COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Appeals Division
Consolidated Appeals 2020/APP/sts/00013, 2020/APP/sts/00018

IN THE MATTER OF THE WINTER TRUST, THE SUMMER TRUST AND THE SPRING TRUST
AND
IN THE MATTER OF AN ARBITRATION
AND
IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 89, 90 AND 91 OF THE ARBITRATION ACT 2009

BETWEEN:
GABRIELE VOLPI

Applicant/Appellant

AND
(1) DELANSON SERVICES LTD.
(2) MATTEO VOLPI
(3) SIMONE VOLPI

Respondents

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2020/CLE/gen/00632

IN THE MATTER OF THE ARBITRATION ACT 2009
AND IN THE MATTER OF AN ARBITRATION

BETWEEN:
DELANSON SERVICES LIMITED

Applicant/Appellant

AND
(1) MATTEO VOLPI
(2) GABRIELE VOLPI
(3) SIMONE VOLPI

Respondents

Before:	The Hon. Mr. Justice Loren Klein
Appearances:	Mr. Michael Black KC, with Ms. Wynsome Carey for Gabriele Volpi Mr. Brian Simms KC, with Mr. Marco Turnquest and Mr. Wilfred Ferguson for Delanson Services Ltd. Mr. Adrian Beltrami KC, with John Wilson KC, Ms. Knijah Knowles and Ms. Berchel Wilson for Matteo Volpi

Mrs. Janet L.R. Bostwick-Dean, with Mr. Tavarrie D. Smith for Simone Volpi

Hearing dates: 26-30 April 2021; 25-28 May, 28 June to 1 July 2022.

RULING

KLEIN J.

Arbitration—International Commercial Arbitration—Trust Arbitration—Distribution of Trust assets to Settlor by institutional Trustee and dissolution of Trusts—Breach of Trust—Scope of Trustee's Powers—Fraud on a Power—Inadequate Deliberations—Knowing Receipt—Rectification—Counterclaim for Mistake—Exercise of powers, whether void or voidable

Arbitration—Partial Awards—Multiple challenges and appeals to Partial Awards by Settlor and Trustee (Applicants/Appellants)—Arbitration Act 2009—Statutory gateways for Challenges and Appeals under the Act—s. 89, Lack of Substantive Jurisdiction—s. 90, Serious Irregularity—s. 91, Appeal on a Point of Law

Section 89—Challenge as to the substantive jurisdiction of the Tribunal—Purpose Trusts Act 2004 ("PTA")—Challenge to jurisdiction on the basis that Trusts authorized purpose trusts ("APTs") within the meaning of s. 3(1) of the PTA and therefore required authorization of the Court under s.6 to commence enforcement proceedings—Whether the Tribunal lacked substantive jurisdiction as a result of failure to obtain court authorization—Whether Trusts authorized purpose trusts within the meaning of the Act—Sutton v Fedorowsky [2000] BHS J. No. 36—"Person trust" v. "Purpose Trust"—Substantive jurisdiction vs. Admissibility

Section 89—Counter-claim by settlor to set aside Trusts for mistake—Challenge to finding that Tribunal was competent to determine that it had substantive jurisdiction to determine counter-claim—Whether provisions of Trustee Act (as amended) provides for arbitration of validity disputes in Trust Arbitration—Construction—Trustee Act 1998 (as amended)—Arbitration Act—Construction, Trust Deed—Whether arbitration clauses encompass validity disputes—Principle of Separability—Competence-Competence—Inter-relationship between concepts—Abrogation of Separability in Trust Arbitration—Effect on ability of Tribunal to determine jurisdiction

Section 89—Claim to set aside Trust on grounds of mistake before supervisory court—Whether cognizable under s. 89—Whether claim properly before Court—Pleadings—Notice of Motion—Effect of s. 92(2) of the Act on the ability to bring challenge—Effect of s. 95 of the Act on ability to bring challenge—Evidence—Res judicata—Issue Estoppel—Abuse of process—Procedural Fairness

Section 90—Applicants challenging Partial Awards on numerous heads under s. 90—Breach of general duty of fairness within the meaning of s. 44, such as to give rise to serious irregularity under s. 90(2)(a)—Excess of powers by tribunal, s. 90(2)(b)—Breach of procedures agreed by the parties, s. 90(2)(c)—Failure of the tribunal to deal with all the issues put to it, s. 90(2) (d)—Uncertainty or ambiguity of award, s. 90(2)(f)—Whether claims amounting to serious irregularities—Whether causing substantial injustice

Construction—Arbitration Act—Sections 91, 92(8)—Appeal on a point of law—Application for leave to appeal—Whether the Arbitration Act, properly construed, provides for the grant of leave to appeal on a point of law—Whether leave to appeal on point of law by consent of parties only—If appeal available with leave of Court, what is the requisite test for the grant of leave?—Whether grounds can meet threshold for the grant of leave (applying the analogous test for leave under the UK Act or at common law)

Statutory interpretation—Principles of statutory construction—Presumption of rational drafting—Presumption against abrogation of fundamental rights—Conflicting statutory provisions—Rectifying construction—Pre-legislative materials—Reference to Hansard—Pepper v Hart [1993] AC 593

Section 90—Appeal on a point of law, s. 90(1)—Whether Trustee's decision to make Distributions as a result of fraud on a power void and not voidable—Cloutte v Storey [1911] 1 Ch. 18—Whether proper test used in finding of inadequate deliberations by Trustee for Distributions—Whether error in exercise of Tribunal's discretion to set aside Distribution for breach of trust or fraud on the power—Whether error in finding Trusts were not authorized purpose trust and that the claimant had standing to institute the arbitration proceedings without authorization under the PTA —Whether Tribunal substituted its discretion for that of the Trustee in finding Trustee was guilty of inadequate deliberations.

Trust (Choice of Governing Law) Act, 1989—Trustee Act 1998 (as amended—Rules Against Perpetuities (Abolition) Act 2011

Remedies—s. 90, 91 remission or setting aside of award, declaration of no effect—s. 91 confirmation or variation—Whether award to be set aside, varied or remitted (in part of whole), or confirmed.

TABLE OF CONTENTS

A. **INTRODUCTION** 4
B. **FACTUAL AND PROCEDURAL BACKGROUND** 6
C. **THE ARBITRATION AND AWARDS** 10
1. The Partial Award dated 13 June 2020 ("Partial Award") 12
2. The Additional Award dated 26 August 2020 ("Additional Award"). 15
D. **THE APPLICATIONS/APPEALS AND THEIR GROUNDS** 17
1. Gabriele's challenges/appeals 17
(i) Notice of Motion filed 9 July 2020 (the Partial Award) 17
(ii) Notice of Motion filed 23 September 2020 (the Additional Award) 18
2. Delanson's challenges/appeals 19
(i) Notice of Motion filed 9 July 2020 (the Partial Award) 19
E. **PRINCIPAL ISSUES** 21
1. Whether the Tribunal lacked jurisdiction to hear the arbitration or certain claims in it (s.89 challenge) 21
2. Whether properly construed the Arbitration Act provides for the Court to grant leave to appeal on questions of law 21
3. Whether the Tribunal committed any serious irregularities in the conduct of the arbitration (s. 90) 21
4. Subject to (2), what is the test for the grant of leave and whether the alleged legal errors justify the intervention of the court (s.91) 21
F. **THE RELEVANT LAW AND LEGAL PRINCIPLES** 22
1. The *Arbitration* Act 2009 22
(i) s. 89: Substantive Jurisdiction 23
(ii) s. 90: Serious Irregularity 23
(iii) s. 91: Point of Law 24
2. Governing Legal Principles 25
(i) General Approach 25
(ii) s. 89: substantive jurisdiction (s. 41) 27
(iii) s. 90: serious irregularity 29
(a) s. 90(2)(a): breach of general duty of tribunal (s. 44) 30

(b) s. 90(2)(b): excess of powers by tribunal 32
(c) s. 90(2)(c): breach of agreed procedures 33
(d) s. 90(2)(d): failure to deal with all the issues put to it 34
(e) s. 90(2)(f): uncertainty or ambiguity of award 37
(iv) General principles applying to challenges 38
(a) s. 95: loss of the right to object to an award 38
(b) Substantial injustice 39
(v) s. 91: Appeal on question of law 40
G. THE JURISDICTIONAL CHALLENGES UNDER SECTION S. 89 40
1. The Tribunal's determination of the authorised purpose trust (ATP) issue (Delanson Gr. 2; Gabriele Gr. 7) 41
2. The Tribunal's determination of Gabriele's counterclaim for mistake 57
H. APPEAL ON POINTS OF LAW: WHETHER BY OPT-IN ONLY 95
1. Whether the Act provides for leave to appeal on questions of law 96
I. GROUNDS OF APPEAL EXAMINED: CHALLENGES UNDER SECTION 90 (SERIOUS IRREGULARITY) AND 91 (ERROR OF LAW) 114
1. The Tribunal's construction of the scope of Delanson's distributive powers under the Trust Deeds (Delanson Gr. 1; Gabriele Gr. 1) 114
2. The Tribunal's determination of the authorised purpose trust ("ATP") issue (Delanson Gr. 2; Gabriele Gr. 7) 124
3. The Tribunal's determination of the inadequate deliberation issue (Delanson Gr. 3; Gabriele Gr. 4) 126
4. The Tribunal's findings on the reasons for distribution (Delanson Gr. 4) 130
5. The Tribunal's exercise of its discretion to set aside the Distributions if voidable (Delanson's Gr.5, Gabriele Gr. 4). 137
6. The Tribunal's alleged failure to determine the "scope of powers rectification claim" (Gabriele Gr. 2) 142
7. The Tribunal's conclusions as to whether a fraud on the power makes the exercise void or voidable (Gabriele Gr. 3) 142
8. The Tribunal's finding on knowing receipt (Gabriel Gr. 6) 146
9. The Tribunal's treatment of the parties' expert evidence on Liechtenstein law (Gabriele Gr. 9) 152
10. The Tribunal's conclusions in the Additional Award (Gabriele Gr. 10) 159
J. CONCLUSION AND DISPOSITION OF APPEALS 165
1. Summary of Conclusions 165
2. Postscript 167

A: INTRODUCTION

[1] In 2009, following the appointment of an *ad hoc* committee to examine the law relating to arbitration, Parliament enacted the Arbitration Act 2009 (the "Arbitration Act" or "2009 Act").

The effect was to usher in a sea-change in the law of arbitration which had remained largely untouched since the extension to the Bahama Islands of the UK Arbitration Act 1889.

[2] In particular, it swept away the wide powers of the Courts to remit for reconsideration arbitration awards under the old "case stated" procedure and drastically reduced the scope for judicial intervention in the arbitral process, bringing The Bahamas in line with the modern approach in international commercial arbitration.

[3] As given effect in the Act, the ability of the court to intervene in an arbitral award is restricted to three very narrow grounds: (i) lack of substantive jurisdiction (s. 89); (ii) serious irregularity (s. 90); and (iii) appeal on a point of law (s. 91). In practice, this means that the courts will strive to uphold arbitration awards. They will avoid reviewing such awards with "…a *meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards…with the object of upsetting or frustrating the process of arbitration*" (per Bingham J. in *Zermalt Holdings SA v NU-Life Upholstery Repair Limited* [1985] 275 EG 1134).

[4] This limited court-intervention principle is tested in no small way by these conjoined applications/appeals. Through them, the "applicants/appellants" (respondents in the Arbitration) have launched a "root-and-branch" attack on two arbitration awards issued by an eminent arbitral Tribunal in multi-party, complex trust arbitration, respectively on 13 June 2020 (the "Partial Award") and 26 August 2020 (the "Additional Partial Award")

[5] Among their numerous complaints, they allege that the Tribunal: (i) lacked substantive jurisdiction under s. 89 (and by reference to s. 41); (ii) committed multiple serious irregularities within s. 90, giving rise to substantial injustice for the applicants/appellants; and (iii) made various errors of law under section 91 (assuming an appeal on points of law is available under the Act in the absence of the parties' consent). The primary respondent to these challenges (the successful claimant in the Arbitration) says that these "*disparate criticisms*" are wholly without merit, lie far outside the proper scope of review permitted by the Act, and are anathema to the non-intervention approach in arbitration awards.

[6] If the breadth of the challenges advanced on the legislated grounds were not enough, the applications/appeals also raise several points of statutory interpretation relating to how arbitration challenges are meant to function under the 2009 Act. In particular, the court is asked to resolve the important question of whether the framers intended to provide for the court to grant leave to appeal on a point of law, or whether such an appeal is only by way of the parties' expressed opt-in.

[7] Further, the proceedings involve the not well-trodden area of "trust arbitration", in which the case law is said to be "*thin and underdeveloped*", and the interpretation and application of a statutory framework facilitating trust arbitration that is considered *avant-garde* even among the handful of jurisdictions that do provide for arbitration of trust disputes.

[8] Analysis of the legislative regime is necessary to resolve several key issues which are in contention, namely: (i) whether the "Trusts" (described below) may be classified as authorized

purpose trusts ("APTs") within the meaning of the *Purpose Trust Act 2004* ("PTA"), and the implications of that classification for the question of whether the arbitration proceedings were validly instituted; (ii) whether validity disputes are arbitrable under the *Trustee Act 1998* (as amended); and (iii) what is the effect of the abrogation of the separability principle in the *Trustee Act 1998* on the ability of a tribunal to determine its jurisdiction (the "*competence-competence*" principle). All of these are said to raise issues going to the Tribunal's jurisdiction.

[9] These construction points, I am told, are matters of first impression in this jurisdiction and are of significant practical importance for the conduct of commercial arbitration and in particular trust arbitration.

[10] For convenience, I shall refer collectively to Delanson and Gabriele as the "applicants", notwithstanding that they also feature as respondents in each other's applications/appeals, as does Simone, who appears in a representative capacity. I shall also refer to these proceedings as the applications (or challenges), although as will emerge, the parties contend that there is an important legal distinction to be made between "application/appeal" and "applicant/appellant" in construing the leave to appeal point. As is customary in trust and other family proceedings involving parties with patronymic surnames (and without intending any disrespect), the individual parties are referred to by their first names—thus, Gabriele, Matteo and Simone.

B. FACTUAL AND PROCEDURAL BACKGROUND

Essential factual background

[11] It is only necessary to set out a brief factual outline to provide some context for the applications. To avoid duplication of effort, I have borrowed from the factual summary contained in the June 2022 Ruling, with some modifications.

The Parties and their dispute

Gabriele, Matteo, Simone

[12] Gabriele is a highly successful Italian-Nigerian businessman whose main business is in the oil and gas sector in Nigeria. The business is conducted through a Nigerian company called Intels Nigeria Limited ("Intels"), which is ultimately held through a BVI holding company, Orlean Invest Holdings Limited ("OIH" or "Orleans"). The primary business of Intels is the operation of a series of port logistics and facilities operations in Nigeria, which serve the Nigerian oil and gas sector. From the 1980s onwards, Gabriele amassed considerable wealth through his majority holdings in these companies, which became the leading provider of logistics services to the oil and gas sector in West Africa. In addition to the oil and gas interest, Gabriele's business empire includes an African energy company, real estate, ships and an investment company, as well as a stadium and an Italian waterpolo club. But it is the oil and gas wealth that is the jewel in the crown.

[13] Matteo and Simone are Gabriele's sons. In better times, they were involved in the business enterprise of their father. Relationships apparently soured towards the end of 2015 between Matteo and Gabriele, and Matteo withdrew from any active role in the businesses. It is alleged that he became increasingly at odds with Gabriele. In the first affidavit of Michael Bray ("Bray 1") filed on behalf of Gabriele, it is alleged that "…*in spite of the fact that he is Gabriele's son, Matteo has treated Gabriele in all respects as an enemy and has waged, and continues to wage, an extensive campaign of hostile litigation and arbitration against Gabriele*." This allegation has been denied by Matteo.

[14] Matteo is also an international businessman in his own right, and apparently after the split ventured into businesses similar to those in which he was involved with his father in the oil, gas and logistics industry. These competing interests were matters of some significance in the application for a stay of the Arbitration and other interim reliefs pending the determination of the challenges to the arbitral awards.

[15] Gabriele states that over the years he has provided generously for his family, as well as made a generous offer to settle the arbitration. In this regard, he offered US$120 million of secured payments during his lifetime to Matteo and Simone each, as well as luxury Italian villas to settle the respective claims to the trust assets. This offer was rejected by Matteo and accepted by Simone. Gabriele also settled a matrimonial claim by his wife Rosi in 2017 (from whom he is now divorced), and gave her a package of assets and cash worth some US$100 million, out of which Rosi gave Simone and Matteo US$20 million each. In fact, Matteo claims to have used the financial gift from his mother to fund the arbitration and litigation.

Delanson

[16] Delanson Services Ltd. ("Delanson") is a company that provides professional trustee services. It was incorporated in the Republic of Panama in October of 2006 under the name Delanson Services Inc., which was changed to Delanson Services PTC when it was re-domiciled to the Bahamas on 29 September 2010. Apparently, for tax purposes, it was again re-domiciled to Auckland, New Zealand, in August 2016, where its offices are located, and the corporate name changed to Delanson Services Ltd. It served as the Trustee of the Trusts that are the subject of this arbitration and these applications/appeals. As will emerge, the somewhat itinerant domiciling of the Trustee has thrown up legal issues of significance for earlier proceedings and which still haunt these challenges.

The dispute

[17] At the root of these proceedings is a long and acrimonious dispute between Gabriele and Matteo over the distribution of several family trusts which held the wealth generated by Gabriele's businesses. The entirety of the trust assets was distributed to Gabriele, as settlor of the Trusts, in October 2016 by Delanson. That decision was the basis for (and is the subject of) the arbitration proceedings out of which these challenges arise. Sadly, the dispute has not only pitted son against father but has forced family members to choose sides in the fight.

[18] As may be presumed from the above factual summary, Simone remains in good standing with his father and in an affidavit filed before the Court he has declared his support for the applications/challenges being made by Gabriele and Delanson.

The Trusts and earlier litigation

[19] Between 2006 and 2012, Gabriele settled three irrevocable discretionary Bahamian Trusts: the Winter Trust (28 October 2006), the Summer Trust (28 October 2006), and the Spring Trust (27 March 2012) (collectively "the Trusts"). The Winter Trust was intended to hold Gabriele's interest in OIH/Intels, which had previously been held through the Adiana Foundation (see below), and the Summer Trust was intended to hold various of Gabriele's other investments and assets, through a Panamanian company called Ansbury Investment Inc. The Spring Trust held (or purported to hold), via a Dutch Stichting, Gabriele's interest in various Italian sports teams, including a water polo club and a football club. The beneficiaries of the trusts were Gabriele himself, his wife Rosi, Matteo and Simone, and their descendants. The original language of the Trusts is Italian and all three are settled in very similar terms.

[20] There is considerable uncertainty over the current value of the trust assets, or the value at the time of the distribution in 2016. But it has been alleged that the trust assets were potentially worth billions of US Dollars. According to one of the affidavits filed on behalf of Delanson, the Orlean Group's turnover in the year ending 31 December 2012 was upwards of USD 1.2 billion, although it is alleged by Delanson that the oil price crashes in 2015, political exposure and other market forces drastically reduced the value of the holdings.

[21] As mentioned, in October 2016 the vast majority of the assets of the Trusts were distributed by Delanson to Gabriele, and Delanson subsequently executed a Termination of the Trusts on 13 January 2017. It is the 2016 distribution and in particular the reasons which are said to have given rise to it and the process by which it was procured, that were the catalytic events and the fuel for the litigation and arbitration proceedings.

[22] According to the First Affidavit of Andrea Moja, filed on behalf of Delanson in these proceedings [at 14-16] ("Moja 1"), Delanson decided to make the distributions in circumstances where the Orlean Group was in financial crisis and politically exposed in Nigeria. Delanson indicated that it "*reasonably believed that it would aid the survival of the underlying assets (particularly the Orlean Group) to vest them absolutely in the only beneficiary with the independent financial means to rescue them*". These reasons were highly disputed by Matteo in the arbitration and, as will be seen, ultimately rejected by the Tribunal.

The Liechtenstein Foundation ("Adiana")

[23] At this stage, and subject to further elaboration below, a brief mention should be made of the predecessor structure that held certain of the assets of Gabriele prior to the creation of the Bahamian Trusts. This is because the process by which the transfer of assets into the Winter Trust took place looms large in one of the grounds of challenge.

[24] In 1990, with the help of Swiss lawyer and advisor Dr. Jean-Pierre Baggi ("Dr. Baggi"), Gabriele placed his interest in a Liechtenstein foundation called the Adiana Stiftung Foundation ("Adiana"), which (according to the evidence of Mr. Baggi and Gabriele) was set up as a means of protecting the assets of Gabriele and putting in place a succession scheme for them. The main features of the Foundation were as follows:

(i) Gabriele was the first and only beneficiary of Adiana during his lifetime.
(ii) After his death, his wife Rosi and sons Matteo and Simone were to become beneficiaries, with Rosi entitled to one-half of the total income and assets and the sons to one-quarter each. In the case of her death, her share was to be divided between them.
(iii) Gabriele was able to revoke the by-laws of Adiana at any time.

[25] According to the evidence, in or around 2005, Gabriele was advised to set up a trust to hold his business and assets, and he allegedly instructed Dr. Baggi, an Italian law firm (Fantozzi & Associati) and his then advisor Mr. Francesco Cuzzocrea, to establish the trust(s). By letter dated 23 October 2006, Gabriele wrote to Dr. Baggi and requested him to "*revoke the previous beneficiaries of the Adiana Foundation and appoint the Winter Trust as the sole beneficiary of the Foundation*", once the Winter Trust was established. That letter also explained that Gabriele understood that the Winter Trust was to represent "*a continuum with the Adiana Stiftung Foundation, replicating the latter's main characteristics*".

[26] On 2 November 2006, Gabriele purported to transfer the ownership of the securities and rights of Adiana to the Winter Trust, and on 20 December 2006, Dr. Baggi and a Mr. Matt (the two Board Members of the Adiana Foundation) issued amended by-laws designating the Winter Trust as the sole beneficiary of any and all of the income and assets of the Adiana Foundation. This was approved by Gabriele on the 6 December 2006. The Adiana Foundation was dissolved by resolution on 16 February 2012.

Earlier litigation

[27] Litigation in respect of the trust assets was first launched in the Bahamian courts with an *ex parte* application for a freezing injunction against Delanson and Gabriele on 25 April 2018 (2018/CLE/gen/00474). It was granted at first instance on the 3 May 2018 but later set aside by Winder J. (as he then was) on an application by Delanson and Gabriele. The underlying writ action was also stayed on the ground that the trusts were subject to an exclusive arbitration clause (ruling dated 27 November 2018, "the 2018 ruling").

[28] This ruling is important, not only because it was the rocket-launcher for the arbitration, but it provided the Bahamian court with an early opportunity to consider the arbitration clauses of the Trust Deeds. The parties argue that this ruling had binding legal consequences for several of the matters raised in the current challenges. I shall return to it later in this judgment.

[29] On the 30 November 2018, Matteo made a second pitch for a freezing injunction against Delanson and Gabriele, this time pursuant to s. 55 of the 2009 Arbitration Act and in support

of the arbitration proceedings, commenced by letter of that same date. Again, Matteo obtained an *ex parte* freezing injunction against Delanson and Gabriele (on 4 December 2018). Delanson and Gabriele applied to have the injunction and the underlying originating summons set aside. On the return date, Winder J. set aside the injunction on the basis that the court lacked jurisdiction to grant a free-standing injunction in support of arbitral proceedings in respect of foreign *situs* assets (2018/CLE/gen/01404). Matteo's appeal was dismissed by the Court of Appeal.

[30] In tandem with the Bahamian proceedings, Matteo commenced an action in Malta against Betacorp International Limited ('Betacorp'), to which the vast majority of the trust assets were transferred after the 2016 distribution. Matteo obtained a Provisional Warrant of Injunction by the Civil Court in Malta, which has been appealed to the Maltese Court of Appeal. Those proceedings remain on foot.

The interlocutory proceedings & current challenges

[31] I heard several interlocutory applications by the parties in the lead-up to the substantive challenges (see Ruling of June 2022), and in particular granted applications by the applicants for a stay of the Arbitration pending the hearing and determination of their applications/appeals, as well as granted Matteo's application against Delanson and Gabriele for security for costs of the applications/appeals. Additionally, I granted leave to Delanson and Gabriele to appeal on points of law, but that leave was subsequently recalled (of which more will be said later).

[32] This judgment follows a hearing of the applications which the parties agreed would be truncated into two phases. Over the period 26-30 April 2021, I heard the challenges directed to the substantive jurisdiction of the Tribunal under s. 89 of the Act ("the first phase hearing"). This was followed by a subsequent hearing conducted over 25-28 May and 28 June to 1 July 2021 to deal with the challenges pursuant to s. 90 and/or section 91 of the Arbitration Act ("the second phase hearing"). Any references to the parties' skeleton arguments will be indicated in the following manner: e.g., "GV 1/1", to represent a reference to the first skeleton of Gabriele, para. 1). I should also add here that no skeleton arguments were filed on behalf of Simone, but Mrs. Bostwick-Dean was content to make short oral submissions adopting the arguments of Delanson and Gabriele.

[33] As to the length of the hearing before the court, I pause to note the laconic observation by Mr. Beltrami, counsel for Matteo, that the fact that a five-day evidentiary hearing before an arbitral panel should lead to challenges which have occupied the Court for nearly two weeks of hearings is itself to be lamented. This is said to be a textbook illustration of the improper use to which the limited review jurisdiction conferred on the court under the Act can be put by a motivated challenger, and which runs the risk of undermining the very purpose of arbitration as an efficient means of resolving commercial disputes.

C: THE ARBITRATION AND AWARDS

[34] On 30 November 2018, Matteo initiated arbitration proceedings by letter of even date against Gabriele and Delanson asserting, *inter alia*, that the distribution of the assets of the Trusts in 2016 was carried out in breach of trust and for an improper purpose. The arbitral panel was constituted consisting of Dr. Georg von Segesser (Presiding Arbitrator), the Rt. Hon. Lord Neuberger of Abbotsbury and Professor Avv. Alberto Malatesta.

The arbitration proceedings in outline

[35] The Arbitration was instituted pursuant to the arbitration agreement at clause 27 of each of the deeds establishing the Trusts (the "Trust Deeds"). The provisions of the Trust Deeds dealing with the governing law and jurisdiction, as they appear in the English translation, are below. As they are settled in essentially the same terms, what is below (taken from the Winter Trust) is representative of them all. I have reproduced the translation supplied by Gabriele, to which sub-numbering of the individual sub-clauses has been added for convenience. It has been observed that there are minor differences in the parties' translations, but I do not understand the parties to be contending that these differences are material.

> "ARBITRATION CLAUSE
>
> **26. Governing Law**
>
> [26.1] The Trust is governed by the Bahamian Law known as "The Trust (Choice of Governing Law) Act 1989 and "The Trustee Act 1998") and subsequent amendments and supplements.
> [26.2] The Trustee may at any time amend the Trust's Governing law if the governing law so permits.
> [26.3] Any controversy regarding the validity of the Trust shall be settled in accordance with the aforesaid Governing Law.
>
> **27. Comprissory Clause**
>
> [27.1] Any other controversy relating to the institution or to the effects of the Trust, or between the Settlor and Trustee(s), or among Protectors, or among the parties to the Trust, must be submitted to the judgment of an arbitration panel consisting of three members; the litigating parties shall each appoint one member, and these shall appoint the third Member as Chief Arbitrator. The Panel shall render judgment in the customary manner within 180 days.
>
> [27.2] Controversies touching on rights or properties existing in other countries of the world shall be handled and settled from time to time with due attention to international treaties where applicable.
>
> [27.3] Any proceedings aimed at causing a court to appoint Trustees or Protectors or to impart instructions to the Trustee shall be subject solely to Bahamian law, so long as the Trust has its registered office there.
>
> [27.4] For matters which may or cannot be settled out of court, the court of competent jurisdiction shall be the one located in the venue of the Trust's registered office, currently the Court of Appeal of the Commonwealth of the Bahamas."

[36] As may be seen, by cl. 27 it was agreed that certain disputes concerning the Trusts would be dealt with by a swift arbitration procedure, which was to be concluded within 180 days. In Procedural Order No. 1, issued by the Tribunal on 13 February 2019, the parties agreed to conduct the Arbitration in accordance with the 2010 UNCITRAL Rules. By Procedural Order No. 2, issued 21 February 2019, the Tribunal determined the seat (the *lex fori*) of the Arbitration to be The Bahamas and the governing law (the *lex arbitri*) to be the Arbitration Act.

[37] On 12 April 2019, the Tribunal ordered (Procedural Order No. 4) that the hearing would be bifurcated into two phases: Phase 1, dealing with the substantive claims (breach of trust and fraud on a power, together with Gabriele's counterclaims in relation to the rectification and validity of the Trusts); and Phase 2, which would deal with remedies (issues of quantum, valuation of assets, and the reconstitution of the Trusts). The procedural hearing timetable provided for: (i) an evidentiary hearing to address the merits (Phase 1) to be held over five days from 16-20 December 2019; and (ii) an evidentiary hearing addressing quantum and valuation to be held from 7-11 December 2020.

[38] By way of Procedural Order No. 6, and pursuant to Article 17(5) of the UNCITRAL Rules and upon the request and consent of all the Parties, the Tribunal joined Simone as the Third Respondent in the Arbitration. By the same Order, it also: (i) appointed Matteo to represent the interest of his descendants (including his minor children Ms. Isabella Volpi and Ms. Sofia Volpi) and any of his unborn descendants; (ii) appointed Simone to represent the interest of his mother (Ms. Rosaria Volpi), his offspring (Mr. Edoardo Volpi, Ms. Beatrice Volpi, Mr. Giacomo Volpi, and Mr. Leonida Volpi), and any of his unascertained or unborn descendants; and (iii) appointed Gabriele to represent the interests of his descendants other that Matteo and Simone. The tribunal is empowered to make these appointments pursuant to s. 91B (3) of the Trustee Act 1998 (as amended).

The Partial Award

[39] At paragraph 3 of the Partial Award, the Tribunal described the issues for consideration as follows:

> (i) whether the Trusts were "authorized purpose trusts" ("APTs") under Section 3(1) of the Purpose Trust Act 2004 ("the PTA");
> (ii) the arbitrability of the transfer of assets by the Adiana Foundation to the Winter Trust, and if arbitrable, the validity of such transfer;
> (iii) whether Gabriele is entitled to an order rectifying the Trust Deed in the manner sought;
> (iv) whether Gabriele is entitled to an order setting aside the Trusts for mistake;
> (v) whether the October distributions were made for an improper purpose and constituted a fraud on a power;
> (vi) whether the October 2016 distributions were carried out in breach of trust and/or fiduciary duty; and

(vii) whether Gabriele is liable as an accessary due to unconscionable receipt of property transferred in a breach of trust; or (viii) due to dishonest assistance in breach of trust.

[40] The evidentiary hearing on Phase 1 took place over a 5-day period in December 2019, and involved some 19 witnesses. Matteo was represented at these hearings by a number of senior British Counsel from Taylor Wessing and Wilberforce Chambers. Delanson was represented by Counsel from SLC (Studio Legale Commercial Avv. Moja) of Milan, Italy and senior British Counsel from Serle Court Chambers. Gabriele was represented by senior British and other counsel from Grimaldi Studio Legal, UK, XXIV Old Buildings, and 39 Essex Chambers. Simone Volpi was represented by Counsel from Studio Legal Scaravilli, Milan, Italy.

[41] The Tribunal answered the questions which it identified in a lengthy and detailed award (the "Partial Award"), issued on 13 June 2020. By a majority (Dr. Georg von Segesser and the Rt. Hon. Lord Neuberger of Abbotsbury), the Tribunal declared that the distributions made by Delanson were in breach of trust and for an improper purpose, constituted a fraud on the power and were therefore void. Consequently, the assets distributed to Gabriele were being held on trust for the trustee of the Trusts. The Tribunal also ordered that the trust assets distributed by Delanson to Gabriele on 6 October 2016 and the termination of the Trusts on 13 January 2017 be set aside.

[42] Professor Avv. Alberto Malatesta issued a Dissenting Opinion in which he explained his reasons for disagreeing with the majority that Delanson had acted in breach of trust. He found, *inter alia*, that Delanson acted within the scope of its powers as Trustee, and for a purpose contemplated by the Trust Deeds and therefore there was not a fraud on its distributive powers. Consequently, in his view, Delanson was not in breach of its fiduciary duty to take adequate deliberations prior to the Distributions.

[43] In the operative part of the Partial Award, the majority, *inter alia*, made the following findings and granted consequential declarations [at 749]:

(i) The Trust are not APTs for the purposes of the PTA 2004, and the claimant has standing to bring the claim, which was validly brought.
(ii) The transfer of the assets by the Liechtenstein Foundation Adiana Stiftung to the Trusts is arbitrable for the purpose of the proceedings and was valid as a matter of Liechtenstein law.
(iii) The distributions made by the First Respondent ("Delanson") to the Second Respondent ("Gabriele") were made in breach of trust and for an improper purpose, constituted a fraud on the power, and are void.
(iv) All the assets distributed to the Second Respondent by the First Respondent following the deeds of distribution of 6 October 2016, and their proceeds, were (and to the extent that they are retained by the Second Respondent, are) held by the Second Respondent on trust for the trustees of the Trust.

(v) The Tribunal orders the setting aside of the distributions from the First Respondent to the Second Respondent of 6 October 2016 and termination of the Trust of 13 January 2017.

(vi) The Tribunal denies the Second Respondent's request to rectify the Trust Deeds.

(vii) The Tribunal denies the Second Respondent's request to set aside the Trust Deeds for mistake.

[44] I will come to consider some of the essential reasoning and conclusions of the Tribunal in due course. But central to the determination of the dispute was the view the Tribunal took of Delanson's reasons for implementing the distributions and dissolving the Trusts. Its conclusion on the dispute of facts over these reasons is central to the majority's decision. A critical passage summarizing the conclusions of the Tribunal on this issue is set out at paras. 387-391 of the Partial Award, and it provides a useful lens through which to view the Tribunal's conclusions and orders:

> "387. Based on the foregoing analysis of reasons which have been said to have been the basis of Delanson's decision, the Tribunal does not consider that the reason given at the time of the distributions, i.e., for Gabriele to negotiate the reorganization of the underlying companies with the bank sector directly, to have been a likely motivation for the October 2016 distributions and dissolution of the Trusts.
>
> 388. As to the reasons that have surfaced after the distributions were executed and the Trusts dissolved, including those argued in the course of these proceedings (i.e., that Gabriele was to negotiate the reorganization of the underlying companies with the banks, Gabriele was the only person who had sufficient experience to take the strategic decisions that were necessary to preserve the assets, Gabriele was in a financial position to provide further liquidity to the Trust Assets personally, and/or due to the risk of being sued Delanson decided to wind up the Trusts to avoid liability as a trustee), while these could potentially have been reasons for Delanson's decision, due to the conflicting evidence on record and/or lack of evidence in support of these reasons, it is not plausible that they were in fact the reasons relied upon by Delanson at the relevant time.
>
> 389. There is also insufficient evidence to demonstrate that on the part of Gabriele there had been a malicious motive driving the October 2016 distributions, although the Tribunal considers at the very minimum Gabriele must have been aware of the direct consequences of the distribution and dissolution of the Trusts and how this would impact the other beneficiaries.
>
> 390. Based on the evidence put forward, the Tribunal does not believe that there was any substantive discussion between the directors of the Trustee leading up to its decision to distribute the Trust Assets to Gabriele. Even where a decision by Delanson is to be considered as having been made by Baggi alone, given the history of Baggi and Gabriele's relationship coupled with the complete lack of documentary evidence in support of Baggi's decision-making, it is difficult to accept that Baggi decided to distribute all assets of the Trusts and dissolve the Trusts without Gabriele's prior involvement and agreement. Given the means by which Gabriele conducted his business generally, and more specifically, the management of the Trusts, it is rather more likely that Gabriele materially influenced, if not directed, the Trustee to distribute all of the Trust Assets to himself and dissolve the Trusts.

> 391. Notwithstanding the above findings that Gabriele is likely to have been materially involved in Delanson's decision to distribute the Trust Assets and dissolve the Trusts in October 2016, the Tribunal will assess in the sections which follow the claims made by Matteo against Delanson and Gabriele on the basis that it was a conscious decision of Delanson to distribute the Trust Assets to Gabriele and dissolve the Trusts in October 2016, even if likely to have been heavily influenced by Gabriele. The Tribunal will also discuss below the claims made by Matteo against Delanson and Gabriele on the basis of the reasons which Delanson says were considered at the time and whether on the basis of those reasons Delanson can be said to have acted in breach of trust, and if the case, whether Gabriele should be considered to have dishonestly assisted in such a breach of trust or knowingly received the Trust Assets in breach of trust."

The Additional Award

[45] Concerned that the Tribunal did not deal adequately with all of the claims in the Partial Award, Gabriele submitted a request to the Tribunal on 3 July 2020 pursuant to s. 79 of the Act and Article 39 of the UNCITRAL Rules to correct the Partial Award and/or for the issuance of an additional award to, *inter alia*, clarify its decision in respect to the "Restrictions", which it had found regulated the Trustee's dispositive power, and secondly to determine his "scope of powers rectification claim".

[46] The scope of powers rectification claim arose out of Gabriele's contention that when setting up the Trusts, it was not his intention that Delanson's distributive power should be limited in the way the Tribunal construed it (i.e., that the requirement of taking care of the essential necessities of the beneficiaries prevented a full distribution of the assets to one or more beneficiaries). Thus, to the extent that the Tribunal construed the Deeds as being subject to those Restrictions, they should be rectified to accord with his intentions.

[47] The Tribunal issued the Additional Partial Award on 26 August 2020, denying the "scope of powers rectification" claim. It concluded that the claim arguably did not arise in light of the Tribunal's decision on the construction of Clauses 6 and 7 of the Trust Deeds (i.e., that there was no logical inconsistency between the Restriction which it found in the Partial Award and Gabriele's Letter of Wishes ("LoW") of October 2006 expressing a wish to be able to dispose of the capital of the Trust to one or more beneficiaries).

[48] The reasons advanced by the Tribunal for rejecting the claim were substantially the same reasons for which it rejected an earlier claim by Gabriele to rectify the Trusts to make him the sole beneficiary during his lifetime, with power to amend the terms of the Trust (the "sole beneficiary" rectification claim or "first rectification" claim). At para. 36-37 of the Additional Award, the Tribunal stated that:

> "35. The Tribunal also considers that it is unrealistic to treat the scope of powers rectification claim as entirely independent of the first rectification claim which was the rectification claim relied on in the Second Respondent's opening statement and Post-Hearing Brief, namely that '*the Trust Deeds should be rectified so as to make clear that Gabriele is the only beneficiary during his lifetime and so as to give him a personal power of amendment*.' It is of course perfectly possible to treat the first rectification claim and the

> scope of powers rectification claim as separate, in the sense that they are conceptually different, and that one could succeed while the other could fail. The same logic would suggest that the first rectification claim should also be seen as two claims—one '*to make clear that Gabriele is the only beneficiary during his lifetime'* and the other '*to give him a personal power of amendment*.'
>
> 36.However, both limbs of the first rectification claim and the scope of powers rectification claim all concern an assessment, according to the same principles, of the intentions of the same person at the same time in relation to the same clauses in the same documents. Accordingly, the fact that the Tribunal had little difficulty in rejecting the reliability of the evidence of the centrally relevant witness, Gabriele, on the first rectification claim, suggests that it would require the Second Respondent to make out a particularly compelling case in support of the scope of powers rectification claim before the Tribunal could accept it. Far from making out a strong case, the Second Respondent [Gabriele] has, in the Tribunal's opinion and for the reasons given in paras 22 to 34 above, made out a weak case for the scope of powers rectification claim, and in particular, a case which clearly fails on the balance of probabilities."

The Tribunal accordingly concluded [para. 37] that "*based on the evidentiary record as a whole, the Tribunal finds that [Gabriele] has not established his scope of powers rectification claim by clear evidence of the true intention to which effect has not been given in the instruments*."

[49] On 9 June 2020 Gabriele and Delanson challenged the Partial Award by Originating Notices of Motions filed in the Supreme Court and sought various interim remedies from the Tribunal, including a stay pending appeal to this Court. The Additional Award was also challenged by Gabriele, on 23 September 2020, on the basis that the majority's reasoning and conclusions in the second award, far from curing the errors in the first, further compounded them. This was because the Additional Award was said to contain conclusions that were fundamentally inconsistent with the findings of the Tribunal in the Partial Award with respect to the restrictions on the Trustee's power to make distributions out of the Trusts.

[50] On 28 July 2020, the Tribunal issued procedural order No. 12, in which it ordered "*a stay of the present proceedings pending the Supreme Court of the Bahamas' decision on the stay application before it*". The Tribunal reasoned as follows:

> "The present stay order is granted on the basis that the Respondents will proceed with the Bahamian application with expedition. Furthermore, any party may apply to the Tribunal for the lifting of the present stay at any time, including in the event of a change in circumstances. The Arbitral Tribunal may also lift the present stay at its own initiative."

The Tribunal also decided that the costs would be dealt with at the end of the arbitration.

[51] The legal and factual issues before the Tribunal were therefore numerous and complex. The pleadings ran to 335 pages and the parties filed extensive evidence from a total of 19 lay and expert witnesses. There can be no gainsaying that the Partial Award is a detailed and substantial one. The Tribunal's (or at least the majority's) reasons for making the award

occupies over 749 paragraphs and runs to 200 pages. Professor Malatesta's dissenting opinion and the Partial Award add another 28 pages.

[52] I pause here simply to observe that, whilst the conventional view is that arbitral awards are not required to be as lengthy or engage in the forensic legal analysis typical of court judgments (see *Schwebel v Schwebel* [2011] 2 AER (Comm) 1048, per Aikenhead J. [at 23]), these Awards hew far closer to the manner and style of a judgment. This might not be surprising considering that one of the members of the Tribunal is a former law lord.

[53] In fact, one of the arguments advanced by Matteo for upholding the awards is that the Tribunal not only comprehensively determined the claims on the findings and reasons advanced, but also examined (and rejected) alternative hypothetical findings which would have been favourable to the applicants. In other words, the Tribunal covered all of the bases (so to speak) and therefore there is little room to impeach any of their findings.

D. THE APPLICATIONS/APPEALS AND GROUNDS

[54] The applicants have staked numerous grounds of challenges/appeal, mainly in respect of the Partial Award, but also to the Additional Award. These are made under *all* of the available statutory gateways for a challenge and include multiple sub-grounds and complaints. These grounds were set out in three notices of motion: two by Gabriele and one by Delanson. They were supported (or resisted) by over 155 pages of evidence filed on behalf of the parties (3 affidavits of Michael Bray on behalf of Gabriele; one by Andrea Moja on behalf of Delanson; and a responsive affidavit by Emma Louise Jordan on behalf of Matteo).

Gabriele's challenges/appeals

The first challenge (Notice of Motion filed 9 July 2020)

[55] On the 9 July 2020, Gabriele filed an originating notice of motion ("the Motion") pursuant to Order 66, Rules of the Supreme Court 1978 (R.S.C. 1978) and ss. 89, 90 and 91 of the Arbitration Act 2009 ("the Act") to, *inter alia*, set aside the Partial Award of 13 June 2020, for leave to appeal to the extent necessary, and for a stay of the arbitration pending the determination of the appeal (Action No. 2020/APP/sts/00013). For convenience, this may be referred to as the "First Action". In material part, that Motion sought the following relief:

> "1. An Order pursuant to ss. 90 and/or 91 of the Arbitration Act 2009 ("the Act") setting aside and/or declaring to be of no effect and/or varying and/or remitting to the Tribunal paragraphs (1)(a), (1)(b), 1(c), 1(d), (3), (4) and (5) of the Operative Part (paragraph 749) of the Partial Award of the Tribunal in the Arbitration dated 19 June 2020 (as more particularly defined in the First Affidavit of Michael Peter Bray dated 9 July 2020 and sworn in support of this Originating Notice of Motion) and if to the extent necessary all of those parts of the said Partial Award that are set out in the reasoning of the Tribunal in support of those Operative Parts of the Partial Award.
>
> 2. To the extent necessary, leave to appeal a question of law.

> 3. Further or alternatively, a declaration pursuant to s. 89 of the Act that the Tribunal had no substantive jurisdiction to make the declaration and orders at paragraphs (1)(a), (1)(b), 1(c), 1(d), (3), (4) and (5) of the Operative part of the Partial Award and an Order declaring those paragraphs to be of no effect and/or setting them aside."

[56] The Motion sets out some 9 grounds, as well as a number of sub-grounds, all containing multiple alleged errors said to arise under ss. 89, 90 and 91. It would be necessary to reproduce the Motion in its entirety to portray the extravagant way in which the complaints are pleaded, but that would significantly (and unnecessarily) add to the length of this judgment. As a result, they are summarized below. However, I have reproduced Ground 1 one as an example of the way in which the grounds have been set forth:

> "1. The Tribunal ignored indisputable evidence regarding the proper construction of the powers of the First Respondent in its capacity as trustee of the Winter, Summer and Spring Trusts (the "Trusts") whereby it failed to comply with s. 44 of the Act within the meaning of section 90(2)(a) of the Act and/or failed to conduct the proceedings in accordance with the procedure agreed between the parties within the meaning of section 90(2) (c) of the Act and/or there is uncertainty and ambiguity as to the effect of the Partial Award within the meaning of section 90(2) (f) of the Act and/or the Appellant appeals under section 91(1) of the Act and/or the Tribunal committed an error of law against which the Applicant/Appellant appeals under section 19(1) of the Act such that paragraphs 1(c), 1 (d) (3) and (4) of the Operative Part of the Partial Award are affected by a serious irregularity which has caused and will cause substantial injustice to the Applicant/Appellant and/or are based on an error of law which should accordingly be set aside by the Court pursuant to sections 90 (3) (b) and /or 91(3)(d) of the Act and/or declared to be of no effect pursuant to section 90(3) (a) and 91(3)(c) of the Act."

The second challenge (Notice of Motion filed 23 September 2020)

[57] On 23 September 2020, Gabriele filed another originating notice of motion, *inter alia*, to set aside parts of the Additional Partial Award issued 26 August 2020 (2020/APP/sts/00018) ("the Second Action"). The material parts of that Motion sought the following Orders:

> "1. An Order pursuant to ss. 90 and 91 of the Arbitration Act 2009…setting aside and/or declaring to be of no effect and/or varying and/or remitting to a differently constituted tribunal and/or remitting to the Tribunal paragraphs 1, (3), (4), (5), (6) and (7) of the Operative Part (paragraph 749) of the Partial Award of the Tribunal in the Arbitration dated 13 June 2020 and paragraph 50(2) of the Operative part (paragraph 50) as more particularly defined in the Second Affidavit of Michael Peter Bray dated 22 September 2020 and sworn in support of this Originating Notion of Motion) and if to the extent necessary all of those parts of the said Partial Award and Additional Partial Award that set out the reasoning of the Tribunal in support of those Operative Parts of the Partial Award.
>
> 2. To the extent necessary, leave to appeal on a question of law."

[58] The sole ground of challenge arising from the Additional Partial Award was as follows:

> "(i) that there was an inconsistency between the Partial Award and the Additional Award, concerning a (purported) restriction on the scope of powers of Delanson in its

capacity of trustee of the Trusts, and/or that the purported restriction is incoherent or too uncertain to constitute a valid restriction under the Trusts so that there is ambiguity and uncertainty arising from the Partial Award and the Additional Award when read and interpreted jointly, which is challenged on the basis of serious irregularity under ss. 90(2)(a), (c) and (f), and error of law under s. 91 ("Gabriele Ground 10")."

Delanson's challenges/appeals

(Notice of Motion filed 9 July 2020)

[59] Delanson also filed a notice of motion on 9 July 2020, in very similar terms to the First Action, to *inter alia*, set aside the Partial Award of 13 June 2020, for leave to appeal pursuant to 92 (8) of the Act insofar as necessary, and for a stay of the arbitration pending the determination of the action (Action No. 2020/CLE/gen/000632). In the main, Delanson sought an Order that the Partial Award be set aside in whole or in part and declared to be of no effect.

[60] Delanson's Motion set out 5 main grounds and numerous sub-grounds, again containing multiple complaints. I set out Ground 1 as a sample.

"*Ground 1*

1. The Majority of the Tribunal found that a distribution of the entirety of the assets of the Winter, Summer and Spring Trusts settled on 28 October 2006 (the "Trusts") by the Applicant as trustee exceeded the Applicant's distributive powers under the Deeds of Trusts, such that the distribution was void and of no effect. In so construing the Applicants' distributive power:

a. The majority of the Tribunal ignored agreed and/or undisputed evidence as to (i) the wording of the Trust Deeds and (ii) the factual matrix (which matrix included a letter of wishes from the settlor dated 28 October 2006, and the predecessor structure to the Trust, being a Liechtenstein foundation). In so doing, the majority of the Tribunal (i) failed to comply with s. 44 of the Act, and (ii) failed to conduct the proceedings in accordance with the parties' implicit agreement that all relevant evidence would be considered, giving rise to a serious irregularity under s. 90(2)(1) and (c). This caused substantial injustice to the Applicant because it led directly to the finding of the majority of the Tribunal that the distribution was in breach of trust;
b. The majority of the Tribunal erred in law, the proper construction of the distributive power contained in the Trust Deeds being a question of law."

Summary of grounds

[61] I should indicate that, with minor modifications, I have been content to adopt the summary of the grounds as set forth in the skeleton argument of Matteo for the purpose of dealing with them in this judgment. As summarized there, Gabriele's complaints were fashioned out of the Tribunal's handling of the following matters:

(1) The Tribunal's construction of the scope of Delanson's powers under the Trust Deeds, which is challenged on the basis of serious irregularity under ss. 90(2) (a), (c) and (f), and error of law under s. 91 ("Gabriele Ground 1").

(2) The Tribunal's alleged failure in the Partial Award to determine Gabriele's "scope of powers rectification claim", which is challenged on the basis of serious irregularity under ss. 90(2)(a), (c), and (d) and error of law under s. 91 ("Gabriele Ground 2").

(3) The Tribunal's conclusions concerning whether the Distributions would have been void or voidable if they amounted to a fraud on a power, which is challenged on the basis of serious irregularity under ss. 90(2)(a), (c) (d) and (f), and error of law under s. 91 ("Gabriele Ground 3").

