that it was still possible to read the clauses in harmony rather than in conflict with each other.

59. The second thread of cases to which I should refer concerns the Court's high regard for the arbitral process and the need to avoid disputes having to be heard in different fora if, say, the arbitration clause was limited in scope. The most important of these cases is obviously Fiona Trust & Holding Corp v Privalov [2008] Lloyd's Rep 254. At paras [6], [7] and [13], Lord Hoffmann said this:

> *"6. In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.*
>
> *7. If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention."*

…

> *"13. In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17: "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.""*

60. At para [28] Lord Hope said:

> *"As Bingham LJ said in Ashville Investments Ltd v Elmer Contractors Ltd [1989] QB 488, 517, one should be slow to attribute to reasonable parties an intention that there should in any foreseeable eventuality be two sets of proceedings. If the parties have confidence in their chosen jurisdiction for one purpose, why should they not have confidence in it for the other? Why, having chosen their jurisdiction for one purpose, should they leave the question which court is to have jurisdiction for the other purpose unspoken, with all the risks that this may give rise to?"*

61. In Sul America, Cooke J said this at [45]:

> *"Additionally, although it is possible for parties to agree that quantum should be dealt with in one jurisdiction and liability in another, the two are not always clearly distinguishable and all the authorities reveal a reluctance on the part of any court to decide that certain types of dispute are to be dealt with in one forum and others in another, because the parties are most unlikely to have intended that, since it would be a recipe for confusion."*

62. The third strand of authority concerns situations where there is more than one agreement between the parties, each of which has a different provision for dispute resolution. In some of these, the agreements are reached concurrently. In others, one occurs at a later stage than the other. This strand of cases is relevant here because Clause 52 of the WDPA provides for arbitration, whereas Clause 15 of DOV2, agreed later, provides for litigation.

63. In L Brown & Sons Ltd v Crosby Homes (North West) Ltd [2005] EWHC 3503 (TCC), Ramsey J was concerned with supplemental agreements made after the original agreement but which did not themselves contain provisions for dispute resolution in contrast to the original agreement which did. Whilst that is not this case, he said at [51]:

> *"In addition, I bear in mind that it is quite common in the construction industry for parties to enter into side or supplemental agreements which add to or vary the terms when matters arise during the course of the contract. Those agreements frequently do not have their own provisions for dispute resolution,*

> *including adjudication. If the officious bystander had asked such parties what dispute resolution methods applied, I consider that they would invariably assume that those in the underlying contract would apply. The idea that different or no provisions applied to such additional changed obligations would, in my judgment, be an impossible situation and make adjudication unworkable for such projects."*

64. A similar approach was taken by Jackson J, as he then was, in McConnell Dowell Constructors (Aust) Pty Ltd v National Grid Gas plc [2007] BLR 92 (TCC). In that case it was held that the supplemental agreement, which contained no adjudication clause, operated as a variation to the original agreement, which did, so that disputes in respect of the supplemental agreement were susceptible to adjudication. He distinguished this outcome with that decided in Shepherd Construction Ltd v Mecright Ltd [2000] BLR 489, in which a settlement agreement which resolved all disputes arising under the building contract was not, itself, a construction contract susceptible to adjudication. Whereas the settlement agreement in Shepherd resolved all disputes between the parties, the parties in McConnell Dowell had an on-going relationship after the supplemental agreement and not all issues between them were resolved by it. Having reviewed the authorities, Jackson J said at para [42]:

> *"Let me now stand back and review those three authorities. It seems to me that in each case the relationship between the first agreement and the second agreement was crucial. The reason why the adjudicator had jurisdiction in Beckingham was that the second agreement operated as a variation of the first agreement. The second agreement was not a stand alone agreement. Both agreements were subject to the same adjudication provisions, and, therefore, the adjudicator had jurisdiction to determine the effect of the second agreement. On the other hand, in both Shepherd and Quarmby the second agreement was a stand alone agreement, which did not incorporate and was not subject to any adjudication provision. Accordingly, in each of those cases the court analysed the second agreement in order to determine whether there was a surviving dispute which could be adjudicated."*

65. In Monde Petroleum SA v Westernzagros Ltd [2015] EWHC 67, (Comm), a case relied on by Mr Constable, Popplewell J, as he then was, was concerned with a consultancy services agreement which contained an arbitration clause and a subsequent settlement agreement, ("the Termination Agreement") providing for termination of the relationship, which conferred exclusive jurisdiction on the English Courts. There was a subsequent allegation that the Termination Agreement was induced by misrepresentation and/or duress and a dispute as to whether one party was entitled to terminate the CSA under its terms. At paragraphs [33] to [36], Popplewell J said this:

> *"[33] The leading modern authority on the construction of dispute resolution clauses is the decision of the House of Lords in Fiona Trust & Holdings v Privalov & others [2007] Bus LR 1917 [2008] 1 Lloyd's Rep 254, in which it was held that arbitration clauses in a series of time charters governed claims for rescission of the charters on the ground of bribery. In the leading speech Lord Hoffmann emphasised that it is to be presumed that rational businessmen who are parties to a contract intend all questions arising out of their legal relationship to be determined in the same forum; and that the presumption is a*

strong one, and requires clear words to the contrary if it is to be displaced: see paragraphs [6]-[7] and [13]. This is what, as Hoffmann LJ in Harbour Assurance Co (U.K.) Ltd v Kansa General International Assurance Co [1993] QB 701 at p. 726B, he had characterised as the "presumption in favour of one-stop adjudication". Lord Hope observed at paragraph [26] that a dispute resolution clause is not one that parties tend to focus on during contractual negotiations, and so Courts will be wary of placing too much weight on particular forms of words, so as to exclude certain disputes from its scope.