(4) The Tribunal's finding that Delanson was guilty of inadequate deliberations in deciding to make the Distributions, which is challenged on the basis of serious irregularity under ss. 90(2)(a), (c), (d) (f), and error of law under s. 92("Gabriele Ground 4").

(5) The Tribunal's conclusions as to whether the Distributions should be set aside if there had been a breach of trust or a fraud on a power, which is challenged on the basis of serious irregularity under ss. 90(a), (b) (c), d) and (f) and error of law under s. 91 ("Gabriele Ground 5").

(6) The Tribunal's decision in finding Gabriele liable in knowing receipt and a constructive trustee of assets received from the Trusts, which is challenged on the basis of serious irregularity under ss. 90(2), (a) and (c) ("Gabriele Ground 6").

(7) The Tribunal's conclusion that the Trusts were not "authorized purpose trusts" within the meaning of the Purpose Trusts Act, which is said to constitute a serious irregularity under s. 90(2) (b) and exceeding its substantive jurisdiction for the purpose of s. 89, and further erring in law, which Gabriele seeks to appeal on the basis of s. 91 ("Gabriele Ground 7").

(8) The Tribunal's determination of Gabriele's counterclaim for mistake, which is challenged on the basis of substantive jurisdiction under s. 89 ("Gabriele Ground 8");

(9) The Tribunal's treatment of the parties' Liechtenstein law expert evidence in resolving the Adiana Foundation issue, which is challenged on the basis of serious irregularity under ss. 90(2) (a) and (c) ("Gabriele Ground 9").

(10) The alleged inconsistency between the Partial Award and Additional Award and/or alleged ambiguity and uncertainty when the awards are read and interpreted jointly, which is challenged on the basis of serious irregularity under ss. 90(2)(a), (c), and (f), and error of law on the basis of s. 91 ("Gabriele Ground 10").

[62] The summary of Delanson's complaints is as follows:

(1) The Tribunal's construction of the scope of Delanson's distributive powers under the Trust Deed, which is challenged on the basis of a serious irregularity under ss. 90(2)(a) and (c), and (presumably) error of law under s. 91 ("Delanson's Ground 1").

(2) The Tribunal's conclusion that the Trusts were not "authorised purpose trusts" within the meaning of the Purpose Trust Act, advanced on the basis that the Tribunal committed a serious irregularity under s. 90(2)(b) and exceeded its substantive jurisdiction for the purposes of s. 89, and (presumably) further erring in law under s. 91 ("Delanson Ground 2").

(3) The Tribunal's finding that Delanson breached its duty of adequate deliberation in making the Distributions, which is challenged on the basis of serious irregularity under ss. 90 (2)(a), (b), and (c), and (presumably) error of law under s. 91("Delanson Ground 3").

(4) The Tribunal's finding concerning Delanson's reasons for the Distributions, which is challenged on the basis of serious irregularity under ss. 90(2) (a) (b) and (c) "Delanson Ground 4").

(5) The manner in which the Tribunal explained it would have exercised its discretion to set aside the Distributions had they been voidable and not void, which is challenged on the basis of serious irregularity under s. 90(2)(d) ("Delanson Ground 5").

[63] As is readily apparent, the grounds are multiple and wide-ranging. Between the applicants, they seek to impugn the Awards "*from top to bottom*" (as put by the Matteo) by taking every conceivable ground of challenge available under the Act. With one or two exceptions, the grounds are also overlapping, and it will be convenient to consider the applicants' grounds together. Unsurprisingly, the applications also illustrate that it will not always be clear-cut as to which statutory ground a particular issue falls under and, for example, several of the issues are said to raise issues of substantive jurisdiction, serious irregularity and error of law. In this regard, counsel for Matteo urges the court to approach these alleged errors of law with some vigilance, bearing in mind the frequent warnings in the case law as to the propensity for parties to dress up as questions of law what are unchallengeable findings of facts.

E. THE PRINCIPAL ISSUES

[64] Despite the myriad challenges set out above, the principal issues arising for the consideration of the court may be distilled to the four following issues:

(1) Whether the Tribunal lacked substantive jurisdiction (within the meaning of s. 41, and for the purposes of a challenge under s. 89) to hear the arbitration claims, either because certain matters were not submitted under the arbitration agreement, were non-arbitrable at law, or because the Trust Deeds (and the arbitration clause contained therein) were invalid (as is alleged by Gabriele).

(2) Whether properly construed, the Arbitration Act enables the Court to grant leave to appeal on a point of law, or whether it provides for such an appeal only with the consent of the parties (i.e., on an opt-in only basis).

(3) Whether the Tribunal in its conduct of the arbitration committed any serious irregularities under s. 90 (including any contraventions of the duty of fairness under s. 44) of such a kind that has caused or will cause substantial injustice to the applicants.

(4) If the court concludes that, properly construed, the Act provides for the grant of leave to appeal points of law, what is the appropriate test for the grant of leave and whether the alleged errors of law justify the intervention of the court pursuant to s. 91.

[65] Matteo contends that the challenges are far more circumscribed than as framed in the applications. He submits that, in substance, the principal concern for the court is really whether any of the grounds can sustain a challenge under s. 90 of the Act—i.e., a serious

irregularity. This is because (i) the majority of the complaints made by the applicants are said not to raise any legitimate issues going to the Tribunal's substantive jurisdiction, and (ii) on a proper construction of the Act there is no availability of an appeal on points of law under s. 91, and Matteo has not consented to the opt-in process for appeal. So, in essence, it is only the serious irregularity grounds that are engaged.

F. THE LEGAL FRAMEWORK: RELEVANT LAW AND LEGAL PRINCIPLES

[66] In this section I set out the relevant provisions of the Act and summarize the legal principles against which the issues raised in these applications/appeals are to be decided. I think it is safe to say that much of the law and the legal principles stated are non-controversial. This is because (as explained below) the Arbitration Act adopts many of the provisions that appear in the 1996 UK Arbitration Act ("the UK Act"), and there is a significant body of UK case law that has developed around the provisions of that Act and which are familiar to the parties.

[67] But this is not to say that there are not significant disagreements as to how these principles should be applied based on the facts and circumstances of this case. In addition, as has been pointed out, there are several significant areas of dispute which arise from material differences in the two Acts.

The Arbitration Act 2009

[68] The starting point is the Arbitration Act ("2009 Act"), which sets out the statutory framework for any arbitration where the seat of the arbitration is in The Bahamas. As indicated at the outset, the remit of possible challenges is set out in Part 1 of the 2009 Act under three main gateways: (i) a challenge to the "substantive jurisdiction" of the arbitral tribunal under s. 89; (ii) a challenge to an award on the grounds of serious irregularity under s. 90; and (iii) an appeal on a "question of law" arising out of the award under s. 91.

[69] It is common ground that the 2009 Act is modelled on the corresponding provisions of the UK Act. For the purposes of these challenges, it is useful to bear in mind that ss. 89, 90 and 91 correspond respectively to ss. 67, 68 and 69 of the UK 1996 Act, as frequent references will be made to the corresponding provisions in the UK Act and the case law explicating them. It is important to note further that ss. 89 and 90 are materially identical to their English counterparts. There is, however, a significant divergence between s. 91 of the Bahamian Act and s. 69 of the UK Act—the provisions relating to an appeal on a point of law. This difference is the subject of much contention and its resolution is central to the issue of whether the Act provides for leave to appeal on questions of law.

[70] It is also not in dispute that the English authorities on the 1996 Act are indicative of the correct approach under Bahamian law, a point which was recently stated by the Privy Council in *Rav Bahamas Ltd. v Therapy Beach Club Incorporated* [2021] UKPC 8 (per Lord Hamblen and Lord Burrows at para. 26]:

> "The 2009 Act is similar in structure and content to the 1996 Act and many of its provisions are materially identical. It was common ground that the policy underlying the two Acts

was similar and that it was appropriate to have regard to the English law authorities when interpreting materially identical provisions."

[71] Against that backdrop, it is useful to set out the material provisions of the Act that are relevant to the grounds of challenge and appeal raised by the appellants.

Section 89: Substantive Jurisdiction

[72] Section 89 provides:

> "**89. Challenging the award: substantive jurisdiction**
>
> **(1)** A party to arbitral proceedings may (upon notice to the other parties and the tribunal) apply to the court—
>
> (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
> (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.
>
> **(2)** The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.
>
> **(3)** On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—
> (a) confirm the award;
> (b) vary the award;
> (c) set aside the award in whole or in part.
>
> **(4)** The leave of the court is required for any appeal from a decision of the court under this section."

[73] Substantive jurisdiction is not specifically defined, but by reference to s. 41 ("*Competence of the tribunal to rule on its own jurisdiction*"), this challenge is engaged by virtue of any of the matters listed at s. 41(a) to (c), namely:

> "(a) whether there is a valid arbitration agreement;
> (b) whether the tribunal is properly constituted; and
> (c) what matters have been submitted to arbitration in accordance with the arbitration agreement."

Section 90: Serious irregularity

[74] Section 90 provides:

> "**90. Challenging the award: serious irregularity**.
>
> (1) A party to an arbitral proceeding may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

(a) failure by the tribunal to comply with section 44;
(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction);
(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
(d) failure by the tribunal to deal with all the issues that were put to it;
(e) arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
(f) uncertainty or ambiguity as to the effect of the award;
(g) the award being obtained by fraud or the award on the way in which it was procured being contrary to public policy;
(h) failure to comply with the requirements to the form of the award; or
(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—

(a) remit the ward to the tribunal, in whole or in part, for reconsideration;
(b) set the award aside in whole or in part; or
(c) declare the award to be of no effect, in whole or in part.

(4) The court shall not exercise its power to set aside or to declare an award to be of on effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(5) The leave of the court is required for any appeal from a decision of the court under this section."

[75] As section 90(2)(a) refers to failure by the tribunal to comply with certain duties enumerated at s. 44, it is convenient to set out the latter provision here:

"**44. General duty of the tribunal**

(1) The tribunal shall—
(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decision on matters of procedure and evidence and in the exercise of all powers conferred on it."

s. 91: Appeal on question of law

[76] Section 91 provides:

"**91. Appeal on point of law**

(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. And an agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An appeal shall not be brought under this section except with the agreement of all the other parties to the proceedings."

(3) On an appeal under this section the court may by order—

(a) confirm the award;

(b) vary the award;

(c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination; or

(d) set aside the award in whole or in part.

(4) The court shall not exercise its powers to set aside an award, in whole or in part, unless it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(5) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal. But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general public important or is one which for some other special reason should be considered by the Court of Appeal."

<u>The Governing legal principles</u>

The general approach

[77] Before turning to look at the case law, it is important to state the overarching principles governing the approach of the supervisory court to arbitral challenges. These foundational principles are set out at s. 3 (a-c) of the Act, namely: (a) fair and expeditious resolution of disputes by an impartial tribunal; (b) party autonomy in the arbitral process; and (c) minimal court intervention.

[78] For present purposes it is s. 3(c) which has paramountcy, because it mandates that "…*in matters governed by this Act the court should not intervene except as provided in this Act.*" This represents a philosophy, now firmly rooted in international commercial arbitration, that has been adopted and enacted in the 2009 Act. It represents a deliberate shift by Parliament to curtail the high degree of court control and review of the arbitration process and its outcomes formerly available under the old "case stated" procedure, and to promote an approach that is pro-arbitration.

[79] For example, in the *Rav Bahamas* case *(supra)* the Privy Council recently reiterated that a fundamental purpose of the 2009 Act "*was to reduce drastically the extent of intervention by the courts in the arbitral process*" (quoting *Lesotho Highlands Development Authority v. Impregilo SpA* [2006] 1 AC 221, per Lord Steyn at para. 26). Further, as classically stated by

Bingham J. in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd.* [1985] 2 EGLR 14 (the passage referred to in the opening paragraphs of this Ruling):

> "…the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it."

[80] It was little surprise, therefore, that counsel for Matteo, at various stages of the proceedings before the court, commended the minimal intervention approach as a *leitmotif* of the arbitration process. I accept that this is the approach that must generally guide the Court in dealing with the applications/appeals, and I am duty bound to pay advertence to the now firmly established principle of "compulsory judicial restraint" (as it has sometimes been called) in reviewing arbitral awards.

[81] There is another general feature of the arbitration which it was indicated I should bear in mind in considering the Awards. It was submitted by counsel for Matteo that the court should be attuned to the type and membership of the tribunal which issued the awards. In the context of this case, that redounds to a tribunal that consists of three eminent arbitrators and jurists: a retired law lord and former president of the UK Supreme Court, and two very experienced international arbitrators.

[82] I accept that the nature of the tribunal is something to be borne in mind by the court when considering challenges to an award. However, this can only be part and parcel of the general approach of the court to seek to uphold arbitration awards subject to the ability of a challenger to establish an error under any of the statutory grounds that would justify judicial intervention. I do not apprehend that the eminence or otherwise of the tribunal has any significant role to play in how the court approaches its review function. I can express the sentiment no better than the observations of Teare J in *UMS Holding Ltd. and others v. Great Station Properties SA and another* [2017] EWHC 2398 (Comm), [at 36]:

> "[36] I accept that when reading and understanding an award it is appropriate to have in mind the type of tribunal which wrote the award. However, the approach of the courts, reflecting the intention of Parliament as expressed in section 1 of the 1996 Act, which sets out the principles which underpin the Act, is to support the resolution of disputes by arbitration and not to intervene in arbitration except as provided in the Act. That is why the courts strive, as Bingham J. put it (even before the enactment of the 1996 Act) to uphold arbitration awards and so, in my judgment, the approach described by Bingham J must apply to all arbitration awards, whoever the arbitrators might be. I therefore consider that all arbitration awards should be read in a reasonable and commercial way, expecting that no substantial fault will be found with them. Consistently with this conclusion the approach of Bingham J. in the *Zermalt Holdings SA* case has been applied to awards of "three professional lawyer arbitrators" (see *ABB AG v Hochtief Airport GmbH* [2006] 1 All ER (Comm) 529, paras. 1 and 64), to an award of a retired law lord and two experienced international arbitrators (see *Fidelity Management SA v Myriad International Holdings BV* [2005] 2 All ER (comm) 312, paras 2 and 4) and to an award of a retired law lord, a retired

> US judge and a leading international arbitrator (see *Petrochemical Industries Co (KSC) v Dow Chemical Co* [2012] 2 Lloyds Rep 691, paras 2 and 27)."

[83] The *Rav Bahamas* case, to which we shall return for its modern explication of the principles relating to serious irregularity, also contains important dicta as to the interpretive approach and philosophy behind the 2009 Act. There, the Board said [at 26-28]:

> "The 2009 Act is similar in structure and content to the 1996 Act. It was common ground that the policy underlying the two acts was similar and it was appropriate to have regard to the English law authorities when interpreting the materially identical provisions. An important aim of the Acts was to be supportive of arbitration and to limit the intervention of the court. As Lord Steyn stated of the 1996 Act in *Lesotho* at paragraph 26: 'A major purpose of the new Act was to reduce drastically the extent of intervention of courts in the arbitral process. Section 90 of the 2009 Act is integral to the achievement of that purpose. Under the predecessor Arbitration Acts the courts were able to intervene and remit matters to the arbitrators on generalised grounds and in a broad category of cases."

[84] In the ensuing paragraphs, I only attempt to set out the general principles at play in respect of the various statutory grounds of challenge to establish a footing on which to consider the issues raised. It will no doubt become necessary to circle back to some of these principles in greater detail for the purpose of analysis and discussion of those issues, and further reference will be made at that time.

Section 89: Substantive jurisdiction

[85] In relation to an arbitral tribunal, the term "*substantive jurisdiction*" is defined at s. 2(1) as referring to "*the matters specified in section 41(1)(a) to (c), and references to the tribunal exceeding its substantive jurisdiction shall be construed accordingly*." The provisions of s. 41(1) have been set out above. Of the matters mentioned in that section, only "(a)" (whether there is a valid arbitration agreement) and "(c)" (what matters have been submitted under the agreement) are relevant for present purposes.

[86] It is clear that, unlike the position with challenges either based on serous irregularity or points of law, the proper approach of the court is to treat a challenge to the tribunal's jurisdiction as a *de novo* hearing of the matters that were before the arbitrators (*Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan* [2011] UKSC 46). Thus, the court is not bound by the finding of the arbitrators as to their own jurisdiction. However, as explained by Lord Mance in *Dallah*, although the "*tribunal's own view of its jurisdiction has no legal or evidential value*", this is not to say that the court will not "*examine both carefully and with interest, the reasoning and conclusion of an arbitral tribunal which has undertaken a similar examination*" [30, 31]. Further, an applicant is not confined to relying on the submissions or evidence placed before the tribunal in the arbitration on a challenge brought under s. 89.

[87] However, there is a fundamental distinction "*between a challenge that a claim was not admissible before the Arbitrators (admissibility) and a challenge that the Arbitrators had not*

jurisdiction to hear a claim (jurisdiction)…" (*The Republic of Sierra Leone v. SL Mining Limited* [2021] EWHC 286 (Comm), per Sir Michael Burton at [8]). Only the latter challenge is available to a party under s. 89 [s. 67], and therefore such a challenge can only concern a tribunal's award on substantive jurisdiction. (I will come to consider the *Republic of Sierra Leone* case in greater detail later in this judgment.)

[88] Fortunately, it did not become necessary to convene an evidential hearing for any of the s. 89 challenges. I accept the submission of counsel for Matteo that, in the main, the challenge to substantive jurisdiction turns largely (if not exclusively) on questions of law and do not involve any issues of fact (e.g., the APT question and the construction of the Trust Deed). However, the applicants did, very late in the proceedings, file additional affidavit evidence containing the witness statements of several witnesses in the Arbitration for the purpose of hearing the purported s. 89 challenge, and the invitation to the court to determine Gabriele's mistake claim afresh. Matteo described these filings as a "*belated and unauthorized affidavits at the 11th hour without leave or consent in support of this illegitimate challenge*." For reasons which are explained below, it did not become necessary (nor would it have been appropriate) for the court to have embarked on an evidential hearing in aid of this challenge.

Preconditions to making a challenge on the grounds of lack of substantive jurisdiction

[89] Importantly, there are a number of onerous preconditions that have to be satisfied prior to raising a jurisdictional challenge (some of which equally apply to challenges under other grounds, see further below). These include observance of the applicable time limits under the Act, lack of waiver by the objector, and a requirement that the jurisdictional grounds must have been raised before the arbitrators. For example, s. 42(2) requires that an objection raised by a party that the tribunal lacks substantive jurisdiction must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits. Also, by s. 95(1), if a party takes part in the proceedings without raising the objection to substantive jurisdiction, he may not raise that objection unless he is able to demonstrate that at the time he did not know and could not with reasonable diligence have discovered the grounds for the objection. (Section 95 is set out in full later in this judgment.)

[90] These provisions are designed to promote "openness and fair dealing" between the parties and to prevent a party sitting on a potential jurisdictional objection if the arbitration does not go his way. In *Hussman (Europe) v. Al Ameen Development & Trade Co*. [2000] 2 Lloyd's Rep 83, Thomas J said at [21], that the provisions were:

> "…to ensure that a party does not keep a point 'up his sleeve' and wait and see what happens while considerable expense is incurred. A party cannot be allowed to take part in proceedings and then challenge the award if he is dissatisfied with it on the basis of a point about which he knows or ought with reasonable diligence to have discovered.".

To similar effect, in *Konkola Copper Mines plc v U&M Mining Zambia Ltd.* [2014] EWHC 2374 (Comm), Cooke J. confirmed (in the context of s. 67 of the UK Act) [s. 89 of the 2009 Act]) that [at 12]:

> "As has been stated previously by this Court, the principle of openness and fair dealing between the parties to an arbitration demand not merely that if jurisdiction is to be challenged under section 67, the issue as to jurisdiction must normally have been raised at least on some grounds before the arbitrator if it is to be raised under a section 67 application challenging the award."

Section 90: Serious irregularity

[91] The provisions of the Act dealing with serious irregularity have been set out above. Here, I summarize both the general approach and condescend to some of the specific principles applicable to the sub-paragraphs of s. 90(2). This is necessary, as the applicants rely on *all* of the sub-grounds in their challenges to the awards. Those paragraphs enumerate specific circumstances in which a complaint of serious irregularity might arise:

(a) breach of the general duty enshrined in s. 44;
(b) excess of powers by the Tribunal;
(c) breach of agreed procedures;
(d) failure to deal with all the issues put to it; and
(e) uncertainty or ambiguity in the award.

The general approach

[92] Among the leading cases on serious irregularity is the decision of Akenhead J in *Secretary of State for the Home Department v. Raytheon Systems Ltd.* [2014] EWHC 4375 (the "*Raytheon case*") and the modern restatement of the principles by the Privy Council in the *Rav Bahamas* case from this jurisdiction, in which the Board expressly endorsed the observations of Akenhead J. In the *Raytheon* case, Akenhead J, dealing with a challenge under s. 68(2)(d) of the UK 1996 Act [90(2)(d)] (failure by the tribunal to deal with all of the issues put to it) summarized the general approach to applications under s. 68 as follows [at para. 33]:

> "(a) Section 68 reflects 'the internationally accepted view that the court should be able to correct serious failures to comply with the "due process" of arbitral proceedings: cf. art. 34 of the Model Law." (see *Lesotho Highlands Development Authority v Ipregilo SpA* [2005] UKHL 43, Paragraph 27): relief under Section 68 will only be appropriate only where the tribunal has gone so wrong in the conduct of the arbitration that "justice calls out for it to be corrected." (ibid)
>
> (b) The test will not be applied by reference to what would have happened if the matter had been litigated (see *ABB v Hochtief Airport* [2006] 2 Lloyd's Ret paragraph 18).
>
> (c) The serious irregularity requirement sets a "high threshold" and the requirement that the serious irregularity has caused or will cause substantial injustice to the applicant is designed to eliminate technical and unmeritorious challenges (Lesotho, paragraph 28).;
>
> (d) The focus of the enquiry under section 68 is due process and not the correctness of the Tribunal's decision (*Sonatrach v Statoil Natural Gas* [2014] 2 Lloyds Rep 252, paragraph 11).

> (e) Section 68 should not be used to circumvent the prohibition or limitation of appeals on law or of appeals on points of fact (see, for example, *Magdalena Oldendorff* [2008] 1 Lloyd's Rep 7, paragraph 38, and *Sonatrach* Paragraph 45).
>
> (f) Whilst arbitrators should deal at least concisely with all essential issues (*Ascot Commodities NV v Olam International Ltd.* [2002] CLC 277 Toulson J at 28-4D), courts should strive to uphold arbitral awards (*Zermalt Holdings SA v Nu Life Upholstery Repairs Ltd.* [1985] 2 EGLR 14 at page 15, Bingham J. quoted with approval in 2005 in the *Fidelity Case* [2005] 2 Lloyd's Rep 508 paragraph 2) and should not approach awards "*with a meticulous legal eye endeavoring to pick holes, inconsistencies and fault on awards with the objective of upsetting or frustrating the process of arbitration*."

[93] In the *Rav Bahamas Case*, the Privy Council elaborated on the concept of substantial injustice by reference to the UK Departmental Advisory Committee ("DAC") on Arbitration Law Report as follows:

> 28. …Under section 90, such intervention is only possible where there is a serious irregularity, which means an irregularity of one or more of the kinds listed in section 90 and 'which the court considers has caused or will cause substantial injustice.
> [...]
>
> 30. As explained in the 1996 Report on the Arbitration Bill (which became the 1996 Act) of the Departmental Advisory Committee on Arbitration law ('the DAC'), the test of serious irregularity was intended to limit intervention to "extreme" cases where it could be said that the "tribunal got it so wrong in its conduct of the arbitration that justice calls out for it to be corrected". As set out in paragraph 280 of the DAC Report:
>
> > 'Irregularities stand on a different footing. Here we consider it appropriate, indeed essential, that these have to pass the test of causing 'substantial injustice' before the court can act. The court does not have a general supervisory jurisdiction over arbitrations. We have listed the specific case where a challenge can be made under this clause. The test of 'substantial injustice' is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that *what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action*. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice. In short, Clause 68 is really designed as *a long stop, available only in extreme cases where the Tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected*.'

s.90(2)(a): breach of general duty enshrined in s. 44

[94] Section 44 (which is modelled on s. 33 of the English Arbitration Act) is reproduced above, and there is no need to repeat it. But in summary, the tribunal's duty is to give each party "*a reasonable opportunity of putting his case and dealing with that of his opponent*" and "*to adopt*

procedures…to provide for a fair resolution of the matters…to be determined". This duty applies overall to the tribunal's conduct of the arbitration, its decision on matters relating to procedure and evidence, and the exercise of all other powers.

[95] It has oft been stressed that s. 44 is "*concerned with ensuring due process and not with whether the [tribunal] reached the right conclusion, whether as a matter of fact or law*" (*SCM Financial Overseas Ltd. v Raga Establishment Ltd.* [2018] EWHC 1008 (Comm) at [53]; *UMS Holding v Great Station Properties SA* [2017] 2 Lloyds's Rep 421 at [28]).

[96] Consequently, the threshold for invoking serious irregularity giving rise to substantial injustice is very high: *Rav Bahamas* [at 31]; *Terna Bahrain Holding Company v Al Shamsi* [2012] EWHC 3283 (Comm) [at 85]. In the latter case, Popplewell J (as he then was) stated:

> "(2) The test of serious irregularity giving rise to substantial injustice involves a high threshold. The threshold is deliberately high because a major purpose of the 1996 Act was to reduce drastically the extent of intervention by the courts in the arbitral process.
>
> (3) A balance has to be drawn between the need for finality of the award and the need to protect parties against the unfair conduct of the arbitration. In striking this balance, only an extreme case will justify the court's intervention. Relief under section 68 will only be appropriate where the tribunal has gone so wrong in its conduct of the arbitration, and where its conduct is so far removed from what could be reasonably expected from the arbitral process, that justice calls out for it to be corrected.
>
> (4) There will generally be a breach of section 33 where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. If the tribunal thinks that the parties have missed the real point, which has not been raised as an issue, it must warn the parties and give them an opportunity to address the point.
>
> (5) There is, however, an important distinction between, on the one hand, a party having no opportunity to address a point, or his opponent's case, and on the other hand, a party failing to recognise or take the opportunity which exists. The latter will not involve a breach of section 33 or a serious irregularity."

[97] The case law provides several examples of where applications under 68(2)(a) [or 90(2)(a)] have succeeded (see, *Rav Bahamas*, for example, where the tribunal's failure to consider the possibility of the claimant's entitlement to renew the lease for a further three years in calculating the quantum of damages was held to be a serious irregularity). However, it is clearly impossible to come up with any list of circumstances in which such applications are likely to succeed. The question of whether a tribunal has breached its duty is objective and will depend on the particular circumstances of each case.

[98] In this regard, it now seems to be settled law that an allegation that the tribunal has overlooked evidence, or its treatment of evidence, cannot properly form the basis of a challenge to an award, even though a few decisions of the English Commercial Court have suggested that challenges under this head (s. 68(2)(a)) might lie in an exceptional case, such as where the tribunal had overlooked important evidence. However, the decision of Teare J in *UMS*

Holding v. Great Station (*supra*), after a detailed review of the authorities on the point, remains the classic statement of English law on the point [at 28]:

> "…A contention that the tribunal has ignored or failed to have regard to evidence relied upon by one of the parties cannot be the subject matter of an allegation of a serious irregularity within section 68(2) (a) or (d) for several reasons.
>
> First, the tribunal's duty is to decide the essential issues put to if for decision and to give its reasons for doing so. It does not have to deal in its reasons with each point made by a party in relation to those essential issues or refer to all the relevant evidence.
>
> Second, the assessment and evaluation of such evidence is a matter exclusively for the tribunal. The court has no role in that regard.
>
> Third, where a tribunal in its reasons had nor referred to a piece of evidence which one party says is crucial the tribunal may have (i) considered it, but regarded it as not determinative, (ii) considered it, but assessed it as coming from an unreliable source, (iii) considered it, but misunderstood it or (v) overlooked it. There may be other possibilities. Were the court to seek to determine why the tribunal had not referred to certain evidence it would have to consider the entirety of the evidence which was before the tribunal and which was relevant to the decision under challenge. Such evidence would include not only the documentary evidence but also the transcripts of factual and expert evidence. Such an enquiry (in addition to being lengthy, as it certainly would be in the present case) would be an impermissible exercise for the court to undertake because it is the tribunal, not the court, that assesses the evidence adduced by the parties. Further, for the court to decide that the tribunal had overlooked certain evidence, the court would have to conclude that the only inference to be drawn from the tribunal's failure to mention such evidence was that the tribunal had overlooked it. But the tribunal may have had a different view of the importance, relevance or reliability of the evidence from that of the court and do the required inference cannot be drawn."

s. 90(2)(b): excess of power by the tribunal [s. 68(2)(b)]

[99] By the explicit reference to a tribunal exceeding its power "*otherwise than by exceeding its substantive jurisdiction*", section 90(2)(b) makes it clear that this kind of irregularity is concerned with when a tribunal acts outside of the four corners of its legal or arbitral remit, i.e., the arbitration agreement, terms of reference, or the Act itself. It does not permit a challenge based on a claim that the tribunal arrived at the wrong conclusion of fact or law, or that its reasoning was unsatisfactory, if the tribunal exercised (even though erroneously) power which it did have.

[100] In the leading UK case of *Lesotho Highland Development Authority v. Impregilo SpA* [2005] UKHL 1 AC 221 (House of Lords), Lord Steyn explained the position in these terms:

> "By its very terms section 68(2)(b) assumes that the tribunal acted within its substantive jurisdiction. It is aimed at the tribunal exceeding its powers under the arbitration agreement, terms of reference or the 1996 Act. Section 68(2)(b) does not permit a challenge on the ground that the tribunal arrived at a wrong conclusion of law or fact. It is not apt to cover a mere error of law. […]

> In order to decide whether section 68(2)(b) is engaged, it will be necessary to focus intensely on the particular power under an arbitration agreement, the terms of reference, or the 1996 Act which is involved. In making this general observation, it must always be borne in mind that the erroneous exercise of an available power cannot itself amount to an excess of power. A mere error of law cannot by itself amount to an excess of power under section 68(2)9(b)."

[101] As further explained by Cooke J. in *New Age Alzarooni 2 Ltd. v Range Energy Natural Resources* [2014] EWHC 4358 [at 15]:

> "[T]he assertion that a Tribunal has made orders that it should not have made, where based on the Arbitrator's findings of fact, holdings of law or the reasoning advanced by them do not fall within Section 68(2)(b). […] Section 68 (2) (b) is only engaged where there is no power at all under the Arbitration Agreement, the terms of reference or the 1996 Act to do what the Arbitrators did."

[102] Perhaps the distinction between the kinds of excess of power that s. 68 (2)(b) is aimed at is best drawn out by an example of where such a claim succeeded, such as was the circumstances in *CNH Global NV v PGN Logistics* [2009] EWHC 977 (Comm). In that case, the court found that the tribunal had jurisdiction (so it was not a case of lack of substantive jurisdiction under s. 67 of the English Act), but that the claim came within 68(2) (b) because the arbitrators sought to correct an award in circumstances where they had no power of correction. As said by Burton J [at 31]:

> "It was not the kind of exercise which is referred to by Lord Steyn in Lesotho. In Lesotho, on a proper construction, the arbitrators simply went wrong within their powers to award damages and/or interest, and got it wrong by reference to the terms of the contract or otherwise. In this case, the arbitrators simply did not have the power to correct at all. In my judgment there was consequently an irregularity failing within section s.68(2)(b). It was an irregularity which was serious in its effect, because it had the result of transferring a position which in which the Claimant did not have to pay a figure of between £1.5 million and £3 million into one in which they did."

s. 90(2)(c): breach of agreed procedures

[103] This sub-section gives effect to one of the guiding principles of the Act, which is party autonomy, and may be invoked where the tribunal fails to "*conduct the proceedings in accordance with the procedure agreed by the parties*". It is not surprising that there are few cases founded principally on this ground, since it can scarcely be doubted that tribunals will be astute to abide by the procedure adopted by the parties.

[104] A rare example is provided by *Newfield Construction Ltd. v Tomlinson* [2004] EWHC 3051, where the arbitrator failed to deal with costs in accordance with the procedure agreed by the parties, but instead decided the issue by reference to other documents which the pleadings expressly contradicted.

[105] However, where the issue is the interpretation of an agreement which the parties have made as to the conduct of the arbitration, the court will be reluctant to interfere with the tribunal's

construction of that agreement (*Secretary of State for Defence v Turner Estate Solutions Ltd.* [2014] EWHC 244).

s. 90(2)(d) failure to deal with all the issues put to it

[106] Challenges under this head, although it is a frequent ground of challenge (either by itself or often overlapping with s. 90(2)(a)), are "…*engaged only when there is a failure to deal with a 'fundamental issue', which generally means an issue the determination of which is essential to the decision of the claims or specific defence raised*" (A v B [2017] EWHC 596 (Comm)).

[107] Much of the law relating to a challenge under 90(2)(d) [68(2)(d)] was explained in the *Rav Bahamas* case by the Privy Council, restating and building on the earlier exposition of Akenhead J. in *Raytheon (No. 1)* (*supra*). Again, it is useful to set out the passage in some detail, as it merits careful study [at paras. 38-44]:

> "38. […] Section 90(2)(d) can be broken down into three questions. What is an issue? Has the issue been put to the arbitrators? Have the arbitrators failed to deal with it.
>
> 39. As regards all three questions the relevant authorities, on the equivalent section (section 68(2)(d)) in the Arbitration Act 1996), were helpfully drawn together and summarized by Akenhead J in *Secretary of State for the Home Department v. Raytheon (No. 1)* at para. 33(g).
>
> 40. In relation to the first question of what is an issue, Akenhead J. said the following in para 33(g):
>
> '(ii) There is a distinction to be drawn between 'issues' on the one hand and 'arguments', 'points', 'lines of reasoning or 'steps' in an argument, although it can be difficult to decide quite where the line demarking issues from arguments falls. However, the authorities demonstrate a consistent concern that this question is approached so as to maintain a 'high threshold' that has been said to be required for establishing a serious irregularity (*Petrochemical Industries v. Dow* [2012] 2 Lloyd's Rep 691, para 15; *Primera v. Jiangsu* [2014] 1 Lloyd's Rep 255, para 7).
>
> (iii) While there is no expressed statutory requirement that the section 68(2)(d) issue must be 'essential', 'key' or 'crucial', a matter will constitute an 'issue' where the whole of the applicant's claim would have depended upon how it was resolved, such that 'fairness demanded' that the question be dealt with (*Petrochemical Industries*, at para. 21).
>
> (iv) However, there will be a failure to deal with an 'issue' where the determination of that 'issue' is essential to the decision reached in the award (*World Trade Corpn. v C. Czarnikow Sugar Ltd.* [2005] 1 Lloyd's Rep 422 at para. 16). An essential issue arises in this context where the decision cannot be justified as a particular key issue has not been decided which is critical to the result and there has not been a decision on all of the issues necessary to resolve the dispute or disputes (*Weldon Plan Ltd. v The Commission for the New Towns* [2000] BLR 496 at para. 21.

41. While one must be astute to avoid '*definitional gloss [es] upon the statute*' (see Andrew Smith J in Petrochemical Industries Co (KSC) v. Dow Chemical Co [2012] EWHC 2739 (Comm), [2012] 2 Lloyds Rep 691, at para 16), one here sees Akenhead J usefully distinguishing between issues and arguments; and making clear that the arbitrators should deal with an issue that is essential or crucial to the determination of a claim or defense upon which the resolution of the dispute or disputes depends, such hat fairness demanded that the issue be dealt with.

42. Turning to whether the issue has been 'put to' the arbitrators, Akenhead J continued in para 33(g) of the Raytheon case as follows:

> '(v) The issue must have been put to the tribunal as an issue and in the same terms as is complained about in the section 68(2) application (Primera at paras 12 and 17).'

There is a degree of overlap between the considerations relevant to whether there is an 'issue' and whether it has been 'put to' to the tribunal. It is clear that this does not require the issue to have been pleaded or included in a list of issues. It is necessary to consider the arbitration proceedings as a whole, including the pleadings and the written and oral submissions. Having done so, in general, what is required is that the tribunal's attention has been sufficiently clearly drawn to the issue, as one which it is required to determine that it would reasonably be expected to deal with it.

43. Finally, as regards whether the arbitrators have failed to deal with the issue, Akenhead J continued in the following ways:

> '(vi) if the tribunal has dealt with the issue in any way, section 68(2) (d) is inapplicable and that is the end of the enquiry (Primera at paras 40-41); it does not matter for the purposes of section 68(2)(d) that the tribunal has dealt with it well, badly, or indifferently.
>
> (vii) It matters not that the tribunal might have done things differently or expressed its conclusions on the essential issues at greater length (Latvian shipping v. Russian People's Insurance Co [2012] 2 Lloyd's Rep 181, para 30).
>
> (viii) A failure to provide any or any sufficient reasons for the decision is not the same as failing to deal with an issue (Fidelity Management v. Myriad International [2005] 2 Llyod's Rep 508. Para 10, World Trade Corporation, para 19). A failure by a tribunal to set out each step by a party which they reach its conclusion or deal with each point made by a party is not a failure to deal with an issue that was put to it (Hussman v. Al Amen (200) 2 Lloyd's Rep 83).
>
> (ix) There is not a failure to deal with an issue where arbitrators have misdirected themselves on the facts or drew from the primary facts unjustified inferences (World Trade Corpn at para 45). The fact that the reasoning is wrong does not as such ground a complaint under section 68(2)(d) (Petro Ranger [2001] 2 Lloyd's Rep 348, Atkins v. Secretary of State for Transport [2013] EWHC 139 (TCC), para 24).

(x) A tribunal does not fail to deal with issues if it does not answer every question that qualifies as an 'issue'. It can 'deal with' an issue where that issue does not arise in view of its decisions on the facts or its legal conclusions, A tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise (Petrochemical Industries a para 27). If the tribunal decides all those issues put to it that were essential to be dealt with for the tribunal to come fairly to its decision on the dispute or disputes between the parties, it will have dealt with all the issues (Buyuk Camlica Shipping Trading & Industry Co Inc v. Progress Bulk Carries Ltd [2010] EWHC 442 (Comm), para 30).

(xi) It is up to the tribunal how to structure an award and how to address the essential issues; if the issue does not arise because of the route the tribunal has followed for the purpose of arriving at its conclusion, section 68(2)(d) will not be engaged. However, if the issue does arise by virtue of the route the tribunal has followed for the purposes of arriving at its conclusion, section 68(2)(d) will be engaged.

(xii) Whether there has been a failure by the tribunal to deal with an essential issue involves a matter of a fair, commercial, and commonsense reading (as opposed to a hypercritical or excessively syntactical reading) of the award in question in the factual context of what was argued or put to the tribunal by the parties (and where appropriate the evidence) (Ascot Commodities v. Olam [2002] CLC 277 and Atkins, para 36). The court can consider the pleadings and the written and oral submissions of the parties to the tribunal in this regard.'

44. One can therefore here see Akenhead J helpfully clarifying that, while the arbitrators must deal with an issue, it does not matter for these purposes that they have dealt with the issue badly; and that a court must be very careful not to be hypercritical in determining whether the issue has been dealt with by the arbitrators."

[108] Importantly, a challenge under this ground is not concerned with an alleged failure to arrive at the right answer. In the *World Trade Corp*. case (*supra*), Colman J. quoted with approval a passage from *Weldon Plant v. Commission for New Towns* [2001] 1 All ER (Comm), where HH Judge Humphrey Lloyd, Q.C., observed (p. 279 of that ruling) [at 16 of *World Trade*]:

> "Similarly, s. 68(2)(d) of the 1996 Act is not to be used as a means of launching a detailed inquiry into the manner in which the tribunal considered the various issues. It is concerned with a failure, that is to say where the arbitral tribunal has not dealt with the case of a party so that substantial injustice has resulted, e.g., where a claim has been overlooked, or where the decision cannot be justified as a particular key issue has not been decided which is crucial to the result. It is not concerned with a failure on the part of the tribunal to arrive at the right answer to an issue. In the former instance the tribunal has not done what it was asked to do, namely to give the parties a decision on all the issues necessary to resolve the dispute or disputes (which does not of course mean decisions on all the issues that were ventilated but only those required for the award). In the latter instance, the tribunal will have done what it was asked to do (or will have purported to do so) but its decision or reasoning may be wrong or flawed. The arbitral tribunal may therefore have failed to deal properly with the issues but it will not have failed to deal with them."

s.90 (2) (f) uncertainty or ambiguity of award

[109] Challenges under this ground are aimed at correcting any uncertainty or ambiguity that makes the *effect* of the award uncertain to the parties, not any of its reasoning. As explained in a leading commentary on the subject ("*The UNCITRAL Arbitration Rules: A Commentary* (2nd edn, 2013"):

> "Unfortunately, the terms of an award may be written unclearly, obscuring the arbitral tribunal's decision on the claims presented by the parties. Article 37 of the UNCITRAL Rules establishes a procedure whereby a disputing party may request the arbitral tribunal to provide an interpretation of a previously rendered award." [Underlining supplied.]

[110] Such challenges are rare, however, because alleging uncertainty with respect to the "effect" of the award (with which s. 90(2)(f) is concerned), can only be brought if the applicant has first sought to remit the award back to the tribunal under s. 79(3) [s. 57], or any other agreed process of review to have the reward corrected.

[111] Article 37 of the 2010 UNCITRAL Rules provides:

> "Interpretation of the award"
>
> 1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request that the arbitral tribunal give an interpretation of the award.
> 2. The interpretation shall be given in writing within 45 days after receipt of the request. The interpretation shall form part of the award and the provisions of article 34, paragraphs 2 to 6, shall apply."

[112] Section 79(3) of the Act provides that:

> "The Tribunal may on its own initiative or on the application of a party—
>
> (a) Correct an award so as to remove any clerical mistake or error arising from an incidental slip or omission or clarify or remove any ambiguity in the award […]

[113] The availability of this ground is subject to the provisions of s. 92(2) of the Act, which provide as follows:

> "(2) An application or appeal [under ss. 89, 90, or 91] may not be brought if the applicant or appellant has not first exhausted—
> (a) any available arbitral process of appeal or review; and
> (b) any available recourse under section 79."

[114] Failure to exhaust any available recourse with respect to a potential ground of challenge under s. 79 operates as a procedural bar to a subsequent application based on that ground (*Torch Offshore LLC v. Cable Shipping Inc* [2004] EWHC 787 (Comm)).

General principles applying to challenges: s. 95, and requirement for substantial injustice

s. 95: Loss of the right to object to an award

[115] Section 95 of the Act erects another hurdle to pursuing a challenge based on irregularity (which applies equally to challenges based on alleged lack of substantive jurisdiction). This is that a party is estopped from raising any objections that the proceedings have been improperly conducted or that there has been any other irregularity affecting the proceedings if he did not make any objection to the tribunal, unless he did not know or could not with reasonable diligence discover the ground of objection at the time.

[116] Section 95 provides in material part:

> "(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or by any provision of this Act and objection—
>
> (a) that the tribunal lacks substantive jurisdiction;
> (b) that the proceedings have been improperly conducted;
> (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Act; or
> (d) that there has been any other irregularity affecting the tribunal or the proceedings,
>
> he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

[117] An example of the application of s. 95 is provided in *New Age Alzarooni 2 v Range Energy Natural Resources* [2014] EWHC 4358, where a party challenged orders that the tribunal made on a number of substantive grounds. However, it failed to raise any issues of uncertainty or ambiguity or excess of jurisdiction until the court proceedings. As Cooke J said [at para. 17, 30]:

> "In the present case, New Age 2 and Black Gold put forward arguments objecting to the orders which were ultimately made by the Tribunal, but which reflected the orders sought by Range in the Arbitration. New Age 2 and Black Gold were fully aware of the relief that Range was seeking throughout the Arbitration and opposed them on a number of different grounds but raised no objection on the basis of those which are not put forward. It was never suggested that they lacked the power to do what it was they were being asked to do nor that there was any uncertainty or ambiguity in what was proposed. New Age 2 and Black Gold knew exactly what it was that was being sought by Range but never suggested that the Arbitrators would be acting beyond their powers in making the orders sought. They resisted granting the granting of the orders on substantive grounds only, founding themselves on arguments of construction, arguments of law and arguments based on the fact as they contended them to be. […]

> In these circumstances this is a paradigm case for the operation of Section 73 and Section 70(2) of the Act. Each of the orders were specifically sought and known to be sought during the course of the arbitration, though sometimes in wider terms than that given and was the subject of submissions by the parties, without any objection being raised by New Age 2 of Black Gold on the basis that the Arbitrators had no power to make such orders. […]."

The requirement for substantial injustice

[118] It is settled law, and the issues have been restated and expounded by the Privy Council in *Rav Bahamas,* that an irregularity by itself, even if established, is not sufficient to grant any remedy under the Act. It must also have caused or will cause substantial injustice to a party [at 33]:

> "Even if a case is shown to fall within one or more of the kinds of irregularities listed in section 90 this will only amount to a serious irregularity if the court considers that it 'has caused or will cause substantial injustice'. This means more than some injustice."

Continuing, their Lordships stated that "…[*i*]*n general, there will, however, be no substantial injustice if it can be shown that the outcome of the arbitration would have been the same regardless of the irregularity*" [at 37].

[119] The Privy Council also very helpfully clarified that s. 90 does not always require an express allegation. Some irregularities were so serious that substantial injustice could be inferred from the nature of the irregularity—as was the case on the facts of *Rav Bahamas.*

<u>*Serious irregularity*</u>

[120] Weaving together the statutory provisions and case law discussed above, the general legal principles pertaining to serious irregularity are as follows:

(i) Section 90 sets out a "*closed list of irregularities*", including the duty of general fairness under s. 44, on which the court cannot expand. However, the categories are broad enough to capture any number of factual and legal situations.

(ii) A successful claim of serious irregularity under s. 90 requires an applicant to satisfy a two-tier test: firstly, that there was an irregularity of the kind mentioned under 90(2); and secondly, that the irregularity has caused or will cause substantial injustice to the party making the claim.

(iii) Substantial injustice is not defined by the Act. However, guidance provided by the DAC Report and case law indicate that judicial intervention on this basis is only permissible in extreme cases of procedural default, i.e., where "*what happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the Court to take action*" or "*…where the Tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected*." There will be no substantial injustice where the outcome of the arbitration might well have been the same regardless of the irregularity.

(iv) There are some species of irregularity that are so serious that substantial injustice may be inferred from the nature of the irregularity, even if the pleadings do not expressly refer to the matter as such.

(v) The test for serious irregularity imposes a high threshold, in keeping with the purpose of the Act to limit judicial intervention and promote party autonomy and finality of the awards.

(vi) The focus is on due process and not the correctness (or otherwise) of the decision.

(vii) A party may lose the right to complain about serious irregularity to a court if he was aware of a serious irregularity affecting the tribunal or proceedings and did not object during the arbitration.

Section 91: Appeal on Question of Law

Principles

[121] As seen below, the approach to a s. 91 application is bound up in the issue of whether the Act, properly construed, provides for the court to grant leave to appeal. If leave to appeal is available, and the court decides it should be granted—which itself begs the question of the applicable principles for the grant of leave, since none are included in the Act—then the approach to consideration of the legal issues is likely guided by the principles set out by the UK Court of Appeal in *MRI Trading AG v Erdenet Mining Corpn LLC* [2013] 1 Lloyd's Rep 638:

(i) First, the English approach (which is likely to be apposite here) is to strive to uphold the award (Par. 23, Per Tomlinson, J).

(ii) Second, in order to give effect to the first, the court should read an arbitration award in a "*reasonable and commercial way*", not with a view to finding faults and inconsistencies (as per the approach suggested by Bingham J. in *Zermalt Holdings SA* (*supra*)).

(iii) Thirdly, any uncertainty will be resolved in favour of upholding the award.

[122] These principles basically align with the non-intervention philosophy of the Act stated at s. 3.

[123] For reasons that will emerge, I do not think it is necessary to set out here any of the principles relating to leave to appeal as applied under the provisions of the UK Act, or at common law, prior to the Court's determination of the issue of whether in fact leave to appeal a point of law is available.

G: THE SECTION 89 CHALLENGES: LACK OF SUBSTANTIVE JURISDICTION

Gabriele's Ground 7, 8; Delanson's Ground 2

[124] This section deals with the challenges to the Award which are said to be based on the Tribunal's lack of substantive jurisdiction.

[125] They arise from two main issues. The first is the conclusion by the Tribunal that the Trusts were not "authorized purpose trusts" ("APTs") within the meaning of the Purpose Trust Act 2004 (the "PTA"). Both Delanson and Gabriele contend that the trusts were APTs, with the consequence that Matteo would have needed to apply to the court for a declaration authorizing him to commence the proceedings under s. 6 of the PTA. These issues are captured by Gabriele's *Ground 7* and Delanson's *Ground 2* and are brought pursuant to ss. 90 and 91.

[126] The second is the challenge to the Tribunal's determination that it had substantive jurisdiction to determine Gabriele's counterclaim for mistake, based on its construction of cls. 26 and 27 of the Trust Deeds (the arbitration provisions). Gabriele claims this was non-arbitrable, because it was a controversy regarding the validity of the Trusts, which he contends falls outside of the scope of the arbitration clauses.

[127] One of one of the peculiarities of this challenge is that it arises, not in response to any claim made by Matteo, but on Gabriele's (counter) claim before the Tribunal. It is subsumed under *Ground 8* of Gabriele's grounds and was made without prejudice to Gabriele's further argument that the court should be invited (and has power) to itself set aside the Trust for mistake. The presumed s. 89 basis for the second limb of this claim—which Matteo describes as the "*illegitimate jurisdictional challenge*"—is that, if the court were to set aside the Trusts for mistake, the Trust Deeds and therefore the arbitration clauses contained therein would be void. Consequently, the Tribunal would have lacked substantive jurisdiction to hear the mistake claim and, for that matter, the entire arbitration claim.

[128] The APT issues were only addressed briefly by Mr. Black in oral submissions, as full written and oral submissions were made on behalf of Delanson by Mr. Simms pursuant to the parties' division of labour. The thrust of Gabriele's skeleton arguments under the s. 89 issue is directed to the arbitrability of his *mistake* counterclaim and the parasitic argument inviting the court to determine the issue itself (Matteo's "*illegitimate jurisdiction claim*").

[129] I will deal with each of the arguments to jurisdiction in turn.

A. <u>The APT issue (Gabriele's Ground 7, Delanson's Ground 2)</u>

[130] As mentioned, the applicants challenged the Tribunal's finding that the Trusts were not APTs under ss. 89, 90 and 91. At this juncture, the Court is only concerned with the s. 89 challenge; the s. 90 and s. 91 challenges are dealt with later in this judgment.