[34] The presumption applies as much to a jurisdiction clause as to an arbitration clause: see Continental Bank N.A. v Aeakos Compania Naviera S.A. [1994] 1 WLR 588 at pp. 592F to 593G.

[35] Where there is more than one agreement between the same parties, and they contain conflicting dispute resolution provisions, the presumption of one stop adjudication dictates that the parties will not be taken to have intended that a particular kind of dispute will fall within the scope of each of two inconsistent jurisdiction agreements. They will fall to be construed on the basis that they are mutually exclusive in the scope of their application, rather than overlapping, if the language and surrounding circumstances so allow: see Deutsche Bank AG v Sebastian Holdings Inc (No 2) [2011] 2 All ER (Comm) 245 per Thomas LJ at paragraph [41] and UBS AG v HSH Nordbank [2009] 1 CLC 934 per Lord Collins at paragraph [84].

[36] Nevertheless the possibility of fragmentation may be inherent in the scheme of the parties' agreements and clear agreements must be given effect to even if this may result in a degree of fragmentation in the resolution of disputes between the parties. At paragraph [49] of his judgment in Deutsche Bank v Sebastian Holdings, Thomas LJ approved a passage from Dicey Morris & Collins on the Conflict of Laws which is in the following terms (omitting the citation of authorities).

> *'But the decision in Fiona Trust has limited application to the questions which arise where parties are bound by several contracts which contain jurisdiction agreements for different countries. There is no presumption that a jurisdiction (or arbitration) agreement in contract A, even if expressed in wide language, was intended to capture disputes under contract B; the question is entirely one of construction ... The same approach to the construction of potentially-overlapping agreements on jurisdiction (but there will, in this respect, be no difference between the construction of agreements on jurisdiction, arbitration agreements and service of suit clauses) was taken in [UBS] ...*
>
> *In the final analysis, the question simply requires the careful and commercially-minded construction of the various agreements providing for the resolution of disputes, the point of departure being that agreements which appear to have been deliberately and professionally drafted are to be given effect so far as it is possible and commercially rational to do so, even where this may result in a degree of fragmentation in the resolution of disputes. It may be necessary to enquire under which of a number of inter-related contractual*

> *agreements a dispute actually arises; this may be answered by seeking to locate its centre of gravity.*
>
> *The same approach, namely to focus on the commercially-rational construction, governs the interpretation of agreements on jurisdiction as exclusive or nonexclusive, and of agreements which specifically provide that the parties will not take objection to the bringing of proceedings if proceedings are brought in more courts than one.'"*

66. At paras [38] and [39] he continued:

> *"[38] The presumption in favour of one-stop adjudication may have particular potency where there is an agreement which is entered into for the purpose of terminating an earlier agreement between the same parties or settling disputes which have arisen under such an agreement. Where parties to a contractual dispute enter into a settlement agreement, the disputes which it can be envisaged may subsequently arise will often give rise to issues which relate both to the settlement agreement itself and to the previous contract which gave rise to the dispute. It is not uncommon for one party to wish to impeach the settlement agreement and to advance a claim based on his rights under the previous contract. In such circumstances rational businessmen would intend that all aspects of such a dispute should be resolved in a single forum. Where the settlement/termination agreement contains a dispute resolution provision which is different from, and incompatible with, a dispute resolution clause in the earlier agreement, the parties are likely to have intended that it is the settlement/termination agreement clause which is to govern all aspects of outstanding disputes, and to supersede the clause in the earlier agreement, for a number of reasons. Firstly it comes second in time and has been agreed by the parties in the light of the specific circumstances which have given rise to the disputes which are being settled and/or the circumstances leading to the termination of the earlier agreement. Secondly it is the operative clause governing issues concerning the validity or effect of the termination/settlement agreement and therefore the only clause capable of applying to disputes which arise out of or relate to the termination/settlement agreement. Thirdly, in considering any dispute about the scope or efficacy of a settlement or termination agreement, the tribunal is likely to have to consider the background, of which an important element will often be the circumstances in which the dispute arose and the rights of the parties under the earlier contract. There will therefore often arise a risk of inconsistent findings if the tribunal addressing the validity or efficacy of the termination/settlement jurisdiction is not seised of disputes arising out of the earlier contract and the latter fall to be determined by a different tribunal.*
>
> *[39] In such circumstances, therefore, the dispute resolution clause in the termination/settlement agreement should be construed on the basis that the parties are likely to have intended that it should supersede the clause in the earlier agreement and apply to all disputes arising out of both agreements. Whether it does so in any particular case will depend upon the language of the clause and other surrounding circumstances."*

67. Another case in a similar vein is Trust Risk Group SpA v Amtrust Europe Ltd [2015] EWCA Civ 437, CA. That case was considered by Coulson J, as he then was, in Costain Ltd v Tarmac Holdings Ltd [2017] EWHC 319, (TCC) so it is convenient to refer to both of them together. At [31] of Costain, Coulson J said:

> *"[31] My attention was also drawn to the Court of Appeal decision by Beatson LJ in Trust Risk Group SpA v Amtrust Europe Limited [2015] EWCA Civ 437. That was a case which involved a framework agreement and a (separate) terms of business agreement. Each contained different express law and jurisdiction clauses. It was acknowledged that there may be a presumption that the parties intended a 'one-stop' jurisdiction: see Fiona Trust and Holding Corporation v Privalov [2008] 1 Lloyd's Rep 254. But Beatson LJ said in Trust Risk Group that, although that presumption remained a useful starting point, it was not decisive. He explained why not:*
>
> > *"46. Where the overall contractual arrangements contain two or more differently expressed choices of jurisdiction and/or law in respect of different agreements, however, the position differs in that one does not approach the construction of those arrangements with a presumption. So, the 14th edition of Dicey, Morris and Collins on the Conflict of Laws stated:*
> >
> > *'The decision in Fiona Trust has limited application to the questions which arise where parties are bound by several contracts which contain jurisdiction agreements for different countries. There is no presumption that a jurisdiction (or arbitration) agreement in contract A, even if expressed in wide language, was intended to capture disputes in contract B; the question is entirely one of construction…' (§12–094)*
> >
> > *That reflects inter alia the statement of Rix J in Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd [1999] 1 Lloyd's Rep 767 at 777 that:*
> >
> > > *'where different agreements are entered into for different aspects of an overall relationship, and those different agreements contain different terms as to jurisdiction, it would seem to be applying too broad and indiscriminate a brush simply to ignore the parties' careful selection of palette'…*
> >
> > *48. The current (16th) edition of Dicey, Morris and Collins states (at §12–110) that:*
> >
> > > *'Where a complex financial or other commercial transaction is put in place by means of a number of interlinked contracts, and each has its own provision for the resolution of disputes, the point of departure will be that it is improbable that a jurisdiction clause in one contract, even expressed in ample terms, was intended to capture disputes more naturally seen as arising under a related contract. …Even if the effect is that there will be a risk of fragmentation of the overall process for the resolution of disputes, this is not by itself sufficient to override the construction, and consequent giving of effect to, the complex*

> *agreements for the resolution of disputes which the parties have made.'*
>
> *In short, what is required is a careful and commercially-minded construction of the agreements providing for the resolution of disputes. This may include enquiring under which of a number of inter-related contractual agreements a dispute actually arises, and seeking to do so by locating its centre of gravity and thus which jurisdiction clause is "closer to the claim". In determining the intention of the parties and construing the agreement, some weight may also be given to the fact that the terms are standard forms plainly drafted by one of the parties.*
>
> *49. There may be a difference between a complex series of agreements about a single transaction or enabling particular types of transactions, and the situation in which there is a single contract creating a relationship which is followed by a later contract embodying a subsequent agreement about the relationship. The agreements in the UBS case about the issues of securities under a collateralised debt obligation transaction which were "all connected and part of one package", and those in the Sebastian Holdings case enabling over the counter derivative contracts and trading in foreign exchange and equities are examples of the former. The agreements in this case, separated in time by just under six months, are an example of the latter. Where the contracts are not "part of one package", it may be easier to conclude that the parties chose to have different jurisdictions to deal with different aspects of the relationship…"*

68. In Costain, there was one overall subcontract agreement between the parties but that agreement had, from the outset, expressly made plain that two separate sets of contract terms and conditions applied. This was a deliberate decision. That led Coulson J to conclude that if the dispute arose under the Framework Contract conditions, the broader dispute resolution provision applied. If it arose in respect of the individual supply of concrete, a more restricted dispute resolution provision applied. He saw no inconsistency because different clauses governed different parts of the relationship. At paragraph [44] he said:

> *"Dispute resolution provisions require certainty. The parties need to know from the outset what to do and where to go if a dispute arises."*

69. The fourth theme of cases to which I was referred concerns the approach to be adopted when parties have included a hierarchy or precedence clause within their agreement. Such a clause states which set of provisions is to prevail in the event of a conflict between them. Clause 2.4 of DOV2 is such a clause. A question which arises in the present case is how quickly the Court should have recourse to such a provision and, in particular, whether it should first apply some or all of the usual canons of construction before concluding that the provisions are irreconcilable.

70. The first key case in this area is Pagnan SpA v Tradax [1987] 3 All ER 565, CA but I need not refer to it because it was well summarised by the Court of Appeal in Mark Alexander v West Bromwich Mortgage Company Ltd [2016] EWCA Civ 496. In that case Hamblen LJ, as he then was, said at paras [30] to [41]:

"[30] Where inconsistency between specially agreed terms and the printed standard terms of a contract is alleged, and the contract contains an inconsistency clause, authoritative guidance as to the proper approach is provided by the Court of Appeal decision in Pagnan SpA v Tradax [1987] 3 All ER 565, a case cited and relied upon by the Judge.

[31] Pagnan v Tradax concerned an absolute and unqualified obligation contained in a special condition for the sellers to obtain an export certificate. The sellers were, however, held to be relieved of that obligation in circumstances where the standard GAFTA force majeure clause applied. That was held to modify or qualify the sellers' general obligation but not to contradict or to conflict with it.