[131] At paras 406-408, the Tribunal recorded its finding on the APT issue as follows:

> "[T]he Tribunal finds that there is a lack of certainty of intention on behalf of the Settlor to have wanted to create authorised purpose trusts. Not only do the Trust Deeds not expressly state that the trust are authorized purpose trusts, but the terms of the said instruments are also consistent with the creation of discretionary trusts established for the benefit of a class of objects/beneficiaries to whom the Trustee had a discretion to apply trust capital or income.

Indeed, based on Clauses 6, 7, 22, 23 and 24 of the Trust Deeds and following *Sutton v Fedorowsky* [2000] BHS J. no. 36, the Tribunal finds that the fact that the Trust included a specified perpetuity clause, the specification of designated beneficiaries, and the ability to designate specific beneficiaries is dispositive evidence that the Trusts are not purpose trusts but rather are valid trust for ascertainable human beneficiaries.

As a result of the above, the Tribunal is convinced that the Claimant has standing to bring his claims and that the proceedings are validly brought since (i) a purpose trust is a trust for the benefit of advancement of an abstract purpose, rather than for the benefit of beneficiaries, and (ii) the present Trusts have been created for the benefit of specific beneficiaries and are thus standard trusts, giving the beneficiaries standing to advance a claim."

Material provisions of the Purpose Trust Act 2004 ("PTA")

[132] I set out below the relevant provisions of the PTA:

s. 2(1): [Definitions]

"authorised purpose trust', 'authorised purpose' and 'authorised purposes' have the meanings assigned by subsection (2) of section 3.
'ordinary trust' means a trust that is not an authorised purpose trust'

"3. (1) A trust may be declared by trust instrument for a non-charitable purpose, including, exclusively or otherwise, the purpose of holding, or investing in shares in a company or any other assets constituting the trust property if—

(a) the purpose is possible and sufficiently certain to allow the trust to be carried out;
(b) the purpose is not contrary to public policy or unlawful under the laws of The Bahamas;
(c) the trust instrument specifies the event upon the happening of which the trust instrument terminates and provides for the disposition of surplus assets of the trust upon its termination.

(2) In this Act, a trust satisfying the conditions in subsection (1) is referred to as an 'authorised purpose trust', the purpose of an authorised purpose trust is referred to as an 'authorised purpose' and 'authorised purposes' is to be construed accordingly.

(6) The trust instrument may create an authorised purpose trust of capital or income of any property which may have—
(a) a fixed interest;
(b) a discretionary interest; or
(c) any combination of a fixed or discretionary interest as mentioned in (a) and (b).

(3A) The capital or income of the authorized purpose trust referred to in subsection (3) may be disposed of in the following manner—
(a) to persons who may be of any number; or
(b) for purposes which may be of any number or kind, charitable or non-charitable; or

(c) to any combination of persons or purposes mentioned in paragraphs (a) or (b).

(4) The rule against perpetuities (also known as the rule against remoteness of vesting) shall not apply to an authorised purpose trust.

(5) A trust may not be regarded as a charitable trust, or an ordinary trust if it complies with this Act and is specified in the trust instrument to be an authorised purpose trust.

[…]

(7) Nothing in this Act affects the creation, termination or validity of any trust created under any other law, but save as aforesaid, purpose trusts which do not comply with this Act are invalid.

[…]

(10) Save as otherwise provided by this Act, the law relating to authorised purpose trusts is the same in every respect as the law relating to ordinary trusts from time to time and for this purpose the law relating to ordinary trusts includes (without limitation) the Trustee Act."

[133] As the Tribunal's determination as to whether the Trusts Deeds met the statutory criteria for classification as an APT under the PTA turned largely on its interpretation of cls. 6 and 7 of the Trust Deeds, it is useful to set out some of the material provisions of the Trusts (taken from the English translation of the Winter Trust supplied by Gabriele):

"**6. INSTITUTIONAL PURPOSES AND ACTIVITIES OF THE TRUST**

The purposes of the trust are that of dealing with the material necessities of the Beneficiaries during their lives, and to preserve, invest and increase any assets placed or received in the Trust, with the aim of providing tangible support to the beneficiaries.

The Trustee may also, directly or indirectly, purchase shares in enterprises or companies operating in industrial or commercial sectors of any nature.

Finally, it may carry out, through its own companies or any other entities, any commercial or industrial activities, activities relating to moveables or real estate, and access any forms of credit that might be deemed necessary and useful by the Trustee for achieving the institutional purposes of this trust, either directly or indirectly.

7. IDENTIFICATION OF THE BENEFICIARIES

The Trust's designated Beneficiaries are:

1. Mr. Gabriele Volpi "Settlor".
2. the spouse of the "Settlor" not legally separated from the "Settlor".
3. the children of the "Settlor" and their descendants.

jointly referred to as "the Beneficiaries".

When implementing the institutional purposes, the Trustee is authorised, at its discretion, to distribute all or part of the income or capital to the beneficiaries during their lifetime. The Trustee may purchase chattels or any other assets and assign money sums which shall be used to pay for the beneficiaries' ordinary and extraordinary material expenses.

The Trustee may purchase goods or other utilities, and transfer sums of money that will be used for the expenses, costs and burdens incurred from the ordinary and extraordinary necessities of the beneficiaries.
The Trustee must obtain the written consent of the Protectors before distributing any capital or income.
When the Trustee has fulfilled the established purpose, or upon the death of all the above designated beneficiaries, after having deducted any amounts due to the Trustee or other entitled persons, The Trustee must devolve any residual funds and residual assets to:

International Red Cross Committee, Geneva […]"

[..]

22. DESTINATION OF THE INCOME OF THE TRUST

After all costs relating to the administration of the assets of the Trust and any other costs pertaining to the Trust and the achievement of the indicated purposes have been paid off, the income and anything else considered as such will be accumulated by the Trustee in the Trust.
As this deed provides for the possibility for the Trustee to pay income to the Beneficiaries also prior to the Trust being dissolved, the extent of such pay-outs is entirely at the discretion of the Trustee.
Every so often, The Trustee will be obliged to check if the Beneficiaries have the necessity to receive financial means. In each case, after having heard the opinion also of the Protectors, if existing, the assets of the Trust will be sold in the most appropriate manner.

23. PROPERTIES HELD IN TRUST

Should the assets of the Trust include property, the Trustee must in general allow the Beneficiary to live in such properties permanently or in certain periods of the year, depending on the type of property, as a temporary loan. Moreover, where such an advantage granted to a Beneficiary considerably reduces the income of assets of the Trust, the Trustee will have the right to make any appropriate arrangements, including imposing a rent not exceeding 30% of the market tariff.

24. LETTER OF WISHES

In exercising its discretionary powers, the Trustee will bear in mind the wishes of the Settlor, as written down in the "Letter of wishes". Without prejudice to the orders and limitations expressed in this deed of establishment, the Trustee will maintain its full discretion."

25. DURATION AND EXTINCTION

The Trust will have a duration of eighty years from the date on which it is signed, unless it is previously dissolved. Upon expiry of the said period, the Trustee will assign the amounts as referred to in point (7) of this deed. The Trust may also be terminated due to:

(a) the extinction of all the Beneficiaries;
(b) the extinction of all the institutional purpose, due to the lack of possibility to meet such purposes;

(c) the reduction of the assets of the Trust and the impossibility to recover the assets, including following comprehensive distribution;
(d) the death or resignation of the Trustee and the failure to appoint a successor within the subsequent 6 months;
(e) other reasons not explicitly identified that might lead to the definitive impossibility to continue with the activity.

In the event of termination, where possible the Trustee will assign the amounts as set forth in this deed."

The parties' submissions

[134] The challenge advanced by Delanson on the APT point (which may be taken as representative of Gabriele's arguments also) is firstly that the Trusts are APTs within the meaning of the PTA and the Tribunal was wrong to find otherwise. But the second string of the argument is that the Tribunal's earlier holding that the Trustee's distributive powers were subject to the Restrictions or fettered by the institutional purposes of the Trust, could only have been consistent with a conclusion that they were APTs.

[135] The applicants submit that as APTs are statutory creations the question of whether they qualify as APTs must be decided wholly by reference to the statutory criteria, not common law rules. Further, it is said that there is no requirement that a trust be expressly identified in its terms as an '*authorised purpose trust*', or that there be "*certainty of intention on behalf of the Settlor to have wanted to create authorised purpose trusts*". In this regard, complaint is made that the Tribunal placed inordinate emphasis on the fact that the Trust Deeds do not state that they are authorized purpose trusts.

[136] In brief, Delanson says the Trusts are APTs, since objectively construed, they satisfy the criteria under s. 3(1) of the PTA. For example, condition 3(1)(c) is clearly satisfied by the terms of the Trusts (see cl. 25). Further, it is said that, on a proper construction of clause 6 and the fetters which the Tribunal found applied to the distributive powers, s. 3(1)(a) and (b) are also satisfied. The Tribunal's error, they say, is illustrated in the finding that the Trusts were not APTs despite the Tribunal's conclusion that the "*institutional purposes*" of the Trust fettered the Trustee's distributive powers. In this regard, the majority reasoned that "…*the aim of Clause 6 of the Trust Deeds is to provide for the needs of specified human beneficiaries as distinct from providing for a defined and certain purpose from which human beneficiaries could receive a benefit*" (referred to as the *first* institutional purpose).

[137] This, the applicants contend, overlooks the second of the institutional purposes specified by clause 6, which is "*preserving, investing and increasing the assets conveyed to or received by the Trust for the purpose of essential support for the Beneficiaries*." Thus, investing and increasing the Trust assets was a "*defined and certain purpose from which human beneficiaries could receive a benefit*" (using the Tribunal's own language) and "…*investing in […] shares in a company or any assets constituting the trust property*" is specifically given as an example of an APT by s. 3 of the PTA.

[138] It is submitted that the Tribunal's assumption of jurisdiction was based on a fundamental error of law (although the s. 89 challenge is not being advanced on this basis) in seeking to draw a

singular distinction between "*a trust for objects and a trust for a purpose*", and in holding that a purpose trust "*in this context clearly means a purpose which is 'abstract or impersonal'*". In this regard, Delanson and Gabriele are united in the view that the Tribunal erroneously found support for this proposition from its interpretation of the Bahamian case of *Sutton v Fedorowsky* [2000] BHS J. No. 36, a decision which the applicants deem to be of little value, as it predates the PTA and was decided exclusively on common law principles.

[139] The applicants accept that prior to the enactment of the PTA there was a vital and clear distinction between *person trusts* and *purpose trusts*. The latter, unless exclusively charitable and enforceable by the Attorney General, were void for contravention of the so-called beneficiary principle, i.e., lack of a person having an enforceable right as against the trustee. However, it is submitted that the enactment of the PTA, which provides a mechanism for a person to sue to enforce the relevant authorized purpose, has now made the distinction between 'person trusts' and 'purpose trusts' somewhat anachronistic, and therefore removed this as a basis for distinguishing between the two. This is because under the express wording of the PTA, it is permissible for such authorized purpose trusts to have human objects.

[140] They also point out (D 1/95) that the position adopted in the PTA of permitting an admixture of persons and purposes in a trust, as well as the corollary principle of according restricted *locus standi* to authorized persons for the purposes of enforcement, has precedent elsewhere in the offshore world. For example, it is noted that the Cayman Islands STAR Trust (Special Trusts (Alternative Regime)) adopted in 1997, also permits a mixture of persons and purposes as objects (s. 99(1) of the Trusts Law 2018 Revision), and similarly restricts *locus standi*:

> "As is the case in connection with the Bahamian regime restricting *locus standi* to enforce the ATP to 'authorised applicants' the Caymanian regime imposes a similar restriction, enforcement being permissible only by 'enforcers' (see s. 102 of the Trust Law 2018 Revision): "*a beneficiary of a STAR Trust does not have any right, simply by virtue of his status as a beneficiary, to enforce that trust, although such a right may be conferred upon him expressly by the trust instrument or by the court*."

[141] The nub of Delanson's argument with respect to the finding that the trusts were not APTs and its import for the Tribunal's finding that it had jurisdiction in absence of the statutory authorization is summarized as follows (D 1/6):

> "If the Trusts were APTs, then pursuant to s. 6(1) of the PTA, only "authorized applicants" specified in 6(2) of the PTA had the same rights as beneficiaries of an ordinary trust to bring and prosecute proceedings for breach of trust (namely any person appointed under the Trust Deeds, the settlor, or any other person whom the Court declared under s. 6(2) (c). Since MV did not obtain the requisite declaration from the Court under s. 6(2) (c) of the PTA, he lacked standing to commence the Arbitration. By purporting to hear from, and grant relief to, a party who under Bahamian law lacked standing, the Tribunal exceeded its jurisdiction, alternatively created a serious irregularity under s. 90(2) of the Act that caused substantive injustice to Delanson and GV."

[142] Matteo rejects these challenges out of hand as "hopeless" and not available to the applicants. He makes three essential points.

[143] First, it is argued that properly characterized, this challenge cannot be brought under s. 89, as whilst that section may be used to challenge the substantive jurisdiction of the tribunal, the APT issue goes to *admissibility* as opposed to *jurisdiction*. In other words, even if the Trusts are authorised purpose trusts, this means that at best Matteo did not fulfil a pre-condition attached to the right to arbitrate, namely obtaining a s. 6(2)(c) declaration from the Court authorizing him to bring the claims (i.e., a question of admissibility).

[144] For this proposition, Matteo refers to several decisions of the English Commercial Court. I think it sufficient only to refer to the leading case of *The Republic of Sierra Leone v SL Mining Limited* (*supra*). There, it was held that for the purpose of a s. 67 challenge under the UK 1996 Act, compliance with pre-conditions attached to a right to arbitrate are issues going to *admissibility* rather than *jurisdiction*. Sir Michael Burton, after a comprehensive review of the authorities, which included leading commentaries such as "*Born on International Commercial Arbitration*", respected academics such as Professor Jan Paulsson, and decisions from other jurisdictions (e.g., the Supreme Court of the United States and the Singapore Court of Appeal), concluded that this position was one of universal international consensus.

[145] Second, it is contended that because the issue was never advanced as a challenge to jurisdiction before the Tribunal—i.e., both Delanson and Gabriele framed and pleaded the matter as one of standing (*locus standi)* rather than jurisdiction—there was no resultant finding on jurisdiction by the Tribunal that could be the subject of a s. 89 challenge. Alternatively, because no specific challenge was made to the jurisdiction of the Tribunal at that time, s. 95(1) of the Act precludes any such challenge now, and the Tribunal's finding gives rise to an issue estoppel.

[146] The third point directed toward this ground is that even if a challenge were available under s. 89, it is doomed to fail on the merits, as the Tribunal was right to find that the Trusts were not APTs within the meaning of the PTA. Matteo's analysis on the merits has as its starting point the assertion that the effect of the PTA, as appears from s. 3(7), is to modify by statute the general law of purpose trusts. But otherwise, as stated in that section, it does not affect the creation, or validity of other types of trust, including discretionary trusts. Further, s. 10 confirms that the general law regarding trusts continues to apply save as provided by the PTA 2004.

[147] As the PTA does not define or specify what constitutes a 'purpose' within the meaning of the Act, save for the example at 3(1) of what it includes (e.g., "…*holding or investing in shares in a company or any other assets*") it is therefore necessary to have regard to general common law principles to determine the elements of such trusts. In this regard, Matteo observes that the answer in English and Bahamian law is clear: "*purpose in this context means a purpose which is 'abstract or impersonal' and where there is no beneficiary to enforce*". Reference is made to the well-known cases of *re Astor's Settlement Trusts* [1952] Ch. 534, and the more recent authority of *re Denley's Trust Deed* [1969] 1 Ch. 373, where Goff J (as he then was) said [p. 383]:

> "[I]n my judgment the beneficiary principle of *In re Astor's Settlement Trusts*, which was approved in *In re Endacott, decd*.—see particularly by Harman L.J.—is confined to purpose

> or object trust which are abstract or impersonal. The objection is not that the trust is for a purpose or object *per se*, but that there is no beneficiary or *cestui que trust*."
> […]
>
> Again in *Leahy v Attorney-General for New South Wales*, Viscount Simonds, delivering the judgment of the Privy Council, said:
>
> 'A gift can be made to persons (including a corporation) but it cannot be made to a purpose or to an object: so also'- and these are the important words-'a trust may be created for the benefit of perons as *cestuis que trust* but not for a purpose or object unless the purpose or object be charitable. For a purpose or object cannot sue, but if it be charitable, the Attorney-General can sue to enforce it.'

[148] Matteo placed considerable emphasis on these principles, as applied in *Sutton v Fedorowsky* [2000] BHS J. No. 36, where Professor David Hayton, sitting as a Justice of the Bahamian Supreme Court, had to consider whether a trust for the purpose of spreading Krishna Consciousness was a purpose trust or a normal trust. After analysing the trust instrument, the Court stated that:

> "6. The question is whether the trust is for 'The Beneficiaries' motivated by the intention to spread Krishna Consciousness or is a trust for the purpose of spreading Krishna Consciousness."

[149] Hayton J. went on to hold that the trust was a trust for the beneficiaries, in particular because of the inclusion of a specified perpetuity period, and the specification of named and ascertainable beneficiaries. The approach in this case, Matteo says, illustrates that the test in Bahamian law for a purpose trust is whether a trust is for beneficiaries or for the furtherance of an abstract purpose, even if the settlement was motivated by some other purpose of the settlor. It is further argued that the fact that *Sutton* v *Fedorowsky* was decided prior to the PTA 2004 is irrelevant, because the Act is predicated on and does not change the common law understanding of purpose trusts.

[150] Against this backdrop, Matteo contends that the Trusts were not authorised purpose trust for three key reasons. Firstly, they are for the benefit of specified, non-abstract and personal beneficiaries (cls. 6, 7), who can sue to enforce, as Matteo is doing. In other words, cl. 6 provides that the object is to provide for the needs of specified human beneficiaries as distinct from providing for a defined and certain purpose from which human beneficiaries could receive a benefit. Secondly, they were not declared to be for a non-charitable purpose, so as to constitute a valid purpose under the PTA. While the word "purposes" is used in the Trust instruments, this is said clearly not to be intended to be declarative of the type of trust intended to be established. This is because the English translation of the Italian word "purpose" ("*scopi*"), as in the phrase institutional purposes ("*scopi istituziionali*") may be translated as either "*institutional purpose*" or "*institutional objectives*".

[151] Thirdly, it is said that the evidence demonstrates that Gabriele intended to settle and did settle standard discretionary trusts for the benefit of beneficiaries. This is because, firstly, the Trusts do not specify that they are APTs but, in contradistinction, actually refer to other Bahamian

trust legislation and not the PTA 2004 (although it is noted that the PTA is a supplement or amendment to The Trustee Act 1999, which is referred to in cl. 25 of the Trust Deeds). By way of example, the Winter Trust provides as follows:

> "[Gabriele] ESTABLISHES an irrevocable Trust named 'THE WINTER TRUST' governed by the laws of the Commonwealth of The Bahamas, such as The Trust (Choice of Governing Law) Act 1989, and The Trustee Act 1998, as subsequently amended."

[152] Next, it is said that the relevant provisions of the Trust Deeds are consistent with standard discretionary trusts for ascertainable human beneficiaries, as indicated by the following:

(i) cl. 6 and 7 collectively provide that the purpose/objective of the Trusts is to deal with the material necessities of the named beneficiaries and to preserve, invest and increase the Trust assets with the aim of providing tangible support to the beneficiaries;
(ii) cl. 22 provides that Delanson could pay the income to the beneficiaries;
(iii) cl. 23 provides that Delanson must in general allow beneficiaries to live in any properties held in trust;
(iv) cl. 24 (under the Letter of Wishes "LoW") provides for the Trustee to bear in mind the LoW when exercising its discretionary powers; and
(v) cl. 25 provides for a duration (perpetuity period) of 80 years, which Matteo says is not consistent with an intent to create an APT, as the rule against perpetuities is inapplicable to such trusts.

[153] The fact that Delanson is not licensed under the Banks and Trust Companies Regulations Act is said further to militate against the court finding that there was any intention to create APTs. Section 7(1) of the PTA 2004 requires a trustee of an APT to be so licensed. Additionally, it is noted that the applicants themselves have historically and consistently referred to the Trusts as discretionary trusts, and never referred to them as authorized purpose trusts. The following examples are given: (i) the email of Mr. Pallara of Fantozzi dated 9 June 2008, in which he expressly describes the Trust as a '*discretionary…Trust*' and identifies the 1995 Perpetuities Act as applying; and (ii) the email from Mr. Baggi (then a director of Delanson but acting on behalf of Gabriele) to the Bahamian law firm of Higgs & Johnson again referring to the Winter Trust as an "*irrevocable and discretionary trust*".

Court's evaluation and conclusions

Jurisdiction v. Admissibility

[154] As indicated, a significant part of the first phase hearing (almost half) was dedicated to this issue. I agree with the observation of counsel for Matteo, however, that despite the profusion of argument on this point the issues are in a narrow compass and turn essentially on questions of law. I also bear in mind the guiding principle that has already been referred to that a section-89 challenge under the 2009 Act takes the form of a *de novo* rehearing, which is not a review of the Tribunal's findings (although those may be considered) but an original jurisdiction to resolve the issue (*Dallah, supra*).

[155] I begin my analysis with the question of whether the APT issue is to be properly classified as one of substantive *jurisdiction* or *admissibility*. I think there is very little room for dispute that the issue, in the way it was formulated in the pleadings before the Tribunal, was a challenge to *admissibility* as opposed to a challenge to *substantive jurisdiction*, although neither of these terms were specifically invoked before the Tribunal.

[156] In its Defence (para.1, 23.6), Delanson asserted that Matteo "*lacks standing*" and had no right to bring his proceedings, which were therefore a nullity because he did not seek an anterior declaration from the Court under s. 6(2)(c) of the PTA (by analogy with a person who sues on behalf of an estate without a grant—*Millburn-Snell v Evans* [2012] 1 WLR 41). Gabriele's Defence and Counterclaim (para. 215.1) asserted that because Matteo had not obtained permission to pursue a claim for breach of a purpose trust pursuant to s. 6 of the PTA, Matteo had "no *locus standi*" to pursue the claim.

[157] In his Reply, Matteo sought a declaration that he had "*standing to bring the claim and that the proceedings are validly brought*". As noted above, the Tribunal concluded [at 408] that "*it was convinced that the Claimant has standing to bring his claims and that the proceedings are validly brought*", and so declared in the dispositif to the Partial Award [at 749].

[158] In my judgment, the question of a party's ability to bring a claim before an arbitrator is quintessentially a matter of admissibility. A wide body of case law from multiple jurisdictions and the views of leading academic writers all redound to the view that matters which go to compliance with pre-arbitral procedures or pre-conditions for bringing arbitration concern admissibility and not the substantive jurisdiction of the tribunal. No parade of learning is necessary to explicate this point, but I will refer to a few passages and references from the recent English authority of *The Republic of Sierra Leone v. SL Mining Ltd.* case, which was cited by Matteo.

[159] In that case, Sir Michael Burton, after a thorough review of the case law and academic opinion, rejected a challenge brought under s. 67 of the UK Act to the arbitrators' finding that they had jurisdiction. The dispute as to jurisdiction arose under a contract which required the parties to endeavor in good faith to reach an amicable settlement of their dispute, and if they were unable to do so within 3 months of a written notice by one party to the other specifying the dispute and seeking an amicable settlement, either party might submit the matter to arbitration. A notice of dispute was served on 14 July 2019 and a request for arbitration ("RFA") was served on 30 August 2019, some 6 weeks before the expiry of 3 months from the notice of disputes. One of the issues before the learned judge was whether the challenge to the alleged prematurity of the RFA went to the jurisdiction of the Arbitrators and was therefore within s. 67 of the Act.

[160] Before coming to his conclusion, the judge referred to leading case law and academic authority explaining the distinction between jurisdiction and admissibility. At paragraph 8, he stated:

> "8. It was common ground before me that there is a distinction (seemingly first drawn out judicially in an English court by Butcher J in *Obrascaon Huarte Lain S.A. v. Qatar Foundation for Education* [2020] EWHC 1643 (Comm), *PAO Tatneft v Ukraine* [2018][1 WLR 5947 and *Republic of Korea v Dayyani* [2020] 2 All ER (Comm) 672 between a

challenge that a claim was not admissible before Arbitrators (admissibility) and a challenge that the Arbitrators had no jurisdiction to hear a claim (jurisdiction). Only the latter challenge is available to a party under s. 67, and interference by a court is thus limited and discouraged by s. 1(c) of the 1996 Act, just as arbitration, if the choice of the parties, is encouraged (as for example by Lord Hoffman in *Fiona Trust v Privolov* [2007] 1 All ER 951 at [10]. The issue here was alleged prematurity. The claim, otherwise arbitrable, allegedly should not have been brought for another six weeks. To stay or adjourn the proceedings for six weeks (to allow for further negotiations to elapse), a course taken in similar circumstances in the courts (in non-arbitration cases, such as *Cable & Wireless PLC v IBM (UK)* [2002] 2 All ER (Comm) 1041), would not be an answer for the Claimant, because if there were no jurisdiction, there would be no jurisdiction to stay or adjourn: a claim should simply be rejected as outside the jurisdiction of the arbitrators (pro tem). The Arbitrators concluded in the Award that it was a matter of admissibility and ruled that it was admissible. The distinction between admissibility and jurisdiction is, as will be seen, a considerable topic for academic discussion.

[161] Then turning to some of the academic commentary, he quoted (among others) the conclusions of Professor Jan Paulsson in "*Jurisdiction and Admissibility in Global Reflections on International Law, Commerce and Dispute Resolution*," ICC Publishing, 2005 at 616-617 [14]:

"To understand whether a challenge pertains to jurisdiction or admissibility, one should imagine that it succeeds:

If the reasons for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse. If the reason would be that the claim should not be heard at all (or at least not yet) the issue is ordinarily one of admissibility and the tribunal's decision is final.

…Once it is established that the parties have consented to the jurisdiction of a particular tribunal, there is a powerful policy reason…to recognize its authority to dispose conclusively of other threshold issues. Those are matters of admissibility, alleged impediments to consideration of the merits of the dispute which do not put into question the investiture of the tribunal as such."

[162] After a comprehensive review of the authorities and academic opinion he concluded [18]:

"18. I consider that to accord with the views of Paulsson, as approved in the Singapore Court of Appeal (at [77] of *BBA v BAZ* [(2020) 2 SLR 453], if the issue relates to whether a claim could not be brought to arbitration, the issue is ordinarily one of jurisdiction and subject to further recourse under s. 67 of the 1996 Act, whereas if it relates to whether a claim should not be heard by the arbitrators at all, or at least not yet, the issue is ordinarily one of admissibility, the Tribunal decision is final and s. 30 (1) (c) does not apply. The short passage in the Singapore Court of Appeal set out in paragraph 15 (ii) above is useful: "Jurisdiction [and so susceptibility to a s. 67 challenge] is common defined to refer to "the power of the tribunal to hear a case", where admissibility refers to "whether it is appropriate for the tribunal to hear it". The issue for (c) is, in my judgment, whether an issue is arbitrable. The issue here is not whether there is another forum rather than arbitration in which it should be decided, but whether it has been presented too early. That is best decided by the Arbitrators."
19. Such a conclusion accords with the Guidance given by the Chartered Institute of Arbitrators in its International Arbitration Practice Guideline: Jurisdictional Challenges, last

revised in November 2016, and still in force, as setting out, "the current best practice in international commercial arbitration for handling jurisdictional challenges." It reads as follows, in material part, at page 3:

> "6. When considering challenges, arbitrators shall take care to distinguish between challenges to the arbitrators' jurisdiction and challenges to the admissibility of claims. For example, a challenge on the basis that a claim, or part of claim, is time-barred or prohibited until some precondition has been fulfilled, is a challenge to the admissibility of that claim at that time, i.e., whether the arbitrator can hear the claim because it may be defective and/or procedurally inadmissible. It is not a challenge for the arbitrators' jurisdiction to hear the claim itself."

And at pg. 15:

> "After deciding upon the jurisdictional challenges, arbitrators may also be called upon to decide on the admissibility of the claim. This may include a determination as to whether a condition precedent to referring the dispute to arbitration exists and whether such a condition has been satisfied. It also involves challenges that the claim is time-barred."

[163] I have found great assistance in the approach suggested by Professor Paulsson that the litmus test (or what he describes in the same work referred to above as the "*lodestar*" question) to determine whether the issue of admissibility or jurisdiction is raised is: "…*is the objecting party taking aim at the tribunal or the claim*?" He suggests that if the former, it raises an issue of jurisdiction; if the latter, it concerns admissibility.

[164] Based on the analysis of the case law and academic authorities cited above and applying Professor Paulsson's rule-of-thumb, it appears to me that the applicants' criticism was manifestly directed to the *claim*, and not the *Tribunal*. In fact, Delanson specifically contended in written submissions (For the First Procedural Meeting dated 5 April 2019) that Matteo would need to seek a declaration from the Court and if, successful, "*file his proceedings afresh*." Gabriele's position (as indicated in his Rejoinder at para. 11) was that the point would be resolved upon Matteo's "*election*" as to his case on the construction of clause 6 & 7 of the Trust Deeds.

[165] The Tribunal's statement that "*the proceedings were validly brought*" and the resultant declaration to that effect, does not indicate whether the Tribunal itself considered that it was making a pronouncement on jurisdiction as opposed to admissibility. But the natural inference to be drawn is that had the Tribunal found that the Trusts were authorised purpose trusts, they would have come to the opposite conclusion, i.e., that the proceedings were "*not validly brought*"—which again relates to a (curable) defect in the *institution* of the claims rather than any issue with the Tribunal's jurisdiction.

[166] In any event, it stands to reason that a decision as to admissibility presupposes that the Tribunal has first found that it has jurisdiction. As stated in the Guidance given by the Chartered Institute of Arbitrators in its International Arbitration Practice Guidelines (Jurisdictional Challenges), [paras. 7 and 9]:

> "7. […] Before deciding on an admissibility challenge the arbitrators should first be satisfied that they have jurisdiction to determine the admissibility issue. […]
>
> 9. The most important aspect of this distinction is that if the arbitrators fail to classify the challenge correctly, i.e., as a challenge to jurisdiction or admissibility, this may result in grounds for either party to challenge the decision. In addition, whilst inadmissibility may be waived by a party, lack of jurisdiction can only be overcome by a fresh agreement between the parties."

[167] Lastly, as pointed out in the commentary by Professor Paulsson, the starting point for determining whether a challenge pertains to jurisdiction or admissibility is to *assume* that the challenge is made out, and then determine whether the effect is to leave the Tribunal without jurisdiction. Thus, even accepting the construction of cls. 6 & 7 of the Trust Deed contended for by the applicants (that the Trusts were in fact authorised purpose trusts subject to the requirement for leave at s. 6), this would simply mean that the claim could not be heard when it was brought, i.e., because compliance with the s. 6 declaration was a precondition to its institution, not that it could not be heard at all.

[168] I therefore have little hesitation in concluding that s. 89 of the Act is not engaged in respect of the challenge that absent a declaration from the Court authorizing Matteo to bring the arbitration proceedings, the Tribunal had no substantive jurisdiction. If the Tribunal had accepted the applicants' contentions that the Trust were APTs, at the very most it would have been required to stay the proceedings for the requisite declaration to be obtained and/or directed that the proceedings be refiled after the necessary declaration was obtained.

[169] For the reasons outlined above, the claim that the Tribunal lacked substantive jurisdiction under s. 89 because the arbitration was instituted without a s. 6 declaration is dismissed.

Estoppel under s. 95(1)

[170] The point has been reiterated in many of the English cases that the intention behind the corresponding section of the English Act (s. 73) is "*to ensure that parties do not hold objections in reserve for later challenge, reflecting a principle of openness and fair dealing between the parties*" (*Dera Commercial Estate v. Derya Inc.* [2018] EWHC 1673 (Comm)). The UK Courts have also held that the words used in the section "*any objection*" means any ground of objection and "*that objection*" means that ground of objection (*Primetrade AG v Ythan Ltd.* [2005] EWHC 2399 (Comm)).

[171] The section clearly admits of some flexibility in determining whether or not and to what extent an objection might be said to have been taken, so as to preserve a right of challenge under s. 73. As put by Akenhead J. in *The Ythan*, "…*it is wrong to be prescriptive or try to lay down precise limits in the abstract. It is usually easy to recognise in particular cases whether a party is attempting to raise a new ground of objection to jurisdiction on appeal*".

[172] Thus, it has been held that a mere statement that if a particular point were made "*the Tribunal would have no jurisdiction*" to determine it was held to be sufficient to preserve a party's right to take that point (*Reliance Industries Ltd. v The Union of India* [2018] EWHC 822

(Popplewell, J.). On the other hand, a purely speculative reservation of rights—a statement that a party may possibly contest jurisdiction—will not suffice (*Exportador de Sal SA de CV v Corretaje Maritimo Sud-Americano Inc.* [2018] EWHC 224 (Comm)(Andrew Baker, J.)

[173] Although the point is academic because of my finding that the APT issue does not go to substantive jurisdiction, I must indicate for completeness that I am not attracted to the alternative submission of Matteo that the applicants are "estopped" from raising this challenge before the Court. In my view, the applicants took an objection before the Tribunal, and although the nature of the objection was never explicitly expressed to be to "jurisdiction", the effect was said either to *preclude* the Tribunal hearing the matter or render it a *nullity*. It seems to me this comes within the class of statements or objections adverted to by Popplewell J. in *Reliance Industries* that would suffice to preserve a right of challenge under s. 89, although the challenge fails.

Merits

[174] I come now to the merits of the APT decision. I should indicate at the outset that my conclusion on the s. 89 point (*jurisdiction v. admissibility*) really disposes of this issue. However, as the Tribunal's conclusion that the proceedings were validly brought turns on their finding that the Trust were not APTs, and as much ink was split on the issue, it bears further examination. If not for those reasons, the court does so for completeness and in case the jurisdictional analysis may turn out to be wrongly decided.

[175] Having said that, I see no reason to depart from the Tribunal's conclusions that the Trusts were not APTs, but in so doing I do not accept all of its reasoning nor the approach it took to the construction of "*an authorised purpose*" in construing the provisions of the PTA. I will return to the latter observation momentarily. But first I shall state the reason why my conclusion is the same as the Tribunal's.

[176] First, I also find, based on a review of the relevant provisions of the Trust (6, 7, 8, 22, 23 and 24), that the Trusts are standard discretionary trust created for the benefit of a specifically identified class of beneficiaries and in respect of whom the Trustees in their discretion could apply the trust capital or income. I do not think the fact that the Trust specifies a modality for how the "*essential necessities*" of the beneficiaries were to be provided for during their lives (e.g., by providing for the preservation, investment and increase of assets) undermines in any way the fact that it is a trust established for the benefit of specified individuals. For my part, I would not place much stock on the lack of a declaration as an APT, or the inclusion of a perpetuity period as indicia of such a trust. Although they may be affirmative indicators of such a trust, the lack of these factors do not negative the existence of an APT. However, like the Tribunal, I would find that the designation of specific beneficiaries is dispositive of the issue that they are standard discretionary trusts.

[177] This conclusion, I think, is justified by appealing to an even more basic principle. As noted Caribbean trusts Professor Rose-Marie Antoine observes in her seminal work "*Trusts and Related Tax Issues in Offshore Financial Law*" (Oxford, 2005), the purpose trust is "…*a*

statutory response to the common law rule that a trust must have identifiable beneficiaries to be considered a valid trust" (i.e., the beneficiary principle). Once it is accepted that one of the main functions of the statutory or authorised purpose trust was get around the so-called beneficiary principle by providing for the enforcement of the trust by a person (or even the AG in the default position), it is difficult to see how any trust with specifically identifiable beneficiaries can properly come within the definition of an authorized purpose trust. This is counterintuitive to any intention to create a purpose trust, still less an authorized purpose trust.

[178] Second, implicit in the nature of the declaration that the court is empowered to make under s.6(2)(c)—a declaration that "*<u>any other person</u> whom the Court declares …to have a pecuniary or non-pecuniary interest in advancing the purpose or purposes of the trust*"—is that there is no one already identified or existing under the Trust with such an interest. As Matteo is a named beneficiary, it necessarily means that he is already possessed of such rights and such a declaration would be otiose.

[179] Third, while a purpose under s. 3(1) of the PTA is admittedly broad (a concession which Matteo makes), I am not satisfied that what is called the "*second institutional purpose*" can be shoehorned into the s. 3 requirements to conjure an APT. In fact, the Tribunal itself reasoned that a finding that the Trusts were APTs based on this feature would put "*any and all trusts created for the benefit of their beneficiaries within the scope of the PTA*", because at some level all trusts have purposes (e.g., the purpose of provision for beneficiaries). In my opinion, the "purpose" to preserve, invest and increase the assets in the Trust is not a purpose in and of itself; it is but a mediate purpose or modality for meeting the ultimate purpose or *raison d'etre* of the trust, which is to benefit specified individuals. It seems to me that Delanson and Gabriele exploited the lacunae in the non-specific definition of an authorised purpose to attempt to retrofit the Trusts as APTs, with the hope of achieving the possible benefit of a jurisdictional challenge based on the s. 6(2)(c) precondition to enforcing such trusts.

[180] As mentioned, however, I do not accept all of the reasoning and the approach of the Tribunal (endorsed by Matteo) to the APT issue. For example, I agree with Delanson that there is no requirement for "*certainty of intention on behalf of the settlor to have wanted to create authorized purpose trusts*." Certainty of intention is certainly one of three verities for the creation of a trust at common law, but what the Act requires (s. 3(1) (a)) is certainty of *purpose*, i.e., that the settlor must specifically designate the *purpose* to which the assets are dedicated, which must be capable of being carried out under the trust.

[181] I accept the submission by Matteo that, as a matter of principle the PTA is not to stand wholly isolated from the common law (see s.10) and that common law principles can be relied on for construal and to fill any interstices in the Act. The Act does not define what is an "authorized purpose" and leaves it open-ended to any purpose which is not contrary to public policy. No doubt, the court would have to intervene to decide whether a purpose is valid in cases of uncertainty (see s. 5, which permits the court to resolve any uncertainty in administration in relation to a purpose). To illustrate the point, in her text previously referred to, Professor Rose-Marie Antoine comments (under the rubric "Addressing hybrid features of purpose trusts (Use of Common Law Interpretation)" [3.42]:

> "[O]ffshore trusts are essentially hybrid trusts which borrow from the common law. Offshore purpose trusts are no exception. Thus, it seems likely that the interpretation of familiar terms used to establish such trusts under offshore legislation will be similar to common law statutory construction. Questions such as whether the purpose trust is uncertain, against public policy, or immoral for example, stand to be resolved by examining common law interpretations unless excluded. Because of policy differences between onshore and offshore jurisdictions, however, it may be expected that areas of doubt will be resolved in favour of the purpose trust."

[182] But I think there is much force in the arguments of Delanson and Gabriele that the question of what constitutes a purpose for deciding whether or not a particular trust comes within the ambit of the Act does not fall to be resolved by the application of the traditional common law dichotomy (as applied in *Sutton v Federowsky*) between a trust for the benefit of human beneficiaries and a trust for an abstract or impersonal purpose. If the Tribunal's finding and Matteo's submission in this regard were correct, there would essentially be no difference between an "authorized purpose trust" and the non-charitable purpose trust ("NCPT") at common law.

[183] Further, to the extent that Matteo relies on the reasoning in *Re Denley* as being denotative of a "purpose" for the classification of a trust under the PTA, it is not a sure footing. The attempt in *Re Denley* to escape the straitjacket of the "beneficiary principle" has always been viewed with skepticism. Indeed, that case has been criticized on the grounds that in reality it was concerned with a discretionary trust which gave employees beneficial rights and standing to enforce the trust concerning rights of use in the land under the trust and was itself not a true purpose trust (see, for example, the comments of Vinelott J. in *Re Grant's Will Trust* [1980] 1 WLR 360 at 370-371, that the case "*falls altogether outside…purpose trusts*").

[184] In my view, I do not think it is possible to confine "*an authorized purpose*" under the PTA to an abstract or impersonal purpose that accords with NCPTs at common law. To the contrary, the effect of legislation such as the PTA (perhaps following on the Cayman Islands STAR Trust regime), was to remove the conceptual distinction between "*person vs. purpose*" trust and authorize or validate a combination of trusts for abstract purposes (e.g., purely "internal" purposes, such as the holding of shares in a company without more), as well as for human beneficiaries, and whether charitable or non-charitable. For example, 3A(c) provides for the capital or income of an APT to be disposed of for "*any combination of persons or purposes*." Again, a reference may be made to the text of Professor Antoine to illustrate the point that the purpose trust as provided for by statute is not dependent on common law principles for its existence [3.42]:

> "The creation and validation of the non-charitable trust in offshore jurisdictions are given life by the characteristic, but perhaps incestuous, proper law provisions found under offshore legislation, which make the offshore law the proper law of the trust. Thus, the question of the purpose trust is left exclusively to the offshore jurisdiction whose laws, in turn, proclaim its validity."

Relevance of scope of powers to the issue of the APT

[185] Although the merits of scope of powers rectification claim is dealt with later in this judgment, a brief remark might be made in passing of Delanson's argument that its challenge to jurisdiction—to the extent that it is grounded on the APT issue—is predicated on the restricted view the Tribunal took of the Trustee's distributive power. This position is set out in Delanson's skeleton submissions on the jurisdictional challenges as follows [D1/7]:

> "In a nutshell, either: (1) Delanson's distributive powers were not subject to the restriction that the majority identified at [643] of the Partial Award (the "Restrictions"), in which case (a) the Trust were not ATPs, and (b) the distributions that Delanson made to GV in October 2016 (the Distributions") were within the four corners of Delanson's powers; or (2) Delanson's powers were subject to the Restriction, in which case (a) the Distributions exceed Delanson's powers, but (b) the Trust were APTs, so MV had no standing to commence the Arbitration and the Partial Award is a nullity (alternatively should be set aside)." [Underlining supplied.]

[186] Putting to one side any views on the correctness or not of the Tribunal's conclusion on the scope of powers issue, this submission has more than a whiff of circularity. It conflates the Tribunal's interpretation of the scope of powers issue for determining whether there was a breach of trust with the classification of the trust. In other words, the classification of the Trust as an APT or ordinary trust must be based on whether the Trust deeds objectively construed can satisfy the statutory criteria for such a trust. It cannot be based on the particular view the Tribunal took of the scope of the restriction.

B. Arbitrability of Counterclaim to set aside for mistake

[187] The next substantive challenge to jurisdiction taken by Gabriele (and supported by Delanson) is that the Tribunal had no substantive jurisdiction to decide his counterclaim for mistake. Gabriele submits three main reasons why he says the mistake claim is not arbitrable.

[188] Matteo dismisses these arguments outright as "*procedurally impossible and substantively misconceived*". But as substantial written and oral submissions were directed to them, and the issues are important for deciding the operation and limits of the arbitration of trust disputes in The Bahamas under the arbitration regime, the court must give them careful consideration.

[189] Central to Gabriele's argument on this point (which was made without prejudice and as an alternative to his claim for rectification) is the allegation that he established the Trusts operating under a mistake that was grave enough ("an operative mistake") to justify them being set aside. He alleges that the Trusts were established on the false belief that: (i) he would be the sole beneficial object of the Trusts during his lifetime; (ii) he would have a general personal power to amend the terms of the Trusts; and (iii) the Trustee was able under the terms of the Trusts to make distributions of income and capital to him, whether or not such distributions were required to meet his needs.

Parties' submissions

Gabriele's arguments on arbitrability

(i) Validity dispute not arbitrable under s. 91A

[190] The first point taken is that on a proper interpretation and application of The Trustee Act (as amended), the claim made in his capacity as settlor to set aside the Trusts is not arbitrable. This argument is constructed on the basis of ss. 91A and 91B (2) and (3) of the Trustee Act, which are set out below.

> "**91A. Arbitration of trust disputes**
>
> (1) The object of this section is to enable any dispute or administration question in relation to a trust to be determined by arbitration in accordance with the provisions of the trust instrument.
> (2) Where a written instrument provides that any dispute or administration question arising between any of the parties in relation to the trust shall be submitted to arbitration ("a trust arbitration"), that provision shall, for all purposes under the Arbitration Act, have effect as between those parties as if it were an arbitration agreement and as if those parties were parties to that agreement.
> (3) The Arbitration Act shall apply to a trust arbitration in accordance with the provisions of the Second Schedule to this Act.
> (4) The Minister may be order amend the Second Schedule." [Emphasis supplied.]
>
> "**91B. Powers of the arbitral tribunal.**
>
> (1) This section shall apply except to the extent otherwise provided in the trust instrument.
> (2) The arbitral tribunal (hereinafter referred to as "the tribunal") may, in addition to all powers of the tribunal, at any stage in a trust arbitration, exercise all of the powers of the Court (whether arising by statute (including this Act), under the inherent jurisdiction of the Court or otherwise) in relation to the administration, execution or variation of a trust or the exercise of any power arising under a trust.
> (3) Without prejudice to subsection (2) and to any provisions made pursuant to subsection (4) the tribunal has the same powers to appoint one or more persons to represent the interests of any person (including a person unborn or unascertained) or class in a trust arbitration as the court has under order 15 rule 14 of the Rules of the Supreme Court in relation to proceedings before the court." [Emphasis supplied.]

[191] There are several other provisions of the Trustee Act which are important to the arguments. Section 91D sets out the applicable definitions and provides relevantly that "*the parties in relation to the trust*" are defined to mean "*any trustee, beneficiary or power holder of or under the trust, in their capacity as such.*" Further, s. 91A(1) and (2) of the Trustee Act permits arbitration in relation to a trust "*in accordance with the provisions of the trust instrument*" and "*pursuant to a provision making that stipulation in "a written trust instrument*". Thus, it is contended that s. 91A (2), which applies the Arbitration Act to trust matters, is limited to disputes between trustees, beneficiaries or power holders in their capacity as such. It does not apply to a claim by the settlor or donor of the trust, which is the capacity in which Gabriele is making his claim.

[192] Some background to these provisions is necessary in explicating the applicants' arguments. The insertion of ss. 91A-91D into the Trustee Act (along with the Second Schedule) was a momentous statutory development that made trust disputes amenable to arbitration. The prevailing view in many common law jurisdictions (including the UK for that matter) is that absent legislative backing the reference of certain trust questions to arbitration may be void on public policy grounds, in that it would oust the jurisdiction of the court (see the case of *Re Wynn* [1953] Ch. 271). In this regard, Gabriele makes reference to a paper by the UK Trust Law Committee ("Arbitration of Trust Disputes", 1 April 2012), which made the following observations when recommending an amendment to the 1996 Arbitration Act to permit trust arbitration (GV 1/74):

> "25. We mentioned that Messrs. Wood, Brownbill and McCall concluded in their discussion paper that it was not possible for a settlor or testator validly to impose an arbitration clause. They described this as not open to question. To paraphrase, their principal reason was that the trust concept is itself the creature of the courts (historically the courts of equity) exercising judicial discretions as described by the Privy Council in *Schmidt v Rosewood Trustees* [2003] 2 AC 709, so that the legal rights of beneficiaries and trustees can validly be determined only by the courts.
>
> 26. We have no intention to challenge that conclusion. In particular, we take it as a given that the trust relationship is not one of contract (though sometimes there is a contract between settlor and trustees at inception), so that legislation authorising contracts to impose arbitration has no application to trust disputes."

[193] In support of the proposition that s. 91A does not apply to a dispute over the validity of the trust, Gabriele refers to an article by David Brownbill, QC, considered the principal draftsman of the Trustee Act, in which he expresses the following view ("*Arbitration of Trust Disputes Under The Bahamas Trustee Act 1998*", "Arbitration of Trust Disputes (2016)"):

> "Trusts can be involved in a variety of disputes, including those:
> (1) between trustees and at third parties, which would include claims by or against the trustees under a contract entered into between the parties or based on tort or some other matter concerning the trustee's external relationship and not concerning the relationship between the trustee and the beneficiaries as such;
> (2) between trustees and beneficiaries, which would include claims between trustees and beneficiaries in their capacities as such and concerning the relationship between them, such as:
> (i) a breach of duty by the trustee;
> (ii) the exercise of a power by a trustee or another power holder (a protector or a beneficiary holding a power of appointment);
> (iii) the construction of the trust instrument;
> (iv) rectification, where the issue is one of administration or affects only the trustee's position; or
> (v) the appointment, retirement or removal of trustees.
> (3) between beneficiaries, which would include claims to have the beneficial provisions of the trust deed rectified or to have the exercise of a power set aside; and
> (4) between beneficiaries/trustees and third parties, which would include claims questioning the trusts upon which the assets are held, seeking to have the dispositions to the trustee set aside (e.g., for mistake, fraud, misrepresentation, lack of capacity, or fraud

> on creditors), or claiming a proprietary interests (tracing of third party property, community or other jointly owned property). […]
>
> Claims in the fourth category are, again, third party claims but claims which have a particular effect: they are attacks against the trust structure itself, essentially saying that the trust does not exist, at least not in the form reflected in the trust instrument. As third party claims, they stand apart from those in the second and third categories in that they derive from outside the trust. Nothing provided for in the trust instrument can have a direct effect on the prosecution or determination of such disputes, save only the power of a trustee to compromise or settle claims.
>
> Section 91A is solely concerned with internal trust disputes of the second and third type. The section therefore excludes challenges to the validity of the trust and disputes between the trustees and third parties." [Emphasis supplied]

[194] Further support for the proposition that validity disputes in relation to trusts could not or at least should not be arbitrated is said to be derived from the approach taken to trust arbitration in Florida. It was one of the first US States to authorize trust arbitration (1 July 2007) and its approach may have influenced the development of the Bahamian legislation. For example, the UK Trust Law Committee Paper (referred to above), discussed the Florida position [at 19-20] and commented as follows:

> "731.401 Arbitration of disputes
> (1) A provision in a will or trust requiring the arbitration of disputes, other than disputes of the validity of all or part of a will or trust, between or among the beneficiaries and a fiduciary under the will or trust, or any combination of such persons or entities, is enforceable.
> (2) Unless otherwise specified in the will or trust, a will or trust provision requiring arbitration shall be presumed to require binding arbitration under s. 44.104.
>
> It will be seen that this provision excludes what we have called rocket-launcher disputes from the ambit of arbitration, but otherwise includes all types of trust disputes." [Emphasis supplied.]

[195] It is also notable, that the UK Trust Law Committee, in proposing legislation to make trust matters arbitrable, advocated the exclusion of validity disputes from the ambit of trust arbitration: "*We also mention here that our proposal would not encompass the compulsory submission to arbitration of a direct attack on the validity of the trust disposition itself, in other words, a challenge to the so-called 'rocket-launcher' by which the trust is created in the first place*" [at 9].

(ii) Abrogation of the doctrine of separability

The separability principle

[196] The second submission in support of its claim that the Tribunal lacked substantive jurisdiction is that, even if the validity of a trust were a matter that conceptually could be arbitrated under Bahamian law, the statutory abrogation of the separability principle in relation to trust arbitration removed the ability for the Tribunal to determine its jurisdiction.

[197] In simple language, the doctrine or principle referred to as "separability" is that the validity of an arbitration clause in an agreement is to be considered independently from the main or underlying ("matrix") contract in which it is contained. Thus, it may be effective to give a tribunal jurisdiction to determine the validity of the main contract, and any consequences flowing from that, even if the underlying contract is vitiated. In *Enka Insaat Ve SSanayi v. OOO Insurance Company Chubb* [2020] UKSC 38 (citing with approval the words of Moore-Bick LJ in *Sulamerica Cia National de Segurous SA v. Enesa Engenharia SA* [2021] EWCA Civ 638), the UK Supreme Court pithily explained the doctrine as followed:

> "The concept of separability itself, however, simply reflects the parties' presumed intention that their agreed procedure for resolving disputes should remain effective in circumstances that would render the substantive contract ineffective. Its purpose is to give legal effect to that intention, not to insulate the arbitration agreement from the substantive contract for all purposes."

[198] The principle, which is of almost universal application, is enshrined at s. 7 of the Arbitration Act, which provides as follows:

> "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form party of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

[199] However, in applying the Arbitration Act to trust disputes, Parliament imposed the following caveat via paragraph 5 of the Second Schedule to the Trustee Act:

> "Neither section 7 of the Arbitration Act nor any rule of law or construction treating an arbitration agreement separate to any agreement of which it is a part shall apply in relation to a trust arbitration."

[200] Gabriele argues that this abrogation (or disapplication) of the separability principle in relation to trust arbitration has fundamental implications for the ability of the Tribunal to determine its jurisdiction. This is because *sans* the doctrine of separability, the issue of the validity of an arbitration agreement (contrary to the now orthodox position in English law and general arbitration law) stands or falls with the validity of the matrix or substantive agreement. In fact, it was said that The Bahamas appears to be the only modern jurisdiction where the doctrine of separability has been disapplied in relation to trust arbitration. This departure from the otherwise universal principle is said to be a deliberate policy choice reflecting the special status of trust arbitration. As the argument is put in the written submissions (GV 1/90):

> "[T[he deliberate exclusion of the cornerstone of an arbitral tribunal's jurisdiction to determine its own jurisdiction in relation to the arbitration of trust disputes demonstrates the legislative intention that (in keeping with orthodox trust theory and as obtained before the Trustee Amendment Act) it is not intended that arbitrators should have the jurisdiction to rule upon the validity of the trust that contains the scope of their jurisdiction."

[201] In this regard, Gabriele notes that that Tribunal relied on s. 41 [s. 30 in the UK Act] which embodies the so-called principle of *kompetenz-kompetenz* (as the concept is expressed in German law but anglicized as *competence-competence*) which allows a tribunal to rule on its substantive jurisdiction, at least in the first instance. Section 41 provides as follows:

> "(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to
> (a) Whether there is a valid arbitration agreement,
> (b) Whether the tribunal is properly constituted, and
> (c) What matters have been submitted to arbitration in accordance with the arbitration agreement.

[202] Gabriele complains that the Tribunal erroneously assumed jurisdiction because it failed to distinguish properly between *competence-competence* and the doctrine of separability. Support for this view is said to be found in a passage from "Merkin on Arbitration Law" (85th issue), where the learned authors comment as follows [at para. 9.7]:

> "In order to appreciate the difference between separability and *kompetenz-kompetenz* it is necessary to determine the ambit of each. Where the issue is the validity or scope of the arbitration clause itself, with no objection being raised as to the validity of the substantive agreement to which it relates, the separability principle has no part to play and the only question is whether the arbitrators have the right to determine whether the parties have agreed to do to arbitration either at all or in relation to the dispute which has come before them. This is purely a matter for *kompetenz-kompetenz*, and is governed by s. 30 of the Arbitration Act 1996. Again, if the question is whether the arbitral tribunal has been properly appointed, or whether the procedural steps for a reference to arbitration has been carried out, *kompetenz-kompetenz* alone is relevant. Confusion arises where there is a challenge to the validity of the main agreement to which the arbitration clause relates, as in many cases such a challenge will expressly or by implication encompass a challenge to the arbitration itself. The right of the arbitrator to rule purely on the validity of the main agreement has nothing to do with jurisdiction but flows from the principle of separability set out in s. 7 of the 1996 Act." [Emphasis supplied.]

[203] It is therefore contended that the deliberate disapplication of the doctrine of separability with respect to trusts means that the doctrine of *competence-competence* cannot, by itself, permit an arbitral tribunal to rule on the validity of the main agreement. By way of illustration, Gabriele refers to the law prior to the acceptance of the doctrine of separability at common law and its enshrinement at s. 7 of the UK Arbitration Act (s. 7 of the 2009 Act is in identical terms), as illustrated by the UK Court of Appeal in *Ashville Investments Ltd. v Elmer Contractors Ltd.* [1988] 2 All ER 577, 589) (per Balcombe LJ):

> "[A]n arbitrator cannot have jurisdiction to decide that the contract under which he is appointed is void or voidable, since by so doing he would be destroying the very basis of his own position."

[204] See, also, to the same effect, the observations in Mustill & Boyd on Commercial Arbitration (2nd Edition, 1989) at pp. 108-109:

> "…it has in the past always been accepted in England that an arbitrator cannot make a binding award as to the initial existence of the contract, and that he cannot foreclose the question by making an award which takes it for granted. For if in truth no contract was ever made, then the arbitration provisions of the supposed contract never bound the parties; and an arbitrator appointed under those provisions could have not authority to act."

(iii) Scope of arbitration clause excludes disputes as to validity of a trust

Construction of Clauses 26 and 27

[205] The third argument is that, even if the points above were wrong, the arbitration clauses in the Trust instruments do not extend to disputes pertaining to their validity, based on a proper construction of cls. 26 ("Governing law") and 27 ("Arbitration clause") of the Trust Deeds. Gabriele's argument in this regard was summarized by the Tribunal as follows [at para. 520 of the Partial Award]:

> "[…] Gabriele argues that the wording of Clause 26 of the Trust Deeds, pursuant to which '[a]ny controversy regarding the validity of the Trust shall be settled in accordance with the aforesaid Governing Law' and Clause 27 of the Trust Deeds, pursuant to which '[a]ny other controversy relating to the institution or to the effects of the Trust, or between the Settlor and the Trustee(s), or among Protectors or among the Parties to the Trust, must be submitted to the judgment of an arbitration panel […], serves to exclude the issue of mistake from the Tribunal's jurisdiction." [Underlining supplied.]

[206] In this regard, it is said that this is based not only on a plain reading of the Trust deeds and the circumstances in which they were adopted, but also on the allegation that Winder J. (as he then was) had previously held (in the 2018 ruling) that disputes pertaining to the validity of the Trust fall outside the clauses. This ruling is said to constitute a *res judicata* on the issue.

Gabriele's construction of cl. 26, 27

[207] The arbitration provisions of the Trust Deeds have been set out above (p. 11) and will not be replicated here, although reference will be made to specific sections (based on the interpolated numbering) as necessary. Gabriele argues that the drafting scheme of cls. 26 and 27 was to create a code for both the governing law and for the division of jurisdiction between an arbitral tribunal and the court, and that there are some matters (in particular validity disputes) which are not within the scope of the arbitration clause. He sets out his argument in several building blocks as follows (summarized and omitting non-material steps):

(a) Cl. 26.1 is clearly a governing law clause: *"[t]he Trust is governed by the Law of the Island of the Bahamas, known as "the Trust (Choice of Governing Law) Act 1989" and the "Trustee Act 1998", as subsequently amended and supplemented*."

(b) Cl. 26.2 provides that the governing law of the Trust can be changed by the trustee "*if allowed by the governing law*" (which Bahamian law does allow).

(c) Cl. 26.3 provides that "[*a*]*ny dispute relating to the validity of the Trust will be decided by the above Governing law*." As cl. 26.1 already specifies that Bahamian law applies to the trust (which by definition includes any dispute as to the validity of the trust), cl.

26.3 would be mere surplusage, and it must have been intended by the draftsman to have some additional effect.

(d) The purpose of cl. 26.3, when read compendiously with cl. 27.1 is to remove certain disputes from the ambit of the arbitration clause. Cl. 27.1 provide: "[*a]ny* <u>*other*</u> *controversy relating to the institution of the effects of the Trust, or between the Settlor and Trustee(s) or among Protectors, or among the parties to the Trust, must be submitted to the judgment of an arbitration panel*…". The use of "other disputes" in cl. 27 demonstrates that the draftsman's intention was to exclude validity disputes referred to at 26.3 from arbitration.

(e) Cl. 27.2 further limits the scope of the arbitration clause by providing that "[*a*]*ny dispute concerning the rights or ownership in other Countries around the world, will be dealt with on a case-by-case basis, and regulated in consideration of International Agreements, where applicable*." An example given of how this clause was meant to operate in international treaties is provided by the EU Judgment Regulations, which confer exclusive jurisdiction on the courts of the *lex situs* in relation to proceedings that have as their object rights *in rem* in immovable property.

(f) Likewise, cl. 27.3 goes on to provide that "[a*]ny proceedings that aim to have Trustees or Protectors appointed by the court, or directives be given to the Trustee, must be brought exclusively under the law of the Bahamas, as long as the registered office of the trust is located there*." Again, although it only refers to being brought "under the law of the Bahamas", this plainly also refers to types of proceedings that are outside the scope of the arbitration clause. In fact, Matteo's counsel submitted in the 2018 original Bahamian proceedings before Winder J. that "*the second and third paragraphs of clause 27 clearly identify two types of disputes which will not be subject to arbitration*". In his ruling, Winder J. characterized the argument as follows [at 44-45]:

> "[I]n relation to Delanson, Matteo says that his claims against it are not within the arbitration provisions in clause 27. Matteo argues that the claim against Delanson in respect to its removal and replacement, although between parties to the Trust, may not [be] covered by that part of clause 27 which requires mandatory arbitration but is directed to a court action…".

(g) Lastly, cl. 27.4 makes it clear that in respect of matters not arbitrable under the arbitration clause, "*the Court having exclusive jurisdiction is the court at the registered office of the Trust, currently the Court of Appeal of the Commonwealth of The Bahamas*." In this regard, the 2018 ruling of Winder J. has already held that this constitutes an exclusive jurisdiction clause in favour of the courts of the place of the registered office of the Trustee [reference is made to paragraphs 56-61 of the ruling.]

[208] In conclusion, Gabriele says cls. 26 and 27 of the Trusts create a scheme which apportions jurisdiction as follows:

(i) Validity disputes are subject to the exclusive jurisdiction of the courts of the place of the registered office of the Trustee (cls. 26.3/27.1/27.4);

(ii) Disputes in relation to ownership/title engage international treaties as to jurisdiction, these will apply (27.2);
(iii) Actions for the appointment of new trustees and for directions are subject to the exclusive jurisdiction of the courts of the place of the registered office of the trustee (cls. 27.3/27.4);
(iv) All other disputes relating to the institution or effects of the Trusts, or disputes between the parties to the Trust, are subject to arbitration.

[209] Thus, the clear and unambiguous meaning of cls. 26 and 27, read in the context of the circumstances when they were executed, is that validity claims (including Gabriele's claim in mistake) are not subject to arbitration but under the "*exclusive jurisdiction clauses*" are referable to the courts of the registered office of the Trust. This construction of the Trust Deeds is said to support Gabriele's primary submission that the Trustee Act does not apply to Arbitration claims by a settlor/donor involving a claim to set aside a trust for mistake. In other words, the "rocket launcher" question (including mistake claims) are not arbitrable in The Bahamas either.

[210] Gabriele relies on several principles of statutory interpretation for this construction, not all of which need to be mentioned. One is that a contract should be interpreted so as to give it lawful effect, as explained by Toulson LJ in *Great Estates Group Ltd. v. Digby* [2011] EWCA Civ. 1120:

> "…if the contract is capable of being read in two ways, one of which would involve a contravention of a statute and the other would not, that may be a powerful reason for reading the contract in the sense which is compliant with the statute, even if it is the less natural construction. (This is to put in modern terms the approach expressed in the maxim *ut magis valeat quam pereat*.)"

[211] More significantly, it is said that the plain meaning of the clause cannot be displaced by recourse to the so-called liberal rule of construction discussed in *Premium Nafta*, which the Tribunal applied in its construction of the Trust Deeds. That principle, as summarized in the case, is to approach the construction of an arbitration clause on the basis that "*there is no rational basis upon which businessmen would wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another*", and that "*one would need to find very clear language before deciding that they must have had such an intention*" [at para. 7, per Lord Hoffmann]. A fuller expression of the principle is set out in the judgment of Lord Hope [at 27-28] as follows:

> "[O]ne 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 in 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 the risk that this may give rise to?...For them, everything is to be gained by avoiding litigation in two different jurisdictions. The same approach applies to the arbitration clause."

[212] On behalf of Gabriele, Mr. Black argues with some force that, while there is indeed "no rational basis" on which to make a distinction between validity/enforceability claims and performance claims in respect of contract disputes, that does not apply in the trust context. This is because, on the contrary, there is every rational basis for a draftsman preparing an arbitration clause in a trust instrument to make a distinction in respect of validity disputes; consequently the liberal construction rule does not apply.

[213] In this regard, Gabriele argues that not only is the liberal construction rule adopted by the Tribunal inapposite, but that the Tribunal did not read the clauses holistically. Reference is made to paragraph 531 of the Partial Award, where the Tribunal states that "[*i]n this case, the issue of mistake is directly linked to the settlement of the Trust and is thus relating 'to the institution or to the effect of the Trust[s]'. In the Tribunal's view, there is no clear exclusion of the issue of mistake from the scope of the Tribunal's jurisdiction, either explicitly or implicitly*."

[214] This, Gabriele contends, erroneously categorizes the mistake claim as a claim relating to "*the institution or to the effects of the Trust*" to bring it within the scope of cl. 27.1, without any attempt to determine whether validity claims are excluded from the arbitration clause, or to determine whether Gabriele's mistake claim is such a claim. The criticism is neatly encapsulated by Gabriele as follows [GV 1/143 (d)]:

> "(d). A claim to set aside the Trusts for mistake is a claim that the Trusts are voidable and should be set aside: the effect of a successful plea of mistake is that the trust is rescinded and 'it is to be treated, as far as possible, as if it had never happened, or at any rate had never had any legal effect': *Independent Trustee Services Ltd. v GP Noble Trustees Ltd.* [2013] Ch. 91, [113]. Whether or not it pertains to the '*instituzione*' of the trust, a mistake claim is certainly a dispute relating to the '*validita*' of the trust, such that it is not on any view within the definition of 'other' disputes that are referred by clause 27.1 to arbitration. On the express wording of the Trust instruments, validity issues are in a separate category altogether."

<u>Additional points on challenge to jurisdiction</u>

Section 95 preconditions should not be construed restrictively

[215] Gabriele contends further that, as he allegedly made objections before the Tribunal that (i) it had no substantive jurisdiction to determine his mistake claim; and (ii) that the Trusts should be set aside for mistake, the preconditions of s. 95 should not be construed in a way to prevent him from taking the jurisdictional challenge before the court under s. 89. He argues that the proper restrictions to be placed on these preconditions depend on an interpretation of the Act and in particular the policy behind imposing these conditions on parties to arbitration. In this regard, reference is made to a number of UK authorities (several of which have already been cited) which identify the policy as being one of openness and fair dealing. I only refer to two:

(a) In *JSC Zestafoni v Ronly Holdings Ltd.* [2004] 2 Lloyd's Rep. 245 (Comm) [at 64], Colman J identified the policy as follows:

> "The principle of openness and fair dealing between the parties to an arbitration demands not merely that if jurisdiction is to be challenged under s. 67 the issues as to jurisdiction must normally have been raised at least on some grounds before the arbitrator but that each ground of challenge to his jurisdiction must have previously have been raised before the arbitrator it if is to be raised under a s. 67 application challenging the award. This was conceded by counsel and accepted by Mr. Richard Field, QC, then sitting as a Deputy High Court Judge in *Athletic Union of Constantinople v. National Basketball Association*, [2022] 1 Lloyds Rep. 305 at page 311. That concession was, in my judgment, clearly correct. Were it otherwise, the policy of the subsection could be frustrated by introducing at the last minute grounds of challenge not hitherto raised and thereby potential delay and disruption of the application to the prejudice of the opposite party."

(b) In *Primetrade AG v Ythan Ltd* [2006] 1 Lloyds Rep. 457 [at 44-46], Aikens J agreed with Colman J's analysis in *JSC Zestafoni* and said:

> "[i]t is clear that the intention behind section 73 [the UK equivalent to s.95] is to ensure that a party objecting to jurisdiction, who has decided to take part in the arbitral proceedings, should bring forward his objections in those proceedings before the arbitrators. He should not hold them in reserve for a challenge to jurisdiction in the court."

[216] Gabriele, however, seeks to distinguish these cases on the basis that line of authority taking a restrictive view of the pre-conditions is not universally accepted, relying for this proposition on an opinion from the English text "Jurisdiction and Arbitration Agreements and their Enforcement" (3rd Edn., 2015) David Joseph QC:

> "A further question which arose in *Athletic Union of Constantinople v National Basketball Association* is whether a party was entitled to raise an objection to jurisdiction before the judge that had not been raised and argued before the arbitrator. It was accepted by counsel in that case that the reference in the last paragraph of s. 73(1) to prohibiting a party from raising "that objection later" meant that a party could only raise before they court such jurisdiction points as has been raised before the arbitrator. This is a question of the construction of s. 73(1) and is largely a matter of first impression. There is nothing in the DAC Report that requires the construction placed upon the section by counsel in the above-mentioned case. It is suggested, notwithstanding the concession made, that s. 73(1) merely requires a party to raise one or more of the generic objections identified is s. 73(1)(a)-(d) within the time-frame expressed. It does not merely limit a party in court to arguing the points raised before the arbitrator. As seen above the challenge to jurisdiction is by way of re-hearing and not a review. Having said this, a failure to raise a specific point before the arbitrator may be relevant as to weight."

[217] As a result, he claims to be entitled to have the Court determine the issue of the Tribunal's substantive jurisdiction to have his claim in mistake determined by way of a full, *de novo*, hearing on the merits, and supported by the affidavit evidence of Simone Volpi and Dr. Baggi filed on 15 April 2021 (exhibiting their respective witness evidence in the arbitration). Gabriele refers to a number of authorities for this principle (*Electrosteel Ltd. v Scan-Trans* [2003] Lloyd's Law Rep. 190, per Gross J; the *Dallah* case, per Lord Mance, JSC; *Jiangsu Shagana Group Co. Ltd. v. Loki Owning Co. Ltd. (the Pounda)* [2018] 2 Lloyd's Rep. 359. I need not dwell on these authorities, because I understood it not to be contested that jurisdictional challenges involve a *de novo* hearing. But it is in contention between the parties

as to whether the circumstances arise on the facts of this case for the application of that principle.

[218] Next, it is said that the courts of New Zealand have exclusive jurisdiction to determine the claim that the Trusts are vitiated by mistake, and that the Tribunal should have adjourned the arbitral proceedings in order to allow the issue to be determined by the courts of New Zealand. In the alternative, it is contended that, in the event Gabriele's jurisdiction claim is justified, as part of this court's consideration of claim as to the Tribunal's lack of substantive jurisdiction, it would be obliged to determine the mistake claim.

The mistake claim

[219] In support of the contention that Gabriele made a "*distinct and grave mistake as to the nature of the Trust*" and the invitation to the court to set it aside, reference is made to the well-known authorities on setting aside a unilateral transaction such as the creation of a trust (see, for example, the UK Supreme Court decision in *Pitt v Holt* [2013] 2 AC 108, as summarized by Sir Terence Etherton C in *Kennedy v Kennedy* [2015] WTLR 837; *BOM v BOL* [2018] SGCA; and *Wright v National Westminster* [2014] EWHC 3158 (Ch)). A portion of the skeleton submission is also directed to the factual grounds on which he intends to rely if the application were to be heard by the Court, which it is said establish that Gabriele made a distinct mistake as to the nature of the Trust and how they were to operate.

[220] However, for reasons which I shall state shortly, I do not think it is necessary for the court to conduct any analysis of the authorities relating to setting aside a trust for mistake, or the evidential matters relied on by Gabriele in support of that claim.

Matteo's submissions

[221] Matteo summarizes the jurisdictional challenges to the arbitrability of the mistake counterclaim under four main heads: (i) the challenge based on the Trustee Act 1998 (as amended) as the "*Trustee Act Challenge*"; (ii) the challenge on the abrogation of the separability principle as "*the Separability Principle Challenge*"; (iii) the challenge that the 27 November 2018 judgment of Winder J. precluded arbitral jurisdiction over the counterclaim by reason of issue estoppel as the "*Issue Estoppel Challenge*"; and (iv) what is called the "*illegitimate jurisdiction challenge*". It will be convenient to deal with Matteo's responses under these heads.

The Trustee Act Challenge

[222] Firstly, Matteo says that this is a new ground of challenge, which was not taken before the Tribunal, and as such Gabriele is therefore precluded from raising this challenge by virtue of s. 95(1). In this connection, it is said that the jurisdictional issue before the Tribunal was based solely on the construction of cl. 27 of the Trust Deeds. The point was never taken that the Tribunal lacked jurisdiction as a matter of law, and that Gabriele's counterclaim for mistake would have been non-arbitrable whatever the proper construction of the Trust Deeds.

[223] Secondly, it is said that the Trustee Act challenge is not included as a ground of challenge in Gabriele's Motion; again, the pleaded challenge is in respect of the scope of cl. 27. This omission is said to invoke s. 92(3) of the Act and further precludes the point now being taken. Reliance is placed on *Westland Helicopters v Al Jejailan (supra)*, where Colman J. (looking at the corresponding provision in the UK Arbitration Act said: "…[*i]f the applicant knew of a particular ground of challenge when he issued his application but did not include it, he should not be permitted to introduce that ground at a date which is after the expiration of the period of 28 days from the award specified in section 70(3) of the Act*."

[224] Thirdly, it is said that Gabriele has misconstrued the legislative intent of the Trustee Act, the effect of which is *not* to exclude arbitration of claims by the settlor. Matteo points to the same article by David Brownbill (relied on by Gabriele for his alternative interpretation), where Brownbill states [at 13.01]: "*The goal of the new regime is to enable settlors to impose mandatory arbitration of all internal trust disputes and questions so as to avoid any need to involve the court*." In other words, the issue being addressed by the new regime did not arise where there was already a "contract" between settlor and trustee (Brownbill at 13.27). The general point was put this way in an *aide memoire* supplementing MV 1 [at 7(4)]:

> "It is genuinely inconceivable that, in creating a statutory regime for the express purpose of enabling settlors to impose arbitration on non-contracting parties such a beneficiaries, the legislature decided also to prohibit settlors from being bound by the very same arbitration provisions; in other words, that in seeking to solve one problem by making claims more arbitrable it took the trouble to address a separate non-problematic issue by making fewer claims arbitrable."

[225] Further, it is said that the Trustee Act says nothing about claims by settlors and, therefore, cannot be read *sub-silentio*, as prohibiting the operation of the plain terms of the Trust deeds. It is pointed out that s. 91A (1) specifically states that the object is "…*to enable any dispute or administration question in relation to a trust to be determined by arbitration in accordance with the provisions of the trust instrument*." In this regard, by cl. 27 Gabriele and Delanson each agreed that "[*a*]*ny other controversy relating to the institution or effects of the Trust*" was to be submitted to arbitration. This, Matteo contends, was a valid arbitration agreement on its own terms not relying on the deeming provisions of s. 91A of the Trustee Act for its efficacy and "*which encompassed Gabriele's counterclaim*" and to which both Gabriele and Delanson were bound under the terms of the trust before and after the amendments to the Trustee Act. There is, therefore, no reason in principle why claims in a single arbitration cannot encompass both (i) trust-related disputes facilitated by the Trustee Act; and (ii) other disputes, submitted to arbitration without the need for such facilitation. Put differently, there is no requirement that every claim made in arbitration must have the same jurisdictional basis.

[226] Further, and in any event, even aside from the cl. 27 jurisdiction, it is argued that Gabriele conferred jurisdiction on the Tribunal to determine the claim by *ad hoc* submission to the Tribunal, and that this is not precluded by the Trustee Act. On the issue of *ad hoc* submission, reference is made to *Westminster Chemicals and Produce Ltd. v Eichholz & Loeser* [1954] 1 Lloyds Rep 99, per Devlin J at 105: "*If two people go before a third person and submit their*

dispute to that third person, and that third person makes an award upon it, that award is binding, and it is not open thereafter to either one of the two parties to dispute it."

The Separability Principle Challenge

[227] Matteo asserts that this is an entirely new point being taken before the court. Far from seeking to contend that the Tribunal had no jurisdiction to determine whether the mistake claim was arbitrable by reason of the alleged principle of separability (indeed, the concept of separability or its abrogation was not mentioned at all before the Tribunal), Gabriele expressly invited the Tribunal to determine the issue (see post hearing brief at para. 61): "*The first question for determination is whether this mistake claim is arbitrable*." Therefore, it follows that this objection is precluded by s. 95(1) of the Arbitration Act. Also, as with the challenge based on the Trustee Act, it is not included in the Motion, and likewise is now precluded by s. 92(3) of the Arbitration Act.

[228] As to the merits of the arguments on the separability principle, Matteo contends that the arguments advanced are misconceived for at least five reasons:

(1) Schedule 2 (5) of the Trustee Act only abrogates the principle of separability "*in relation to a trust arbitration*", but Gabriele's case is that the mistake claim falls outside the scope of a "trust arbitration", and therefore the principle is irrelevant to his mistake counterclaim.

(2) Schedule 2(5) only abrogates "*any rule of law or construction treating an arbitration agreement as separate to an arbitration agreement of which it is a part*" and does not prohibit the parties to a trust arbitration from specifically agreeing that the tribunal shall have jurisdiction to determine the existence or validity of the instrument containing the arbitration agreement, or that the principle of separability would apply. In this vein, it is contended that the parties specifically agreed by Procedural Order No. 1 that "*the Arbitral Tribunal shall apply the UNCITRAL Arbitration Rules (as revised in 2010) in this arbitration*." Thereby, the parties agreed that "[*t]he arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement*" (2010 UNCITRAL Rules, Article 23(1)).

(3) Third, it is said that Gabriele conferred jurisdiction on the tribunal to determine its jurisdiction by submitting the very question for the determination of the Tribunal.

(4) Fourth, despite the assertion that "*the Arbitral Tribunal failed to distinguish between the doctrine of kompetenz-kompetenz and that of separability*", it is Gabriele who confuses the concepts. In this regard, reference is made to "*Joseph on Jurisdiction and Arbitration Agreements and their Enforcement*", where it is said [at. para.4.36]: "*The principle of separability is distinct from the concept of the arbitrator's jurisdiction to rule on its own jurisdiction*." Reference is also made to *Dallah*, in which Lord Mance cited from the 1953 judgment of Devlin J. in *Christopher Brown Ltd. v Genossenschaft*

Oesterreichischer Waldbesitzer Holzwirtschaftsbetriebe GessmbH [1954] 1 QB 8. As borne out by that case, the doctrine of *competence-competence* was explicated well before the acceptance of the separability principle, and therefore its abrogation cannot affect the principle. Further, the procedural proposition of competence-competence is enshrined at s. 41 of the Act, and it is expressed in absolute terms. It is not therefore, impliedly or expressly, excluded by the Trustee Act in circumstances where separability has been abrogated. In other words, the Act is said to reflect a principle of arbitration law, which is to the effect that while the ability of the tribunal to determine is jurisdiction *ab initio* is connected to the separability principle, it is not *dependent* on it: see *Dallah* [at para. 84]: "*So also the principle that a tribunal in an international commercial arbitration has the power to consider its own jurisdiction is no doubt a general principle of law. It is a principle which is connected with, but not dependent upon, the principle that the arbitration agreement is separate from the contract of which it normally forms a part*." [Emphasis supplied.]

Thus, it is said that Gabriele's argument to the contrary, and the insistence that "[*t]he Tribunal should have adjourned the arbitral proceedings in order to allow the issue of mistake to be determined by the court of New Zealand*" confuses *competence-competence and separability.*

(5) Fifth, to the extent that it is being argued that the abrogation of the separability principle in the context of trust arbitration should inform the construction of cls. 26 and 27, the provisions were introduced *after* the Trust Deeds were settled, and therefore do not form part of the background against which they were executed.

Issue estoppel

[229] In response to Gabriele's claim that the 2018 Ruling created an issue estoppel because the construction of cls. 26 and 27 in relation to validity disputes was *res judicata* between the parties, Matteo submits that as the point was not taken before the Tribunal it is precluded by s. 95(1). Similarly, the point was not raised in Gabriele's Motion, nor mentioned in "Bray 1", and consequently it is now caught and precluded by s. 92(3) of the Arbitration Act.

[230] In any event, even if Gabriele were free to argue issue estoppel, the challenge would fail on the merits. In this regard, reference is made to the judgment of Clarke LJ is *The Good Challenger* [2004] 1 Lloyd's Rep 67, where the requirements for issue estoppel were set out as follows:

> "The authorities show that in order to establish an issue estoppel four conditions must be satisfied, namely (1) that the judgment must be given by a foreign Court of competent jurisdiction; (2) that the judgment must be final and conclusive on the merits; (3) that there must be identity of parties; and (40 that there must be identity of subject matter, which means that the issue decided by the foreign court must be the same as that arising in the English proceedings: se in particular *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.* (No.2) [1967] 1 AC 853, *The Sennar* (No. 2) [1985] 1 WLR 490, especially per Lord Brandon at p. 499; and *Desert Sun Loan Corporation v. Hill*; [1996] 2 All ER 847."

[231] Further, the particular issue in question must form a "necessary ingredient" of the cause or action or matter which is in fact being determined: *Arnold v National Westminster Bank National Bank* [1991] 2 AC 93 (HL) per Lord Keith at 105. In practice, this means that the issue must be a "necessary step" in the decision or a "*matter which it was necessary to decide*": *Carl Zeiss Stiftung v Rayner & Keeler Ltd.* (No. 2) (*supra*).

[232] It is contended that the only issues which that ruling determined were whether Matteo's claims fell within the clauses and whether the clause was null, void or inoperative or incapable of being performed pursuant to s. 9 of the Act. The learned Judge did not need to determine, and did not determine, whether any claim by Gabriele for mistake came within the clause, as no such claim was made, and the consideration of the point was irrelevant to the application to stay Matteo's legal claims in favour of arbitration. Neither, it is said, was there full argument on the point or any clear decision. Thus, Gabriele is wrong to argue that Winder J held in the decision of November 2018 "*that a dispute relating to the validity of the Trust did not fall within the scope of the arbitration clause*" (GV 1/127), and that this gives rise to issue estoppel.

The "illegitimate challenge"

[233] The illegitimate challenge is what is referred to by Matteo as the "belated attempt" to invite the Court itself to set aside the Trusts based on Gabriele's mistake claim. Matteo claims it was only foreshadowed one week before the start of the first phase (jurisdiction hearing), when in an email to the Court, counsel for Gabriele indicated that the "*hearing of the jurisdictional challenge would be likely to occupy a significant amount of time as it will require the Court to determine whether the Trust should be set aside for mistake.*" The basis for this claim is that the Awards were made without jurisdiction because the Trust Deeds, including the arbitration clauses, were void as a result of Gabriele's mistake.

[234] This challenge is said to be "*wholly misconceived, inappropriate and simply impossible to pursue*". As put in his skeleton submissions [MV1/165]: "*It turns on its head the carefully constructed process of limited judicial oversight of arbitrations. And it flies in the face of Gabriele's conduct, in the Arbitration and in the present court*". Matteo says that there are a number of reasons why this is so.

[235] The first (and primary) contention is that the premise is logically flawed. For example, it is said to be Gabriele's case that the mistake claim will only arise "[i]*f the court finds that Gabriele's mistake claim is arbitrable*" [GV1/165]. In other words, if the court rejects the challenge to the Tribunal's decision on the arbitrability of the mistake claim, then the "illegitimate jurisdiction challenge" falls away. Conversely, if the Tribunal did have jurisdiction to determine the mistake claim, then the issue is no longer a jurisdictional one but a determination on the merits, and any challenges to the award on the merits would be futile and legally unavailable.

[236] In addition to the primary submission, Matteo makes a number of procedural points. First, that the challenge made to substantive jurisdiction (on the basis that the Trust should be set aside for mistake) is not contained in the Motions filed by either Delanson or Gabriele. Neither

is the point addressed in any of the evidence that was originally filed in support of the challenges/appeals, hence the recourse to the filing of the affidavits at the 11th hour (without leave or agreement) to support the point. Gabriele's jurisdictional challenge at Ground 8 is focused on the point that the Tribunal had no jurisdiction to determine the mistake claim (see Bray 1). One example will suffice: at para. 41, Bray recites that the issue before the Tribunal on Gabriele's case is that the "…*mistake claim is not within the arbitration clause in the Trust instrument and so is not arbitrable and the Tribunal had no substantive jurisdiction to determine it*." Therefore, to now allow the applicants to assert this challenge offends the requirement that a party must bring all of his challenges in his Motion and must do so within the 28 requisite period, otherwise the challenge is precluded by s. 93(3) of the Act.

[237] Second, it is said that even if the challenge had been made in the motion, the ground would still not be available under s. 89, because no such challenge was taken before the Tribunal (neither ruled on) and it would now be lost under s. 95 (1). This is because s. 89 does not enable a party to advance any objection to the Tribunal's substantive jurisdiction that could have been raised before the Tribunal.

[238] To the point, Matteo argues that, contrary to advancing any challenges to the Tribunal's jurisdiction to determine Gabriele's mistake claim in the arbitration (other than the APT point), both Delanson and Gabriele positively invoked the jurisdiction of the Tribunal for the purpose of determining Gabriele's counterclaim. For example, it is pointed out that Procedural Order No. 3 recorded the parties' agreement as follows:

> "The parties herewith confirm that the dispute, as referred to by the Claimant in their statement of claim, shall be dealt with by the Tribunal pursuant to the Arbitration Agreements set out in the Trust Deeds."

[239] Gabriele's position on the issue before the Tribunal (which was supported by Delanson) and the issues dealt with by the Tribunal as follows [GV1/178(5) and 179]:

> "178(5). In his pre-hearing skeleton, Gabriele maintained the same position, namely (a) by making no challenge to the substantive jurisdiction to determine the claims; (b) overtly invoking the jurisdiction of the Tribunal to determine his counterclaim for rectification; and (c) only in the alternative, and if his primary counterclaim did not succeed, advancing his mistake claim; see for example, Gabriele's skeleton argument at ¶ 10. Even then, the only question he raised was 'is the claim to set them aside for mistake arbitrable'. And his sole argument on this point (at ¶ 58) was:
>
> > 'Gabriele contends that the mistake claim is not arbitrable because it is a 'controversy regarding the validity of the Trust', which is specifically excluded from the wording of the arbitration clause (clause 27), which provides that it is only '[a]ny other controversy relating to the institution or to the effects of the Trust…' which is submitted to arbitration.'
>
> […]
>
> 179. Understandably, and correctly, the Tribunal addressed the jurisdictional argument which was made rather than any jurisdictional argument which was not made. At partial

> Award ¶ 511, the Tribunal noted Gabriele's case that "on a true construction of the arbitration clause" Gabriele's "alternative assertion of mistake is not arbitrable". And in rejecting that argument of construction, the Tribunal ruled that it did have jurisdiction "to deal with the issue of mistake": Partial Award ¶ 536. That was the sole issue on which it made a finding of jurisdiction. It did not consider, because the argument was not made and because such an argument would have been wholly inconsistent with the approach taken throughout the arbitration by both Delanson and Gabriele, that Gabriele's allegation of mistake invalidated clause 27 and so deprived the Tribunal of any substantive jurisdiction over the whole dispute."

[240] Next, it is said that this challenge is also an abuse of process, or in the alternative *res judicata*, based on the 2018 ruling by Winder J. (as he then was). In other words, a challenge to the Tribunal's conclusions on its substantive jurisdiction, on the basis that the arbitration agreement in the Trust Deeds is invalid and/or should be set aside for mistake, is precluded by Gabriele's insistence before the court in 2018 that the dispute be referred to arbitration in accordance with the Trust Deed (and this is so whether one relies on the principles of estoppel, affirmation or abandonment).

[241] In this regard, reference is made to the 2018 action (which led to the 2018 ruling) in which Matteo sought a number of reliefs from the Bahamian court, namely:

(i) a declaration that the purported 2016 distributions of the assets of the Trust by Delanson to Gabriele was a breach of trust or a fraud on the power and was void;
(ii) an order setting aside the distributions and termination of the trust on 17 January 2017;
(iii) an order for reconstitution of the trust, or damages or equitable compensation for knowingly receiving trust property and /or dishonestly assisting in a breach of trust;
(iv) an order for accounting; and
(v) replacement of the Delanson by a suitably qualified, independent professional trustee.

These claims are said to correspond roughly to those made in the Arbitration.

[242] In response to these claims, Gabriele (supported by Delanson) applied, *inter alia*, for the following reliefs:

(i) declarations that the Courts of The Bahamas have no jurisdiction to hear these claims, on the basis that "*the governing law of the Trusts is New Zealand law and […] Matteo did not identify any other basis on which the Bahamian courts should have jurisdiction"* and
(ii) an order staying the proceedings, on the basis that "*the Trusts are nonetheless subject to mandatory arbitration provisions and this action ought to be stayed in favour of arbitration*."

[243] Winder J. made several important findings in that matter, which Matteo contends would have prohibited Gabriele from advancing the illegitimate claim, even apart from the other arguments advanced. The first is that he rejected the argument that the governing law of the Trust was New Zealand law, holding that the Trusts were governed by Bahamian law [at para. 31]; and secondly, he agreed with Gabriele (and Delanson) that "*the court is constrained, in accordance*

with the provisions of section 9 [of the Arbitration Act] to order that the action be stayed whilst the matter proceeds to arbitration" [at 50]. In coming to that conclusion, Winder J. said: "*I am satisfied that the trust is not null and void, inoperative, or incapable of being performed*" [at 50].

[244] The abuse of process point is supported by reference to the observation of Sir Nicolas Browne-Wilkinson V.C. (later Lord Browne-Wilkinson) in *Express Newspapers plc v. News* (UK) Ltd. (1990) 1 WLR 1320, where he said:

> "There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them, and having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance."

[245] Second, it is contended that Winder J. found that the conditions of s. 9 of the Act were satisfied, in that the matters in Matteo's claim fell within the arbitration clause and were subject to the Act. As such, a decision on arbitral jurisdiction by the Court on an application under s. 9 is said to be binding on the parties, and so the matters are *res judicata* (see *AES Ust-Kamenogorsk v. USt-Kamenogorsk* JSC [2013] UKSC 35).

[246] Lastly, it is said that, even if the court were to find that the illegitimate jurisdictional challenge was theoretically available (Matteo maintains it clearly is not), it would fail on its own terms, mainly for procedural reasons. This is because the late-stage evidence which the applicants submitted is not properly before the court and should be rejected. In any event, the factual basis for the rectification claim is substantially the same as the factual basis for the mistake claim, and Gabriele alleges the same misunderstanding for both (see paras. 467 and 513 of the Partial Award). As the Tribunal rejected both claims on essentially the same basis (it did not accept the evidence of Mr. Baggi and Gabriele), the findings of fact made on the rectification claim necessarily undermine the mistake claim. Delanson and Gabriele are bound by those findings of facts, and the court cannot be asked to make different findings of fact from the Tribunal.

[247] Moreover, it is contended that there is no way that the demands of due process and fairness could have been accommodated in the context of a *de novo* hearing on this issue. It would have required directions to be given for the service of evidence by all parties and an adjournment for an evidentiary hearing. Moreover, as the case would essentially turn on evidence which had already been disbelieved and discredited, Matteo would reserve the right to cross-examine Gabriele on this evidence. However, as Matteo was keen for the arbitration to progress to stage 2, the evidential hearing was not pressed, and Matteo would invite the court to dismiss this "illegitimate challenge" for the reasons given.

[248] Lastly, Matteo therefore invites the court to declare, for the avoidance of doubt that the Applications do not "*require the Court to determine whether the Trusts should be set aside for mistake*" as alleged by Gabriele.

Matteo's argument on the construction of cl. 26 and 27

[249] Apart from the procedural arguments, it is contended that the Tribunal was correct in any event to conclude that it had jurisdiction under cl. 27 of the Trust deeds to determine Gabriele's counterclaim for mistake, for essentially the reasons given by the Tribunal in the Partial Award.

[250] The Tribunals conclusions on subject-matter arbitrability is found at paras. 530-531 of the Partial Award, where it said:

> "530. It is undisputed that the Tribunal has the power to decide on its own jurisdiction, including on any objections thereto. In this case, the second Respondent alleges that the Tribunal does not have jurisdiction to deal with his alternative counterclaim on mistake, claiming that this is excluded from the scope of the dispute resolution clause and thus not arbitrable. More specifically, Gabriele argues that the wording of Clause 26 of the Trust Deeds, pursuant to which "[a]ny controversy regarding the validity of the Trust shall be settled in accordance with the aforesaid Governing Law" and Clause 27 of the Trust Deeds, pursuant to which '[a]ny other controversy relating to the institution or to the effects of the Trust, or between the Settlor and the Trustee(s), or among the Protectors or among the parties to the Trust, must be submitted to the judgment of an arbitration panel […]", serves to exclude the issue of the mistake from the Tribunal's jurisdiction.
>
> 531. It is the Tribunals' opinion that rather than supporting Gabriele's contention, the wording of the provisions of the Trust Deed serve to establish the Tribunal's jurisdiction. To begin with, Clause 26 of the Trust Deeds refers to the governing law and does not set out a forum for settling disputes, and thus only Article 27, the dispute resolution clause, may serve as the yardstick to determine the Tribunal's jurisdiction. In this case, the issue of mistake is directly linked to the settlement of the Trusts, and is thus relating "to the institution or to the effect of the Trust[s]". In the Tribunal's view, there is no clear exclusion of the issue of mistake from the scope of the Tribunal's jurisdiction, either explicitly or implicitly. Furthermore, it is a well-established principle of international arbitration that claims against the validity of the underlying contract do not dispute the Tribunal's ability to decide such claims."

[251] The essential strands of the Tribunal's reasoning in concluding that it had jurisdiction over Gabriele's counterclaim for mistake are contained at para. 531 of the Partial Award:

(i) that it is only cl. 27 that is relevant to the scope of the Tribunal's subject matter jurisdiction, as cl. 26 simply refers to the governing law;
(ii) the counterclaim for mistake relates to the "*institutions or to the effect of the Trust[s]*", and is therefore within the ambit of cl. 27;
(iii) there is no "…*clear exclusion of the issue of mistake from the scope of the Tribunal's jurisdiction, either expressly or implicitly*";
(iv) the well-known principle that claims against the validity of the underlying contract does not negate the Tribunal's ability to decide such claims (see *Fiona Trust v. Privalov* [2007] UKHL 40.)

[252] As to the merits of Gabriele's counterclaim for mistake, the Tribunal concluded that it failed on the facts, reasoning as follows [paras. 546-547]:

> "Based on the foregoing, the Tribunal finds that either from conscious belief or tacit assumption one could deduce that Gabriele had a different understanding than the one he now claims to have had. The Tribunal determines that there is insufficient evidence to suggest that Gabriele made a causative, distinct and sufficiently grave mistake in establishing the Trusts.
>
> In light of the evidence examined above, there is no reason to suppose that there was a mistake, let alone a fundamental mistake, on the part of Gabriele, or his advisors, either as to the legal character or nature of the transaction, or as to some matter of fact and law, which was the basis for the creation of the Trusts. In the Tribunal's view, the text of the Trust Deeds accurately reflects Gabriele's intention to provide for greater asset protection and tax-planning, two of his most pressing concerns when establishing the Trust. Moreover, even if there was any carelessness on behalf of either his advisors or himself, this would not be sufficient to convince the Tribunal that it is just and equitable for the establishment of the Trusts to be set aside for mistake."

[253] In coming to this conclusion, the Tribunal put significant emphasis on several evidential findings in respect of this matter. Among others, these were (i) that Gabriele knew and was not mistaken as to the fact that there would be differences between the Adiana Foundation and the Trusts; (ii) the terms of the LoW, which it is said showed that Gabriele was aware that he did not have control over the Trusts during his lifetime and that the Trustee was not obliged to follow his wishes; (iii) the failure to incorporate the terms of the LOWs into the Trust Deeds themselves, if he genuinely intended to be the sole beneficiary during his lifetime; (iv) his delay in asserting a claim for mistake which is also said to undermine his alleged belief regarding his powers under the Trust; and (v) his testimony at the hearing, which conflicted with previous evidence in discrete arbitral proceedings in which he confirmed he understands the working of trusts.

[254] Matteo further submits that, contrary to the argument by Gabriele, the pro-arbitration construction of cl. 27 taken by the Tribunal is consistent with the approach taken to the construction of arbitration agreements by a long line of English authorities, of which the House of Lords decision in *Fiona Trust* (*supra*) is the leading authority. In setting out the principles, Lord Hoffmann stated as follows [2007] UKHL 40 at [6]:

> "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 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.
> In 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.
> […]
> 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."

Court's evaluation and conclusions

[255] I have not found the question of whether the Tribunal had jurisdiction to decide Gabriele's mistake counterclaim easy to decide.

[256] As has been noted, trust arbitration is still somewhat of a new frontier. The Bahamas is among only a handful of jurisdictions that have made statutory provisions for trust arbitration. Others include (although the list is not exhaustive) Guernsey, Malta, and a number of US States (Arizona, Florida, Missouri, New Hampshire and South Dakota). Thus, many of these questions which arise for consideration fall to be resolved as matters of first impression, as the law regarding internal trust arbitration has been described as "thin and underdeveloped" (see, Erin Katzen, "*Arbitration Clauses in Wills and Trusts: Defining the Parameters for Mandatory Arbitration of Wills and Trusts*," 24 QUANNIPIAC PROB. L.J. 118, 118-19 (2011)".

[257] Secondly, even apart from the limited jurisprudence, the legislation under consideration is arguably more far-reaching than many of the other jurisdictions. It was indicated to the court, for example, that The Bahamas appeared to be the only modern jurisdiction in which the doctrine of separability has been disapplied (or abrogated) in relation to trust arbitration. As noted, the applicants contend that this has significant legal consequences.

[258] Having said that, it is not necessary for me to deal in detail with every permutation of the arguments that have been presented to the Court on these issues. The central issue which arises under this section is whether the Tribunal was correct to determine that it had substantive jurisdiction to hear the mistake counterclaim.

[259] This depends on the answers to two corollary questions, the first of which is whether the mistake counterclaim was within the scope of the arbitration agreement. In his skeleton argument, Gabriele referred to this ground as whether "…*clauses 26 and 27 provide some limitation on the jurisdiction of the arbitral tribunal (and if so, what those limitations are), or whether…the Tribunal's jurisdiction is universal and unfettered in respect of all possible disputes pertaining to the Trusts*". The second issue, which did not arise before the Tribunal but which is pursued before this Court, is whether a validity dispute is arbitrable at all under Bahamian law. It is convenient to take these issues in inverted order.

Competence of the Tribunal to rule on its own jurisdiction (competence-competence vs. separability)

[260] The main argument deployed by Delanson and Gabriele in support of the contention that the mistake counterclaim is not arbitrable *per se* is that the disapplication of the principle of separability removed the juridical basis on which the Tribunal could determine its own jurisdiction where there was a challenge to the underlying agreement. Without separability, any invalidity in the underlying contract would *ipso jure* render the arbitration clause invalid, with the effect that the very jurisdictional basis on which the arbitrator relied for analyzing any challenges to it would be destroyed (*Ashville Investment's Ltd. v Elmer Contractors Ltd*., *supra*).

[261] A significant chunk of the written and oral arguments of Gabriele and Delanson was devoted to this issue, and Matteo responded in kind. But despite the sophistication and ingenuity of the arguments by the applicants, I find myself unable to agree that the Tribunal did not have competence to determine its jurisdiction to hear the mistake counterclaim.

[262] I start with the general proposition, as stated by Matteo, that the amendments to the Trust Act relating to trust arbitration were intended to "*provide a firm statutory foundation*" for the arbitration of trust-related disputes within its scope, and to eliminate some of the uncertainties that pertain at common law in relation to trust arbitration. This is a recurrent theme in Brownbill's commentary.

[263] In this connection, the first thing to note is that the *competence-competence* principle has been codified in the Act. Section 41(1) provides that "*unless otherwise agreed, the arbitral tribunal may rule on its own substantive jurisdiction*", and that any ruling by the Tribunal may be challenged by any available arbitral process of appeal or review. Substantive jurisdiction (as referentially defined at s. 41) includes the question of "*whether there is a valid arbitration agreement*". As Matteo points out, this is stated in unqualified terms and is not said to be dependent on the separability rule, although there is a caveat for the parties to agree otherwise, which reflects the shift to promote party autonomy as one of the main purposes of the Act. In other words, absent any contrary agreement by the parties, s. 41 provides a *statutory* basis for the Tribunal to determine its competence at first instance.

[264] The very able arguments which have been submitted by both leading counsel as to the relationship between the *competence-competence* principle and separability, supported by case law and academic authority, put into sharp relief the difficulties in interpreting the operation of these familiar concepts that are at the cornerstone of international arbitration. Gabriele says the Tribunal improperly distinguished between them in relying on s. 41 for jurisdiction, when the right of the arbitrator to rule on the validity of the main agreement flows from the principle of separability. Matteo says it is Gabriele who confuses the concepts, because while they are admittedly connected, the ability of a Tribunal to exercise *competence-competence* is not dependent on separability (*Dallah,* per Lord Collins, JSC [at 84]).