[32] In Pagnan v Tradax the contract contained an inconsistency clause, in comparable terms to that in the present case, whereby the special conditions were to prevail over the printed standard contract form "in so far as they may be inconsistent".

[33] Bingham LJ pointed out (at p574h) that it would be "wrong to approach the contract on the assumption that there is no inconsistency" since "by including the inconsistency clause the parties have acknowledged that there may be".

[34] On the other hand, Bingham LJ observed that it would be "wrong to approach this question with any predisposition to find inconsistency" since the clauses are all part of the same contract and the parties chose to make the contract subject to the printed standard conditions.

[35] Where there is an inconsistency clause, one should therefore approach the question of inconsistency without any pre-conceived assumptions. One should not strive to avoid or to find inconsistency. Rather one should "approach the documents in a cool and objective spirit to see whether there is inconsistency or not" (per Bingham LJ at p574h).

[36] It follows that in such a case the general approach to potential inconsistency summarised in Lewison on The Interpretation of Contracts (5th edition) at para. 9.13 that the "court is reluctant to hold that parts of a contract are inconsistent with each other" does not apply, as Lewison observes at p508 (footnote 206).

[37] As to what amounts to inconsistency Bingham LJ explained as follows (at p575a-b):

> *".....it is not enough if one term qualifies or modifies the effect of another; to be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses."*

[38] In the same case Dillon LJ stated that inconsistency only arises where the provisions "cannot sensibly be read together" (at p578e-f).

> *[39] This approach has been followed and applied in subsequent cases, such as Cobelfret Bulk Carriers v Swissmarine [2009] EWHC 2883, (Comm), [2010] 1 Lloyd's Rep 317and Public Company Rise v Nibulon SA [2015] EWHC 684 (Comm), [2015] 2 Lloyd's Rep. 108.*
>
> *[40] An example of a case where such inconsistency was established is Gesellschaft Burgerlichen Rechts v Stockholms Rederiaktiebolag Svea, The Brabant [1967] 1 QB 588 in which McNair J concluded that there was inconsistency in circumstances where one clause would deprive another "almost entirely" of any effect, thereby effectively, but not completely, emasculating it.*
>
> *[41] An example given by Akenhead J in RWE Npower Renewables v Bentley [2013] EWHC 978 (TCC), and relied upon by the Lender, is where one part of the contract required a building to be painted black and another part stated it should be painted white. That is an example of a clear and literal contradiction between clauses. In my judgment, inconsistency is not limited to such cases. As Pagnan v Tradax makes clear, it extends to cases where clauses cannot "fairly" or "sensibly" be read together; not merely cases where they cannot literally be read together. One should approach that question having due regard to considerations of reasonableness and business common sense. As Rix J stated in The Northern Progress [1996] 2 Lloyd's Rep. 319 at 330:*
>
> > *"Indeed, it seems to me that the doctrine of the exclusion of terms which do not make sense (and the doctrine of manipulation which is designed to save an appropriate term for incorporation which would otherwise have to be excluded) as well as the doctrine of inconsistency are but aspects of the overall process of arriving at the true intention of the parties in which the concept of rationality and commercial commonsense must play their appropriate and fundamental roles."*

71. In Alexander, the clause provided that the Mortgage Conditions should prevail if there were "any" inconsistencies. In the present case the clause also refers to "any" inconsistency. That did not bear on the Court's reasoning. At [44], Hamblen LJ said:

> *"If, on the other hand, he is suggesting that where there is an inconsistency clause a wider meaning should generally be given to inconsistency, or like words, than that given in Pagnan v Tradax then I respectfully disagree. Pagnan v Tradax is clear Court of Appeal authority as to the proper approach to be adopted where the contract contains an inconsistency clause, such as that in the present case."*

72. In the context of when, within the analysis, it is right to reach for the hierarchy clause, it is clear from [41] that recourse should be had to business common sense when construing the clauses before determining that they could not fairly or sensibly be read together. When it came to undertaking the exercise in that case, I also note that the Court first applied the canon of construction that a specially agreed term prevails over the printed standard term which is inconsistent with it: see [60]. It then applied a different canon of construction that a printed term must not be construed to defeat the

main object and intent of the contract: [61]. At [66], the Court considered that both of these were alternative ways in which the inconsistency could be addressed, without recourse to the hierarchy clause being necessary.

73. The issue was recently considered again by the Court of Appeal in Septo Trading Inc. v Tintrade Ltd [2021] EWCA Civ 718. In that case, the Court described the law as well settled, referring to both Pagnan and Alexander. At [28], Males LJ said:

> *"Thus there is a distinction between a printed term which qualifies or supplements a specially agreed term and one which transforms or negates it. In order to decide on which side of this line any particular term falls, the question is whether the two clauses can be read together fairly and sensibly so as to give effect to both. This question must be approached practically, having regard to business common sense, and is not a literal or mechanical exercise. It will be relevant to consider whether the printed term effectively deprives the special term of any effect (some of the cases describe this as the special term being "emasculated", but in my view it more helpful to say that it is deprived of effect). If so, the two clauses are likely to be inconsistent. It will also be relevant to consider whether the specially agreed term is part of the main purpose of the contract or, which is much the same thing, whether it forms a central feature of the contractual scheme. If so, a printed term which detracts from that scheme is likely to be inconsistent with it. Ultimately, the object is to ascertain the intention of the parties as it appears from the language in its commercial setting."*

74. In its application of the law to the facts of the case, the Court construed the relevant clauses and formed a provisional view as to their meaning. It concluded that the two provisions could not fairly and sensibly be read together such that the specific Recap term should prevail over the General Terms and Conditions.

75. Finally, in this context, I refer back to Costain Ltd v Tarmac Holdings Ltd in which Coulson J said, at [45]:

> *"Only if there is an irreconcilable discrepancy is it necessary to resort to some sort of order of precedence in order to make sense of the contract (see Moore-Bick LJ in RWE Npower). Here on my construction of the sub-contract agreement there was no such irreconcilable difficulty, so there is no need to adopt that approach."*

76. Once again, this emphasises the need to construe the provisions in the conventional way before reaching for the precedence clause.

77. From all of these cases I draw together the following principles so far as they are relevant to the present case:

(a) Whilst the exercise is ultimately one of routine construction, where possible the Court should strive to give effect to an arbitration clause in the presence of a competing jurisdiction clause. It has latitude to do so where there is infelicitous drafting but cannot do so where the clauses are in direct conflict with each other

and wholly irreconcilable, so that no sense whatever can be given to the intention of the parties.

(b) Unless they expressly and clearly say otherwise, there is a strong presumption that parties are assumed to have agreed on a single tribunal for the determination of all their disputes, at least when there is only one agreement between them. Dispute resolution clauses require certainty so parties know where they should go when a dispute arises.

(c) Where there are two agreements each containing different provisions for dispute resolution, the outcome may depend on the nature of the second agreement and its relationship to the first. A second agreement which varies the first one will probably be regarded differently from a second agreement which makes a clean break from the first one. The desire for one-stop shopping means that, where possible, the clauses should be regarded as mutually exclusive in their scope of application, rather than overlapping. However, some degree of fragmentation may be inherent in what has been agreed, in which case the centre of gravity of a given dispute will be relevant.

(d) Where a contract contains a hierarchy or conflicts clause, there should be no predisposition to find or not find a conflict between two clauses. The ordinary rules of construction should first be deployed and only if those result in a conclusion that the two provisions are irreconcilable is recourse to the conflicts clause required. I did not understand Mr Constable to dispute this approach.

Discussion

78. Whereas Suez submits (and Surrey accepts) that DOV2 is a variation to the WDPA, subject to its terms, Surrey submits that DOV2 should be regarded as providing for a ring-fenced project for the construction of the EcoPark, with its own provisions for dispute resolution.

79. I have come to the clear conclusion that the parties in this case intended the dispute resolution provisions of the WDPA to remain applicable for their substantive disputes arising in respect of the construction of the EcoPark. I now set out the reasons for that conclusion.

Variation

80. Each of the successive agreements, including DOV2, was described as a variation to the WDPA. Surrey itself pleads that the WDPA was amended by DOV1 and DOV2: see paragraph 10 of the Particulars of Claim. Clause 2.3 of DOV2 expressly states that the terms of the WDPA are to remain in full force and effect unless expressly modified. DOV2 does not expressly modify Clause 52 to make it subject to Clause 15 of DOV2 so, by reference to Clause 2.3, it must remain in full force and effect. The parties themselves identified those provisions which they regarded as varying the terms of WDPA. The parties in fact amended Clause 52, admittedly in minor respects, which shows that they must have considered the extent to which that provision was to be impacted (if at all) by DOV2. Therefore, this was not a case where it can be said that they simply forgot about the impact of DOV2 on the arbitration clause.

81. Surrey's construction also requires Clause 51.14 of the WDPA (concerning Expert Determination) to be rewritten to refer to litigation in respect of disputes arising from DOV2, but the parties did not specify that as one of the amendments they chose to make to Clause 51. That is so notwithstanding that Clause 6.7 of DOV2 introduces a new termination right, providing for compensation on termination to be assessed under Part 2 of Schedule 9 of the WDPA, with disputes about that being referrable to an Expert under Clause 51.

82. The fact that DOV2 is and was described by the parties as a variation to the WDPA makes it different from, say, a settlement agreement, or a termination agreement. The relationship is ongoing. It makes it more likely that the parties will have intended their substantive disputes to be dealt with in a single forum, namely the one first identified. This conclusion is therefore consistent with McConnell Dowell.

83. The format adopted by the parties in the successive agreements was as follows. Each Deed contains a clause headed "Variation"[3]. That clause identifies the remaining parts of the Deed which constitute variations to the terms of the WDPA. By way of illustration, in the case of DOV2, Clause 4.1 provides:

> *"The parties agree that the WDPA is varied as set out in Clauses 5 to 9 and Schedule 1 with effect from the date of this Deed."*

84. It therefore seems to me that those clauses expressly listed, together with Schedule 1, are the ones which the parties intended should be governed by the provisions of the WDPA, including Clause 52 thereof. As Mr Hargreaves expressed it, the WDPA is the master agreement and the DOVs are its servants, to be performed in accordance with it.

85. Mr Constable submitted that it was of importance that when the parties finally produced a consolidated version of the WDPA, as attached as Schedule 1 to DOV2, they did not actually insert into it those clauses which had been introduced at Clauses 5 to 9 of DOV2. I do not regard that as remotely significant. Clause 4.1 already says that the parties were in agreement that the WDPA was varied by those clauses and it is, therefore, of no moment that they did not actually re-write them into the consolidated version at Schedule 1. It does not justify the submission that those clauses had their own life alongside the WDPA.