[265] In *Fiona Trust,* the House of Lords took the opportunity to clarify the common law with respect to the principle of separability in the context of arbitration agreements, prompting Lord Hoffmann to say that "…*it is time to draw a line under the authorities to date and make a fresh start*" [12]. Despite the blue-sky effect of *Fiona Trust* in UK law, the courts in some common

law jurisdictions continue to grapple with the "linguistic nuances" that plagued English law during the development of the common law principle, which illustrates the potential for varying judicial treatment of these concepts (see the position in Australia, "*The Presumptive Approach to the Construction of Arbitration Agreements and the Principle of Separability—English Law Post Fiona Trust and Australian Law Contrasted*," Joachim Delaney and Katharina Lewis, UNSW Law Journal, Vol. 31(1)).

[266] I would venture to suggest that the statutory solution adopted in the Trustee Act of disapplying separability from trust arbitration was specifically intended to guard against the possible inconsistent outcomes that could result from variable judicial treatment and application of these principles at common law. The provision of s. 91A, which deems an arbitration clause in a written trust instrument to "*have effect as between those parties as if it were an arbitration agreement and as if those parties were parties to that agreement*", gives efficacy to the arbitration agreement without the need to resort to the legal fiction of separability. For example, it provides that the agreement "*shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid*", and "*shall be treated as a distinct agreement*" (s. 7 of the Act). (Emphasis supplied.)

[267] Brownbill summarizes the effect of s. 91A as follows:

> "13.45 At the heart of the legislation is the decision to link trust arbitration to arbitration under the Arbitration Act 2009. This reflects the simple fact that, even with statutory assistance, trust arbitration remains non-contractual. In the absence of an arbitration agreement, the existing body of arbitration law, both statutory and judicial, will not be available in a trust arbitration. The solution has been to deem a provision in a trust instrument to be an arbitration agreement for the purposes of the Arbitration Act 2009. In this way, the existing statutory and common law arbitration regime is engaged and immediate solutions are provided to the problems of binding the relevant parties to the arbitration, the scope of arbitral powers, and the enforcement of arbitral awards."

[268] Viewed through this lens, the abrogation or disapplication of the principle of separability in relation to trust arbitration might not be as Delphic as Gabriele and Delanson contend, but a simple drafting convenience. Having enacted legislation which specifically deems an arbitration clause in a written trust instrument to be an "*arbitration agreement*", no useful purpose would be served by continuing to apply the principle of separability (as expressed at s. 7 of the Act or at common law) to trust arbitration.

[269] It clearly could not have been the intention of Parliament, in attempting to create a regime to facilitate trust arbitration, to turn back the position to the pre-separability position. In the *Harbour Assurance* case [1993] 6 Lloyds' Rep 455, Leggatt LJ, rejecting the notion that if a contract is void *ab initio* the arbitration clause contained therein is also necessarily void, noted the stark effect this could possibly have on agreements to arbitrate: "*Otherwise it would put in it [the arbitration agreement] the power of one contracting power to prevent arbitration from taking place simply by alleging that the contract was void for illegality*."

[270] By analogy, if Delanson and Gabriele are right in their contention, it would mean that the removal of separability would enable a party to defeat the jurisdiction of the Tribunal and avoid

arbitration simply by challenging the validity of the Trust Deed. This would be a most absurd result for legislation which was specifically intended to make trust arbitration more effective. While the Tribunal did not have to deal with the issue of the abrogation of the separability principle (because it was not argued before them), in my view they were not wrong to find jurisdiction in s. 41, especially when considered in light of s. 91A.

Scope of the arbitration agreement

[271] Standing back from the above conclusion, however, and even assuming that the Tribunal had the legal right to determine its jurisdiction to hear a validity dispute (and to determine it), it is plain that the dispute must also, on a proper construction of the Trust Deed, come within the range of dispute the parties intended to encompass within their arbitration agreement. As said by Dunedin LJ in *Champsey Bhara & Co. v Jivraj Balloo Spinning & Weaving Co. Ltd.* [1923] AC 480 at 488 (albeit a case which predates the development of the separability principle at common law):

> "The question of whether an arbitrator acts within his jurisdiction is, of course, for the court to decide, but whether the arbitrator acts within his jurisdiction or not depends solely upon the clause of reference."

Obviously, this exercise is done against the backdrop of the legislation facilitating the arbitration of trust disputes.

[272] As indicated, there are scant pre-legislative sources to guide the court on the interpretation of the 2011 amendments to the Trustee Act 1998. Perhaps the most comprehensive commentary (in fact, none other has been cited and I have not come across any in my research), is the Brownbill article referred to ("*Arbitration of Trust Disputes Under the Bahamas Trustee Act 1998*"). It is noted in that article that Brownbill, who was a contributor to the UK discussion paper which has been referred to, advised the Bahamas government on the amendments to the Trustee Act, and in doing so followed to some extent the Florida approach. This is a seminal article, and it is not surprising then that both parties have made references to it. Brownbill's view must clearly be given some weight, and I have found it a very useful explanandum on the provisions. But it is an auto-interpretation, and the usual canons of statutory interpretation must be applied.

[273] Brownbill commences with the laudable statement that: "*The Bahamas, by the Trustee Amendment Act 2011 (amending the Bahamas Trustee Act 1998 and adding new sections 91A, 91B, and 91(C),) has introduced a comprehensive regime for the arbitration of trust disputes. The goal of the new regime is to enable settlors to impose mandatory arbitration of all internal trust disputes and questions to avoid any need to involve the court*." This is clearly based on s. 91(A), which proclaims that its objective is "*to <u>enable any dispute or administrative question</u> in relation to a trust to be determined by arbitration in accordance with the provisions of the trust instrument*." [Underlining supplied.]

[274] He notes that the scope of the section is "substantially widened" by the reference therein to "*any dispute or administration question*", which are basically defined terms. For example, an

"administrative question" is defined in s. 91C as "*any relief or question in respect of which an action, application other reference to the court could, subject to section 91A and the Arbitration Act, be brought or made under Order 74 of the Rules of the Supreme Court, under this Act or under the Purpose Trust Act*." He concludes that this is meant to "*cover almost every application which trustees, beneficiaries, and protectors (as such) could bring in relation to a trust*". [Underlining supplied.] In this vein, it is also to be noted that s.91A (2), which deems any provision in a written trust instrument providing that "*any dispute or administration question arising between any of the parties in relation to the trust*" an "arbitration agreement", is limited by the definition of "parties". Section 91C defines party in this regard as "*any trustee beneficiary or power holder of or under the trust, in their capacity as such*."

[275] Despite the breadth of s. 91(A), Brownbill concludes, after setting out four categories of disputes in which a trust can be involved, that: "*Section 91A is solely concerned with internal trust disputes of the second and third type. The section therefore excludes challenges to the validity of the trust and disputes between the trustees and third parties*". (The entire passage in which the excerpt quoted appears has been set out above, pp. 59-60.) Claims in the second and third category are said to constitute those claims which are often referred to as "internal" trust disputes, and which are concerned with the rights and duties of the trustees and beneficiaries under the terms of the trust instrument. Claims in the first and fourth category (the latter of which are said to include claims questioning the trust on which the assets are held), are third party claims, which arise from outside the trust.

[276] This is what Brownbill says about claims in the fourth category:

> "13.52. Claims in the fourth category are, again, third party claims but claims which have a particular effect: they are attacks against the trust structure itself, essentially saying that the trust does not exist, at least not in the form reflected in the trust instrument. As third-party claims, they stand apart from those in the second and third categories in that they derive from outside the trust. Nothing provided for in the trust instrument can have a direct effect on the prosecution or determination of such disputes, save only the power of a trustee to compromise or settle such claims."

[277] It is correct to observe that the statutory regime does not specifically mention the arbitration of validity disputes, or any dispute or challenge that might originate from the settlor. As mentioned, the parties to any dispute or administrative question for the purpose of a trust arbitration are defined as *"any trustee, beneficiary or power holder of or under the trust, in their capacity as such*". This definition does not include the settlor (a point which Gabriele attempts to make heavy weather of), except perhaps inferentially as a possible power holder. In any event, there would hardly have been any necessity to refer to the settlor in the legislation, reflecting the traditional understanding that once the donor/settlor has donated what is "*the equitable equivalent of a gift*", the donor/settlor has no further role in the trust unless some power or right is reserved. However, Brownbill's conclusions as to the limitation of the scope of dispute to internal trust disputes, and the alleged *sub-silento* exclusion of disputes and challenges between the trustees and third parties (including validity disputes), seem predicated on the way in which parties to a dispute are defined.

[278] On this point, I would also make a passing reference to s. 87A of the Trustee Act (although I do not recall that either party mentioned it) which seems to reflect the common law understanding that validity disputes have traditionally been settled by the court. That section provides for various circumstances in which the interest of a beneficiary "shall" terminate, one of which concerns "*the validity of the trust being challenged, in whole or in part, in any court within or outside the Bahamas*". Validity of the trust is defined to include "the validity of any disposition of property to be held upon the trust and any question whether any settlor of the trust intended to create a trust on the terms of the instrument." [Underlining supplied.]

[279] However, I do not think that the failure of the legislation to make any specific reference to validity disputes or the exclusion of a settlor from the definition of parties is determinative of the issue. Neither is there anything in s. 87 to suggest that it is exclusively the court that can hear a validity dispute. In this regard, I am attracted to Matteo's submissions that the provisions of s.91(A) and the related provisions are "permissive" (or enabling) and not exhaustive or preclusive. In other words, they were intended to facilitate a wide range of trust disputes, perhaps most obviously the conventional internal trust disputes referred to arbitration, but they do not prohibit the parties agreeing to submit other types of trust disputes to arbitration.

[280] There are many signals in the legislation that Parliament intended to create a regime that was permissive and supportive of arbitration. I highlight only a few [underlining supplied]:

(i) s. 91(A), which proclaims that the goal of the section is to "*enable any dispute or administrative question in relation to a trust to be determined by arbitration in accordance with the provisions in the trust instrument*".

(ii) s.3 of the Second Schedule, which applies section 3 of the Arbitration Act as if it read "*the settlor shall be free to determine (by provisions in the trust instrument) how, in relation to a trust, disputes are resolved, subject only to such safeguards as are in the public interest*."

(iii) s. 3(b) (the principle of party autonomy), which provides, that "*the parties shall be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest*."

(iv) s. 70 of the Act, which grants very wide powers to the Tribunal, subject only to the parties' agreement. For example, ss. (1) states that "*The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies*". Further, unless otherwise agreed by the parties, the tribunal has power (*inter alia*) to "(4)(c) *to order the rectification, setting aside or cancellation of a deed or other document*", powers which arguably can only be exercised in relation to a validity challenge.

(v) s. 91B(2), which further expands the arbitral tribunal powers and empowers it to exercise all the powers of the court: *"(2) The arbitral tribunal…may, in addition to all other powers of the tribunal, at any stage in a trust arbitration, exercise all the powers of the Court (whether arising by statute (including this Act), under the inherent jurisdiction of the Court or otherwise) in relation to the administration, execution or variation of a trust or the exercise of any power arising under a trust*." As noted by Brownbill, a settlor is free to limit or expand the powers of the tribunal as he wishes.

[281] In other words, the compendious effect of these provisions is to provide for both "*subject matter arbitrability*" and "*remedial arbitrability*" in the case of trust arbitration (to use the terminology of the Privy Council in the recent case of *Family Mart China Holding Co. Ltd. v. Ting Chaun (Cayman Islands) Holding Corporation Ltd*. [2023] UKPC 33 [at 70], although in that case the Board was examining factors that would make an arbitration agreement operative or non-operative). So not only is a wide array of trust disputes made arbitrable by the Act, but the Tribunal is also given the powers of the court to grant remedies.

Whether the settlor agreed to submit validity disputes to arbitration

[282] I accept that I am not bound by the Tribunal's determination of its jurisdiction, but I can obviously pay some heed to their reasoning. In this regard, I do not think that the Tribunal can be faulted for the conclusion it came to on its construction of the Trust Deeds, and certainly not based on the material that was before it.

[283] Firstly, I am satisfied that the Tribunal was right to apply the liberal construction commended in *Fiona Trust*. In a very recent decision (*Mozambique v Privinvest* [2023] UKSC 32, 20 September 2023), the UK Supreme Court affirmed that the *Fiona Trust* principle applies to the construction of an arbitration agreement to determine what matters were covered by the agreement. Significantly, the UKSC held that the principle applied not only as a matter of English law, but as a general principle of international commercial arbitration (although it clearly does not displace the need for the court to construe the agreement according to the governing law). In delivering the majority decision, Lord Hodge said [at 46]:

> "A pro-arbitration approach may involve a liberal interpretation of an arbitration agreement in order to respect the autonomy of the parties in determining how their disputes are to be resolved. In *Enka Insaat ve Sanayi AS v OOO* "*Insurance Co Chubb*" [2020] UKSC 348 ("*Enka Insaat*"), Lord Hamblen and Lord Leggatt, giving the leading judgment of the court, stated (para.107):
>
> > 'In *Fiona Trust & Holding Corpn v Privalov* [2007] UKHL 40; [2007] Bus LR 1719, the House of Lords affirmed the principle that "the construction of an arbitration clause should start from the assumption, that the parties, as rational business men, are likely to have intended or purported to enter to be decided by the same tribunal" (see para. 13, per Lord Hoffman).
> > Contrary to the submission made on behalf of Chubb Russia, this is not a parochial approach but one which, as the House of Lords noted in the Fiona Trust case, has been recognized by (amongst other foreign courts) the German Federal Supreme Court (Bundersgerichstshof), the Federal Court of Australia and the United States Supreme Court and, as stated by Lord Hope at para 31, "is now firmly embedded as part of the law of international commerce". In his monumental work on International Commercial Arbitration, 2nd ed. (2014), p 1403, Gary Born summarizes the position as follows:
> >
> > 'In a substantial majority of all jurisdictions, national law provides that international arbitration agreements should be interpreted in light of a 'pro-arbitration' presumption. Derived from the policies of

> leading international arbitration conventions and national arbitration legislation, and from the parties' likely objectives, this type of presumption provides that a valid arbitration clause should generally be interpreted expansively and, in cases of doubt, extended to encompass disputed claims. That is particularly true where an arbitration clause encompasses some of the parties' disputes and the question is whether it also applies to related disputes, so that all such controversies can be resolved in a single proceeding (rather that in multiple proceedings in different forums).' "

[284] Even if Gabriele could credibly argue, prior to the 2011 amendments, that the liberal construction principle (stated in the context of a contract) was not sufficiently analogous with the trust relationship to import into the construction of a trust Deed, this argument is significantly diminished (if not negated) by the effect of the amendments. This is because the amendments put trust disputes on the same footing as other commercial arbitration and did so by specifically treating an arbitration agreement as a "*binding agreement*" between the parties.

[285] I also reject the contention that the arbitration clauses exclude validity disputes from their subject matter. Indeed, it is noted that even while maintaining this contention, Gabriel concedes that the clauses admit of "*alternative realistic interpretations*", and therefore the maxim *verba ita sunt itelligenda ut res magis valeat quam pereat* (the court should lean towards that construction which validates the agreement) is against him. The Tribunal was also right, in my opinion, to point out that cl. 26.1 is merely a choice of law clause and does not specify a judicial or arbitration forum to determine validity claims. True it is that cl. 27.1 speaks to "*any other*" controversy, which is admittedly ambiguous, but the arbitration clauses are not exactly a model of clear drafting to begin with (as was noted by Winder J in the 2018 ruling).

[286] Clause 27.4, which is the only clause that specifically refers to a judicial forum, states that "*matters which cannot be settled out of court*" (or "*matters that cannot be brought to arbitration*", using Matteo's interpretation) were to be brought before the court of the registered office of the Trust, which was then said to be the Court of Appeal of The Bahamas. As pointed out in the 2018 Ruling, it is questionable factually whether The Bahamian courts could have been the courts of the registered office of the Trust at their commencement because of the then domicile of the Trustee.

[287] What is clear, and there is no disagreement on this, is that the determination of matters which could not be brought to arbitration was left to be determined by Bahamian law. In settling the Trusts, Gabriele specifically provided that they were to be subject to *The Trust (Choice of Governing Law) Act 1989* and the *Trustee Act 1998* "*and subsequent amendments and supplements*". Thus, all of the 2011 amendments, and their application for the purposes of arbitration under the Act, apply to the construction of these clauses. In fact, it has been noted that the Spring Trust, which was settled in 2012 (well after the amendments were in effect), was executed without any change to the language of any of the Trust deeds.

[288] Thus, it was well within the range of reasonable interpretations (or the "alternative realistic interpretation" conceded by Gabriele), for Tribunal to find that the expression claims relating

to the "institution or effect" of the Trust was wide enough to encompass a validity claim. As stated, the Act does not exempt validity disputes from arbitration. Specifically, s. 102 states that nothing in the Act is to be construed as "*excluding the operation of any rule of law*" as to, *inter alia*, "(a) *matters which are not capable of settlement by arbitration*," and "(b) *the refusal or recognition or enforcement of an arbitral award on the grounds of public policy*." If Parliament wanted to exclude validity disputes, it could easily have followed the Florida language (which it has been noted influenced the Bahamian position) and specifically excluded from enforceability "*disputes of the validity of a part of a will or trust*" (S. 731.401 (2)). Instead, s. 3(b) leaves it to the parties to be "*free to agree how their disputes are resolved, subject to such safeguards as are necessary in the public interest*."

[289] This is obviously a reference to the "public interest" (or public policy) of The Bahamas. Different national systems take different views of what is arbitrable under their laws and, in this context, arbitrability (which is a portmanteau term) is being used to refer to those disputes which, having regard to their nature, or public policy or statute, could only be resolved before the public courts of the State.

[290] But there is no universal yardstick for determining what disputes are non-arbitrable. As the Privy Council noted in the recent case of *FamilyMart China Holding Co. Ltd. v Ting Chuan (Cayman Islands) Holding Corp* [2023] UKPC 33:

> "72. The underlying concept of subject-matter arbitrability is that there are certain matters which in the public interest should be reserved to the courts or other public tribunals for determination. But there is no agreement internationally as to the kinds of subject matter or dispute which fall within subject matter arbitrability. In the 2001 Companion Volume to their book on Commercial Arbitration Lord Mustill and Stewart Boyd stated (p 71):
>
> > 'Since different states have their own tradition and precepts, differing radically from state, on matters of politics, economics, morality and the like, it is not surprising that equally radical divergences can be found when each state identifies the matters which are regarded as too important to be left to private resolution.'
>
> 73. A similar statement can be found in Born, *International Commercial Arbitration*, 3rd ed (2021) Vol I p 1029, para. 6.01, in which the author states:
>
> > 'Although the better view is that the [New York] Convention imposes international limits on Contracting States' applications of the nonarbitrability doctrine…the types of claims that are nonarbitrable differ from nation to nation. Among other things, typical examples of nonarbitrable subjects in different jurisdictions include selected categories of disputes involving criminal matters; domestic relations and succession; bankruptcy; trade sanctions; certain competition claims; consumer claims; labour or employment grievances; and certain intellectual property matters. Over the past several decades, the scope of the non-arbitrability doctrine has materially diminished in most developed jurisdictions.
> >
> > As these examples suggest, the types of dispute which are nonetheless almost always arise from a common set of considerations. The

> nonarbitrability doctrine rests on the notion that some matters so pervasively involve either 'public rights and concerns, or interest of third parties, that agreements to resolve such disputes by 'private arbitration should not be given effect.' "

[291] The Bahamian Parliament specifically made trust disputes subject to arbitration as a matter of public policy. Indeed, it went further and clothed the arbitral Tribunal with all of the powers of the court (statutory and under the inherent jurisdiction) relating to the administration, execution, or variation of a trust. The tribunal was also given the same powers of the court to appoint persons to represent the interest of any person (including a person unborn or unascertained) or class in a trust arbitration. Further, as noted, unless otherwise agreed by the parties, the tribunal has power (*inter alia*) to "(4)(c) *to order the rectification, setting aside or cancellation of a deed or other document*", powers which arguably can only be exercised in relation to a validity challenge.

[292] While Gabriele makes general allegations in his written skeleton arguments that the Tribunal's determination that it had jurisdiction was "*contrary to law*" and "*unlawful*", it is never explained how this was contrary to the Arbitration Act or any other law, or public policy. My attention was not drawn to any statute which excludes validity disputes or any public policy considerations involved in such disputes that would preclude their determination by an arbitral tribunal.

[293] The applicants did submit, however, in aid of their construction arguments that one of the possible reasons why Parliament would not have intended to make validity disputes arbitrable nor preclude leave to appeal on a point of law, was that this would have the effect of ousting the supervisory jurisdiction of the court.

[294] For example, Gabriele argues that the explicit exclusion of validity disputes from the scope of the arbitration clause is entirely rational and understandable considering the prevailing view in 2006 (when the majority of the Trusts were executed) that validity disputes were not (or should not be) submitted to arbitration. He relies on an excerpt from the Trust Law Committee Paper, at [28], where it was said:

> "[I[t is clear from the Wynn case [*Re Wynn*] [1952] Ch. 271], that it is not open to a settlor or testator wholly to oust the jurisdiction of the court. The analysis must presumably be that the beneficiaries' interest do not derive their validity solely from the benefaction of their settlor or testator but also at a higher level from the principles of law and equity by which the courts have elected to enforce them."

[295] In similar vein, Delanson argues that when (as in the present case) an award in arbitral proceedings has significant consequences for the administration of a trust, the Court's inherent supervisory jurisdiction over trusts is invoked, citing the Privy Council's decision in *Schmidt v Rosewood Trust Ltd.* [2003] UKPC 26, and an article "*The Supervisory Jurisdiction Over Trust Administration*", Daniel Clarry, Oxford. As put in Delanson's skeleton argument No. 2 (at 73):

> "[E]ven if Delanson and GV do not have the right to appeal (or seek leave to appeal) on questions of law under the Act or the Trust Deeds, the Court should nevertheless consider their legal challenges to the Partial Award on the merits. For the Court to decline to do so would be anathema to supervisory jurisdiction over the Trusts."

[296] Firstly, it is noted that neither Gabriele's argument nor Delanson's provide any support for the assertion that the Tribunal's determination of jurisdiction over the validity dispute was "*unlawful*" because its determination ousted the court's supervisory jurisdiction over Trusts and was therefore contrary to public policy. At best, the points are marshalled in support of the contention that the court should not construe the Trust Deed as encompassing validity disputes or the Act as precluding appeal on points of law because of the potential to oust the supervisory jurisdiction of the court.

[297] But on any analysis, I do not accept that granting a right to the Tribunal to determine validity dispute ousts the court's supervisory jurisdiction. In fact, this argument could not be made even on the authority of *Re Wynn* itself, where the court had to determine whether a clause in a will which purported to refer questions arising in the execution of the trust to the trustees and which attempted to make their determination "*conclusive and binding on all persons interested under the will*" was void, *inter alia*, as being an attempt to oust the jurisdiction of the court. There, the court came to the conclusion that it did, but in his judgment Danckwerts J noted [at 346]:

> "The courts always decline to recognize an agreement to refer all disputes to arbitration as compelling them to stay an action, and to do so because such an agreement would oust the jurisdiction of the King's court. I prefer the language of Lord Sumner, concurred in by Lords Buckmaster and Atkinson [in *Atlantic Shipping Co v Dreyfus* (1922) 38 TLR 534], to the effect that as long as a clause does not exclude the claimant from such recourse to the court as is always open by virtue of the provisions of the Arbitration Act, 1889, but only requires conditions as precedent to a valid claim, it does not oust the jurisdiction. I think Lord Sumner would have regarded a clause depriving a claimant of the protection of the Arbitration Act as an ousting of the jurisdiction and unenforceable."

[298] Further, as has been noted, the concept of what range of matters are arbitrable has moved far beyond what was contemplated at the time of cases such as *Re Wynn*. As has been pointed out, the Act gave an arbitral tribunal *all* of the powers of the court in relation to the administration, execution or variation of a trust and the exercise of any of the powers under the trust. This would encompass a wide range of matters in relation to trust disputes hitherto not thought arbitrable.

[299] In this regard, I would wish to make reference to the observations of Brerenton J. in *Wekler & Ors. v Rinehart & Anor (No.2)* [2011] NSWSC 1238 (7 October 2011), a case from the NSW Supreme Court (cited in the footnotes to the article by Daniel Clarry, Oxford, *supra*). There, in deciding, *inter alia*, that a claim for the removal of one of the trustees of a trust could be submitted to arbitration and did not remove the jurisdiction of the court, his Lordship said [25]:

> "25. An agreement to submit to mediation and arbitration a dispute of the type the subject of the plaintiffs' application here is not one totally to exclude the jurisdiction of the court,

> but only to require its prior submission to mediate and arbitration. In my view, there is no reason why a dispute between beneficiaries and a trustee, including an application by beneficiaries for the removal of a trustee, could not be referred to arbitration and, *a fortiori*, mediation. To do so does not exclude the jurisdiction of the Court. If anything, public policy encourages the private resolution of disputes concerning family matters, and there is no reason why this should not include family trusts."

[300] It is beyond the pale that the 2009 Act, even though it limits the court's review jurisdiction, still provides for review of the Tribunal's decision under the statutory gateways. Further, I have already referred to the Hansard debate where, even in recognizing that the purpose of the Act was to limit the grounds on which the court could intervene, it was clearly indicated that the court's jurisdiction over trusts would be preserved. In fact, I have considerable difficulty reconciling the applicants' arguments that the ability of the Tribunal to determine a validity claim by the Tribunal would oust the supervisory jurisdiction of the court, while in the same breath appealing to the court's supervisory jurisdiction (via the Arbitration Act) to remediate the error allegedly made by the Tribunal. I therefore do not find that there are any matters of public policy or law that would preclude the Tribunal deciding a validity dispute agreed to be submitted to arbitration by the parties.

Winder J's decision

[301] Gabriele placed significant emphasis on the 2018 judgment to assert that disputes referred to at cl. 26.3 would not be subject to arbitration, contending that the judgment decided that such disputes were not arbitrable and constituted a *res judicata* between the parties. I do not agree that this is the effect of his Lordship's ruling, for reasons given below.

[302] I set out what I consider to be the relevant parts of his Lordship's ruling in this regard. Firstly, at [para. 50] he found as follows:

> "[50] I am satisfied that the Arbitration Act 2009 applies to these claims, save for the remedy seeking for the removal and replacement of Delanson. In such a case the court is constrained, in accordance with the provisions of section 9 to order that the action be stayed whilst the matter proceeds to arbitration. I am satisfied that the trust is not null and void inoperative, or incapable of being performed."

Then at paragraph 50 he says:

> "[51] The defendants contend that clause 27 created an exclusive jurisdiction clause in the Court of New Zealand and that these proceedings, in so far as any claim may not be the subject of arbitration, must be litigated there. This it seems would apply even if I am wrong as to the application of the Arbitration Act 2009."

At paragraph 56, his Lordship, contrasting the "ambivalent" and "confusing" nature of cl. 27(3) with cl. 27.4 said:

> "Clause 27(3] may be considered ambivalent as to whether it was an exclusive jurisdiction clause or whether it merely maintained exclusivity as long as the Registered office of the Trust is located in The Bahamas. Clause 27[3] also confusingly speaks to the registered

> office of the Trust being the Bahamas at the commencement of the Trust which, on the evidence, could not have been the case. This is explained away on the basis that a contemplated move to The Bahamas was eventually to take place and Panama, being a civil law country, the deed deemed the registered office to be in The Bahamas for the purpose of Clause 27[3]. Clause 27(7) however is not so ambiguous as to the intent to vest an exclusive jurisdiction in the Courts of The Bahamas appears clear. It provides that "for any matters that cannot be brought to arbitration" the courts having exclusive jurisdiction is the court at the registered office of the Trust, …".

Finally, in the dispositive [at 61], he concludes as follows:

> "In the circumstances therefore, if these claims (or any part of them) do not fall to be considered by arbitration, I would have ordered that they be stayed in favour of proceedings in New Zealand."

[303] Winder J's conclusion at para. 61 was therefore conditional on a determination that *if* any of the claims did not fall to be determined by arbitration, they would be subject to the exclusive jurisdiction of the courts of the registered office of the Trusts, not that a validity dispute was not subject to arbitration. No such dispute was before him in any event. I therefore reject the contention that this ruling constituted a *res judicata* between the parties on this point.

Procedural Bars

Submission to jurisdiction

[304] Leaving to one side the question of whether or not the mistake counterclaim was included in the arbitration agreement, I think there is great force in the submission by Matteo that Gabriele conferred jurisdiction on the tribunal by voluntary *ad hoc* submission. As the argument is put, there is no reason in principle why the claims brought in a single arbitration cannot encompass both "(i) *trust related disputes facilitated by the trust arbitration provisions of the Trustee Act; and (ii) other disputes, submitted to arbitration without the need for such facilitation.*"

[305] In Born, "International Commercial Arbitration (3rd Ed, 2021), p. 734, it is noted that the creation of an arbitration agreement "*can also occur in the course of arbitration, by way of the parties' written submissions, not raising any objection to jurisdiction or affirmatively consenting to the tribunal's jurisdiction*." To similar effect, the learned editors of Russell on Arbitration (24th edn. 2015) [2-006] state that: "[*Ad hoc submission] may also describe a situation where the parties agreed to expand the reference and the tribunal's jurisdiction to take account of new issues introduced as the claim progresses, for example in their pleadings and where no objection by the other side is made*."

[306] It has been observed that "*it is possible for an arbitration agreement to be established by conduct as well as through an express agreement (analogous to the concept of submission as applied to the jurisdiction of a court), if an arbitration is commenced by one party and the other party accepts through participating in the proceedings (other than to dispute jurisdiction)*" (Alex, Mills, "*Oxford handbook on International Arbitration*" (Thomas Schulz and Frederico Ortino (eds)). [pg. 9]; and see *Gulf Import & Export Co. v Bunge* [2008]1

Lloyd's Rep. 316, although on the facts of that case, the claim that there was submission to jurisdiction failed.)

[307] As pointed out, Gabriele made the (counter) claim and positively invited the Tribunal to determine it, and therefore affirmatively consented to the tribunal's jurisdiction. Although I have already found that the counterclaim was arbitrable for the reasons given, I would also find in the alternative that Gabriele's conduct and presentation of this claim constituted an *ad hoc* submission to the Tribunal's jurisdiction.

Estoppel, Statutory bars

[308] Even apart from the finding that the dispute was within the arbitration clauses, I would hold that Gabriele is estopped and precluded from challenging the submission to jurisdiction. As far as the mistake claim is concerned, Gabriele was not in the position of a respondent defending a claim. He assumed the position of a claimant and, as has been pointed out, positively invited the Tribunal (albeit in the alternative) to resolve the counterclaim. It is repugnant to a fundamental and basic principle of law (which is incorporated in arbitration law) that a party should be allowed to actively seek to have a claim determined by a tribunal, but then afterward seek to dispute the jurisdiction of the tribunal to have determined the very dispute which was laid before it (see *Express Newspapers, supra*).

[309] I agree with the submission of Matteo [MV 1/187] that "*Having fully participated in the arbitration process and having run all the points that he wished to run…Gabriele cannot, at the drop of a hat, ask the Court to dismantle the arbitration by contending that the Tribunal lacked jurisdiction which neither he nor Delanson challenged and indeed which they positively invoked. That is fundamentally inconsistent with basic precepts of arbitration law and makes a mockery of the process*." This would run a horse-and-carriage through the Arbitration Act and the principle of promoting finality and a single-forum for adjudication of disputes.

Loss of right to object, s. 95

[310] Though this point comes at the tail end of the court's observations, it is not an inconsequential one. If upheld, the effect would be to render much of the foregoing reasoning on whether the validity dispute was arbitrable at law academic, although it has been necessary for dealing with the novel issues raised. I have set out s. 95 in its entirety much earlier on in this judgment, but that section stipulates that if a party to arbitral proceedings—

> "takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection […] (a) that the tribunal lacks substantive jurisdiction…he may not raise that objection later, before the tribunal or the court, unless he shows, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

[311] Gabriele has sought to argue, based on a single academic opinion, that this section should not be construed to limit a party challenging an award to only arguing the points raised before the

arbitrators. While I accept, as a matter of principle, that it might be possible for a party before the court to expand on the points in support of a ground of objection taken before the Tribunal, I am not of the opinion that this can apply where the ground of objection is discrete from the objection raised before the Tribunal. In my view, this is exactly the kind of situation that the policy behind the enactment of s. 95 [s. 70 UK Act] of promoting "*openness and fair dealing between the parties*" was intended to guard against. There is no paucity of case law identifying or confirming these principles in respect of the corresponding provision (s. 70) of the UK Act, (see, for example, the list of authorities cited at para. 522 of the very recent judgment of the Hon. Mr. Justice Robin Knowles in *The Federal Republic of Nigeria v. Process & Industrial Developments Ltd.* [2023] EWHC 2638 (Comm).)

[312] I think it is useful to refer to one of those authorities, *Rustal Trading v Gill & Duffuss SA* [2002]1 Lloyds' Rep 14, where Mr. Justice Moore-Bick (as he then was) commented on s. 73 of the UK Act as follows [19-20]:

> "The effect of this section is that a party to an arbitration must act promptly if he considers that there are grounds on which he could challenge the effectiveness of the proceedings. If he fails to do so and continues to take part in the proceedings, he will be precluded from making a challenge at a later date. Moreover, it is clear from the language of sub-s. (1) itself that it is unnecessary for an applicant to have had actual knowledge of the grounds of objection in order for him to lose his right to challenge the award. If the respondent can show that the applicant took part or continued to take part in the proceedings without objection after the grounds of objections had arisen, the burden passes to the applicant to show that he did not know, and could not with reasonable diligence have discovered, those grounds at the time. It may often be necessary, therefore, to consider the applicant's conduct of the proceedings against the background of his developing state of knowledge."

[313] The only objection taken before the Tribunal was as to the *scope* of the arbitration clause in the Trust Deeds, on the grounds that it did not include a validity dispute. The grounds now asserted based on the Trustee Act are legal grounds that would have been known to the experienced counsel that represented Gabriele and Delanson, and it is impossible to argue that they could not with reasonable diligence have been discovered. This is not the kind of situation encountered by Knowles J. in *Federal Republic of Nigeria*, where the facts relied on by the applicants to challenge an award under s. 68 (bribery on a large scale) did not come to light and could not have been discovered by them at the time they took part in the arbitration.

[314] In my judgment, s. 95 seeks not only to maintain openness and fair dealing between the parties but serves the more fundamental purpose of protecting the authority of the Tribunal and the integrity and efficiency of the arbitration process. Jurisdiction of the forum, whether an arbitral tribunal or a national court, is foundational to the determination of any dispute. Thus, any and all challenges to jurisdiction, except for those based on grounds which could not with reasonable diligence have been discovered at the time, should be taken timeously and not held up a parties' sleeve to be deployed later with a view to upsetting the entire arbitration apple cart after enormous time, effort and costs have been expended on the process.

[315] The importance the Act gives to ensuring that any challenges to the tribunal's jurisdiction are made timeously is signalled by a number of provisions (which have their corresponding provisions in the UK Act). For example, under s. 42(1), a party who wishes to object on the grounds that the tribunal lacked substantive jurisdiction at the outset of the proceedings must do so no later than when he takes the first step in the proceedings to contest the merits. Then by s. 42(2), if a party wishes to object on the grounds that the tribunal has exceeded its jurisdiction during the course of the proceedings, they must do so as soon as the matter is raised. Alternatively, a party may apply to the court to have the issue of jurisdiction determined as a preliminary point, upon notice to the other parties (s. 43(1)). Further, there is 95(1), which has been examined, and 95(2), which provides that where the tribunal rules on its jurisdiction and a party does not challenge the ruling by any available arbitral process of appeal or review, or by challenging the award within the time allowed by the arbitration agreement or the Act, he may not thereafter object later to the tribunal's substantive jurisdiction on any ground that was the subject of that ruling.

[316] If the challenge to jurisdiction was put on the grounds that the mistake claim was non-arbitrable as a matter of national law, it is possible that the Tribunal might have proceeded differently and put the election to the parties (as provided for at 42(4)), as to whether to make an interim ruling on jurisdiction (and suspend any hearing on the merits), or deal with the objection in its awards on the merits. As the mistake claim had the potential to fundamentally undermine the arbitration agreement, and so deprive the Tribunal of jurisdiction over the whole dispute, it is likely the first option would have been pursued. Further, as mentioned, pursuant to 43(1), Gabriele could have approached the court to determine any question of jurisdiction as a preliminary point.

[317] I would hold therefore that in any event Gabriele is precluded by s. 95 from now objecting to the Tribunal's jurisdiction on the grounds that the mistake claim is said to be non-arbitrable based on the provisions of Bahamian law.

The illegitimate (parasitic) challenge

[318] I agree, for many of the reasons submitted by Matteo (although I do not need to treat with all of them) that the attempt to invite the court to exercise original jurisdiction to set aside the Trusts based on Gabriele's mistake claim is misconceived. This is necessarily so, because the claim was contingent on the court finding that the mistake claim was arbitrable (which I have found). Thus, if the tribunal had jurisdiction to determine the claim, there is no complaint that can properly give rise to a jurisdictional challenge under s. 89, and no challenge is (or could be) made to the merits of the tribunal's findings on the claim.

[319] I also agree that the challenge is not properly before the court (e.g., not "on a procedurally extant footing", as put by Matteo), as it is not pleaded in Gabriele's originating notice of motion. It is therefore precluded by s. 93(3) of the Act. That section has been referred to several times, but it requires a party to bring all of his challenges in his notice of motion and within the 28 period. In this regard, a passing reference may be made to Order 55, Rules of

the Supreme Court 1978 (R.S.C. 1978), which were the procedural rules governing appeals, *inter alia*, from tribunals when the applications/appeals were filed:

> "(3) Except with the leave of the Court, no grounds other than those stated in the notice of motion by which the appeal is brought or any supplementary notice under paragraph (1) may be relied upon by the appellant at the hearing; but that [the] Court may amend the grounds so stated or make any other order, on such terms as it thinks just, to determine the real controversy between the parties."

No supplementary notices were served amending the notices and neither was any leave sought to rely on the additional grounds.

[320] Matteo rightly adverts to the procedural delays that would have resulted from adjourning for the purposes of an evidentiary hearing to properly resolve the matter, as this would have involved affording him an opportunity to serve evidence and to cross-examine Gabriele. Therefore, strictly speaking, the court was never in a position to determine the mistake claim and could not do so on the unilateral evidence of Gabriele. In any event, it is clear that Gabriele did not seriously press for an evidential hearing, and in fact no application was made for leave to adduce additional evidence. The obvious conflicts in the parties' evidence with respect to Gabriele's intentions in setting up the Trust, as elucidated in the Tribunal's treatment with the rectification claim (paras. 467 and 513 of the Partial Award), could only have been resolved on *viva voce* evidence and cross-examination.

[321] The above reasons are sufficient to dispose of the "illegitimate jurisdictional challenge" claim, but I also think it is important to mention as a matter of principle that to entertain such a claim would be to stray wholly outside the "*carefully constructed process of limited judicial oversight of arbitrations*." It has to be remembered that the court, although it still retains some inherent powers in its ability to support the arbitral process (as noted in the court's Ruling on the interlocutory issues) is exercising *supervisory* and *review* powers when a challenge/appeal is brought under the limited grounds available under the Act. The orders or remedies which the court may make on a s. 89 application [s. 89(3)] are to "*(a) confirm the award; (b) vary the award; or (c) set aside the award in whole or in part*", and one of the foundational principles is that the court should not intervene "*in matters governed by this Act*" except as provided. I do not think that a s. 89 challenge, because it involves a *de novo* hearing of the issue that was under consideration by the Tribunal, can be used as a backdoor route for a party to attempt a second bite at the cherry under the guise of invoking the supervisory jurisdiction of the court.

[322] As has been mentioned, it is clearly the case that an application could have been made even after the commencement of the arbitration to the supervisory court in The Bahamas or made elsewhere if thought appropriate (i.e., the courts of New Zealand) for a stay of arbitration and the determination of the mistake claim. Alternatively, the supervisory court or the arbitration panel could have been asked to decide the issue as a preliminary question. None of these options was pursued.

[323] By way of conclusion on this point, I note that Matteo has invited the Court to declare that the Applications do not "*require the Court to determine whether the Trust should be set aside for*

mistake". I decline to make the declaration, as it was only raised by dint of skeleton argument, and the Act is clear on the reliefs the court may grant on an application/appeal. But this is all academic, as it is my considered opinion that what is called the "illegitimate challenge" does not arise on the applications before the Court, and it would be an improper use of the court's jurisdiction to determine that claim.

H. THE SECTION 91 CHALLENGE: APPEAL ON A POINT OF LAW

[324] It is not in dispute that section 91 of the Arbitration Act is largely modelled on s. 69 of the 1996 English Arbitration Act. But there is one significant divergence, which counsel for Matteo contends makes all the difference as to whether the 2009 Act permits the grant of leave to appeal on questions of law where there is no express opt-in by the parties. This is because s. 69 of the English Act specifically provides for the Court to grant leave to appeal on a point of law and sets out a test for the grant of such leave. These sections are conspicuously omitted from s. 91, even though it otherwise tracks s. 69 in all other material respects.

[325] In summary, Matteo's position is that this is a deliberate omission that can only logically be interpreted as being consistent with the intention of Parliament to remove any ability for the court to grant leave at the unilateral request of a party. By contrast, the applicants argue that, even if the omission is deliberate, when the provisions of ss. 91 and 92(8) are construed compendiously, they ought to be interpreted as providing a residual ability in the court to grant leave to appeal on a point of law.

[326] This issue is not entirely new to the court. It reared its head during the interlocutory applications, during which I formed the preliminary view, in deference to the summary procedure adopted under the English Act and after hearing brief submissions from counsel, that the court had jurisdiction pursuant to s.92 (8) to grant leave to appeal on a question of law. I therefore initially granted leave to Gabriele and Delanson to appeal errors of law, to the extent necessary, in the court's oral ruling delivered on 3 March 2021 [see paras. 151-160 of the 2022 Ruling].

[327] That leave was recalled, however, on 14 April 2021, after Matteo filed a summons for that purpose dated 3 March 2021. As the court said in the written Ruling on the interim applications:

> [163] "[T]o the extent that my oral decision on this point would have deprived Matteo of his right to make substantive submissions as to whether s. 91 and 92(8) properly construed, provide any jurisdiction to the court to grant leave (in the absence of a consent position), and if so what was the test to be applied, I perhaps prematurely in retrospect, granted leave to appeal. I therefore recalled this, based on a clear determination that I had the jurisdiction to do so, and that this was a proper case in which to do so, for reasons which I shall shortly explain."

Whether leave to appeal point of law available

[328] A logical place to start this analysis is to look at the contrasting provisions of the UK and Bahamian legislation. Section 91 has been set out in full above, and there is no need to repeat

it here. In any event, it is imbedded in the corresponding provision of s. 69 of the UK Act (the portions in boldface are those omitted from s. 91 of the 2009 Act, and there are minor formatting differences):

> "69. Appeal on point of law
>
> (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.
>
> An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.
>
> (2) An appeal shall not be brought under this section except—
>
> **(a)** with the agreement of all the other parties to the proceedings, **or**
>
> **(b) with the leave of the court.**
>
> **The right to appeal is also subject to the restrictions in sections 70(2) and (3).**
>
> **(3) Leave to appeal shall be given only if the court is satisfied—**
>
> **(a) that the determination of the question will substantially affect the rights of one or more of the parties,**
>
> **(b) that the question is one which the tribunal was asked to determine,**
>
> **(c) that on the basis of the findings of fact in the award—**
>
> **(i) the decision of the tribunal on the question is obviously wrong, or**
>
> **(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and**
>
> **(iii) that despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.**
>
> **(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.**
>
> **(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears necessary to the court that a hearing is required.**
>
> **(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.**
>
> **(7)** On an appeal under this section the court may by order—
>
> (a) confirm the award;
>
> (b) vary the award;
>
> (c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination; or
>
> (d) set aside the award in whole or in part.

The court shall not exercise its powers to set aside an award, in whole or in part, unless it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal. But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general public important or is one which for some other special reason should be considered by the Court of Appeal."

[329] If the matter turned only on the interpretation of s. 91, the position would be clear. But section 92, which is entitled "*Challenge or appeal: supplementary provisions*", sets out supplemental provisions which either relate to challenges brought under s. 89 or 90 and/or appeals brought under s. 91. It basically replicates s. 70 of the UK Act, *mutatis mutandis*, with minor formatting differences. As the arguments on construction turn substantially on the provisions of section 92, in particular 92(8), it bears setting out this provision in full:

"92. *Challenge or appeal: supplementary provisions*

(1) The following provisions apply to an application or appeal under section 89, 90 or 91.

(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted—

a. any available arbitral process of appeal or review; and
b. any available recourse under section 79.

(3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.

(4) If on an application or appeal it appears to the court that the award—
a. does not contain the tribunal's reasons; or
b. does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal,
the court may order the tribunal to state the reasons for its awards in sufficient detail for that purpose.

(5) Where the court makes an order under subsection (4), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from its order.

(6) The court may order the applicant or appellant to provide security for the costs of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with; the power to order security for costs shall not be exercised on the ground only that the applicant or appellant is—
(a) an individual ordinarily resident outside The Bahamas; or
(b) a corporation or association incorporated or formed under the law of a country outside The Bahamas or whose central management and control is exercised outside the Bahamas.

(7) The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.
(8) The court may grant leave to appeal subject to conditions to the same or similar effect as an order made under subsection (6) or (7) but this does not affect the general discretion of the court to grant leave subject to conditions."

The parties' submissions

[330] Gabriele and Delanson make very similar points in respect of the construction of section 91. They accept that s. 91 does not expressly confer any right on the Court to grant leave to appeal, as compared to the corresponding s. 69 of the UK Act. But they contend that there is a general or residual discretion to grant leave to appeal in section 92(8).

[331] In this regard, the applicants urge the Court to apply a holistic and contextual construction of the provisions relating to challenges and appeals, and that s.91 has to be interpreted together with s. 92(8). It is contended that, if Matteo's construction of s. 91 is right (i.e., that leave to appeal is only by the opt-in provision), this sets up a direct conflict between s. 91 and s.92(8). This, the court would be required to resolve either by giving priority to one or the other, or by applying a rectifying construction to the one containing the error.

[332] Mr. Black commenced his submissions on the construction point with a *tour-d' horizon* of a number of well-known canons of construction and statutory presumptions. Several are standard and do not need much explication. For example, there is the presumption of rational drafting by a reasonable and informed legislature (*Bennion, Bailey and Norbury on Statutory Interpretation* ("*Bennion"*), 8th Edn (2020), at [11.3]; and *R (on the application of N) v Walsall Metropolitan Borough Council* [2014] EWHC 1918 (per Leggatt J. at [65]). It follows, therefore, that the legislature is taken to mean what it says and that there is a presumption in favour of the grammatical or plain meaning of an enactment (Bennion at [11.4]) from which the Court "*may be reluctant to depart*" (Bennion at [12.3]). Another, is that where there are two opposing possible interpretations of a statutory provision, the Court is entitled to "*look at the results of adopting each of the alternatives respectively in its quest for the true intention of Parliament*": *Fry v Inland Revenue Commissioners* [1959] Ch. 86 at 105, per Romer J.

[333] Emphasis was placed on the court's jurisdiction to apply a rectifying construction where it was abundantly clear that the text of an Act contains an error, subject to meeting the test set out by the decision of the House of Lords in *Inco Europe Ltd. v First Choice Distribution* [2000] 1 WLR. Reliance was also placed on the legal presumption that fundamental common law rights can only be overruled with clear words from the legislature: *R v Secretary of State for the Home Department ex p. Simms* [2000] 2 AC 115. This principle, it is argued, augurs against a construction that would in effect abrogate the right of appeal against errors of law by inferior tribunals, which existed under the "case stated" procedure for challenging arbitral awards under the 1889 Act, which the 2009 Act repealed.

[334] Gabriele also relies on the presumption that Parliament does not by legislation intend an absurd result. The principle is set out in Bennion as follows:

> "13.1: The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature. Here the courts give a very wide meaning to the concept of absurdity, using it to include virtually any result which is impossible, unworkable, impractical, inconvenient, anomalous or illogical, futile, pointless, artificial or productive or a disproportionate counter mischief. The strength of the presumption against absurdity …depends on the degree to which a particular construction produces an unreasonable result. The presumption may be displaced as the ultimate objective is to ascertain legislative intention."

[335] Gabriele makes three central arguments in favour of the construction that the Act empowers the Court to grant leave at the application of a party:

(i) it accords with an analysis of the words of s. 92(8) (e.g., on a linguistic analysis);
(ii) it is in line with the general purpose of the Act; and
(iii) it is supported by public policy concerns.

Linguistic analysis

[336] Firstly, it is submitted that the expression in 92(8) that the "*court may grant leave to appeal*" can only be to leave to appeal an arbitral award under s. 91. This is because s. 92 distinguishes throughout between "appeals" and "applications" and "appellants" and "applicants"—with the second designation in each set being used describe a challenge and the challenging party under either ss. 89 or 90. Thus, because s. 92(8) refers only to "appeals" it can only make sense in the context of leave to appeal an arbitral award pursuant to s. 91.

[337] Secondly, it cannot be a reference to an appeal against a decision made by the Court under ss. 89, 90 or 91 to the Court of Appeal (an "onward appeal"), which is the interpretation contended for by Matteo. The applicants say that the interpretation they favour is supported by the provisions of several of the sub-sections. First, s. 92(2) refers to the requirement to exhaust all available arbitral processes of appeal or review or any recourse under s. 79 (power of tribunal to correct an award or make an additional award), before an application or appeal can be brought. This provision would only be logical in the context of provisions relating to a first appeal to the Supreme Court and not an onward appeal. Second, s. 92(3) provides a time limit for appeals, pegged at 28 days of the date of the award or date of notification of any arbitral process of appeal or review, which can only refer to an appeal of the award, rather than a judgment of the court. Third, the power in s. 92(4) for the court to order further reasons can only be in respect of an award; it would be illogical for the court to order reasons from itself. Fourth, in each sub-section the expressions "application or appeal" is used to refer to applications under ss. 89, 90 and 91, and it would be a bizarre construction if "appeal" in 92(8) was directed to an onward appeal.

Purpose

[338] Gabriele contends that a construction that the Court can grant leave to appeal would not be contrary to the principle of the Act which seeks to limit the intervention of the Court and uphold the finality of arbitration awards. In this regard, reliance is placed on the views expressed by the DAC Report, which recommended that a limited right of appeal was not inconsistent with the philosophy behind what eventually became the 1996 Arbitration Act:

> "284. We received a number of responses calling for the abolition of the right of appeal on the substantive issues in the arbitration. These were based on the proposition that by agreeing to arbitrate their dispute, the parties were agreeing to abide by the decision of their chosen tribunal, not by the decision of the Court, so that whether or not a court would reach the same decision was simply irrelevant. To substitute the decision of the Court on the substantive issues would be wholly to subvert the agreement the parties had made.
>
> 285. This proposition is accepted in many countries. We have considered it carefully, but we are not persuaded that we should recommend that the right of appeal should be abolished. It seems to us, that with the safeguards we propose, a limited right of appeal is consistent with the fact that the parties have chosen to arbitrate rather than litigate. For example, many arbitration agreements contain an express choice of the law to govern the rights and obligations arising out of the bargain made subject to that agreements. It can be said with force that in such circumstances, the parties have agreed that the law will be properly applied by the arbitral tribunal, with the consequence that if the tribunal fail to do this, it is not reaching the result contemplated by the arbitration agreement."

[339] Gabriele makes the additional point that the approach of the 2009 Act was not to follow the UNCITRAL Model Law (Art. 34) which, as has been noted, does not permit appeals on points of law. If it were the intention of Parliament to follow art. 34, it is contended that this could have easily been done by enacting the Model Law. In this regard, reference is made to the contribution by Hon. Zhivargo Laing on 16/18 of November 2009 during the Parliamentary debate on the Bill in the House of Assembly. It is submitted that the tenor of his and other contributions show that Parliament accepted that the role of the Court with respect to arbitration must be preserved in order to maintain public confidence in the process:

> "the extent of the court intervention because the idea behind an arbitration law is for the most part to avoid the expense and the time consuming nature of the courts….there is a balance to be struck in respect of a proper arbitration law that limits the amount of court intervention to the extent possible, but at the same time recognizing the need for the court, where it arises, to provide recognition and enforcement of the arbitral procedure."

[340] Gabriele also contends that interpreting the Act to allow for the court to grant leave to appeal would not open up the floodgates to numerous appeals, as is suggested by Matteo. This is because, if the court finds that it has the jurisdiction to grant leave under s. 92(8), there are three procedural safeguards on a party's ability to appeal an error of law: (i) the court must first grant leave; (ii) such leave may be subject to conditions; and (iii) the parties are free to exclude the ability to appeal an error of law altogether (s. 91(1)).

Public Policy

[341] Gabriele argues that there are clear policy reasons why the legislature would wish to preserve the court's ability to grant leave to appeal an error of law. This is because The Bahamas, unlike many other jurisdictions, is in the vanguard of permitting trust arbitration (a subject area normally reserved for litigation) and that in doing so the legislature has thereby not decided to oust the jurisdiction of the Court to supervise Bahamian trusts. The effect of allowing a tribunal to make final determinations on questions concerning the administration of trusts based on an erroneous view of the law would effectively remove the trust from the supervision of the court and open it up to interpretations which may be unworkable in practice (which is what is alleged to have occurred here).

[342] Further, it is pointed out that there would be nothing "controversial" about a construction of the Act in favour of leave to appeal, as this was the practice in The Bahamas before the passage of the Arbitration Act via the Victorian era case-stated procedure. This was codified at s. 19 of the Arbitration Act 1889 as follows:

> "19. Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the court or a judge, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference."

[343] In oral submissions, Mr. Black summarized his submissions on the construction issue by way of seven propositions:

1. On a plain and ordinary construction of s. 90(2)(8) it is contemplated that the court has the power to grant leave to appeal on points of law. Matteo's suggestion that s. 90(2)(8) only refers to appeals to the COA cannot be justified.
2. There is nothing to indicate that the legislature intended to deprive the court of the power that it enjoyed since 1889 to review issues of law arising out of arbitral awards.
3. A linguistic analysis of s. 91 shows that the legislature did not intend to ban a review on points of law, as would have been the position if it had decided to follow the UNCITRAL Model Law;
4. It is a possible construction that the draftsman deleted the section (as it appears in the English Act) providing for leave to appeal, with the possible construction that the legislature intended that appeals should only be allowed with the consent of the opposing party.
5. If that were the intention of the legislature, the provisions of s. 91 and 92 would have the absurd result of granting leave to appeal in one subsection, but making it dependent on the consent (whether pre-award or post-award) of the winning party, which is likely never to be had.
6. If Matteo is right about the meaning of s. 91(2), there is a direct conflict with s. 92(8). This should be resolved by the express words of section 90(2)(8), namely that the court has an overriding general discretion to grant leave.
7. If there is a conflict between the statutory provisions, the conditions for a rectifying construction of 91(2) would apply, as there is no suggestion that 92(8) contains any error.

[344] In a nutshell, Matteo's argument is this. On a comparative analysis of the Bahamian and UK Acts, it is clear that the Bahamian Parliament deliberately omitted from s. 91 the provision which is found in s. 69(2)(b) of the English Arbitration Act giving the court power to grant leave to appeal. It also chose to delete the mechanism for and the test that should be applied to determine any applications for such leave (ss. 69(3)-(6) of the English Arbitration Act). Parliament thus created an exclusively "opt-in" regime for appeals (in contradistinction to the UK's position) and therefore the court has no general discretion to grant leave to appeal on points of law where there is no agreement between the parties that appeals may be brought. As there is no such agreement between the parties, no appeal under this section is available to Delanson or Gabriele.

[345] In his written submissions, Matteo says that the legislative approach to the grant of leave to appeal a point of law (MV 2/61)—

> "[R]eflects a conscious decision by the Bahamian legislature to move away from the relatively interventionist approach adopted by the English Arbitration Act in s. 69, and towards the position advocated by the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law"), under which there is no possibility for challenging an award on the basis of mistake of law, however narrow, and the approaches of other jurisdictions that do not permit any appeals on points of law from arbitral awards (such as France, Switzerland, and the United States)."

[346] In this regard, Matteo notes that the expressed right of appeal under the English position has been subjected to much criticism, and is said to be inconsistent with the prevailing practice in international commercial arbitration and the UNCITRAL Model Law. This has prompted one commentator to state that "…*the whole of section 69 should be repealed, and the matter of appeals on questions of law consigned to the dustbin of history*" (Professor Needham, in Arbitration 1999, 65(3), "*Appeal on a point of law arising out of an award*.").

[347] Reference is also made to the position adopted by Singapore, a leading international arbitration jurisdiction, in the Report on the Right of Appeal against International Arbitration Appeals produced by the Law Reform Committee of the Singapore Academy of Law dated February 2020 (the "SAL Report"). There, the English position is described as "*an outlier amongst popular seats of arbitration*" and the Report recommended that Singapore's International Arbitration Act 2002 (which permits for appeals in domestic arbitrations but not in international arbitrations) to be reformed to provide for arbitration appeals only where parties have agreed to exercise such a right. In fact, this is said to be the direction in which the Bahamian legislation has travelled.

[348] Matteo posits that this debate about the genesis and future of s. 69 is a useful backdrop and context to understanding the position adopted under s. 91 (MV 2/68):

> "It provides to the extent that is necessary, an entirely plausible context for s. 91 of the Arbitration Act. Whilst the Bahamian legislature adopted large sections and the broad principles of the English Arbitration Act, it chose not fully to adopt a controversial provision which weakened arbitral autonomy and in respect of which England was very much in the minority. In so doing, it thereby enhanced the attractiveness of the Bahamas

> as a venue for arbitrations. The consequences of s. 91, as it stands, is that, whilst there is a facility for appeal on points of law, this is on an "opt-in" basis only, in other words only if the parties actually agree."

[349] Matteo rejects the claim by the applicants that notwithstanding the removal of the expressed right to grant leave to appeal on a point of law under s. 91, a general discretion to grant leave to appeal is contained at s. 92(8). Mr. Beltrami submitted seven points in support of this contention, which are summarized below (although not all of them will attract any further commentary):

1. The purpose of s. 92(8) is only to confirm that where the court has granted leave to appeal its own decision (i.e., an "onward appeal"), it may make the grant of leave conditional upon the appellant providing security for costs or security for the award.
2. Section 92(8) is drafted in materially identical terms to s. 70(8) of the English Act, and must be presumed to have the same effect—i.e, the latter does not have the effect of providing a basis to grant leave to appeal in the English context because that is exclusively the subject of ss. 69(2)(b) and (3-6), which were deliberately omitted from s. 91.
3. It would be illogical to suggest that s. 92(8), even if considered in isolation, provides "leave to appeal" since s. 91 does not contemplate the court granting a party "leave to appeal" under s. 91. (I do not think this adds anything to point 2.)
4. By s. 92(1) of the Act, s. 92(8) would apply equally to "*an application or appeal under s. 89 [or] 90*" as it would to an appeal under s. 91, when it is clear that s. 89 and 90 challenges are by right and require no leave. Thus, the only reference to "leave to appeal" in ss. 89, 90 and 91 is in relation to the onward appeal provisions in ss. 89(4), 90(5) and 91(5).
5. Even if s. 92(8) could be construed as granting the court a discretion to grant leave pursuant to s. 91, there is no guidance as to how the court would exercise that discretion.
6. The effect of section 3(c), which provides that "*in matters governed by this Act the court should not intervene except as provided in this Act*", is to remove any inherent jurisdiction to grant leave where it is not provided for in the Act.
7. Finally, as the power to grant leave has been deliberately removed, the court would be going beyond its interpretive function to apply a "rectifying construction", as contended for by Gabriele, and would be amending a statutory provision.

Court's evaluation and conclusions

[350] Whether or not the court is empowered to grant leave to appeal an error of law under the 2009 Act is eminently a question of statutory interpretation. The general principles of statutory interpretation were set out by Mr. Black in his skeleton argument (some of which have been referred to) and I do not think that there is any dispute about these principles.

[351] The starting point is to ascertain the "*ordinary linguistic meaning of the words used*": Bennion at [10.4]; and see also *R v A (No. 2)* [2001] English HL 25, per Lord Steyn at [44]. But the court does not examine the language of the statute in isolation. It must be read in context,

which includes the statutory and historical context, and with any permissible aids to interpretation: *R (Jackson) v Attorney-General* [2005] English HL 56, per Lord Bingham at [29].

[352] It is also trite law that in construing an enactment, the overarching aim of the Court is to ascertain the true meaning of the words used by Parliament and to give effect to the legislative purpose: "*Bennion"(supra)* at [12.2] and *R (Quintavalle) v Secretary of State for Health* [2003] English HL 13 per Lord Bingham at [8]:

> "The basic task of the Court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment. But that is not to say that attention should be confined and a literal interpretation given to the particular provision which gives rise to difficulty. […] The court's task within the permissible bounds of interpretation, it to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

[353] In this vein, I also bear in mind the observation of Lord Nicholls of Birkenhead in *R v Secretary of State for the Environment, Transport and the Region, ex p Spath Holme Ltd.,* [2001] 2 A.C. 249, 396-97, who expressed the concept in the following terms:

> "Statutory interpretation is an exercise, which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention, which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or any other person who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individuals or even of a majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when the courts say that such-and-such a meaning "cannot be what Parliament intended," they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning. As Lord Read said in *Black-Clawson International Ltd. v Papierwerke Waldhof-Aschaffenburg AG* [1975] A.C. 591, 613: 'We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used.' "

[354] However, because language is innately imprecise, it is not always so easy to discern the meaning Parliament intended, and oftentimes the efforts of the very best draftspersons culminate in statutory language that is unclear or admits of one or more meaning. The courts have developed over many centuries various approaches as well as canons and presumptions of statutory construction (some of which have been mentioned) to assist them when confronted with interpretative difficulties. A taxonomy of those approaches would have little more than academic value here since a court rarely relies on any single approach. But the modern approach is to apply what is called a 'purposive construction', which is really a composite approach that gives primacy to statutory purpose insofar as it can be derived from a textual,

contextual and holistic construction of the Act (see cases cited above). That is the approach that will guide me in considering the proper interpretation of these provisions.

[355] One of those extrinsic aids that might be relied upon in seeking to ascertain the "intention" of Parliament is to have recourse to the Parliamentary debates to see to whether and to what extent the context in which the Act was discussed and approved throws any light on ambiguous or unclear provisions (see *Pepper v Hart* [1993] AC 593). The Hansard debates attending the presentation of the Bill in the House of Assembly were adduced in the hearings before the Court. However, they shed little light on the legislative intention with respect to the right to appeal on a point of law. Neither the contribution of the mover of the Bill nor any of the other contributors illuminated the intention of the legislature on the provisions relating to appeals on points of law. As already set out above, the promoter of the Bill (Hon. Z. Laing) made a passing reference to the need for the arbitration law to strike a balance between non-intervention and the role of the court with respect to recognition and enforcement of the arbitral procedure.

[356] Another speaker, the Hon. Philip Davis, indicated in his presentation that the Bill:

> "…borrows from the English Act and what they call the United Nations Commission on International Trade Law that promotes arbitration as the most ready means of resolving disputes. And I gather it already has key provisions from countries such as Australia. It is my understanding, which I embrace…that the intent of combining provisions from different jurisdictions and sources was to assist in ensuring that we establish The Bahamas as the most effective and comprehensive jurisdiction for arbitration. […] As I have said before, the arbitration…the arbitral process is a substitution for going to court, but there are a number of issues that appear from the Act that the court supervision is still required. And I think we need to revisit that in more detail. Because at the end of the day, the Court ought only to be dealing with, in a very limited way, matters of substantive issues that went into the arbitral award. And they ought to be concerned more with the justice of the matter as opposed to whether the arbitration was right or wrong. And that goes into what I call the justice of the process itself."

[357] I was told by counsel for Matteo during the hearing that there was an *ad hoc* group which was appointed to review the legislative position and make recommendations on the Bill. Regrettably, there is no official report from that Body, or at least none which has passed into the public domain.

[358] The parties agree that there is some ambiguity in the Act as to whether Parliament intended to remove the ability of the court to grant leave to appeal on a point of law, and that there are rival constructions which might be viable. Matteo obviously places great emphasis on the deletion of s. 69 (2)(b) of the English Act from the Bahamian version, which he contends is a strong indicator that Parliament intended to hew closer to the UNCITRAL Model Law, even if it was not adopted wholesale. However, he acknowledges in his written submission that this is only a "*plausible context*" for s. 91 of the Arbitration Act and is in no way dispositive of the point.

[359] I think he is right to view these indicators as less than unequivocal, as the literature reveals that even in several "model-law" jurisdiction where the right of appeal on a point of law has been expressly removed, the position is not all black and white. For example, in the very passage

in *Mustill & Boyd* (para. 10.74) relied on by Matteo as exemplary of the no-appeal jurisdictions, it is noted that some US Courts (although not all of them) still regard manifest disregard of the law as a valid (though narrow) ground for challenge (*Wilko v Swann* (346 US 427, S.Ct.). In fact, the authors of Mustill & Boyd actually contrast the US approach with the Model Law, "*in which there is no possibility for challenging an award on the basis of mistake of law*." [at 10.75].

[360] The true position of several of these states, as summarized in Mustill & Boyd, is as follows, at [10.68]:

> "The extent of court intervention permitted by different states may be viewed as a spectrum. At one end of the spectrum are States such as France and Switzerland, which exercise a very limited control over international arbitral awards and permit certain parties to 'contract out' of control by the courts of the seat altogether. In the middle of the scale, a large number of states have adopted (either in full or with some modifications) the limited grounds of recourse laid down in the Model Law, which mirror the grounds for refusal of enforcement under the New York Convention. The United States also exercise a similar level of control over awards in its territory. At the other end of the spectrum are countries such as England, which operate a range of controls, including a limited right of appeal on questions of law, which the parties may agree to waive."

[361] As there is very little assistance to be derived from pre-legislative materials, I must resolve the issue on standard construction principles set out above. As indicated, they include a study of the language used, read in its statutory and historical context, against the backdrop of any permissible aids to construction.

[362] It makes little difference to my conclusion on this matter, but I reject Matteo's contention that the provisions of s. 92 are intended to relate to an onward appeal to the Court of Appeal, basically for the reasons which have been suggested by Gabriele and Delanson. Reading them that way would yield a number of *non-sequiturs* and illogical outcomes. For one, the semantical and legal distinction employed in s. 92 between appeal and application would be rendered otiose. Additionally, where it is intended by the draftsman to refer to an onward appeal to the Court of Appeal (as appears in ss. 89(4), 90(5) and 91(5)), the language used is uniformly "…an *appeal* from a decision of *this* court", not an "appeal or application". By counterpoint, Matteo points out that since 92(1) states that the provisions of s. 92 (2)-(8) apply equally to an appeal or application under s. 89 and or 90, reading a right to grant leave to appeal in 98(2) would have the absurd result of applying the grant of leave to applications under ss. 89 and 90, which are by way of right and require no leave. I do not think there is anything in this point. The absurdity only arises because the earlier provision in the UK Act providing for leave was deleted, with no consequential amendment to the supplementary provisions. It seems reasonably clear in any event that the intended meaning of s. 92(1) is that the provisions were to apply to applications or appeals only so far as the context admitted, or as if the word "respectively" were inserted after "apply".

[363] Secondly, it would be nonsensical to speak of a requirement to exhaust any available process of review or recourse before launching an appeal, if s. 92 (2) referred to onward appeals only.

That can only be a reference to exhausting any recourse to the first-level tribunal itself or any other institution the parties may have agreed for first-level dispute resolution.

[364] Thirdly, the ability of the court to order the *tribunal* to state it reasons for its award, where it appears to the court to be deficient, can only make sense in respect of an appeal to the court, otherwise the court would be ordering itself to state its reasons. In any event, "court" is defined as the Supreme Court and tribunal obviously applies to the arbitral tribunal. On any commonsense construction, I think it is only reasonable to conclude that these provisions were meant to be supplemental to the provisions already allowing for applications under s. 89 and 90, and any appeal (to the extent permitted) under 91(2).

[365] In fact, it can hardly lie in the mouth of Matteo to say that the provisions of s. 92 relate to an onward appeal to the Court of Appeal, when these were the very provisions relied on in the interlocutory application to seek security for costs in respect of the applications/appeals to this court.

[366] Both parties accept that on a linguistic analysis of the provisions of s. 91 and 92, in particular sub-section (8), the Court is left with two possible (or plausible) constructions on the question of leave to appeal on points of law. This is because while section 91(2) purports to remove any express right of the court to grant leave to appeal (as appears in the analogue provision of the UK Act), s. 92(8) seems to provide a general, stand-alone discretion to grant leave. I do not accept, however, that these opposing constructions are evenly balanced grammatically to set up a conflict that the court is required to solve by a rectifying construction.

[367] I accept Matteo's submission that s. 91(1) and (2) are the main or controlling sections in relation to an appeal on a point of law, while the provisions of s. 92 (indicatively headed "supplementary provisions") are intended to govern how any applications or appeals already provided for are to be brought. In other words, s. 91(1) and (2) might be viewed as the enabling or specialized provision dealing with leave to appeal on a point of law. On the other hand, s. 92 is a general provision that applies to applications under s. 89 and 90 and appeals under s. 91 (to the extent that provision is made for such appeals). If Parliament intended to provide an ability in the court to grant leave to appeal on a point of law in addition to the opt-in procedure, s. 91(2) would have been the logical place to provide for it. It would be an extremely odd form of drafting to set out the three limited gateways and grounds for challenging an award under ss. 89, 90 and 91, and then provide a basis (or additional basis) for appeal on a point of law under s. 92(8). Similarly, it would be unusual, if the applicants' construction of s. 92(8) were to be accepted, to prescribe the *conditions* for the grant of leave to appeal up front, and then purport to mention the *right* for the court to grant leave almost as an afterthought at the very end.

[368] Although the point was not argued before me in these terms (and neither were the authorities referenced below cited), the interpretation problem created by s. 91 and 92(8) seem to call for the application of the rule that the court will resolve internal inconsistencies or conflicts in statutory provisions by giving primacy to the leading provision. In *Browne v Francis-Gibson* (1995) 50 WIR 143, CA ECS, Sir Vincent Flossiac, CJ, had to determine whether the applicant

had a right of appeal to Her Majesty in Council based on conflicting provisions in the Constitution of St. Vincent and the Grenadines: s. 36, which was the specific provision governing appeals in election petitions, prohibited such appeals; s. 99, provided general rights of appeal, and granted the right to appeal to Her Majesty in Council.

[369] His Lordship said as followed:

> "Section 99 is a general section governing imperial appeals generally. Section 36(8) is a specific section prohibiting imperial appeals from decisions of this court on appeal from final decisions of the High Court determining questions as to the validity or otherwise of elections and appointments to Parliament. Section 99 should therefore be read subject to section 36(8). Otherwise, there would be a conflict between section 99 and section 36(8) of the Constitution. Assuming that there is such a conflict, it must be resolved by reference to the rule of interpretation which governs such a conflict. According to that rule, the ascertained leading provision prevails over the ascertained subordinate provision."

[370] In coming to this conclusion, His Lordship cited the decision of *Owens Bank Ltd. v. Cauche* (1989) 36 WIR 221, where Lord Ackner, delivering the advice of the Privy Council in an appeal from St. Vincent and the Grenadines involving inconsistent provisions, said (at pg. 226):

> "Where such an inconsistency exists, the courts must determine, as a matter of construction, which is the leading provision and which one must give way to the other: see *Institute of Patent Agents v Lockwood* [1894] AC 347 at page 360, and 44 *Halsbury's Laws of England* (4th Edn) paragraph 872."

[371] Likewise, I am of the view that any ambiguity or indeterminacy in the provisions of s. 91(2) when construed with s. 92(8), must be resolved by giving primacy to the former, which is the leading provision. I think there is common ground among the parties that s. 91 does not in isolation provide a ground for the court to grant leave to appeal.

[372] I also agree with Matteo that there are other interpretive indicia, some textual and some based on drafting history, which further supports the conclusion that there is no right in the court to grant leave to appeal on a point of law. For one, I accept the argument that the corresponding provision in the UK Act to s. 90(8) [s. 70(8)] does not provide any basis for the grant of leave (as opposed to prescribing terms for its grant). The ability to appeal on a point of law in the 1996 UK Act is exclusively provided for at ss. 69(2)(b) and (3-6) of the Act. It is common ground that the UK Act was largely the template for the Bahamian Act. Secondly, as pointed out by Matteo, the terms of s. 91 contain no guidance as to the test the court should apply in determining whether to grant leave, assuming that a right could be implied. To my mind, Parliament could hardly have intended to provide for the court to grant leave to appeal and conveniently omit the requisite test for the grant of leave clearly stated in the template it was following in the UK 1996 Act.

Rectifying construction

[373] Even if I had accepted the applicants' contentions as to the need to apply a rectifying construction, I am not of the view that the conditions for invoking that power are met. These

conditions are very restrictive and were set out authoritatively by the House of Lords in *Inco Europe Ltd. v First Choice Distribution* [2000] 1 WLR 586 (applied by the PC in *Ghany v Attorney General of Trinidad and Tobago* [2015] PC 12) and which is cited by Gabriele:

> "This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretive. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation:…"

[374] In assessing whether these conditions are present, I am reminded of the fundamental principle that the court's role is to give effect to legislative intention rather than engage in judicial legislating. It is therefore only when the court's intervention is necessary to give effect to the clear intention of Parliament (because of an obvious drafting defect) that there is any room for the application of this doctrine.

Statutory interpretation and fundamental rights

[375] I accept the principle (and I do not think it is disputed by Matteo) that fundamental rights cannot be overruled except by clear words from the legislature, and the courts will be slow to infer an intention to abrogate such rights: see, per Lord Hoffman in *R v Secretary of State for the Home Department, ex p. Simms* [2002] 2 AC 115, at 131; recently confirmed by the United Kingdom Supreme Court in *R (on the application of Privacy International) v Investigatory Powers Tribunal* [2019] English SC 22, where the court indicated after a review of authorities going back to the 17th century that "…*recent authority has affirmed the continuing relevance of this strong interpretative presumption against the exclusion of judicial review, other than by 'the most clear and explicit words'*.")

[376] However, I am unpersuaded that the opposing constructions between s. 91(2) and s. 92(8) are enough to invoke the presumption that Parliament did not intend to override any historic appeal rights in respect of arbitral awards. As argued by Matteo (MV/106):

> "The Courts cannot reinterpret the statute so as to preserve a right of appeal (if there ever was one) which the statute does not preserve and which is directly inconsistent with the regime which by its express terms the statute imposes. The deliberate policy of the Act is to restrict (inter alia) the possibility of appealing arbitral awards on points of law, at least where the availability of such an appeal had not been agreed by the parties."

[377] In this vein, whatever rights of review or appeal that existed under the 1889 Act, or presumably at common law, were repealed by the 2009 Act, which was a restatement of the entire law relating to arbitration. Thus, the Act was clearly intended to be a self-contained code governing

arbitration, and it can hardly be thought that Parliament, in replacing a regime which had pertained for over 100 years, would not have been astute to prescribe for appeal rights on points of law. In fact, it was made clear that the jurisdiction which existed prior to the commencement of the Act to entertain appeals on errors of law or fact would no longer be operative from the terms of s. 102(2) of the Act:

> "(2) Nothing in this Act shall be construed as reviving any jurisdiction of the court to set aside or remit an award on the ground of errors of fact or law on the face of the award."

[378] Having considered the pre-legislative material and drafting history of the Act and conducted a contextual construction of the relevant provisions, I am not satisfied that it was the intention of Parliament to provide either by s. 91 or by 92(8) for the grant of leave by the court to appeal an arbitral decision on points of law. To the contrary, the omission to include the corresponding provisions of s. 69 of the UK Act appears to be a very conscious decision. There is no dispute that the UK Act was the primary (though not exclusive) point of reference for the Bahamian Act. While the draftsman slavishly adopted ss. 67 and 68 in relation to challenges based on lack of jurisdiction and serious irregularity, there seems to have been a conscious departure with respect to s. 69. It would have been all too simple to copy wholesale the UK provisions if that were the intention. And, as suggested, in light of the three founding principles of the Act, in particular the intention to "*…reduce drastically the extent of intervention of courts in the arbitral process*", I would conclude that the omission to include the grant of leave as a basis for appealing a point of law was intentional. Consequently, I do not find that there is an ability for the court to grant leave to appeal to appeal a point of law.

[379] Now, I will say that the wisdom of excluding an ability for a party to appeal on a point of law except by consent may be questionable in the context of a trust arbitration framework, and there is some force in the observations of Gabriele and Delanson in this regard. It is only too trite that the concept of a trust derives from equitable considerations, and a primary feature of trusts is that they remain subject to the supervisory jurisdiction of the court (see authorities cited). In its skeleton argument, Delanson comments that "*…to give the winning party the power to veto an appeal on a point of law would be downright Kafkaesque*" and that "*the legislature cannot have intended to do so*" (D2/56). Essentially, this is tantamount to excluding any ability to appeal points of law, as it would be hard to imagine circumstances in which the winner in an arbitration would confer on the loser a chance to appeal and reverse the situation.

[380] While the *Kafkaesque* reference may be overstated, the point is well taken that the inability to appeal points of law in arbitration disputes except by consent could have unintended consequences for the administration of trusts subject to the law of this jurisdiction. The upshot could be an uneven application of trust law and principles, with the possibility for conflicting decisions issued by different tribunals, not subject to appeal on questions of law, and therefore the removal of some court supervision. But this is a matter for Parliament. In structuring the Act in this way, Parliament must obviously have had in mind the finality principle, and that when parties agree to go to arbitration they also agree to be bound by the arbitral tribunal's decision. As memorably stated by Scrutton LJ in an early arbitration case (*African & Eastern (Malaya) Ltd. v. White, Palmer & Co. Ltd.* (1930) 36 Ll L Rep 113 at 114:

> "[I]f the arbitrator whom you chose makes a mistake in law that is your lookout for choosing the wrong arbitrator; if you choose to go to Ceasar you must take Ceasar's judgment."

Whether implied consent to appeal on point of law?

[381] If the court has no power to grant leave to appeal points of law (as has been accepted by the Court), Matteo submits that the sole question is whether Delanson and Gabriele have the agreement of the other parties (i.e., himself) to bring appeals within the meaning of s. 91(2). Matteo's position is that he has not agreed and does not agree to any appeal being brought under s. 91(1). Delanson and Gabriele argue that there is an agreement to do so, because the arbitration clauses, which predate the 2009 Act, should be interpreted as if the governing law relating to arbitration appeals were imported into the agreements.

[382] Matteo argues that this is wrong for several reasons. First, the arbitration clause, which falls to be construed on ordinary principles of contractual interpretation, does not contain any express reference to the possibility of an appeal or other judicial supervision of the tribunal's determinations on questions of law or otherwise. It simply provides that "*any other dispute relating to the establishment or effects of the trust*" etc., "*will have to be submitted to any arbitration board for determination*…". This is to be contrasted with examples where the UK court has found the corresponding provision of the UK Act [s. 69(2) (a)] to apply. An example, is *Royal & Sun Alliance v. BAE Systems (Operations) Ltd.* [2009] 1 Lloyd's Rep 712, where the following wording was found sufficient to signify an agreement to appeal: "*Any party to the Dispute may appeal to the court on a question of law arising out of an award made in the arbitral proceedings*".

[383] Next it is said that the argument that the Trusts (at least the Winter Trust and the Summer Trust, since the Spring Trust was settled after the Act) should be construed as embodying an agreement to appeal, as they were created prior to the enactment of the 2009 Act, when review/appeals were permitted under the pertaining legal regime, is unsound. This is because, taken to its logical extremes, it would require the implication of terms into the agreement (and for that matter, any arbitration agreement made under the old law) to permit an appeal regardless of the state of the current law, when there is no basis for implying terms into the agreement on normal contractual principles.

[384] Lastly and most emphatically, Matteo says that such a reading of the arbitration clause is directly contrary to the transitional provisions of the Act [s. 103], which provides as follows:

> 1. The provisions of this Act do not apply to arbitral proceedings commenced before the date on which this Act comes into operation.
> 2. They apply to arbitral proceedings commenced on or after that date under an arbitration agreement.

Thus, the Act applies to proceedings commenced after it came into force, whatever date the arbitration agreement itself was made, and there is no carve-out for a s. 91 challenge. As it was the deliberate policy behind the Act to remove the ability of a party to appeal on points of

law with the leave of the Court, and the Act applies, such an implication would be contrary to the specific terms of the Act.

[385] These are ingenious and creative arguments by the applicants, but I do not think they can carry the day. Considering the very clear transitional provisions, I do not see any basis on which it would be proper for the court to imply an agreement to appeal into the arbitration agreement based on the procedural provisions of the pre-existing law. In fact, I have already referred to s. 102(2), which puts it beyond the pale that the Act does not revive any pre-existing procedural rights to challenge an award. As Matteo rightly points out, if these arguments were correct, it would require the court to import the procedural provisions of the law existing at the time the agreement was created (relating to appeals and other aspects) into every arbitration agreement, notwithstanding that the 2009 Act specially applies to any arbitration commenced after its entry into force. I accordingly conclude that there is no consent to appeal, actual or implied at law.

Appeal on points of law futile in any event

[386] To round out their arguments on the point, Matteo argues that even if an appeal on a point of law were hypothetically available under s. 91, it would be futile in any event. This is because: (i) the applicants/appellants would not be able to meet the criteria for the grant of leave, applying either by analogy the stringent test contained at s. 69(3) of the English Act or the more general common-law test (as laid down in *BTP Tioxide v Pioneer Shipping Co., The Nema* [1981] 2 Lloyds's Rep 239); and (ii) because any substantive review of the legal merits of an award are extremely circumscribed and the applicants' wide-ranging challenges would fail a legal challenge in any event.

[387] Section 69(3) of the English Act sets out a four-part cumulative test for the grant of leave:

(1) first, the determination of the question will substantially affect the rights of one or more of the parties (s. 69(3)9(a);
(2) second, the question is one which the tribunal was asked to determine (s. 69(3)(b);
(3) third, on the basis of the findings of fact in the award:
  (a) the decision of the tribunal on the question is obviously wrong (s. 69(3)(c)(i), or
  (b) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt (s. 69(3)(c)(ii); and
(4) fourth, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the questions (s. 69(3)(d).

[388] Commenting on the nature of this test in *HMV UK v Propinvest Friar Limited Partnership* [2011] EWCA Civ 1708, Arden LJ said:

> "It will be apparent from section 69 that rights of appeal from an arbitration award are severely restricted. It is not enough, therefore, simply to show that there is an arguable error of law. Nor is it enough that the judge to whom the application for leave is made might himself or herself have come to a different answer. The required quality of the accepted error must be transparent. It must also, at the least,

> be clear. The word 'obvious' is a word of emphasis which means that the courts must not whittle away the restriction on rights of appeal in subsection (c)(i) by being over–generous in their determination of the clarity of the wrong."

[389] With reference to the test for leave to appeal as developed under the English Arbitration Act 1979 (which left it to the courts to work out the circumstances in which leave should be given), the guidelines were set out most comprehensively in *The Nema* (*supra*) as confirmed in *Antaios Compania Naviera SA v Salen Redierna* [1985] AC 191. The authors of "Mustill & Boyd" summarized the essential question as follows:

> "Here we are concerned with the impact of *The Nema*, reinforced by the *Antaios*, on the court's approach to the question of whether leave to appeal should be granted. In the great majority of cases, a sufficiently general picture of the spirit in which the 1979 Act should be applied has emerged from the two principal cases to dispense the Court from the need for minute verbal analysis. Instead, the Court approaches the matter by reference to principles of a more general nature, such as those which we have endeavoured to summarise, and simply asks whether in light of these principles, it can be said that the interests of justice to the individual parties, and the need to promote the health of the common law, and to preserve the integrity of the arbitral process, require that the question of law should be argued again and decided in the High Court."

[390] Next, it is said that the general approach to errors of law ordained in the authorities in respect of an appeal under s. 69 of the English Act (referred to above), and which would presumably be applicable to an appeal under s. 91 if an appeal is possible, would militate against any success on those grounds.

[391] Furthermore, it is contended that the court should give due deference to the experience and skill of the arbitrators. Here, the point is made that the Tribunal in the instant case is an eminent one, especially having regard to the trust issues which arise (e.g., one of the members is Lord Neuberger, who gave the concurring judgment in the leading case on trustee's duties and mistaken dispositions). Additionally, the court is reminded that even on an appeal on points of law under s. 69, the court cannot disturb the tribunal's findings of fact, and Matteo complains that many of the issues which are dressed up as potential points of law are in fact findings of fact which are unchallengeable.

[392] I only mention these points to round out the discussion on this issue, because if there is no ability to seek leave to appeal on a point of law by a party (as I have found), and there is no opt-in by Matteo, it does not become necessary to investigate what would hypothetically be the appropriate test for leave, or the outcome on the merits of any ground of appeal. This is not to say, however, that the court cannot along the way comment on the likely merits of any legal grounds raised or the tests for the grant of leave, either out of completeness, or on the assumption that the Court is wrong in its conclusion that there is no right to grant leave to appeal a point of law.

I. GROUNDS OF CHALLENGES/APPEAL EXAMINED: S. 90 (SERIOUS IRREGULARITY) AND S. 91 (ERROR OF LAW)

[393] I have set out in general terms the applicable legal principles in relation to the various grounds of challenge and appeal earlier in this judgment, which I do not understand to be controversial. While it is not my intention to restate them, it might become necessary to reiterate several of the relevant principles, especially having regard to the spatial separation created by the intervening jurisdictional and construction points. Additionally, because of the overlapping grounds there will inevitably be some repetition. But for economy of effort and brevity, the court will simply refer to the explication of principles or authorities taken under one ground where they are also applicable to others.

[394] Against that backdrop, I begin by reminding myself of the principle (set out in para 280 of the DAC Report) and confirmed in numerous judicial pronouncements (several of which have already been referred to) that s. 90 [s. 68 UK] imposes a very high threshold for an applicant seeking to establish the existence of some "serious irregularity" that has or will cause "substantial injustice" to him.

1. **Delanson Gr. 1, Gabriele Gr. 1:** The Tribunal's construction of the scope of Delanson's distributive powers under the Trust Deeds

[395] The primary ground of attack made by Delanson and Gabriele to the Partial Award and the Additional Award is contained in their respective Ground 1, which is that the Tribunal improperly construed the scope of Delanson's distributive powers under the Trust Deeds. These challenges are made under several of the s. 90 sub-grounds, as well as an error of law under s 91. The complaints are made on the following bases:

(i) an appeal under s. 91, that the Tribunal made an error of law in its determination of the so-called "Restriction" (the limit or restriction on the scope of the Trustee's dispositive power);
(ii) a challenge under s. 90(2)(a), that the Tribunal overlooked relevant evidence;
(iii) a challenge under s. 90(2)(c), that the Tribunal failed to conduct the proceedings in accordance with the implicit agreement that all relevant evidence will be considered; and
(iv) a challenge under s. 90(2)(f) that the Tribunals' construction of the Trust Deed has resulted in uncertainty or ambiguity in the Awards.

Construction of the Trust Deeds

[396] The major bone of contention between the parties arises over the extent (if at all) to which the purposes of the Trust at cl. 6 modify the general power of distribution at cl. 7.

[397] Delanson and Gabriele take the view that the power of distribution is not limited by the purpose at cl. 6 of providing material necessities or providing tangible support to the beneficiaries ("*first institutional purpose*"). In other words, as expressed in the arguments of Delanson (D1/49),

the finding that a distribution of the entirety of the trust assets was somehow prohibited by cl. 6 cannot be reconciled with the express words of cl. 7, which authorized the Trustee to "*pay out to the beneficiaries, during their lifetime any income or capital in full or in part*." The applicants submit that the "*second institutional purpose*" of the Trust to "*preserve, invest and increase any assets*" is unlimited (GV 1/72.2) and (D1/78-79).

[398] In addition to cls. 6 and 7, Delanson argues that clauses 8, 22, 24 and 25 of the Trust Deeds (set out above pp. 48-49) further support their contention and are consistent with the Trustee having an unrestricted discretionary power to distribute the Trust Assets. For example, cl. 8, which is headed "Powers and Limits of the Trustee" provides in relevant part that "[*t]he Trustee enjoys and manages the assets in Trust with the powers the law bestows upon the owner or titleholder of the assets in Trust, and he may also dispose of the of the capital if the income is not sufficient for the stated purpose*." Clause 22, headed "Destination of the Trust's Income", provides in part that "…[*t]his deed contemplates the possibility for the Trustee to pay out income to the Beneficiaries even prior to the Trust's termination and the extent of such pay-outs shall be determined in the absolute discretion by the Trustee*."

[399] Clause 24, which is headed "*Wishes of the Settlor", provides in part that: "[i]n exercising his discretionary powers, the Trustee shall take into account the wishes of the Settlor, as set forth in writing in the Letter(s) of wishes*". *However, except as provided herein, the Trustee's discretionary powers remained untouched*." Finally, clause 25(c) recognizes as one of the reasons for the potential early termination of the Trust, "*the reduction of the assets in the Trust and the impossibility of recovery, also after integral distribution*" (or "*comprehensive distribution*", according to the translation furnished by Matteo). Additionally, it is pointed out that cl. 25 provides for the complete distribution of the Trust Assets within the perpetuity period in the event the trust terminates because it becomes impossible to continue the activity.

[400] Matteo's essential submission is that the operation of cl. 7 is subject to the institutional purposes at cl. 6, which means that when making a distribution to the beneficiaries, it must be for the purpose of "*dealing with the material necessities of the Beneficiaries during their lives*" or preserving/investing/increasing the Trusts' assets "*with the aim of providing tangible support to the beneficiaries*". This is because the caveat at the end of cl. 6—"…*with the aim of providing tangible support to the beneficiaries*"—provides a limiting purpose for the power to "*preserve, invest and increase any assets placed or received in the Trust*". Secondly, it is argued that the submission of an unlimited discretionary power to distribute runs counter to the principle that any power must be exercised for the purpose for which it is given; even an 'unfettered' discretion or power must be exercised within its remits.

Tribunal's findings

[401] The majority of the Tribunal basically agreed with the submissions of Matteo that Delanson's power of distribution was limited by the institutional purposes. Its conclusion on the issue is to be found at paras. 633-634, the essential portions of which are as follows:

> "[633] The Tribunal notes that the natural meaning of the first half of Clause 6 of the Trust Deed would seem to limit Delanson's powers regarding the permissible

> distributions to the rather limited scope of "material [or essential] necessities" of the beneficiaries. However, this would seem to produce a very improbable outcome, given the value of the assets held by the Trusts and the fact that at least some of the beneficiaries, in particular Gabriele, would be unlikely to need support for their necessities. Rather, in the Tribunal's view the provisions of the Trust Deeds ought to be given a commercially sensible meaning, which in this case would seem to equate "*necessities*" to any and all income necessary for the purposes of the beneficiaries, whatever those purposes may be, especially when read in conjunction with the latter half of Clause 6 of the Trust Deeds ("*providing tangible*") [or essential] *support to the beneficiaries*"), which can properly be read as widening the first half, so that any tangible or essential support may be permitted and forms indeed part of the express purpose of the Trusts.
>
> [634] In this regard, Clause 7 of the Trust Deeds supplements Clause 6, and specifically permits "*pay[ing] out to the beneficiaries, during their lifetime any income or capital in full or in part*" "*while implementing the institutional purposes*." As a result, Clauses 6 and 7 of the Trust Deeds, read in conjunction, can only lead the Tribunal, by majority decision, to the conclusion that, while the Trustee was free to exercise its considerable discretionary powers, this exercise should not be to such an extent that it would rule out future payments to beneficiaries for their necessities as understood under Clause 6 of the Trust Deeds."

[402] Professor Malatesta departed from the majority as to the scope of Delanson's distributive powers under the Trusts, for the reasons set out in his Dissenting Opinion. I only refer to the main reasons given:

> "10. Firstly, the suggested construction does not correspond to the ordinary meaning of "essential necessities". In order to depart from it, one should find support from the "surrounding circumstances" insofar as that [*sic*] they show that the different meaning better reconciles ("accords") with the settlor's intentions. However, this is not the case (the opposite is rather true, as seen under para. 12) and therefore a more rigorous approach in the interpretative process would be advisable. A not negligible implication of the construction would be a limitation of the trustee's freedom and of the settlor's intention.
>
> 11. Above all, I note that, in spite of the bad quality of the drafting of the Clauses, it is clear that, apart from "*providing for the essential necessities*", Clause 6 sets out, on an equal footing, another purpose of the Trusts, that is to say "*preserving, investing, and increasing the assets conveyed or received by the Trust*" and that under Clause 7 ("*while implementing the institutional purposes*" payment of the income or capital in full or in part are permitted. […] [T]o construe the "*essential necessities*" of the beneficiaries in a broad way so as to include any payment upon request for any tangible need "whatever they may be" would risk, in the light of the high standard of life of the people involved, to be fatal for the objective to preserve and increase the assets. [...]
>
> 12. [T]he construction here proposed seems to be more in line with the factual "matrix". Given the ambiguity of the relevant terms of the Trusts on the whole, this "tool" can help. From this point of view, there is no reason to depart from the ordinary meaning of the words used by the Deeds. The events after the setting up of the Trusts confirm that Matteo and Simone always viewed the father as the first beneficiary entitled to benefit from the Trust during his lifetime and even to receive back the asset…."

[403] In the Partial Award, this led the Tribunal to the conclusion that, in distributing the Trust fund to Gabriele, "*Delanson acted in a manner that went beyond the scope inherently contemplated or justified by the Trust Deeds and thus finds Delanson acted in breach of trust*". This was the basis for the finding that Delanson committed a fraud on the power rendering the distributions *void ab initio*.

[404] In the Additional Partial Award, the Tribunal was challenged by Gabriele to explain its reasoning of the Restriction in the Partial Award. The Tribunal stated that there was "*no logical inconsistency*" between the Restriction as interpreted in the Partial Award and the 2006 Letter of Wishes ("LoW"). It said further that the effect of the Restriction "*did not eliminate the ability of Gabriele to propose a distribution of all Trust assets insofar as that would be possible for the irrevocable discretionary Trusts*," but that this would require "*a request whose implementation was acceptable to the Trustee*" and "*consistent with the duty of the Trustees*" to consider all beneficiaries.

[405] Gabriele argues that while it is clear that such a distribution would only be done by the Trustee in the proper exercise of his fiduciary duties if considered appropriate in all the circumstances, it is incontrovertible that an exhaustive distribution of capital would be possible within the scope of the Trustee's dispositive power. This, he argues, is the conventional understanding of a standard form discretionary trust, where the trustee may be obliged or empowered during the trust period to pay the income or capital of the trust fund out to one or more beneficiaries (referring to "*Lewin on Trusts"*, 28-024):

> "A typical example of a discretionary trust in the wider sense (particularly in the context of offshore trusts) is one under which the trustees have various mere powers of appointment, and of distribution or application of capital and income, among a class of beneficiaries during the trust period, subject to which income is to be accumulated during the trust period, and at the end of the trust period the trust fund and its income, so far as not disposed of, is held on fixed trusts for a class of beneficiaries, such as the descendants of the settlors or specified charities."

Parties' submissions

Alleged errors of law

[406] It is contended, therefore, that the Tribunal made an obvious error of law in reading Delanson's scope of powers regarding the distributions in this way, an error which was only compounded by the Tribunal in the Additional Award "*backpedaling the substance of the so-called Restriction*". (I will come to deal with the issues raised by the Additional Award later in this judgment, as the substantive challenge to the second award is taken in Gabriele's second motion under Gr. 10, although there is some overlap between the grounds.)

[407] Gabriele prefaces his arguments on error of law by referring to the duty of the Tribunal to apply an iterative process to the construction of the Trust, where the proposed construction is checked

and its consequences investigated: *Wood v Capita Insurance Services Ltd*. [2017] AC 1173, at [11-12], per Lord Hodge JSC:

> "12. This unitary exercise [process of interpretation] involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the Arnold case, para 77 citing *In re Sigma Finance Corp* [2010] 1 Al ER 571, para 12, per Lod Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

[408] Gabriele says that there was a wholesale failure of the Tribunal to conduct this iterative process of checking the proposed construction of the Trust instrument against the consequences of that construction for the execution of the Trust, which led to it committing three obvious errors:

(i) it failed to consider whether the Restriction was sufficiently certain to enable the Trustee to understand whether a particular proposed distribution would be a valid exercise of its powers;

(ii) it came to an "absurd construction" in determining that the Restriction would rule out future payments to beneficiaries for their necessities, contrary to the 2006 LoW and the expectation that a trust fund can be utilized for the benefit of its beneficiaries; and

(iii) it came to an absurd construction in holding that the Restriction required the Trustee to preserve Trust assets to meet future "necessities" of beneficiaries (none of whom had a requirement for a distribution to meet their "necessities" as they were wealthy) would have the effect of preventing any distribution to any of the living beneficiaries.

Serious irregularity

[409] The serious irregularities under s. 90(2)(a) and (c), that the Tribunal failed to either consider relevant evidence or breached s. 44 by failing to conduct the proceedings in accordance with the parties' agreement that all relevant evidence would be considered, is said to stem from several failings by the Tribunal. Firstly, the failure to consider the founding letter of wishes for the Trust (2006 LoW), in which Gabriele asked the Trustee to "…*consider favourably all my request for distributions of capital and income, including all the assets in Trust, that I will make during my lifetime*…". Secondly, the failure, either by Matteo's counsel or the Tribunal to put to either Gabriele or Dr. Baggi during the course of their oral testimony, the suggestions that the LoW contained some "confusion" in respect of the request that the Trustee consider distributions of capital requested by Gabriele, including all of the assets of the trust. Therefore, it is said, there was an absence of any relevant evidence for the Tribunal to conclude, as it did, that [para. 29 of the Additional Award]:

> "…in the light of any reliable relevant evidence in the witness statements and oral testimony from or on behalf of Gabriele at the evidentiary hearing, the most that could safely be said would be that the inclusions of the words 'including all the assets of the Trust' in the October 2006 Letter of Wishes' suggest a degree of confusion on the part of the person who drafted those letters."

[410] The ambiguity in the award (s. 90(2) (f)) is said to be created by the lack of certainty in respect of the Trustee's powers of disposition given the Restriction and the Tribunal's additional reasoning in the Additional Award. (Again, this is addressed in greater detail under Gr. 10.)

[411] In response to the s. 90 claims, Matteo argues firstly that none of these grounds is capable of amounting to a serious irregularity when considered under the general principles of the Act, and that there is no reason for the court to even consider the merits of the complaints. However, for completeness, it is argued that the complaints lack merit for the following reasons.

[412] Firstly, the complaint made by both Delanson and Gabriel that the Tribunal overlooked Gabriele's LoW of 28 October 2006 is wrong in fact and law, as it is clear that the Tribunal referred to the LoW in both the Partial Award (539-540) and the Additional Award (pp. 28-30).

[413] Secondly, to the extent that it is being argued that the Tribunal could not have come to the conclusion it did if it had given proper consideration and effect to the LoW, this is said to constitute an impermissible attempt to interfere with the Tribunal's evaluation of the LoW. In any event, it is argued that the construction of the Trust Deed was either correct, or a reasonable one that the Tribunal was entitled to come to for the following reasons:

(i) to the extent that the LoW was relevant to the construction of the Trust Deed as part of the factual matrix, at best it is an expression of the subjective intention of the settlor which cannot purport to define the Trustee's powers;

(ii) if it was intended to define the limits of the trustee's powers, it would have been placed in the Trust Deed, and not a non-binding LoW; and

(iii) in any event, the LoW is not inconsistent with the Tribunal's conclusions on the scope of Delanson's distributive powers under the Trust Deeds. The Tribunal essentially concluded that Clauses 6 and 7 "…*did not eliminate the ability of Gabriele to propose a distribution of all the Trust Assets insofar as that would be possible for the irrevocable discretionary Trust […and] to the extent that the Trustee considered to distribute all the assets of the trust, their duty required them to consider all the beneficiaries. This could have taken the form of making a particular provision for the other beneficiaries.*"

[414] Thirdly, Delanson's argument that the Tribunal did not refer to and give any weight to the status of the Adiana Foundation (of which Gabriele was the sole beneficiary during his lifetime with a power to revoke its regulations at any time) as the predecessor structure when construing Delanson's distributive power under the Winter Trust, is flawed for several reasons. For one, it is settled law that a tribunal "*does not have to deal in its reasons with each point made by a party in relation to those essential issues or refer to all of the relevant evidence*" (*UMS Holding Ltd. v Great Station Properties SA* [2017] EWHC 2398]. More substantively, as the Adiana Foundation was replaced with the Winter Trust, the provisions and framework of the Adiana Foundation are irrelevant to the construction of Delanson's powers under the Trust Deeds.