86. At the time the parties agreed DOV1, it would have been very odd and probably unworkable for disputes about the amended terms of the WDPA thereby introduced to be capable of determination outside the ambit of the arbitration clause. Instead, the course adopted was to bring the changes into the WDPA and make them subject to its terms. Although Schedule 24 was first introduced in DOV1, it was obviously intended that any disputes arising in respect of it should be determined in accordance with the WDPA, rather than in accordance with Clause 15 of DOV1. Indeed, Schedule 24 expressly anticipated a possible use of Expert Determination under Clause 51 of the WDPA.

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[3] Headings are not material to construe the provision but I do not use it for that purpose, only for explanation. The Deed describes itself as a variation.

87. When agreeing the WDPA, the parties contemplated that it may later be amended. Clause 1.6 provided:

> *"A reference to this Agreement or to any other agreement or document shall, unless otherwise expressly stated, include a reference to this Agreement or that other agreement or document as from time to time amended."*

88. It follows that Clause 52 should be read as encompassing disputes arising out of or in connection with the Agreement as from time to time amended.

89. I consider that the factual background comprising the approach adopted by the parties in DOV1 informs the way the parties proceeded in the two later agreements. It provides a consistency of approach which, in each case, gives a limited purpose to the exclusive jurisdiction clauses in each of those DOVs. That is not, as Mr Constable suggested, an exercise in construing Clause 15 of DOV1 and seeking to impose that construction on Clause 15 of DOV2.

90. I consider that it is possible to construe Clause 15 of DOV2 in a manner which sits alongside the continued application of Clause 52 of the WDPA and follows the same approach which the parties adopted in DOV1. For that purpose, it is necessary to consider those remaining provisions of DOV2 (and the two earlier agreements) which are not expressed to be part of the variations to the WDPA.

    (a) In DOV1, Clause 4.1 identified that the WDPA was varied to the extent provided for in Clauses 6 to 9 and Schedule 1. However, Clause 4 was itself only to become effective upon the fulfilment of the conditions in Clause 3. Therefore, Clause 3 was not, itself, a variation to the WDPA. It may well be[4] that a dispute as to the fulfilment of the conditions in Clause 3 is one which would go to Court, as provided for in Clause 15. Another example is that in DOV1, there was a third party to the Deed who was not subject to the arbitration agreement in the WDPA, namely Suez Environnement SA, based in France. Clause 15.2 would have bound it to the English Courts in respect of any disputes about, say, Clause 5.1 of DOV1.

    (b) In the August 2010 DOV, the same approach was adopted whereby Clause 3.1 identified the varied provisions of the WDPA that were to have effect. In my judgment, the parties must therefore have intended that disputes in respect of the obligations in those new clauses were subject to the arbitration clause in the WDPA. In Clause 12, which is not a clause which acts as a variation to the WDPA since it is not listed in Clause 3.1, the parties contemplated that an individual term, condition or provision of the Deed may be held to be invalid, unlawful or unenforceable. It may well be that a dispute as to whether any of these was the case would be one which would go to Court by reason of Clause 15[5].

    (c) In DOV2, I consider that the same principle applies.

[4] I express no final conclusion on this since it was not argued and is not central to my reasoning.
[5] Once again, I express no final view about that for the same reason.

91. I recognise that, stripped of the clauses falling within the scope of the variation, the remaining provisions in the Deeds are largely standard ones concerning, for example, counterparts, service of notices and exclusion of third party rights. It is therefore unsurprising that the parties should leave those, largely procedural, matters in the hands of the Courts by virtue of Clause 15. Even if Clause 15 were left with very little purpose in practice, that would not be a reason to reject the application of the arbitration clause: see Sul America at [49]. In the cases to which I have referred, the remaining purpose was the court's control of the arbitral process, which is not the case here, but the same point applies by analogy.

92. Clause 52 should continue to be broadly construed in keeping with the approach commended by Fiona Trust. As set out in Ace Capital at [83], this approach to construction is in keeping with the principle of liberal interpretation in favour of arbitration; it reads Clause 52 in an expansive way and it restricts the ambit of the Court's jurisdiction in Clause 15 of DOV2. Although, reading that clause in isolation, a dispute about the contractual obligations contained in Clause 5 of DOV2 could be interpreted as falling within Clause 15.2, I consider that the jurisdiction clause should be read in light of the whole of the Deed, including the provisions of Clause 4. The effect of doing so is to give a more restricted meaning to Clause 15 than it would have if viewed in isolation.

93. Although the breadth of Clause 15.2 in DOV2 (and Clause 13.2 of the August DOV) is arguably greater than Clause 15.2 of DOV1, that additional breadth is irrelevant in the context of a dispute to which the exclusive jurisdiction provision does not attach.

94. I am satisfied that the disputes raised in these proceedings are all ones that fall within the scope of those clauses listed in Clause 4 to DOV2 that the parties recognised should be amendments to the WDPA (or the earlier equivalents). I reach that conclusion having regard to the breadth of Clause 52 to which I have referred. Turning to the matters in dispute as explained in paragraph 4.4 of Mr Smith's witness statement:

    (a) In respect of disputes relating to the Stage 2 Report, it is appropriate to note that this formed part of DOV2 by reason of Clause 3.2 thereof. Clause 3 is not one falling within the amended clauses listed in Clause 4.1. By Clause 3.2 the parties expressed the agreement that the Stage 2 Report was non legally binding save to the extent that it established processes relating to the development of updates to the Service Delivery Plan. Accordingly, disputes about the meaning and effect of the Stage 2 Report are capable of resolution under the WDPA because it is agreed to be a product of Schedule 24 of the WDPA (the Project Approvals Process) and therefore subject to Clause 52. The connection between the Stage 2 Report and Schedule 24 to the WDPA is reflected in the Stage 2 Report itself.

    (b) The dispute over paragraph 2.9 of the Stage 2 Report falls within Clause 52 of the WDPA for the same reason.

    (c) A dispute about Clause 6.6E falls within the remit of Clause 52 of the WDPA because that was one of the clauses mentioned in Clause 4 as being an amendment to the WDPA.

(d) The dispute about the criteria for Acceptance Tests falls within the remit of Clause 52 since it is the WDPA which provides for such tests. DOV1 amended these provisions. Insofar as the dispute centres on the Stage 2 Report, I repeat (a) above.

95. Omitted from Mr Smith's list is the dispute as to whether Surrey has a right to terminate. DOV2 provides no right to terminate. Termination is provided for in Clauses 34 to 39 of the WDPA. Surrey pleads Clauses 35.1 and 34.1.6 of the WDPA as the basis for its declaration in respect of termination.

96. Although I have reached the conclusion contended for by Suez, I reject its specific submission that the two clauses (Clause 15 of DOV2 and Clause 52 of the WDPA) can be reconciled in the particular manner developed in the Paul Smith line of authorities, not least because here those two provisions are contained in separate contracts agreed at different times. I understood it to be common ground, but in any event find, that Clause 63 of the WDPA probably fulfilled the role of assisting and supervising the arbitral process through the English Courts as suggested by the Paul Smith line of cases. Clause 63 remained untouched by any of the subsequent agreements and there is no reason to think it is any less relevant now for that purpose than it was then, when the WDPA was the only applicable agreement. As Clause 63 remained effective, it required no further agreement that the Courts should have supervisory control over the arbitral process. In this respect, Clause 1.6 of the WDPA caters for the fact that the WDPA has subsequently been amended.

One forum

97. Standing back, the commercial sense of resolving in one forum all substantive disputes about matters arising from the obligations under the WDPA becomes obvious. Mr Constable does not suggest that, on its own, Clause 52 of the WDPA would have been too narrow to encompass disputes about the construction of the EcoPark. That is not surprising as Clause 52 is in wide terms. Surrey must therefore be driven to say it should be cut down by the subsequent impact of Clause 15 of DOV2, but only to that extent. That is, in my view, an unlikely outcome.

98. If Surrey were right it would not be difficult to imagine examples of cases in which there would be confusion and uncertainty about the appropriate forum for the resolution of a dispute (which would be contrary to what Coulson J said in Costain). Mr Constable accepted that there were numerous matters that were still governed by the WDPA which would, in the event of a dispute, be referred to arbitration. That was different from the position adopted by Gowling in its letter of 10 December 2020 which had suggested that the effect of Clause 15 of DOV2 was to "supersede" Clause 52 of the WDPA. Mr Constable also acknowledged that there was a possibility of some "blurred edges". During argument, Mr Constable accepted that any issues relating to the provision of Services concerning the EcoPark, once constructed, would fall within the WDPA and therefore be subject to arbitration. That was an inevitable concession because, by the time those Services came to be provided, it would be inappropriate to differentiate between the provision of Services at the EcoPark and the provision of Services elsewhere. Suez's performance in the provision of Services as a whole could become relevant to issues such as termination[6]. As Mr Hargreaves also pointed out, targets in

[6] See, for example, Clause 34.1.14 which describes an Event of Default where "the Contractor fails in a material respect or to a material extent or persistently fails in any other respect or to any other extent to provide any of

respect of the recycling and diversion of landfill apply across the entire remit of the WDPA, within or outside the EcoPark. Mr Constable suggested that these issues posed no objection to the ring-fencing of disputes arising from DOV2 because DOV2 was not concerned with the anything after the completion of construction. In particular, it was not concerned with the provision of Services in respect of the newly constructed facilities. I disagree. In my view "the commencement of operations" in Clause 5.2 of DOV2 is a reference to the provision of Services in operation. It is clear from, for example, Appendices 4, 6 and 7 to the Services Specification that the parties used the expression "operate" to mean or include the provision of Services. So, DOV2 was indeed addressing the provision of Services in respect of the EcoPark.

99. The dividing line which I have identified, whereby all substantive disputes about the construction and operation of the EcoPark are subject to arbitration under the WDPA, is far more satisfactory and in accordance with the expectation of commercial businessmen than one which divides the fora for dispute resolution between the construction of the EcoPark on the one hand and its operation on the other. That distinction lacks reality where both construction and operation are provided for in DOV2 and, once constructed, the EcoPark is to form part of the entire provision for Services under the WDPA. Surrey's dividing line would not be a clear-cut distinction of the type which existed in Costain.