[415] Fourthly, the challenge that the Tribunal's conclusions as to the scope of Delanson's distributive powers gives rise to "*uncertainty or ambiguity as to the effect of the award*" and "*if upheld would render the administration of the Trust unworkable*" is hopeless, for the following reasons. The Tribunal's construction of cls. 6 and 7 merely prevented Delanson from ruling out future distributions (which it characterized as the negative aspect of the construction), but this did not preclude the Trustee from making any distribution reasonably requested by a beneficiary. In other words, the finding that Delanson only had power to make distributions for a beneficiary's "*essential necessities*" (the positive aspect of the construction) is said to be eminently and self-evidently workable.

[416] In any event, Matteo contends that even if the Tribunal's construction of these clauses was unworkable, this would still not give rise to any challenge under s. 90(2)(f). That is because this section is intended to target the *effect* of the award, which was that the distributions were ineffective, a clear and certain outcome. This is not to be confused with any question as to how the trustees would be required to exercise their obligations in future, as it is not the role of the Tribunal to provide an advisory opinion on the Trustee's duties.

[417] Lastly, and by way of completeness, it is argued that even if Delanson and Gabriele could establish any serious irregularity as to the scope of Delanson's distributive powers under the Trust Deeds, they could not establish the second cumulative hurdle of substantial injustice, i.e., that "*but for*" that irregularity, the outcome of the arbitration might have been different. For example, in addition to what are said to be indicators in the Partial Award that the Tribunal would have come to the same conclusion as to the effect of the distribution even if it had come to a different conclusion on the scope of the distribution powers issues, they point to the finding in the Additional Award in respect of the scope of powers rectification claim in which the Tribunal held as follows [at 40] :

> "The Tribunal is of the view that, contrary to Gabriele's submissions, even if the scope of powers rectification claim had succeeded [and Gabriele's case as to the scope of Delanson's powers under the Trust Deeds had been upheld], it would not have altered the Tribunal's conclusion in the Partial Award that the decision to make, and the implementation of, the October 2016 Distributions were (i) in breach of trust and (ii) amounted to a fraud on a power, (iii) were inconsistent with the duty to consider the interest of other beneficiaries, and (iv) resulted in Gabriele being liable for knowing receipt."

No appeal on a point of law

[418] Matteo reiterates the point that an appeal on a point of law is procedurally precluded in any event, for reasons which have already been canvassed. Shortly stated, they are that: (i) the Act does not provide for the grant of leave, which is only possible by mutual consent (Matteo has not consented); (ii) Delanson and Gabriele would not have been able to satisfy any of the hypothetical tests for the grant of leave (i.e., either at common law or the statutory test in the UK Act); and (iii) even if an appeal were available, the case law is clear that the court should be slow to intervene in the findings of the tribunal on a point of construction: "…*it is only in the clearest cases that a judge considering a s. 69 [and thus s. 91] application, who has not*

heard such evidence [the relevant background factual material] should substitute his own construction for that of the arbitrator, who has" (*Trustees of Edmond Stern Settlement v Levy* [2007] EWHC 1187).

[419] Apart from the procedural points, Matteo argues further that no s. 91 challenge could succeed, since in applying the general principles relevant to assessing a challenge on a point of law—reading the award in a reasonable and commercial way and giving due weight to the Tribunal's evaluation and construction—it is clear that the Tribunal's construction was correct, or at least reasonable. In this regard, it is necessary to look at the rival constructions of the parties and the conclusions of the Tribunal on this point, as both Gabriele and Delanson obviously consider this finding to be crucial to the Partial Award, since it forms the keystone on which the Tribunal set aside the distributions.

Court's evaluation and conclusions

Error of law

[420] Given that I have held that, properly construed, the 2009 Act does not provide for an appeal on a point of law with leave of the court, and that Matteo has not consented to such an appeal, anything else that might be said on this ground is academic. But I proffer a few observations for completeness, and in the event that my conclusion on the leave point is wrong.

[421] In *Betamax Ltd. v. State Trading Corporation (Mauritius)* [2021] UKPC 14, the Privy Council, considering the grounds for intervening in an award made under an International Arbitration Act which incorporated the UN Model Law and excluded appeals on questions of law unless the parties expressly agreed to opt in to such an appeal, said [at 48-49] (per Lord Thomas):

> "48. This would be inconsistent with the purpose of the International Arbitration Act and the Model Law. The Model Law is premised on the principle that where a matter has been submitted to an arbitral tribunal and is within the jurisdiction of the arbitral tribunal, the arbitral tribunal's decision is final whether the issue is one of law or fact. The parties have so agreed in their contract to submit the dispute to arbitration. It is therefore the policy of modern international arbitration law to uphold the finality of the arbitral tribunal's decision on the contract made within the arbitral tribunal's jurisdiction, whether right or wrong in fact or in law, absent the specified vitiating factors."

[422] As explained earlier, although the 2009 Act does not replicate the model law with respect to an appeal on a point of law, the exclusion of the ability to seek leave to appeal, where the parties do not consent, basically has the same effect as that of the model law. Therefore, their Lordships' comments in the *Betamax* case are apposite here.

[423] But I go on to consider that even if leave to appeal on a point of law were possible it is unlikely that the rigorous standard which is applied to such applications can be met. The criterion that has been applied is that the tribunal was "*obviously wrong*" or that the tribunal's reasoning must reveal a "*major intellectual aberration*" (see *HMV UK v Propinvest Friar* [2011] EWCA Civ 1705 at [5], [8]. In any event, even if the leave threshold could possibly be surpassed,

Matteo is right to point out that the court would be slow to intervene in the Tribunal's construction of a document on a s. 91 application (*Trustees of Edmond Stern Settlement v Levy, supra)*. Further, the award would have to be read with a view to upholding it, rather than seeking to find fault (*MRI Trading AG v. Erdenet Mining Corp LLC (supra) and Zermalt Holdings SA (supra)*.

[424] That said, I think I might be permitted one observation on the point (even though it is mere *lagniappe* because of the conclusion on the appeal point), and it is this: I do not agree with the submission of Matteo (MV2/160) that even if an appeal were possible cls. 6 and 7 of the scope of Delanson's distributive powers thereunder "*could only properly be interpreted in the manner set out in these submissions and in the Partial Award*." I venture to say that this is contradicted by the fact that one of the arbitrators himself, Professor Malatesta, came to a different (and not unreasonable) construction than that of the majority. Further, Delanson and Gabriele have also advanced rival constructions, which though rejected, cannot be said to be unreasonable. In this regard, I am aware that a dissenting opinion is not "*formally part of the Award of the Tribunal"* (per Tomlinson J., at [21], in *B v. A, AX v. B* [2010] EWHC 1626 (Comm). However, in that same case, Tomlinson J commented that he was of the view that "*where the proper law of the dispute is English law and there is an appeal on a point of law, I can see that the views of a dissenting arbitrator might well inform the decision of the court.*" Obviously, the dissent is nothing to the finding of the court since there is no appeal on a point of law, but reference can certainly be made to any dissenting views by way of discussion of the issues before the court.

[425] I would therefore dismiss this ground, as I am satisfied that no appeal on a point of law is available. In any event, and for the reasons given as to the way the court would approach errors of law, even if an appeal were available, it is highly unlikely that the Tribunal's interpretation of this point, critical though it was to the entire arbitration, would be upset. This is not to say that the court necessarily agrees with the interpretation of the Trust Deeds advanced by the majority with respect to the scope of Delanson's distributive powers. But that is neither here nor there.

Serious irregularity

[426] As to the claim that the tribunal overlooked important evidence or did not give proper consideration to such evidence, to wit the LoWs of 28 October 2006 and 1 November 2006 (Winter and Summer Trusts) and 27 March 2012 (Spring Trust), I do not think this complaint can be sustained. Indeed, Matteo points to several specific examples of where the tribunal made specific references to the LoWs. For example, at paras. 539-540, the Tribunal expressly referred to the LoWs to draw several important inferences as to their meaning and effect. Firstly, that Gabriele was aware that he did not have full control over the trusts during his lifetime, as the letters noted that "[*he] would like [Delanson] to consider favourably all [his] requests*"; and secondly, that the considerations expressed in the letters of wishes, although said to express his "true intentions" in respect of the Trusts Deeds, were not interpolated in the Trust Deeds themselves, as might reasonably have been done if he intended to be the sole beneficiary during his lifetime. The majority also referred to the October 2006 LoW at para.

662, to conclude that the request to consider favourably all requests for distribution of capital and income "*could not have been understood by Baggi as authorizing the distribution of all assets to Gabriele if requested by him*".

[427] Reference was also made to the 2006 LoWs in the Additional Partial Award at paras. 29-30. For example, at para. 29, the Tribunal noted that:

> "29. […] [I]n the light of the absence of any reliable relevant evidence in the witness statements and oral testimony from or on behalf of Gabriele at the evidentiary hearing, the most that could safely be said would be that the inclusion of the words "*including all the assets of the Trust*" in the "2006 Letter of Wishes" suggest a degree of confusion on the part of the person who drafted those letters. […]
> 30. In any event, the Tribunal considers that there is no logical inconsistency between the existence of the Restriction (as interpreted in the Partial Award) and the contents of the "October 2006 Letter of Wishes" as relied on by Gabriele in the Request."

[428] I also accept that a tribunal "*does not have to deal in its reasons with each point made by a party in relation to those essential issues or refer to all of the relevant evidence*" (*UMS Holding Ltd. v Great Station Properties SA* (*supra*), and failure to do so cannot without more amount to a serious irregularity. In any event, the tribunal's findings of fact and treatment of the evidence is a matter for them, absent a finding of serious irregularity of one or more of the kinds specified. As stated by Fields J. in *Brockton Capital Llp v Atlantic-Pacific Capital Inc.* [2014] EWHC 1459:

> "…the duty to act fairly is distinct from the autonomous power of the arbitrators to make findings of fact and it will only be in the most exceptional case, if ever, that a failure to refer to a particular part of the evidence will constitute a serious irregularity with s. 68 [90]. Findings of fact were for the tribunal….".

[429] I therefore reject the challenges made under s. 90(2)(a) and 90(2)(c).

[430] As to the challenge under s. 90(2)(f), I also accept the submission of Matteo that this is not made out. It might be, as asserted, that the applicants do not agree with the construction of the Trust Deeds by the majority, but this does not amount to any uncertainty or ambiguity in the award. The Tribunal's conclusions are clear, even if disagreeable to the applicants. I dismiss this challenge.

2. Delanson Gr. 2, Gabriele Gr. 7: The Tribunal's determination of the authorized purpose trust ("APT") issue

[431] As has been noted, the applicants challenged the Tribunal's conclusions that the Trust were APTs within the meaning of the PTA on all of the available grounds: ss. 89, 90 and 91. The submissions in respect of s. 89 (substantive jurisdiction) have already been dealt with under the section on jurisdiction. It is only necessary to deal here with the grounds insofar as they are advanced on ss. 90 and 91.

Parties' Submissions

Serious Irregularity

[432] The main complaint under this head is under s. 90 (2)(b), that the "*tribunal exceeded its powers (otherwise than by exceeding its substantive jurisdiction*". This is said to have to arisen because the Tribunal, in proceeding to hear and determine Matteo's claim without a s.6-declaration under the PTA the Tribunal exceeded its powers.

[433] The arguments of Delanson and Gabriele challenging the finding of the Tribunal that the Trusts were not APTs within the meaning of the PTA have been canvassed in the section dealing with substantive jurisdiction and do not need to be rehashed. The only new twist here is that this finding is also said to constitute an excessive use of the powers of the Tribunal, otherwise than by the tribunal exceeding its substantive jurisdiction.

[434] Matteo contends that this ground is legally untenable and unfounded, firstly because it is said that Delanson and Gabriele have failed to identify the power (whether under the arbitration or under the Act) which the Tribunal is alleged to have exceeded. More significantly, it is asserted that the complaint cannot in any event satisfy the legal requisites of a complaint under s. 90(2)(b), which is concerned with "…*whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have. If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under section 68(2)(b) is involved*" (*Lesotho Highlands Development Authority, supra*).

[435] On the facts and the law, it is contended that the Tribunal unquestionably had the power to entertain Matteo's claim and, therefore, even if the Tribunal exercised its power to hear the matter "*erroneously*" (which is denied) it could not properly found a claim under s. 90(2)(b). Further, the submission is repeated that no appeal on a point of law is available. To round off the point, they contend that even assuming an appeal were available, it would not succeed, based on the constraint of the court not to unduly interfere in the decision of the Tribunal and that, in any event, the Tribunal's decision on the point was "plainly correct".

<u>Court's observations and conclusion</u>

[436] In light of the extensive discussion of the APT issue under the s. 89 challenge, these grounds can be given relatively short shrift.

[437] For there to be a "serious irregularity" under s. 90(2)(b) because the tribunal exceeded its powers, it will be necessary for the applicants to establish that the tribunal purported to exercise a power that it did not have. As Hamblen J. said in *Abuja Hotels Ltd. v Meridien SAS* [2012] EWHC 87 (Comm), at [50]:

> "[F]or there to be a "serious irregularity under s. 68(1)(b) because the tribunal has exceeded its powers it is necessary to establish that the arbitral tribunal purported to exercise a power it does not have. The erroneous exercise of a power which the tribunal does have involves no excess of power. In particular, s.68 is not engaged if the tribunal merely arrives at a wrong conclusion of law or fact: see, for example, *Lesotho* at paras. 24 and 31."

I have already referred to the relevant passages from *Lesotho*, and *New Age Alzarooni 2 Ltd.* (per Cook J), which are to similar effect, in the section of this ruling setting out the governing legal principles of relevance to the arguments raised. They are apposite here and do not need to be repeated.

[438] It is also important to point out the clear distinction between a s. 89 challenge and a challenge of serious irregularity under s. 90(2)(b). The boundary was explained in *CHN Global NV v. PGN Logistics Ltd.* [2009] EWHC 977 (Comm) by Burton J at [18] in relation to the corresponding provisions in the UK Act:

> "18. S. 68…which allows a challenge by reference to serious irregularity, specifically provides in s. 68(2)(b) that one of the grounds of challenge on the basis of serious irregularity is based upon the Tribunal exceeding its powers "otherwise that by exceeding its substantive jurisdiction; see section 67)". I have no doubt whatever that s. 67 relates to situation in which it is alleged that the arbitral tribunal lacks substantive jurisdiction, i.e., that there was in fact no arbitration clause at all, and no jurisdiction for the arbitrators to act at all at any rate in relation to the relevant dispute, and not to situations in which arbitrators properly appointed were alleged to have exceeded their powers."

[439] I agree with the submissions of Matteo that it is difficult to discern the basis on which the excess of powers claim is made. As I have found that the Tribunal had substantive jurisdiction (for the reasons given), the question is whether the tribunal's decision involved the exercise of a power outside the terms of the arbitration agreement, or the 2009 Act. I am satisfied that the applicants have not in the least made out a case that the Tribunal exercised any powers which it did not have under the agreement or Act, and a challenge on this ground is stillborn.

[440] It seems to me that the claim, put at its highest, is that the tribunal erroneously exercised its powers to hear Matteo's claim in the context of the APT argument. As *Lesotho Highlands* and *Abuja Hotels* make clear, an erroneous exercise of an available power does not involve an excess of power within the meaning of s. 68(2)(b) [90(2)(b)]. Furthermore, as was stated in *Lesotho* (at para. 24), "*…s. 68(2)(b) [90(2)(b)] does not permit a challenge on the ground that the tribunal arrived at a wrong conclusion of law or fact. It is not apt to cover a mere error of law*."

[441] That being the case it also rules out any appeal on a point of law under s. 91. In any event, for reasons already discussed in this judgment, no appeal on a point of law is available. But even if such an appeal could be made, the point would not succeed, as the Court itself has found that the Trusts were not APTs such as to require compliance with any statutory preconditions, which is the basis for the applicant's complaint as to an error of law.

[442] For all of the foregoing reasons, these grounds are dismissed.

3. Delanson Gr. 3; Gabriele Gr. 4: *The Tribunal's determination of the inadequate deliberation issue*

[443] Under their respective Grounds 3 and 4, Delanson and Gabriele challenge the Tribunal's conclusions that Delanson failed to consider relevant factors and considered irrelevant factors in the decision to implement the distributions and to dissolve the Trusts. These challenges are made on the basis of ss. 90 and s. 91 of the Arbitration Act.

Parties' Submissions

Serious irregularity

[444] First, it is said that the Tribunal "…*exceeded its powers by intervening in the exercise of [Delanson's] discretion in circumstances where it had no power to do so*", which constitutes a serious irregularity under s. 90(2) (b). As put by Delanson in the supporting affidavit [para. 51, Moja 1]:

> "The majority of the Tribunal held 'the evidence establishes that Delanson had overlooked a relevant and very important factor when distributing the entirety of the Trust Assets exclusively to Gabriele namely the position of the beneficiaries, other than Gabriele'. […] 'Delanson did not consider the interests of all beneficiaries before exercising its discretion. **However, I consider it is clear from the majority's analysis that its real complaint was the manner in which Delanson had taken the other beneficiaries into account and the conclusions it had reached—not that it had failed to consider the other beneficiaries at all**." [Emphasis in original.]

[445] This claim can be short-circuited, Matteo contends, because it is tantamount to a claim that the Tribunal erred in law which, even if correct, cannot amount to a serious irregularity. The authorities clearly establish that "…[*a] mere error of law will not amount to an excess of power under s. 68(2)(b)* [and therefore s. 90(2)(b)]" (*Lesotho Highlands case*). Further, it is said that the challenge on this ground is unavailable in any event because no challenge was ever made to the jurisdiction of the Tribunal to determine and conclude (as it eventually did) that the distributions were made in breach of trust and to set them aside. In fact, to the contrary, it is pointed out that while the applicants contended on various grounds that the Tribunal should not have reached the conclusion it did that the trustee breached its duty of adequate deliberation, or made the consequential declaration, it was never contended that the Tribunal *could not* do so. Therefore, the challenge is now precluded by s. 95(1).

[446] Matteo argues further that, in any event, this ground is misconceived. This is because Delanson (and Gabriele) have set up a straw man argument in contending that the Tribunal's reasoning faulted the "*manner in which Delanson had taken the other beneficiaries into account and the conclusion it had reached*", when in fact the critical passages in the Tribunal's award in this regard contains an objective analysis of the factors Delanson took into account (which were irrelevant) and which it ignored (which were relevant). After evaluating the evidence, the Tribunal concluded [at 664]:

> "[T]he Tribunal finds, that had the Trustee considered all the issues which it ought to have had considered and not taken into account any irrelevant maters (as it ought not to have done) it would not have dissolved the Trust or made the October 2016 distributions. The Tribunal has little doubt that Delanson would have acted differently

> had the irrelevant factors not been taken into account and relevant factors not overlooked.
> Indeed, had Delanson for example (i) taken into account the interests of the other beneficiaries named under the Trust, both named and as yet unascertained, (ii) given proper weight to the consideration that Gabriele was already involved in strategic decision involving the underlying companies; and (iii) given appropriate consideration to the possibility of further delegating the management of the Trust Assets to Gabriele, the Tribunal is of the opinion that it would not have reached the decision to distribute the entirety of the Trust Assets to Gabriele and dissolve the Trusts."
> "

[447] The second and third irregularities are deployed under the complaint that the Tribunal "*ignored agree and/or undisputed evidence*", which amounted to a breach of (i) the Tribunal's general duty under s. 44 (s. 90(2)(a)); and (ii) an alleged implied agreement that all relevant evidence would be considered, and hence serious irregularity under s. 90(2) (c).

[448] These arguments are hopeless, Matteo submits, because the law is settled that "…[*a*] *contention that the tribunal has ignored or failed to have regard to evidence relied upon by one of the parties cannot be the subject matter of an allegation of a serious irregularity within s. 68(2)(a) [and so s*. 90(2)(a)]" (*UMS Holding case*). Apart from this, there was no implicit agreement that relevant evidence would be considered, only that the proceedings would be conducted in accordance with the provisions of the Arbitration Act and the 2010 UNCITRAL Rules. Therefore, no contravention of the duty of fairness under s. 44 is involved.

[449] But even if it were possible to make the argument, in particular that the Tribunal failed to have regard to relevant evidence (in this case, Gabriele's 2006 LoWs), this is wrong because the Tribunal does in fact refer to the LoWs at several places in both the Partial and Additional Awards. Further, even to the extent that the applicants can refer to any evidence that was before the Tribunal which is not expressly discussed in the Partial Award or Additional Award, that does not establish that the Tribunal ignored or failed to have regard to that evidence (per Teare J. in *UMS, supra*) [at 134]:

> "[T]he duty to act fairly imposed by section 33 does not require the tribunal to refer in its award to all of the evidence regarded by the losing party as key or to deal with all of the submissions made in relation to the evidence but simply, in the language of s. 52(4), to set out 'the reasons for the award'. All that can be said is that such an approach to writing the reasons for an award is different from the current practice of the courts when writing judgments. It is true that where the evidence alleged to be key by the losing party is not referred to by the tribunal that party may be left in doubt as to what the tribunal though of that evidence, but in circumstances where the parties have agreed that their chosen tribunal is the sole judge of fact they cannot expect the court to review the evidence in order to form a view as to whether, as is likely to be the case, the tribunal has regarded the evidence as unhelpful (for one or more reasons) or, as is unlikely to be the case, the tribunal has ignored or overlooked the evidence."

Substantial injustice

[450] The further point is made that even if Delanson or Gabriele could satisfy serious irregularity in relation to the Tribunal's conclusion concerning the inadequacy of the deliberations, they could not satisfy the second requirement for substantial injustice. This is because, the Tribunal not only concluded that there was inadequate deliberation (even accepting for argument's sake Delanson's reasons), but also found as a matter of fact that Delanson's stated reasons were not the true reasons, and that Gabriele materially influenced, if not directed, the distribution of the trust assets to himself and the dissolution of the trust. As a finding of fact, this cannot be challenged. Further, even if the Tribunal's findings on inadequate deliberation were discarded, it would not disturb the finding that Delanson acted outside the scope of its power in implementing the distributions and dissolving the trusts, and/or that Delanson's implementation of the distributions (and dissolution) amounted to a fraud on its distributive power.

Error of law

[451] Matteo reiterates that there is no appeal on a point of law under s. 91 in this case, and even if s. 91 had replicated the provisions of s. 69 of the English Act with respect to the court's ability to grant leave to appeal, no appeal would be possible. This is both because it is said that Delanson and Gabriele would be unable to satisfy the first requirement that there is a substantial question that would affect the rights of the parties, since even if an appeal on the inadequacy of the Delanson's deliberations were to succeed, it would make no difference to the end result. Secondly, it is said that the decision on inadequate deliberations could not meet the "*plainly wrong*" requirement nor give rise to a question of general public importance, assuming the test at s. 69(3)(c) of the UK Act for the grant of leave were in play.

[452] Finally, it is argued that even assuming that leave to appeal were available, there is in fact no point of law involved for the court to determine. This is because, the alleged point of law—that the Tribunal applied the wrong legal test by considering whether they agreed with Delanson's decision—is not the test actually applied by the Tribunal. The stated test applied by the Tribunal was whether "….*an important relevant factor was ignored by the trustee or a legally irrelevant factor played an important part in the trustee's decision*". This has not been challenged as an error of law. Thus, the actual grounds of challenge raised by Delanson and Gabriele are said to involve a question of fact or, at best, a question of mixed fact and law. The factual finding cannot be challenged on appeal, and it is contended that with respect to the second, there is no prospect of Delanson or Gabriele establishing that the Tribunal misdirected itself, or that no tribunal properly instructed could have come to the determination reached.

<u>Court's evaluation and conclusions</u>

[453] I have already set out the legal considerations relevant to an excess of the Tribunal's powers (not exceeding substantive jurisdiction) and do not need to repeat them. I do not find any basis in the submissions by Delanson and Gabriele to substantiate the claim under this ground that the Tribunal exceeded its powers or committed any serious irregularity, for the following reasons. Firstly, it is never identified what powers the Tribunal purportedly exercised which it did not have. Further, I do not accept that the tribunal's findings (as summarized at para. 664)

constitutes any "*intervening in the exercise of Delanson's discretion*." The tribunal was called upon to decide whether the distributions were made in consequence of proper deliberation and as part of that evaluative process it was entitled to look at whether Delanson considered irrelevant factors and failed to consider relevant factors, as the tribunal found them to be on the evidence. As previously stated, even if its finding in this regard could be said to have constituted an error of law or fact, it cannot engage s. 90(2)(b).

[454] I also accept that even if a claim could be made out for serious irregularity in this regard, it would not satisfy the requirement for substantial injustice. This is because, as Matteo submits, the Tribunal made it clear that, even accepting Delanson's reasons for distribution were as alleged, there was still inadequate deliberation. Thus, as the Tribunal's finding with respect to the inadequacy of Delanson's deliberations were alternative and hypothetical findings, whichever version of the facts is accepted, it would have made no difference to the outcome.

[455] I am similarly unimpressed by the argument that the Tribunal's treatment of evidence, in allegedly ignoring the LoWs, amounted to a breach of the duty or fairness under s. 44, and that this constituted a breach of an implied agreement that all relevant evidence would be considered and hence a serious irregularity under s. 90(2)(c).

[456] Firstly, I do not accept that as a matter of fact the tribunal overlooked the LoWs. As outlined earlier in this judgment, there are several references to the meaning and effect of these letters by the Tribunal (paras. 539-540, and 662 of the Partial Award, and paras. 29-30 of the Additional Award).

[457] Secondly, in any event, the cases indicate that in order to deal with a case fairly under the requirements of s. 44 (s. 33 of the UK Act), arbitrators do not need to condescend to mentioning every piece of relevant evidence. It would have to be an "exceptional" case before a court could infer that a tribunal failed in its duty to deal fairly with a case (*UMS Holdings Ltd. (supra)).*

[458] Thirdly, the argument that the alleged failure to consider relevant evidence was a failure by the Tribunal to conduct the proceedings in accordance with the procedure agreed by the parties that all the evidence would be considered (so as to amount to a serious irregularity under s. 90(2) (c), also does not succeed. There is no suggestion that the Tribunal did not follow the UNCITRAL 2010 Rules for the conduct of the proceedings, and in any event no such agreement is to be applied under those rules. The tribunal is given extensive powers to decide the approach to the procedure and evidence (see s. 45 of the Act).

[456] For the above reasons, I am unable to accept that the alleged failure to have regard to relevant evidence (which in any event is not a correct characterization) amounts to a failure to act fairly pursuant to s. 44 of the Act.

[460] Finally, to the extent that the Tribunal's decision on this point is said to constitute an error of law, I reiterate the finding that the challenge is not available to the applicants, as there is no leave to appeal on a point of law. Even if leave were available, I would simply refer to (without

restating) the earlier observations made with respect to the hurdles in advancing a claim based on alleged error of law, both procedural and substantive.

4. Delanson Gr. 4: *The Tribunal's determination on the reasons for distribution*

[461] Under this ground, Delanson challenges the Tribunal's findings rejecting its reasons for the distributions on the basis of both s. 90 and 91.

Parties' Submissions

Serious Irregularity

[462] There were 3 bases on which this ground was advanced:

(i) a challenge that there was a failure by the Tribunal to act fairly pursuant s. 44 of the Act by allegedly drawing an adverse inference against Delanson without any prior warning and without any basis for its failure to call a witness (a Mr. Carollo), giving rise to a serious irregularity under s. 90(2)(a) of the Act;
(ii) a challenge under s. 90(2)(b) asserting an excess of power (or an error of law) said to be caused by the Tribunal intervening in Delanson's exercise of its discretion on the basis that it was not "necessary" for the discretion to be exercised in the way it was; and
(iii) a challenge under s. 90(2) (a) and (c) that the Tribunal ignored agreed/ and or undisputed evidence as to the applicant's reasons for its decision, giving rise to a serious irregularity.

Procedural Challenge: adverse inference against failure to call Mr. Carollo

[463] The alleged adverse inferences are said to have been drawn in connection with the Tribunal's evaluation of the evidence concerning Delanson's reason for making the distributions. In particular, the majority found that it was "*difficult to accept*" that one of Delanson's reasons for the distribution was the need to restructure the underlying companies within the Trusts with the banking sector due to a threat of insolvency, and that in any event it did not consider that the threat of bankruptcy rendered the distribution "necessary". One of the evidentiary issues was whether the banks involved in the efforts to restructure the companies preferred to deal directly with Gabriele, as was suggested by some of the evidence, though contradicted by other parties. For example, Mr. Baggi's oral testimony (consistent with Gabriele's written evidence) was that the banks indicated that they would have preferred to deal directly with Gabriele (not through the Trusts), although Gabriele in his oral testimony repeatedly testified that he had not been and was not the person that would have been directly discussing financing with the banks.

[464] Against this background, the Tribunal observed [para. 345, Partial Award]:

> "…Baggi's understanding of what the banks required or requested in 2016 was based on statements said to have been made by Carollo as to what the banks were reporting. As Carollo has not been proffered as a witness in these proceedings […] hearsay

> statements based on what Baggi had been told at the time offer little evidentiary value."

[465] The Tribunal's final conclusion on the issue is set out [para. 347 of the Award] as follows:

> "Given the lack of documentation and the conflicting evidence on this issue, the Tribunal finds it difficult to accept that the reorganization of the underlying companies within the banking sector was an actual reason or the distributions in October 2016, although the only reason volunteered at the time. While it is conceivable that in cases of very serious risks, including potential insolvency of the Orlean Group and potentially other assets held in trust, Gabriele would become personally involved in discussions with the banks, and the banks could require his direct involvement, there is a lacuna of evidence showing that this is what happened, and there is no reason to assume that Gabriele could not have become personally involved in such negotiations within the trust structure." [Emphasis supplied.]

[466] Delanson contends that neither Matteo nor the Tribunal ever suggested to Delanson that any adverse inferences would be drawn for failing to call Mr. Carollo. It is said that several attempts were made unsuccessfully to contact Mr. Carollo (who lives in Brazil), but if it had been known that the Tribunal was contemplating drawing an adverse inference from the failure to call him, they would have adduced evidence on the point.

[467] It was fundamentally unfair and a breach of s. 44 of the Act, it is said, for these inferences to be drawn without giving Delanson any warning. Delanson asserts that it amounts to the kind of unfairness which the Privy Council recently warned against in *Therapy Beach Club* at [46]:

> "An arbitrator will not have acted fairly if a party is learning for the first time in the award in the award about findings and matters in the decision of the arbitrator which that party has not had the opportunity to address."

Intervention in Delanson's exercise of discretion/Tribunal asking the wrong question

[468] Delanson's complaint in this regard is captured by the evidence in the supporting affidavit of Moja [Moja 1, para. 70] as follows:

> "Despite not accepting that Delanson's reasons were as pleaded, the Tribunal nevertheless stated that it was proceeding to consider whether those reasons were 'irrational' or 'irrelevant' so as to place Delanson in breach of the duty of adequate deliberation […]. However, it is clear that the question it was actually asking was whether Delanson had provided that transferring the Trust Assets to Gabriele was necessary in order to save them, and whether the Tribunal would have made the same decision; that is the wrong question to ask, and imposes, wrongly, a much higher threshold than that imposed by the correct question, which is whether the course of action was rational."

[469] Here, Delanson contends that the test the Tribunal ought to have had regard to in considering the reasons for the distributions was what Avv. Baggi believed, and not whether those reasons were objectively correct, i.e., whether it was true or not that the banks would have preferred to negotiate with Gabriele in circumstances in which he was the owner of the assets. Thus, it is

said that the Tribunal acted in excess of its powers (committed a serious irregularity, or alternatively an error of law) in failing to address whether Matteo had established: (1) that the contemplated restructuring was an "irrelevant" factor to which Delanson should not have had any regard; or (2) that Delanson's reliance on it was "irrational". Instead, in asking the question (posed to the parties prior to closing submissions) "*Why was it necessary to distribute the assets […] to Gabriele Volpi for the restructuring of the Orlean Group and other assets*", it is submitted that the Tribunal reversed the burden of proof (see, Professor Malatesta Dissent, where he described this as "*an excessive reversal of the burden of proof*" at [30]).

Ignoring of agreed/undisputed evidence

[470] At para. 388, the majority concluded that "…*while these [reasons given by Delanson] could potentially have been reasons for Delanson's decisions, due to the conflicting evidence on the record and /or lack of evidence in support of these reasons, it is not plausible that they were in fact the reasons relied upon by Delanson at the relevant time*." This failure of the majority to accept Avv. Baggi's evidence as to the perceived need to restructure the Orlean Group is said to have caused substantial injustice because absent such irregularities it is argued that the majority would have concluded that the Distributions were subjectively justified.

[471] Matteo argues that in essence these complaints are an attempt to re-open the Tribunal's findings of fact, which is not available on appeal.

[472] Firstly, it is said that the Tribunal did not draw any adverse inference in respect of the failure to call Mr. Carollo, but merely observed that the evidence in respect of Gabriele's alleged involvement with the banks, which was the subject of contradictory oral evidence from Mr. Baggi and Gabriele, was also not corroborated by any evidence from Mr. Carollo. In other words, in rejecting Delanson's case on the facts (for which it bore the burden of any assertions made by it) the Tribunal simply noted (as a small part of its analysis) that Mr. Carollo had not given evidence.

[473] Further, it is argued that the assessment of the evidence presented to it was a matter for the Tribunal, and it would not amount to a serious irregularity for the Tribunal to attach significance to the presence or absence of evidence, as the parties had been given a full opportunity to make whatever submissions they wished to make as to the evidence and or the lack of it. But even if it were possible to construe the Tribunal's dealing with this matter as an adverse inference, it is said that this could not in law amount to "*decid[ing] the case on the basis of a point which one party has not had a fair opportunity to deal with*", because the Tribunal did not decide the issue on the basis of the lack of evidence from Mr. Carollo.

[474] Matteo submits first that the Tribunal made no intervention in Delanson's exercise of its discretion, and in fact (when the Tribunal's award is properly considered) the Tribunal was not asking whether Delanson made the correct decision but was simply identifying objectively the factors which Delanson irrelevantly took into account, and the relevant ones which it ignored. Secondly, even if the Tribunal had interfered on the basis alleged by Delanson, this would at most amount to an error of law, citing the oft-referred to decision of *Lesotho Highlands*, where

the House of Lords said "…*the erroneous exercise of an available power cannot by itself amount to an excess of power. A mere error of law will not amount to an excess of power under section 68(2)(b)* [and thus s. 90(2)(b).]" Lastly, it is said that the challenge would be precluded by s. 95, no challenge being taken at the time the Tribunal made the order.

[475] Matteo refutes the complaint that the Tribunal did not consider whether the reasons proffered by Delanson for the distribution were irrational. But he goes further and says that in any event, this is a round-about and inappropriate way to challenge the Tribunal's findings of fact. This is because the matters which Delanson points to in impugning the way in which the Tribunal dealt with this point, are really references to evidence alleged ignored by the Tribunal. Those matters cannot constitute a legitimate challenge under ss. 90(2)(a) or (c) it is contended (citing *Primera (Hellas) Ltd. v Jiangsu Eastern Heavy Industry Co. Ltd.* [2013] EWHC 3066 (Comm), [2014] 1 Lloyds's Rep. 255 per Flaux J):

> "It is clearly not appropriate to use an application under section 68 to challenge the findings of fact made by the tribunal. If it were otherwise every disappointed party could say it had been treated unfairly by pointing to some piece of evidence in its favour which was not referred to in the Reasons or not given the weight it feels in should have been. That is precisely the situation in which the court should not intervene. Matters of fact and evaluation of the evidence are for the arbitrators."

Substantial injustice

[476] Again, it is argued that even if the matters alleged under this ground could be said to amount to a serious irregularity, Delanson would still fail to satisfy the substantial injustice requirement, for four main reasons. First, even if Delanson had been given a specific opportunity to make submissions on the significance of Mr. Carollo as a witness, this would not have altered any of the Tribunal's findings. Second, in any event, the Tribunal rejected the evidence of both Mr. Baggi and Gabriele, and therefore it is highly unlikely that any explanation as to Mr. Carollo's absence would have caused them to take a different view of the facts. Third, it is contended that in any event the Tribunal also approached and decided the inadequate deliberation claim on the hypothetical basis that the reasons given by Delanson were correct, and therefore whether Mr. Carollo's absence could be explained or otherwise, it would not have yielded a different outcome. Fourth, it is said the Tribunal's conclusions on the inadequacy of the reasons for the Distributions were in any event immaterial to the conclusion that the distributions were outside the scope of Delanson's powers and/or had amounted to a fraud on Delanson's powers.

Appeal on point of law

[477] To the extent that the matters relied on in Delanson's Ground 4 are also said to have amounted to an error of law under s. 91, Matteo repeats the contention (already made with respect to several of these grounds) that no appeal could ensue, due to the unavailability of an appeal under s. 91 of the Act. Secondly, even if leave could be granted to appeal, Delanson could not satisfy the requirements for leave as might be applied by analogy to the analogue provisions of the English Act or at common law (see principles previously stated).

Court's evaluation and conclusions

Adverse inference

[478] In respect of this claim, the Court was referred in the main to the authority of *P v D* [2019] EWHC 1277 (Comm), where Sir Michael Burton concluded that arbitrators had breached their duty under s. 33 of the UK Act [s. 44] by coming to a decision on a core issue without the benefit of any cross-examination of the main witness of the party against whom the award was made. Sir Michael Burton conducted an extensive examination of the authorities on the point, and I will only refer briefly to two:

The Vineira [76] where Ackner LJ said (para. 37 of Sir Michael Burton's ruling):

> "Where there is a breach of natural justice, as a general proposition it is not for the Court's to speculate what would have been the result if the principles of fairness had been applied. I adopt, with respect, the words of Mr. Justice Megarry in *John Rees, Martin v Davis, Rees v John* [1970 Ch. 345 at 402, were he said:
>
> > 'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained, of fixed and unalterable determinations that, by discussions, suffered a change.' "

Vee Networks, where Colman J. stated [90] (para. 38 of Ruling):

> "…The element of serious injustice in the context of s. 68 [s. 90] does not in such a case depend on the arbitrator having come to the wrong conclusion as a matter of law or fact, but whether he was caused by adopting improper means to reach one conclusion whereas had he adopted appropriate means he might well have reached another conclusion favourable to the applicant. Thus, where there has been an irregularity of procedure, it is enough if it is shown that it caused the arbitrator to reach a conclusion unfavourable to the applicant which, but for the irregularity, he might well never have reached, provided always that the opposite conclusion is at least reasonably arguable."

[479] It is also important to point out that, along the way, Sir Michael Burton considered the principle in the leading common law authority of *Browne v Dunn* (1894) 6 R 67 HL, on which the applicants placed significant emphasis. That principle, as summarized in "*Phipson on Evidence*" (19th Edn 2016) [62] and reproduced at para. 31 of the judgment, is in material part as follows:

> "In general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point. The rule applies in civil cases as it does in criminal. […] This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in

> difficulty in submitting that the evidence should be rejected. However, the rule is not an inflexible one. For example, if there is a time limit imposed by the judge on cross-examination it may not be practicable to cross-examine on every minor point, particularly where a lengthy witness statement has been served and treated as evidence in chief. Thus in practice there is bound to be at least some relaxation of the rule. Failure to put a relevant matter to a witness may be most appropriately remedied by the court permitting the recall of that witness to have the matter put to him."

[480] On the facts of that case Sir Michael Burton did not find that any of the exceptions to the rule applied and found that "*Mr. E's evidence had potential flaws which were calling out for cross-examination both as to its "proper analysis*" and otherwise. Sir Michael Burton concluded as follows [39]:

> "I cannot possibly say that if Mr. E had been properly cross-examined and given the opportunity to deal with what were in the event seen as weaknesses by the Arbitrators in his case and/or to deal with the alternative case which Mr. Berry did not run, there might not have been a different outcome."

[481] Applying these legal principles to the facts of this case, I am far from persuaded that there was a breach of s. 44 based on the reasons alleged by Delanson. Firstly, as has been submitted by Matteo, there is no evidence that the Tribunal drew any adverse inferences by the failure of Carollo to testify. It merely commented that evidence in respect of the necessity for Gabriele to be directly involved in the restructuring process with the banks, which was already the subject of conflicting evidence before the tribunal, was not "corroborated" by the evidence of the witness who was said to feed Gabriele's understanding of what the banks required. In fact, it is clear from para. 347 of the Partial Award (excerpted above) that the tribunal rejected the reasons for the restructuring of the companies within the banking sector based on the evidence *before* it (that of Gabriele and Mr. Baggi), and not on the evidence that was not before it.

[482] That said, it is rather fanciful to suggest that the evidence of Mr. Carollo (whatever it might have been), might have yielded a different outcome, and one favourable to the applicants. In this context, it must be remembered that the issue of the need for Gabriele to become personally involved with the banks was only one part of the factual matrix rejected by the Tribunal as to the need for the company restructuring. In any event, it might be observed that the facts of this case are far removed from the scenario in *P v. D*, where there were serious inconsistencies in the witnesses' evidence and his credibility was in question on what was a core issue that could only be resolved by way of cross-examination.

Excess of power

[483] I can deal shortly with this challenge, as the relevant legal considerations have already been discussed under several of the earlier grounds and additionally the alleged intervention of the Tribunal in the exercise of Delanson's discretion on this same ground are raised under Delanson Grs. 2 and 3. The same principles and reasoning are equally apposite here.

[484] Firstly, it may again be observed that the applicants never identify the source of power involved and how the Tribunal is said to have acted outside those powers so as to fashion a challenge

within the preserve of s. 90(2)(b). As has already been stated in respect of the earlier grounds, I am at a loss to see how the Tribunal's findings on Delanson's exercise of its discretion amounted to an excess of powers. Secondly, to the extent that the challenge is put on the basis of an error of law, or is indirectly a challenge to factual findings, it is beyond clear that a mere error of law or fact will not amount to an excess of power (*Lesotho, supra*). Lastly, I would also hold that the challenge in any event is precluded by the provisions of s. 95, as no challenge was taken at the appropriate time to the jurisdiction/power of the Tribunal to make the order in respect of the Delanson's reasons for the distribution.

Ignoring evidence

[485] Again, not a whole lot needs to be said about this complaint, as the court has already examined the issue of an alleged failure to consider evidence as amounting to a serious irregularity under s. 90(2)(a) as amounting to unfairness or (c) (as departing from any agreed procedure by the parties). The principles which the court adverted to earlier are equally apposite here.

[486] As those authorities make clear, s. 68(2)(a) in the UK Act [s. 90(2)(a)] is not intended to provide a "backdoor route" to an appeal on questions of facts, which is not permissible. The (high) threshold to justify the intervention of the court may be met where essential or critical evidence has been overlooked or misunderstood. But as was put by Toulson J. in *Arduina Holdings BV v Celtic Resources Holdings plc* [2006] EWHC [at 46]:

> "[T]here is all the difference in the world between such cases and an arbitrator evaluating evidence but reaching factual conclusions on it (as will happen in most arbitrations), which one party does not like. That cannot be the basis of a complaint under s. 68 [s. 90]."

[487] See also the observations of Flaux J, in *Primera (Hellas) Ltd.* (cited above).

[488] I would also add the observations of Colman J in *Bulfracht (Cyprus) Ltd. v Boneset Shipping Co. Ltd., the MV Pamphilos* [2002] EWHC 2292 (Comm) [10] as follows:

> "[W]hereas it may normally be contrary to the arbitrator's duty to fail to give the parties an opportunity to address them on proposed findings of major areas of material primary facts which have not been raised during the hearing or earlier in the arbitral proceedings, it will not usually be necessary to refer back to the parties for further submissions every single inference of fact from the primary facts which arbitrators intend to draw, even if such inferences may not have been previously anticipated in the course of the arbitration. Particularly were they are complex factual issues it may often be impossible to anticipate by the end of the hearing exactly what inferences of fact should be drawn from the findings of primary facts which have been in issue. […] In needs to be emphasized that that in such cases there is simply no irregularity, serious or otherwise. What has happened is simply an ordinary incident of the arbitral process based on the arbitrator's power to make findings of fact relevant to the issues between the parties."

[489] In my view, the challenge on this basis falls exactly within the kinds of impermissible challenge to the tribunal's findings of fact which the cases caution against and does not properly raise

any issues of irregularity. For example, Delanson puts the challenge on the alleged footing that the Tribunal seemed to have evaluated the reasons for the distribution on the basis that Delanson needed to prove that they were "*necessary*" to save the assets (which it says is a higher threshold and wrong legal test) rather than whether Delanson's decision was a "*rational course of action*", and this is said to be an error of law. However, in reality this is only to put semantic glosses on what is in effect a challenge to the Tribunal's findings of facts for rejecting the reasons.

[490] I do not consider that this challenge properly raises any issues of serious irregularities capable of challenge under the s. 90 sub-grounds, including an alleged contravention of the duty of fairness under s. 44. I would dismiss them all. To the extent that it is alleged that the Tribunal committed an error of law in applying the wrong test, no appeal on a point of law is available under the Act, and again I refer to the earlier observations (both procedural and substantive) militating against a challenge on legal grounds.

5. Delanson's Gr. 5; Gabriele Gr. 5: *The Tribunal's exercise of its discretion to set aside the Distributions if voidable*

[491] The Tribunal found that the Distributions were in excess of Delanson's powers and therefore void and set them aside on those grounds. It nevertheless proceeded to determine that they were also a fraud on the power [at 637] and made in breach of Delanson's duty of adequate deliberations [at 665]. In respect of the breach of duty, the majority acknowledged or indicated that Distributions made in breach of Delanson's duty were "voidable" at the Tribunal's discretion.

[492] The Tribunal's analysis and findings are set out at paras. 672 -676 of the Partial Award, and the following extract provides a birds'-eye-view of how the Tribunal dealt with this matter:

> "672: In the context of the Tribunal's findings regarding whether the distributions were permissible in the context of the Trustee's powers but were made for impugnable reasons, as illustrated above, the Tribunal finds that the consequence of the resulting breach is that any exercise of the said powers be deemed voidable. This is the category of acts described by Lord Walker as "inadequate deliberation" in Pitt v Holt [2013] UKSC 26, where the Court found that if the trustee has committed a breach of trust, then the act will be voidable at the Court's discretion. "
> […]
> 676. The Tribunal considers that the defects, as fully described above, in Delanson's decision to make the October 2016 distributions, and in the implementation of that decision, were such as to render such acts by the Trustee a fraud on a power, and amounted to a serious and extensive breach of trust. In the light of the decision in Cloutte v Storey, the Tribunal is at least arguably bound to conclude that the fact that the distributions amounted to a fraud on a power mandates the result that they were void. Even if that is not right, and the October 2016 distributions are voidable, the Tribunal has little hesitation in concluding that in the light of the aforesaid serious defects in Delanson's decision-making, those distributions could not be allowed to stand."

Parties' submissions

[493] The complaints of Gabriele and Delanson here are that, in its statement that the breach of the duty was voidable at its discretion, the Tribunal confined itself only to a consideration of Delanson's allegedly flawed decision-making process, and did not consider any other factors, including subsequent events. These matters are summarized in Delanson's Motion as follows:

(i) The fact that First Respondent [Matteo] was substantially wealthy independently of the Trusts;
(ii) The fact that all of the beneficiaries of the Trust save for Matteo supported the distributions;
(iii) Matteo's decision to reject financial provision of USD 120 million from Gabriele;
(iv) The risk of family conflict if the distribution were set aside;
(v) The risk that no replacement trustee could be found if the distribution were set aside.

[494] By failing to have regard to these matters, it is contended that the Tribunal failed to determine a key issue put to it—that the Tribunal was *required* to take account of these factors in exercising its discretion whether to set aside the Distributions—and that all these factors militated against setting aside. Delanson says this gave rise to a serious irregularity under s. 90(2)(d) (failure to deal with all the issues put to it), which also amounted to an error law under s. 91, as the majority missed an entire part of the legal analysis that should have factored into setting aside the Distributions. Gabriele develops this ground by reference to serious irregularity under ss. 90(2)(a), (c) and (f), as well as an error of law under s. 91.

Serious irregularity

[495] The gist of the serious irregularity alleged by Delanson in Ground 5 is set out at para. 81 of Moja 1, where is it suggested that in holding that it (hypothetically) would have set aside the Distributions if they had been voidable rather than void, the Tribunal "…*was deciding only the issue of whether the gravity of Delanson's errors in its decision-making justified the setting aside of the distributions [and] did not even turn its mind to the issue of whether events subsequent to the Delanson's [sic] decision […] could in principle – and in this case should—affect its exercise of discretion*."

[496] Matteo argues that there is no reason to suppose, when the award is read in a reasonable and commercial way (as it should be), that the Tribunal did not appreciate the relevance and significance of events and matters subsequent to Delanson's decision. Specifically, he pointed to the Tribunal's finding [para. 676] that "[*even if] the October 2016 distributions are voidable, the Tribunal had little hesitation in concluding that in the light of the aforesaid serious defects in Delanson's decision-making, these distributions could not be allowed to stand*." This is said to signal that the Tribunal's view was that the decision-making process was fundamentally flawed and that they would have been set aside in any event. Matters subsequent to Delanson's decision would not have changed this, nor were they a necessary consideration.

[497] Next, it is said that s. 90(2) (d) is "*engaged only when there is a failure to deal with a 'fundamental' issue, which generally means an issue the determination of which is essential*

to decision of the claim or specific defences raised." In this case, as the Tribunal's indication of how it would have exercised its discretion to set aside the Distribution if voidable was *ad arguendo*, it necessarily could not be essential to the claims or specific defences raised.

[498] Further, to the extent that the challenge is said to arise to an irregularity under s. 90(2)(d) by failing to advert to subsequent events, this is said to be tantamount to a criticism that the arbitrators "*made mistakes in their findings of primary fact or drew from the primary facts unsustainable inferences*." Again, it is said that the law is clear that "*a failure by the tribunal to arrive at the 'correct decision' could not afford a ground for challenge under section 68 [and thus s. 90*]" (*Lesotho Highlands*).

[499] Matteo makes short work of Gabriele's grounds advancing the serious irregularity claim under ss. 90(2)(a), (c) and (f). As to the contention under s. 90(2)(a)—"*that the Tribunal failed to take into account all the evidence relevant to a decision as to whether or not the Distributions should be set aside*"—Matteo refers to the now well-worn quotation from *UMS Holding* that a contention that a failure to have regard to evidence relied on by one of the parties cannot be the subject matter of an allegation of a serious irregularity (*UMS*, per Teare J, at para. 28).