The benefits of arbitration

100. As suggested in Fiona Trust, the parties in this case must be taken to have agreed to arbitration under the WDPA for reasons of neutrality, expertise and privacy. As Cooke J said in Sul America at [48], the Courts look to the strong legal policy in favour of arbitration. Pursuant to the WDPA, arbitration would have been the appropriate forum to resolve disputes of a technical nature, had they arisen, regarding the construction of the mass burn EfW facilities built pursuant to the WDPA. I see no reason why these advantages should suddenly cease to apply in the case of a dispute about the construction of the gasification and AD facilities at the EcoPark. No commercial or other reasons were advanced to explain why, what was attractive as a means of dispute resolution originally, stopped being so when it came to DOV2. Even if Mr Constable was right to submit that the construction of the EcoPark was a discrete subset of obligations, that does not in and of itself explain why the parties should have preferred to litigate disputes about those obligations, rather than use arbitration in the way they had first agreed, and then re-asserted in each subsequent agreement. There is certainly nothing anywhere to suggest a change of heart by the parties in this respect.

Other points

101. In my judgment, Surrey has ignored or underplayed the significance of the August 2010 DOV. It is not referred to in paragraph 10 of the Particulars of Claim and Mr Smith barely mentions it. Yet it is quite clear that it was the August 2010 DOV which set the foundations for the new EcoPark Development Project. By Clause 4.4 of that agreement, the parties agreed that the EcoPark would be delivered by the completion of construction, installation and operation of the new facilities. DOV2 was therefore a reiteration of that prior agreement, taking account of the new Stage 2 Report. That is

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the Services to do so in accordance with the Service Specification or the Service Delivery Plan or otherwise in accordance with the terms of this Agreement".

why it is described as the Second Ecopark Deed of Variation. It was Annex 1 to the August 2010 DOV which provided an entirely new Services Specification setting out the construction and operation requirements for the new EcoPark. If disputes surrounding the construction of the EcoPark were to be ring-fenced, as Surrey submits, it is unclear why that had not already been the position under the August 2010 DOV. Yet that is not Surrey's case, not least because Surrey makes no reference to it. I reject Mr Constable's submission that the construction of the EcoPark was initiated through the execution of DOV2.

102. I would distinguish the Monde Petroleum case from the present one. The second agreement in that case was a settlement or Termination Agreement, not a variation to the original agreement. The intention of Surrey and Suez was for their relationship to continue, not come to an end. Unlike paragraph [39] of Monde Petroleum, the parties could not have intended that Clause 15 should supersede the arbitration clause in the earlier agreement (though this was what Surrey's solicitors originally argued). Further, for the reasons given, I have concluded that there are no conflicting dispute resolution provisions in the present case. Instead, they fulfil different purposes. Accordingly, the desirability of the one stop shop approach means that substantive disputes other than, say, one about the very legitimacy of DOV2 itself, should fall within Clause 52 of the WDPA (subject to the ambit of Clause 51). Even if I had to apply the "centre of gravity" test suggested in both that case and Trust Risk, I would conclude that centre of gravity of this construction dispute lay within the WDPA. The ultimate conclusion sought by Surrey is that it has a right to terminate the WDPA under Clause 35.1 thereof. It would be a surprising outcome to discover that the centre of gravity of that dispute nonetheless lay in a different agreement. Mr Smith of Surrey says that the central issue between the parties is whether Suez is entitled to acceptance of the Facility. Acceptance is a regime contained in the WDPA and disputes over its achievement must surely fall to be determined under that agreement.

103. In light of my conclusion that the two provisions are capable of reconciliation, it is not necessary to have regard to the hierarchy regime in Clause 2.4. Just as earlier Courts have done, I have construed the provisions with no predisposition to find or not to find a conflict between them. Having undertaken that exercise, I do not consider them to be in conflict.

104. I therefore conclude that Surrey was right when it referred to arbitration in its letter of 17 September 2020. The position it subsequently adopted was not, in my judgment, the correct one.

Clause 15.3

105. Lastly, I turn to Clause 15.3 of DOV2. Mr Hargreaves submitted that this was mere belt and braces, providing little that was not already available in Clause 15.2, and Mr Constable also relied on it only as a provision which endorsed the exclusive nature of the jurisdictional clause in Clause 15.2. I accept both parties' submissions that this is the limited effect of Clause 15.3. At one stage during argument I suggested that it might have wider application, namely the provision of a choice in the hands of the claiming party to litigate notwithstanding the arbitration clause in the WDPA but, on reflection, I do not consider that can be right. It is not what the clause says and it makes no reference to Clause 52 of the WDPA as it would be expected to do if that was what was meant. As Gloster J said in Axa Re at [32]:

> *"However, it is well recognised that there is no presumption against surplusage in a commercial contract and no conclusions can be drawn from the presence of two express choices of English law. In my judgment, in a commercial contract such as this, one should not be surprised to see parties stating clearly in a belt and braces way, the intention that English law is to apply."*

Inherent Jurisdiction

106. Since I have concluded that the proceedings should be stayed pursuant to s.9, there is no need to consider the alternative basis for a stay. Suffice it to say that Suez advanced no additional basis upon which the Court should exercise its inherent jurisdiction to order a stay beyond those applicable to s.9.

Conclusions

107. For the reasons given above, I order a stay of these proceedings pursuant to s.9 Arbitration Act 1996. I invite counsel to agree the appropriate form of order.

108. I will deal with any consequential matters, including costs, in due course.