[500] With respect to ss. 90(2)(c) and (f), Matteo contends that there is no discernible ground advanced on this basis, and in any event the challenge under sub-paragraph (f) is doomed to fail, since there was no application to the Tribunal for interpretation of the Awards on this issue, and therefore the right to challenge on this ground has been lost.

Substantial Injustice

[501] Matteo contends that in any event, the second limb of substantive injustice needed to complete a claim in serious irregularity could not be met, as the outcome of a challenge to the exercise of the Tribunal's discretion in this matter could not have changed the outcome of Phase 1 of the Arbitration. This is because, it is said that the matters alleged would have been immaterial to the exercise of the Tribunal's discretion, given the Tribunal's conclusions and its reasons, even if the Tribunal did not bear all relevant matters in mind. Further, it is said that even if it could be established that but for the alleged serious irregularity the Tribunal might not have exercised its discretion to set aside the distributions, this was nothing to the point that the Tribunal found that the Distributions were outside the scope of Delanson's powers and therefore void. Finally, and not to state the obvious, it is submitted that the challenge was based on a hypothetical finding by the Tribunal, which could not change the outcome of the proceedings.

Appeal on point of law

[502] For the same reasons submitted in respect of the other grounds, Matteo reiterates the point that no appeal on a point of law is possible (because statutorily the court cannot grant leave to appeal, and because the test for leave would not be satisfied in any event).

[503] But again, it is argued in the alternative that even if an appeal were available on questions of law, the law is settled that a tribunal's exercise of its discretion can only be challenged in extreme circumstances, as put in one case "…*limited to bad faith and the taking into account of wholly extraneous matters […] [*or*] a case where the tribunal had abdicated its responsibility of making a rational decision and, in effect, had simply tossed a coin*" (*Al Hadha Trading Co. v Tradigrain SA* [2002] 2 Lloyds Rept. 512). It is said that the contention that the Tribunal failed to take into account events subsequent to the distribution decision in indicating how it would have hypothetically exercised its discretion to set the distributions aside had they been voidable, does not fall within this narrow remit. Further, and in any event, the argument is based on a false premise, since the Tribunal did take into account the events.

Court's evaluation and conclusions

[504] I must observe at the outset that there is some degree of artificiality in the claims of serious irregularity and/or error of law said to arise out of the Tribunal's exercise of its discretion to set aside the Distributions, predicated on the finding that Delanson's decision to distribute in breach of its duty of adequate deliberation was voidable and not void. This is because the Tribunal in fact also decided that the distributions were void, and therefore any question as to how the discretion ought to have been exercised and the alleged failure to have regard to relevant matters on the alternative finding that the Distributions were voidable, was essentially a *brutum fulmen*.

Failure to deal with the issues put to it

[505] The relevant principles to this ground of challenge have been discussed in several leading authorities on the point canvassed earlier in this judgment (*Petrochemical Industries Co (KSC) v Dow Chemical Co* [2012] EWHC (Comm) Smith, J) at 15; and the *Raytheon* case, at [33]), Aikenhead J) and their considerations of the points form the backdrop to this discussion.

[506] Firstly, as set out in the *Raytheon* case, s. 68(2)(d) [90(2)(d)] is only engaged if there is a failure to deal with an issue that is "essential", "key" or "crucial" for the decision of the claim or specific defences raised. As the Tribunal had already decided that the Distributions were void, and set them aside on that basis, how it would have exercised its discretion in the context of a decision that was voidable, was not a key or essential issue for the determination of the claim or any specific defence.

[507] Further, I agree that the claim that it failed to consider certain factual matters is to take a crack at the Tribunal's ability to make findings of fact or draw inferences from them, which does not amount to a sustainable challenge under s. 90 (*Lesotho*). I agree with Matteo's submission that there is no reason, reading the award in a reasonable and commercial way with a view to upholding it, to assume that the Tribunal closed its mind to those matters which Delanson adverted to, as the applicants claim. The Tribunal's statement that in light of the "serious defects" in Delanson's decision-making the distributions could not be allowed to stand, could equally be interpreted as a conclusion that the matters that the applicants claim were ignored

would not in any event have had any ameliorative or remedial effect on the Tribunal's discretion to set aside the 2016 Distributions within the context of a voidable decision.

S. 90(2)(a)(c) (d) and (f)

[508] Gabriele challenges the exercise of the Tribunal's discretion on the "voidable decision" point on multiple grounds of serious irregularity. I accept the submission of Matteo that Gabriele's claim that the Tribunal, in allegedly not adverting to these factors failed to take into account evidence relevant to a decision as to whether or not the Distributions should be set aside, cannot be the subject of a sustainable challenge under s. 90. As has already been explained, the Tribunal has a very wide remit as to how it treats with evidence, and a contention that the Tribunal has ignored or failed to have regard to evidence relied on by one of the parties cannot be the subject matter of an allegation of serious irregularity under s. 90(2)(a) (per Teare J, *UMS Holding*).

[509] I have already discussed (and rejected) the contention that the failure of the Tribunal to harken to the so-called "implicit" agreement to advert to all evidence amounts to a serious irregularity under s. 90(2) (c)). For the reasons already discussed, I also find that this claim is not made out.

[510] As to the claim of uncertainty or ambiguity, I have difficulty in discerning how this is said to arise as a result of the Tribunal's decision on this ground. There is no clear formulation (or any formulation at all) in the Ground as to how the said uncertainty or ambiguity arises, other than to state the head of challenge. But in any event, as Matteo notes (and which I accept), no such challenge is now available before the court, as no application was made for any interpretation of the award (s. 95).

Substantial injustice

[511] Even if the claims had survived the serious irregularity hurdle, there is no basis on which I would find that the irregularities have caused, or will cause, substantial injustice to Delanson or Gabriele. In other words, the requisite test—that "but for" the failure of the Tribunal to consider these factors, the outcome of the arbitration might well have been different—cannot be satisfied, as the Tribunal decided that the distribution were *ultra vires* and in any event would have set them aside given the flaws in the decision-making.

Appeal on point of law

[512] As has now become commonplace, the first defence to a ground of appeal on a point of law is that such an appeal is just not available, for reasons already canvassed at length. Further, I also accept Matteo's submissions that in any event (and always with the view that even if the court is wrong in its conclusion on the question of leave), the law is settled that the ability to challenge the Tribunal's exercise of its discretion is extremely circumscribed (*Al Hadha Trading Co. v Tradigrain SA, supra*) and do not at all arise on the grounds contended for by Gabriele and Matteo.

6. Gabriele Gr. 2: *The Tribunal's alleged failure to determine the "scope of powers rectification claim"*

[513] Gabriele's Ground 2 challenged the alleged failure of the Tribunal to deal with the so-called "scope of powers rectification" claim. However, this claim was partly the subject of the request for the Additional Award, and as that claim was determined by the Tribunal in the Additional Award, it may now be considered overtaken by subsequent events. As the ground was formulated, Gabriele indicated that the challenge to the Partial Award on these grounds would only be maintained "*if and to the extent that the Tribunal does not issue an Additional or Corrective Award or the matters set out in Ground 1 and Ground 2 (a) remain outstanding*…".

[514] The Tribunal's determination of the "scope of rectification" claim in the Additional Award is the subject of Gabriele's Ground 10, and therefore it may be convenient to deal with any residual issues that arise under this ground there.

7. Gabriele Gr. 3: *The Tribunal's conclusions as to whether a fraud on the power makes the exercise void or voidable*

[515] Under this head, Gabriel complains that the Tribunal either "…*failed to determine or wrongly determined the issue whether the Trustee's decision to make the Distributions was void or voidable as a result of any fraud on the power on the part of Delanson in deciding to make the Distributions*." This is alleged to give rise to serious irregularities under ss. 90(2)(a), (c) (d) and (f), as well as to an error of law under s. 91.

[516] The Tribunal's considerations of the effect of its findings that the distributions constituted a fraud on the power is recorded at paras. 673 and 676 of the Partial Award:

> "673. In the case of the application of the doctrine of fraud on a power, where the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power, the resulting exercise is considered to be void in equity and not merely voidable. That is the general thrust of the decision of the Court of Appeal in *Cloutte v Storey* [1911] 1 Ch 18, where Farwell LJ spoke inter alia of compromises of ascertained specific questions, which are not to be construed 'so as to deprive any party thereto of any right not then in dispute and not in contemplation of the parties to such deed' and the 'mere fact that the appointment is void does not prevent the court of equity from having regard to it'. […]
>
> 676. The Tribunal considers that the defects, as fully described above, in Delanson's decision to make the October 2016 distributions, and in the implementation of that decision, were such as to render such acts by the Trustee a fraud on the power, and amounted to a serious and extensive breach of trust. In light of the decision in *Cloutte v Storey*, the Tribunal is at least arguably bound to conclude that the fact that the distributions amounted to a fraud on a power mandate the result that they were void."

Parties' Submissions

Serious Irregularity

[517] Although Gabriele advances this complaint under several of the sub-categories of serious irregularity, none of the grounds are developed in any significant way in his skeleton arguments.

[518] In response, Matteo contends that the only possible basis for a complaint under s. 90 is the allegation that the Tribunal failed to determine the issue as to whether the Distributions would have been void or voidable had they amounted to a fraud on Delanson's distributive power (e.g., s. 90(2)(f)). This complaint is said to be unsustainable for at least two reasons. Firstly, that the Tribunal in fact determined the issue, finding that "*the resulting exercise is considered to be void in equity and not merely voidable*" [para. 673, Partial Award]. In this regard, it relied on the well-known (but not uncontroversial) authority of *Cloutte v Storey* [1911] 1 Ch. 18 (CA), which Gabriele contended should not be followed.

[519] In any event, this is said not to arise to a serious irregularity under s. 90(2)(b), as the Tribunal's determination on this was hypothetical and inconsequential. It had already found that the Distributions had been outside the scope of Delanson's powers and therefore void. Thus, there was no serious irregularity as there was no failure to deal with an issue that was "…*essential to the decision of the claim or specific defences raised*" (*Rav Bahamas Ltd. v Therapy Beach Club Incorporated* [2021] UKPC 8, per Lord Hamblen and Lord Burrows at para. 40, and authorities cited therein).

Substantial injustice

[520] Further, in any event it is contended that the conclusion that the Distributions would have been void and not voidable had they amounted to a fraud on Delanson's power would not satisfy the requirement for substantial injustice, mainly because: (i) even if the Tribunal's finding on this point were reversed, it could not impact the finding that Delanson acted outside the scope of its powers in implementing the Distributions; and (ii) the Tribunal held that, even if the Distributions had only been voidable, it would have had "*little hesitation in concluding that in the light of the aforesaid serious defects in Delanson's decision-making, those distributions could not be allowed to stand*." Thus, irrespective of these complaints, the outcome of Phase 1 of the Arbitration would have been the same.

s. 91: Appeal on a point of law.

[521] Gabriele advances two main arguments why it is contended that the Tribunal was wrong to conclude that the distributions were void based on fraud on a power, and relying on *Cloutte v Storey*:

(i) The Tribunal was not bound to follow the decision of the English CA in *Cloutte v Storey*;

(ii) The correct approach as a matter of law is that fraud on a power renders the exercise of a power voidable and not void.

[522] In this regard, Gabriele refers to the decision of Lord Walker in *Pitt v Holt* [2013] casting doubt on the decision of *Cloutte v Storey*, where he said [at 62] that *Cloutte* "*is an authority which had bedevilled discussion of the true nature of the Hasting-Bass rule" and that "[t]he decision in Cloutte v Storey may have to be revisited one day. For present purposes it is sufficient to note that a fraudulent appointment (that is, one shown to have been made for a positively improper purpose) may need a separate pigeon-hole somewhere between the categories of excessive execution and inadequate deliberation*."

[523] Gabriele summarizes his argument [at para. 279] as follows:

> "A fraud on a power is thus conceptually identical to the exercise of a power in breach of duty, and the remedial consequences of that should also be the same: namely, that the exercise is valid *ab initio*, but is voidable at the instance of a beneficiary who has been adversely affected by the trustee's conduct."

[524] Matteo counters firstly that no appeal on a point of law is available under s. 91, both as a result of the lack of a statutory provision providing for such leave and also because it is said that the appellants could not in fact meet any of the prospective tests for the grant of leave if a statutory avenue of appeal were available.

[525] Further, it is said that in any event such an appeal would not succeed. This is because the Tribunal in deciding this issue followed the English Court of Appeal in *Cloutte v Storey* [1911] 1 Ch. 18, which was followed by the UK Supreme Court in *Pitt v Holt* [2013] UKSC 26. Citing the leading textbooks on the point ("Lewin on Trusts"; "Underhill and Hayton on the Law Relating to Trusts and Trustees"), Matteo contends that the Tribunal decided the point in accordance with the law as it stands, and to have decided the point differently would have resulted in Bahamian law being out of step with English law. I will only reproduce the comment from the latter text:

> "[i]t is well established that both an attempt to appoint outside the class of objects, and an attempt to subvert the power by committing a fraud on it, are void rather than voidable. The power has simply not been exercised."

Further, Matteo commends to the Court that significant deference should be paid to the Tribunal's findings in this regard as the Tribunal benefitted from the experience and expertise of Lord Neuberger, who (whilst President of the Supreme Court of the United Kingdom) heard and decided *Pitt v Holt.*

<u>Court's observations and conclusions</u>

[526] For the reasons advanced by Matteo, and those which have been canvassed in respect of the challenges advanced to the exercise of the Tribunal's discretion as to the alternative finding of voidable dispositions (both Delanson's and Gabriele's Gr. 5), I am satisfied that the grounds alleging serious irregularity under s. 90(2)(a), (c) and (f) are misconceived and unsustainable.

In any event, similar claims in respect of a breach of fairness under s. 44 said to give rise to an irregularity under 90(2)(a) have already been rebuffed (*UMS Holdings*), so has the challenge of breach of agreed procedure under 90(2)(c), and the issue of uncertainty and ambiguity as to the effect of the award under 90(2) (f).

[527] The one surviving claim under the head of serious irregularity, i.e., that the Tribunal failed to determine the issue as to whether the Distributions would have been void or voidable had they amounted to a fraud on Delanson's distributive power (s. 90(2)(d), a failure to deal with an issue put to it), is also not fertile ground for a challenge. This is because, as pointed out by Matteo, the Tribunal did in fact determine the issue, finding that (see passage set out at para. 516 above): in the case of the doctrine of fraud on a power, "*where the power was exercised for a purpose, or with an intention beyond the scope of or not justified by the instrument creating the power, the resulting exercise is considered to be void in equity and not merely voidable*."

[528] As was stated in *Primera Maritime (Hellas) Ltd. v Jiangsu Eastern heavy Industry Co. Ltd.* [2013] EWHC 3066 (Comm) at [40-41]: "*Once it is recognized that the tribunal has 'dealt with' the issue, the sub-section does not involve some qualitative assessment of how the tribunal dealt with it. Provided that the tribunal has dealt with it, it does not matter whether it has done so well, badly or indifferently*."

[529] I would therefore also dismiss the complaint under 90(2) (f) as being unsubstantiated.

Appeal on point of law

[530] It then becomes clear that Delanson's ground is really a challenge that the Tribunal committed an error of law in concluding that fraud on a power has the ineluctable effect of making the exercise of the power void. In that regard, I must trot out the now well-worn response that no appeal on a point of law is available because the Act does not provide for it. In any event, it would likely falter on any of the tests for leave even if leave were conceptually available.

[531] As the issue of an appeal does not arise, it is not necessary for the court to express any concluded view on the issue. But while I accept that the decision in *Cloutte v Storey* has been doubted, I am not convinced that the Tribunal came to a wrong decision in applying it. It has not been overruled and as it has been applied in *Pitt v Holt* (which has been accepted and applied in The Bahamas as the common law position on unilateral mistake with respect to a trust), and I do not see why a Bahamian court would feel the need to depart from it.

8. Gabriele G. 6: *The Tribunal's finding on knowing receipt*

[532] Under this ground Gabriel attacks the Tribunal's decision finding him liable in knowing receipt and (thus) a constructive trustee of assets received from the Trusts. The bases for the allegation of serious irregularity are said to be s. 90(2)(a) and (c)), and are as follows: (i) that the Tribunal allegedly "*drew inferences of fact, the alleged bases of which were not put to the relevant*

witnesses in cross-examination by [Matteo] or by the Tribunal"; and (ii) allegedly "*reached conclusions as to the alleged knowledge and/or conduct of* [Gabriele] (said *to render the receipt of assets by* [Gabriele] *unconscionable) which were denied by him in his evidence and which were not put to him in cross-examination by* [Matteo] *or by the Tribunal*."

[533] I set out below some of the essential background and findings and reasoning of the Tribunal on the knowing receipt point, beginning at para. 386 (where the majority focused on the role of Avv. Fegnolio as an intermediary between Gabriele and the Trustee), but the essential conclusions are at paras. 390-391(Partial Award):

> "386. Furthermore, even though Baggi says that after his appointment as director of Delanson he was not otherwise in contact with Gabriele in 2016 regarding the Trusts and trust management, there is evidence of Baggi nevertheless having been in contact with Fenoglio (whom Gabriele describes as '[his]lawyer') regarding the Trusts in the period leading up to the October 2016 distributions. According to Baggi's testimony, Fenogliio helped him in the negotiations with Cuzzocrea so that Baggi could become director of the Trustee. Fenoglio also appears to have been at the 'first meeting' between Baggi and Fiorani on 17 March to discuss the state of certain trust assets, which Fiorani says took place at Fenoglio's law offices in Milan. Baggi also appears to have discussed with Fenoglio matters such as the transferring of the seat of Delanson to New Zealand and potentially managing the Luxembourg companies of the Summer Trust through a contact of Landman. Fenoglio, who according to Fiorani had been at the alleged meeting between Fiorani and Gabriele when he was informed that the Trustee was planning to distribute almost the entirety of the trust assets to him, is also credited with drafting Gabriele's letters of wishes dated 26 July 2016. Thus, even if the Tribunal were to accept Baggi's and Gabriele's evidence that they had not been in contact to discuss the fate of the Trusts in 2016, Bagg was at a minimum discussing matters involving the Trust with Fenoglio and is more than likely to have received instructions regarding the Trusts if not from Gabriele directly, then through his personal lawyer.
>
> […]
>
> 390. Based on the evidence put forward, the Tribunal does not believe that there was any substantive discussion between the directors of the Trustee leading up to its decision to distribute the Trust Assets to Gabriele. Even where a decision by Delanson is to be considered as having been made by Baggi alone, given the history of Baggi and Gabriele's relationship coupled with the complete lack of documentary evidence in support of Baggi's decision-making, it is difficult to accept that Baggi decided to distribute all assets of the Trusts and dissolve the Trusts without Gabriele's prior involvement and agreement. Given the means by which Gabriele conducted his business generally, it is rather more likely that Gabriele materially influenced, if not directed, the Trustee to distribute all of the Trust Assets to himself and dissolve the Trusts.
>
> 391. Notwithstanding the above findings that Gabriele is likely to have been materially involved in Delanson's decision to distribute the Trust Assets and dissolve the Trusts in October 2016, the Tribunal will assess in the section

> which follow the claims made by Matteo against Delanson and Gabriele on the basis that it was a conscious decision of Delanson to distribute the Trust Assets to Gabriele and dissolve the Trusts in October 2016, even if likely to have been heavily influenced by Gabriele. […]."

Parties' submissions

[534] In coming to this decision, Gabriele points out that the Tribunal (rightly) relied on dicta from the English Court of Appeal decision in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch. 437 CA at 69: '[*a]ll that is necessary is that the recipient's state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt*." Against these principles, therefore, the Tribunal's reasoning and findings as to the state of Gabriel's knowledge were central considerations.

[535] However, in spite of correctly identifying the test, it is contended that the Tribunal essentially found that Gabriele must have been aware of the limited purposes for which the Trust capital could be used as found by the majority (the Restriction). This is said to be evinced by its conclusions that Gabriele was not only aware of the circumstances surround the distributions but was also aware "…*of the effects the said distributions would have, which rendered them in breach of trust, and that he must have appreciated that the distributions were being made in breach of trust.*"

[536] Gabriele contends that not only was the evidence in favour of his knowledge weak, but that that there was consistent evidence from a number of witnesses that Gabriele did not instruct or direct Delanson to make the distributions to him in 2016. This was said to be a unilateral decision by Delanson. In particular, Gabriele singles out two findings which are said to be the basis for the Tribunal finding that he had the requisite knowledge to constitute knowing receipt:

(i) The finding that having written the July 2016 Letters of Wishes, Gabriele "*must have known that taking ownership over the Trust Assets would be at the exclusion of the beneficiaries and would prevent the other beneficiaries from ever benefitting from the Trusts*."

(ii) The finding that, even discounting Dr. Baggi and Gabriele's evidence that they had not been in contact to discuss the fare of the Trusts in 2016, "*Dr. Baggi was at minimum discussing matters involving the Trust with Fenoglio and is more than likely to have received instructions regarding the Trust if not from Gabriele directly, then through his personal lawyer*."

[537] This latter conclusion is said to be key to the conclusion that Gabriele "*materially influenced, if not directed the Trustee to distribute all of the Trust Assets to himself and dissolve the Trusts*."

[538] In making these findings, it is said the Tribunal's approach constituted a serious irregularity, representing a failure by the Tribunal to comply with its duty under s. 44(1)(a) to act fairly and impartially and give each party a reasonable opportunity of putting his case. This is said to be so namely because (i) Gabriele was not cross-examined on any of these points, which are said

to go to the heart of the knowing receipt claim; and (ii) neither was Gabriele questioned on the finding made by the Tribunal that through Avv. Fenoglio, he materially influenced or directed the distributions of the Trust Assets in 2016. Gabriele argues that this amounts to "*an excessive reversal of the burden of proof*" (the point remarked on by Prof. Malesta in his dissent).

[539] Gabriel contends that the failure to cross-examine him on the involvement of Avv. Fenoglio was a core issue, and the question of whether or not he used his personal lawyer to instigate the Distributions (which were found to be in breach of trust) goes to the heart of his knowledge of the events, and whether or not he was an unconscionable recipient of the trust assets. The Tribunal's finding on the role of Fenoglio is said to be an entirely new point which the parties did not address. In other words, it is contended that the Tribunal speculated as to Avv. Fenoglio's role as there was no witness statement from him, and there was little evidence that could support the contention that he was being used by Gabriele to direct the distributions.

[540] Gabriele draws attention to what is said to be one of the few mentions of Avv. Fegnolio in the evidence, when during his oral evidence Gabriele explained that Avv. Fenogloio advised him to write the 2016 LoW, although he contends that these letters were drafted after Dr. Baggi had asked him whether he agreed with his decision to distribute the Trust Assets (transcript of 19 December 2019):

> "COUNSEL MARTIN—Can we go down please, to the bit that starts 'Distribution of the trust fund and'? After that it says: 'It is my desire, as settlor of the above trust that all the shares in the companies, jointly with the related rights, forming the trust fund in its entirety, shall be distributed to me given my position of beneficiary of the trust.' So, you asked them to give them back to you. That's right, isn't it?
>
> WITNESS G. VOLPI—Mr. Lawyer, I think you're joking. The truth is another one, Mr. Baggi, who was trustee of my Trust, has dissolved the Trust because he was not feeling like continuing And I don't know how to say, he retired from his function, so in that moment the lawyer, Giacomo Fenoglio, who was my lawyer, he was already following me for other operation, he advised me, following to the dissolution of the Trust by Mr. Baggi, to write this letter of wishes that I wore, and then through my lawyer Fenoglio I gave it to Mr. Baggi. But I never asked him, since he resigned, I made the letter of wishes, and I accepted, because I didn't have any other choice, to receive the assets of the trust. But I didn't write, say, I didn't' write him, "You're not any more the trustee.' He decided to leave. He dissolved the Trust, and as legal notification, I did this letter that Mr. Fenoglio gave to Baggi. But I've never seen it. I have – I have never seen it. I just did this, and – but as I say I am not seeing personally Baggi since very long time."

[541] Therefore, it is argued that the Tribunal's decision to make findings about Gabriele in these circumstances, without the matter having been put to him in cross-examination or him having been given an opportunity to answer the suggestion that he had knowledge of such a breach of trust, amounted to a serious irregularity pursuant to s. 90(2)(a) of the Act, which is said to have caused Gabriele clear and substantial injustice.

Serious irregularity

[542] In respect of these claims, Matteo counters on several levels. The first is that the allegations that the Tribunal did not make a positive finding on the issue misreads the award and does not accurately indicate what the Tribunal actually found. Secondly, that in any event, they constitute a clear incursion into the Tribunal's evaluation of the evidence, which the court is restrained from doing.

[543] With respect to the first, Matteo contends that the Tribunal, expressly found, on the balance of probabilities, that Gabriele had either directed or (at a minimum) materially influenced Delanson to make the Distribution. In this regard, reference is made to the lengthy analysis of the Tribunal on the evidence between paras. 387 and 391, going to the Delanson's reasons for the Distribution.

[544] Matteo contends that the Tribunal's findings, as partially encapsulated in those paragraphs, belie Gabriele's assertions that the Tribunal's comments on the evidence of Mr. Baggi's evidence at para. 385 of the Partial Award did not amount to a positive finding that Gabriele did in fact direct the Distributions. This is because the Tribunal used phrases such as "*it is not plausible*", "*it seems very unlikely*", "*it is difficult to believe*" that Gabriele did not in fact direct the Distributions in that paragraph. Matteo notes however, that para. 385 opens with the statement "[*t]he Tribunal does not find Baggi's evidence [on this issue] convincing or credible*", which is said to a be a rejection in terms of his evidence.

[545] As to assertions that the Tribunal ignored certain witness evidence (for example, Gabriel's evidence concerning his reasons for signing his letter of wishes, or Mr. Baggi's evidence that Delanson had already decided to make the Distributions to Gabriele and wished to know whether he agreed with that), Matteo contends that the factual premise for these are false, as in fact the Tribunal did not ignore the evidence. In any event, even taking the point *ad arguendo*, it flies in the face of the well-known principle that such matters cannot be the subject matter of an allegation under the comparative provisions of the UK Act (68(2)(a) and by comparison s. 90(2)(a)), because these are clearly the kinds of situations in which the court should decline to intervene and interfere with the Tribunal's finding (*UMS Holding*).

[546] Insofar as Ground 6 is predicated on an allegation that findings were made against Gabriele that were not put to him in cross-examination, this is said to be contrary to the provisions in s. 45 of the Arbitration Act that the application of the strict rules of evidence (or any other rules) is a matter for the Tribunal. Further, the Tribunal had, by ordering that the IBA Rules would be used in the conduct of the proceedings and by its procedural ruling of 2 December 2019, confirmed that any "strict rules of evidence" would not apply, and the Tribunal would retain "*ultimate discretion to determine the relevance, materiality and weight of all evidence*". Therefore, there is no basis for this challenge and it lies outside the scope of what is permissible under s. 90 of the Act.

[547] Further, it is said that the challenge is without merit in any event, as Gabriele's evidence was to the effect that Mr. Baggi made the distribution "*without any input or influence from me or my representatives*", and therefore if he had been asked about Mr. Fenoglio or any other agent,

he would not have been able to answer differently. In any event, his evidence was not accepted by the Tribunal.

Substantial injustice

[548] Even if Gabriele could establish serious irregularity in relation to the Tribunal's treatment of the evidence concerning his state of knowledge for the purposes of the knowing receipt claim, it is argued that it could still not amount to substantial injustice. In this regard, the applicants submit that if certain evidential issues had been put to Gabriele in cross-examination the answers might have led the Tribunal to come to a different conclusion in respect of the finding of knowing receipt. Among others, these were: (i) "*that Gabriele directed the distributions in order to prevent his own family from benefitting from the assets*"; (ii) "*that Gabriele was giving instructions to Dr. Baggi via Advocate Fenoglio*"; (iii) or any challenge to the evidence that the distributions were not "*done to prevent [Matteo] from benefiting from the assets [and] so far as I was concerned had nothing whatsoever to do with whether Matteo or his family would receive a benefit from my wealth*".

[549] In this regard, Matteo points out that the Tribunal conducted a comprehensive analysis of the evidence by examining all of the possible reasons (scenarios) that had been presented by Delanson and Gabriele for effecting the 2016 distributions, which were all rejected by the Tribunal. They are set out at para. 326 of the Partial Award as follows:

> "The Parties have presented conflicting accounts of what is said to have been Delanson's motivation in dissolving the Trusts and putting the Trust Assets in Gabriele's hands in October 2016. The reasons for Delanson's effecting the October 2016 distributions appear to include the following primary possibilities, namely:
>
> (i) Due to the parlous state of the Trust Assets, in order to maximise the prospects of the assets of the Trust surviving, Delanson needed to place them in Gabriele's hands.
> (ii) Due to the risk of being sued, Delanson decided to wind up the Trust to avoid ultimate liability as trustee.
> (iii) In order for Gabriele to exclude his family, with whom he had fallen out, from having any interest in the assets.
> (iv) Delanson was simply doing what Gabriele asked, without really considering the matter for itself."

[550] Further, it is said that as the Tribunal rejected all of the central parts of Gabriele's evidence, any further exploration of the issues, such as the precise role of Mr. Fenoglio, would not have made any difference. As stated in the Additional Award, "…*the Tribunal had little difficulty in rejecting the reliability of the evidence of the centrally relevant witness, Gabriele on the first rectification claim*".

Court's evaluation and conclusions

[551] Firstly, I would give little consideration to the argument that the Tribunal did not make a positive finding with respect to Gabriele's knowing receipt because in its evaluation of the evidence it did not use the indicative mood to express its conclusions in that regard. The fact

that it used language such as it seems "unlikely" that Gabriele was not involved in the decision to make the Distributions is just another way of expressing that on a balance of probabilities it accepted that he was involved.

[552] In my opinion, this is a textbook example of the kind of "*nitpicking and looking for inconsistencies and faults*" that is said to be antithetical to the way in which the court should read an arbitral award (*Transition Feeds LLP v Itochue Europe plc* [2013] EWHC (Comm), per Field J at para. 17l, and Bingham J in *Zermalt Holdings SA v Nu Life Upholstery Repairs Ltd*., [34]). As was said in the *Raytheon* case, although in the context of a challenge on the grounds of failure to deal with the issues (but which is equally apposite here), the court should not engage in a "*hypercritical or excessively syntactical reading*" of the award.

Tribunal's evaluation of evidence

[553] I also reject the argument that the Tribunal drew inferences of fact and came to conclusions regarding Gabriele's state of knowledge and/or conduct relative to the Distributions, the alleged basis of which were not put to him in cross-examination, and that these amount to a serious irregularity under. I likewise reject the contention that the Tribunal also ignored relevant parts of the evidence (such as Gabriele's evidence concerning his intention behind the letter of wishes or Mr. Baggi's evidence that the decision to distribute by Delanson was already made and Gabriele's view was only being solicited as to whether he agreed), or that these allegations could credibly ground a s. 90(2) (c) challenge.

[554] Firstly, in my view, these allegations are inviting the court to make an impermissible incursion into the well-known principle that the Tribunal's treatment of the evidence cannot be the subject matter of an allegation under s. 90(2)(a). As the Court has had occasion to state repeatedly during the course of this judgment, these are clearly the kinds of situations in which the court should not intervene and interfere with the Tribunal's findings (*UMS Holdings case*).

[555] Secondly, in relation to the above complaints, the Court has been referred to (and read) the transcript of the hearing in relation to the evidence and cross-examination of Gabriele. I would note that the examination of Gabriele (by Matteo's counsel and his own counsel) occupied roughly three hours of the evidential hearing before the Tribunal, during which he was extensively cross-examined on the full range of issues put to him. One could always, in hindsight, after issues have concretized for the purposes of a legal challenge, go back and tease out issues in the conduct of the proceedings, whether in the conduct of the evidential phase of the hearing or the legal submissions, which might be viewed as deficient treatment of certain areas by a party or even the Tribunal, when viewed against the issues that are taken on appeal. But this is the nature of any legal hearing. To second guess the way the evidence was led before the Tribunal and the degree of specificity with which matters were treated or not, would involve the Court in the forbidden exercise of engaging in its own detailed and forensic re-consideration of the evidence, which is not the purpose of the supervisory court.

[556] For the reasons identified above, I do not find that there was any irregularity under s. 90(2)(a) or section 90(2) (c) 68(2) with respect to the Tribunal's evaluation and treatment of the

evidence relating to the knowing receipt claim. However, even if I had concluded that there had been an irregularity, in my opinion it would not have been an irregularity which caused or will cause substantial injustice to Gabriele. In my view, even if the questions or issues which Gabriele and Delanson argue were not put to Gabriele in cross-examination had been put, there is nothing to suggest that the Tribunal would have reached any different conclusion with respect to the issue of knowing receipt.

[557] In this regard, and as has been pointed out, the Tribunal's finding that Gabriele directed or materially influenced Delanson to make the distributions was done after an evaluation of all of the possible scenarios. It is highly unlikely that any permutation of the questions which it is suggested could have been put to Gabriele would have changed the Tribunal's comprehensive and considered findings concerning Gabriele's involvement in Delanson's decision to make the Distribution.

9. Gabriele Gr. 9: *The Tribunal's treatment of the expert evidence on Liechtenstein law and its implications for the transfers*

[558] Under this ground Gabriele challenges the finding of the Tribunal that the initial transfers of assets into the Winter Trust from the Adiana Foundation were valid as a matter of Liechenstein law. This is said to amount to serious irregularities under s. 90(2) (a) and 90 (c).

[559] As to the first category of serious irregularity (s. 90(2)(a), it is said to be caused because "[*t]he Tribunal ignored agreed evidence regarding Liechtenstein law and/or reached conclusions on questions of Liechtenstein law that were not open to it based on the expert evidence of Liechtenstein law that was before it*". This argument was deployed on the basis that the Tribunal determined the issue based on two propositions, which it accepted, but which were not supported by the expert evidence: (i) that Adiana never challenged the validity of the transactions and had ceased to exist; (ii) and that Gabriele, whom the Tribunal regarded as the principal of the defunct foundation, himself ratified the transaction. This is said to be a "*flagrant mishandling of the evidence*" because the evidence led by the Liechtenstein experts was to the effect that the only person or entity that could ratify the transaction was Adiana itself.

[560] The second alleged irregularity in respect of the Liechtenstein issue (s. 90(2) (c)) is that the Tribunal reached its conclusion on the state of Liechtenstein law "*without permitting cross-examination of the Liechtenstein law experts called by the parties*."

Parties' submission

Background

[561] As will be recalled, Gabriele argued that the initial transfer of assets into the Winter Trust from the Adiana Foundation had been void *ab initio* as a matter of Liechtenstein law, namely because transfers from a Liechtenstein foundation to a different fiduciary structure are void if the purposes of the receipted structure do not mirror the purposes of the foundation. Since the

purposes of the Winter Trust were said not to mirror the purposes of Adiana, the transfer was void. In these circumstances, as there were no assets in the Winter Trust to set aside (or reconstitute) this should have affected Tribunal's exercise of its discretion whether or not to set aside the Distributions in the event it found (which it did) a breach of trust (see paras. 303-304 of Partial Award).

[562] Both parties adduced expert witnesses who prepared reports and gave evidence on the issue (Gabriele called Dr. Johannes Gasser (the "Gasser report") and Matteo called Dr. Nicholas Reithner ("the Reithner Report"). How the Tribunal decided to deal procedurally with the expert evidence is recorded in the transcript of 17 December 2019 as follows:

> "PRESIDENT— Thank you very much. In view of the time constraints and that we are behind schedule, we have discussed among the members of the Tribunal what we can do in order to economize with the available time. We have come to the conclusion that we are fully informed about the Liechtenstein law issues and we don't need further evidence on that from experts and lawyers."

[563] When the hearing resumed on the following day, the matter was revisited by Counsel for Gabriele, apparently in objection to the view adopted by the Tribunal. It is useful to reproduce what transpired as recorded in the transcript of 19 December 2019:

> "COUNSEL TALBOT RICE—Sir, what was left with us overnight was the two suggestions. One that the Liechtenstein lawyers be not examined, and two that we have ten minutes with the handwriting expert. On the first point, we are slightly troubled by it, because we will be submitting that the fact that the Winter Trust never had anything in it at all is relevant to your discretion as to whether or not to set aside the distributions if you find that there has been a breach, and that relief is specifically requested in the claim, it is requested that you set aside the distributions. That is a discretionary remedy, and what it is relevant to that discretion if in fact there is nothing in the Winter Trust. So setting aside the distribution does nothing. For the purposes of deciding whether there is nothing in the Windter Trust that is the Liechtenstein point. The Tribunal will have to decide on that. My learned friend says it is not arbitrable, but that is not the point in the sense that certainly if it was an application by the Adiana Stifton saying, "those are my assets I'd like them back please, because the transfer to you, Delanson, as trustee of the Winter Trust didn't work", I completely agree with it. But that is not what you are dealing with here, what you are dealing with here is, "should I set aside the distributions? Hang on a minute, I have got to think about what that actually does", and if what it actually does is absolutely nothing, then we will be saying, "you shouldn't set them aside."
>
> PRESIDENT—We didn't want to express any concern that we would think that the Liechenstein law is not relevant. We just are of the view, but we will revisit that during the break, that the report provided by the Lichtenstein lawyerse are quite extensive and conclusive in their own way, and that on that basis we would be able to base our decision with the regard to the implication of Liechenstein law. That is the reasons why we thought that would not be necessary.
>
> COUNSEL TALBOT RICE—I think the two experts don't agree on this critical point.

> PRESIDENT—They don't agree, but that is a frequent situation that experts don't agree and Arbitrators have t deal with that. But as I said, I will come back with some reaction after the break.
>
> COUNSEL TALBOT RICE—I suppose then that the question resolves itself in how the Tribunal determine that disagreement without hearing from them.
>
> ARBITRATOR NEUBERBER—If it helps, my only experience as an arbitrator, and indeed as an expert witness, is that Tribunals, whether judges or arbitrators, are increasingly trying to regard cross-examination of witness as to law as being extremely unhelpful, and really once the points had been had, they can be argued about as points of law, and the fact that foreign law doesn't alter that."

[564] The Tribunal disposed of the issue on the following basis:

> "435. Since the experts appear to agree that so long as the principal ratifies the transactions the said transaction is valid ab initio, the Tribunal considers that the said princip[al]'s approval has been provided implicitly. The Adiana Foundation never challenged the validity of the transfer and consequently to its dissolution, Gbbriele having lived with the Winter Trust, issued letters of wishes, received distributions duringthe life of the Winter Trust(which included distribution of dividends received from Orlean from 2006 until 2016), and ultimately having accepted the full distribution fo the assets from the Winter Trust in October 2016, the Tribunal has difficulty in following the conclusions supported by the Second Respondent. Indeed, a party cannot set itself in contradiction to its previous conduct vis-à-vis another party if that latter party has acted in reasonable reliance on such conduct. In this case, the Tribunal finds that Gabriele cannot asset that the decanting of the Adiana Foundation's assets into the Winter Trust through the designation of the Winter Trust as its sole beneficiary is void, since he never refuted and had consistently benefitted from the said transaction in the past.
>
> 436. As a result, the Tribunal finds that the transfer of the assets from the Adiana Foundation to the Winter Trust as its sole beneficiary is valid and in [any] event Gabriele's behaviour has validated the said transactions, which in any event, during the life of the Adiana Foundation had never been challenged."

[565] Following the hearing, the Tribunal also invited the parties to address the question: "*Regarding the Adiana Foundation, whether the transaction between the Adiana Foundation and the Winter Trust is to be treated as valid due to the conduct and subsequent behaviour of Gabriele Volpi (e.g., letter of wishes, acceptance of the assets, etc*.)".

[566] Both parties addressed the issue in closing submissions, but Gabriele argues that neither party submitted that (i) Gabriele was the principal of the Adiana Foundation, or (ii) that following the dissolution of the Adiana Foundation in 2013, Gabriele became entitled to ratify the provisionally invalid transaction. This, it was said, was because neither expert had contended that Gabriele was the Foundation's principal or that he became entitled to ratify the transactions on its behalf.

[567] Firstly, Matteo contends that the argument that the Tribunal treated Gabriele as the Foundation's principal is not factually correct, as the Tribunal in fact found that it was the

Adiana Foundation and not Gabriele who had implicitly approved the transfers. As explained at para. 431 of the award by the Tribunal, "…*the transfers are to be considered invalid unless and until the Adiana Foundation decided to ratify it*." As neither Liechtenstein expert had contended that ratification could not be done by implication, it is argued that it was open to the Tribunal to come to the conclusion it did, which was in no way contrary to the expert evidence provided.

[568] But, even if the Tribunal had reached a conclusion which was either not supported by or contrary to the expert evidence, it is said that this would not have provided any basis for a serious irregularity challenge, citing *B v A* [2010] EWHC 1626 (Comm). Secondly, it is contended that any finding on Liechtenstein law are to be regarded as findings of fact and cannot give rise to a claim for the court to interfere on the basis of a serious irregularity.

Principle of "Tre und Glauben" and "Konversion"

[569] Further, it is said that to the extent that the Tribunal considered the conduct and subsequent behavior of Gabriele relevant to the validity of the transaction between the Adiana Foundation and the Winter Trust, it was not on the basis that he was the principal, but pursuant to principles of Liechtenstein law which were adduced in evidence and relied on by the parties. The first, was that of *Treu und Glabuen*, which generally translates as a requirement of fair business dealings and would have precluded Gabriele from challenging the acts of his own agents, and the second (relied on by Matteo) of *Konversion*. It is argued that these can be relied on as alternative bases for the findings of the Tribunal on the validity of the impugned transfers, which are consistent with Lichtenstein law.

[570] It is true that the Liechtenstein law experts were not cross-examined, but Matteo argues that the complaint is inaccurate, as the Tribunal considered itself "*fully informed*" of the Liechtenstein issue and *did* allow an opportunity for Gabriele and his attorneys to further press the issue, which was not taken up (see the excerpt from the transcript of the second day of hearing above). He also refers to the further exchange on the issue between the Tribunal and counsel for Gabriele the following morning (see above), but notes the matter was not further pursued.

[571] In any event, Matteo submits that a failure to permit cross-examination cannot ground a challenge in serious irregularity, as such a refusal lies squarely with the Tribunal's powers to deal with "procedural and evidential matters", as has already been noted, pursuant to s. 45(1) and s. 45(2)(h) of the Act. Thus, it is said that the Tribunal's clear exercise of the powers expressly granted to it under the Act to limit the scope of oral evidence cannot amount to a serious irregularity under ss. 90(2)(a) or (c). Further, Matteo invokes the s. 95 bar, which precludes a challenge to an objection not raised before the Tribunal that could have been taken.

Substantial injustice

[572] Lastly, it is contended that even if the points of the treatment of the Liechenstein law expert evidence could hypothetically amount to a serious irregularity, the substantial injustice limb

could be satisfied. This is because the validity of the initial transfers into the Winter Trust from the Adiana Foundation were only relevant to the exercise of the Tribunal's discretion to set aside the Distributions if it had found them to be voidable, not void. As the case has been made that this was a hypothetical consideration, any different outcome by the Tribunal on the issue of Liechtenstein law would not have made any difference to the Tribunal's exercise of its discretion, and in any event could not have affected the conclusion that the Distributions were outside the scope of Delanson's powers. Thus, the outcome of Phase 1 of the Arbitration would have been the same and a s. 90 challenge must invariably fail.

Court's evaluation and conclusion

[573] It is convenient to take the heads of challenge alleged by Gabriele under this Ground together, as they both relate to the Tribunal's treatment of the evidence. To recapitulate, they are:

(i) That the tribunal ignored agreed (expert) evidence on Liechtenstein law and/or reached conclusions on questions of Liechtenstein law contrary to the expert evidence before it.

(ii) These conclusions were reached without cross-examination of the Liechtenstein experts called by the parties.

[574] As indicated, the Tribunal had before it two expert reports on the question of Liechtenstein law related to the transfers to the foundation: the Reithner report and the Gasser report. I have set out the Tribunal's conclusion (at 435 of the Partial Award) above, but I would add to that critical excerpts from the Tribunal's evaluation of those reports and its approach to that evidence, as is contained in paras. 431-432 of the Award:

> "431. [T]he Tribunal notes that, according to the aforementioned expert reports, it would appear that such a transaction is considered "provisionally invalid", i.e., that the principal can decided whether to accept the transaction by a respective notice to the counterparty and then to accept the transaction by a respective notice to the counterparty and then it will be valid *ab initio*, or not, which will make the transaction void ab initio. In other words, the transfers are to be considered invalid unless and until the Adiana Foundation decides to ratify it…."

The Tribunal then noted that, as the Adiana Foundation was no longer in existence, the conduct of Gabriele as the effective founder was relevant to the validity of the transaction between the Adiana Foundation and the Winter Trust. It then said:

> 432. [G]abriele should not and indeed cannot challenge the acts of his own agents due to the general duty of fair business dealing (*Tre und Glauben*). In addition, to the extent that Gabriele's behaviour provides evidence of the hypothetical will of the Foundation, it is also relevant to the Claimant's claim that the transfer of assets was valid by reason of the principle of conversion (*Konversion*).

Legal principles

[575] It will come as no surprise that in considering these grounds I have in mind the principles set out by Teare J in *UMS Holding Ltd. v Great Station Properties SA* (*supra*) with respect to claims relating to the tribunal's treatment of evidence. I will simply reiterate the opening comment at para. 28 that: "*A contention that the tribunal has ignored or failed to have regard to evidence relied upon by one of the parties cannot be the subject matter of an allegation of a serious irregularity within s. 68(2) (a)* [s. 90(2)(a)] *or (d)*…". In this regard, evidence includes "*not only documentary evidence, but also the transcripts of factual and expert evidence.*"

[576] I am also unable to accept the argument by Gabriele that it was not open to the Tribunal to come to the conclusion it did. Firstly, it accepted that any ratification had to be done by the Adiana Foundation itself (as pointed out above). Secondly, whilst the expert evidence might not have been advanced on the basis that ratification could be done by implication, neither was there any reference to a rule of law which precluded it. In fact, the principles of "*fair business dealing*" and "*conversion*", which are a part of Liechtenstein law, and partly relied on by the Tribunal, would have produced a similar outcome as ratification.

[577] Put at its highest, the complaint by the applicants is that the Tribunal misinterpreted or misapplied Liechtenstein law. However, neither of these would properly found a complaint under s. 90(2)(a). In *B v A*, the UK Court rejected an argument that the tribunal had ignored the applicable (Spanish) law, which gave rise to an irregularity under s. 69(2)(b) of the UK Act. There, Tolinson J. held [26]:

> "Making an error as to the application of the applicable law can involve no excess of power under section 68(2)(b) since, as Lord Steyn explained [in *Lesotho Highlands*] the concept of a failure by the Tribunal to reach the 'correct decision' as affording a ground for challenge under section 68 is wholly inimical to the scheme and purpose of the Act."

Thus, if disregard of the applicable law cannot amount to an irregularity, it is argued that *a fortiori* misapplication of the chosen law cannot amount to such an irregularity.

[578] Neither can a finding of fact (and it is trite law that questions of foreign law are regarded as issues of fact) give rise to a serious irregularity. As said in *UMS Holdings Ltd. v Great Station Properties SA* [2017] EWHC 2398, "…*by choosing to resolve disputes by arbitration the parties clothe the tribunal with jurisdiction to make a 'wrong' finding of fact*." Further, in *Bulfracht (Cyprus) Ltd. v Boneset Shipping Co. Ltd. (The "Pamphilos")* [2002] EWHC 2292 (Comm), a tribunal is entitled to "…*arrive at a conclusion on an issue of expert evidence which differs to some extent from that put forward by either opposing expert [and] in such cases there is simply no irregularity, serious or otherwise*."

[579] I accept Matteo's submission that the exercise of the Tribunal's statutory powers to deal with "procedural and evidential matters" does not amount to any serious irregularity under s. 90(2) (a) or (c). In arbitration proceedings, either pursuant to the Rules (in this case UNCITRAL) or the *lex fori*, and subject to the parties' agreement, the tribunal is often given wide powers to conduct the proceedings. In this regard, s. 45(1), it provides in part that "*it shall be for the tribunal to decide all procedural and evidential matters*…"; and under s, 45(2)(h), procedural matters are defined to include " *whether and to what extent there shall be oral or written*

evidence". Art. 19 of UNCITRAL provides in part that in conducting the proceedings, the arbitral tribunal may "*determine the admissibility, relevance, materiality and weight*" of the evidence.

[580] Further, as seen from the excerpts from the transcript, it cannot be said that the Tribunal did not engage with the issues arising from Liechtenstein law and give counsel a fair opportunity to put their cases. The Tribunal also specifically invited the parties to address the issues in closing submissions, providing a further opportunity for them to comment on the issues.

[581] In the circumstances it is difficult to see how the failure to permit cross-examination (to the extent that it could even be said that the Tribunal closed the door on this, having regard to the transcript of the second day hearing referred to above) caused any procedural unfairness of such gravity that justice calls out for it to be corrected. I have referred in a previous section to the decision of *P v. D*, which is also authority for the proposition that there is no absolute rule that a challenge must be made to every part of a witness's evidence in cross-examination if the tribunal is being invited not to accept that evidence (see the recent case of *BPY v MXV* [2023] EWHC 82 (Comm). I am left in no doubt that the arbitrators did not breach the general duties under s. 44 by failing to allow cross-examination of the expert witnesses.

[582] In *BPY v MXV*, the Hon. Mr. Justice Butcher, commenting on "the rule in *Brown v Dunn*" said [35]:

> "In arbitration proceedings, subject to any specific agreement between the parties, the tribunal is likely to have a wide discretion as to how to conduct proceedings. The LCIA Rules expressly provide for this. Subject to compliance with the general duties enshrined in s. 33A, a tribunal may adopt a procedure which does not involve cross-examination of witnesses, whether on a particular point or at all. This includes in a case in which it is said that a witness is not telling the truth, although in some cases, fairness will necessitate cross-examination."

[583] In any event, even if these matters could arise to serious irregularities, I am satisfied (for the reasons submitted by Matteo) that it would not have amounted to an irregularity which caused, or will cause substantial injustice to Gabriele. The validity of the initial transfers were only relevant to the issue of the tribunal's exercise of its discretion to set aside the Distributions if it had found them to be voidable and not void—i.e., whether there would have been anything to set aside in the first place on the hypothetical exercise of its discretion to set aside a distribution. As the Tribunal found that the Distributions were outside the scope of Delanson's powers, they were void and the finding on the Liechtenstein issue would not have changed this outcome. In other words, it could not be contended on the facts that the result might well have been different so as to amount to substantial injustice (see the comments of Colman J in *Vee Networks Ltd.* (cited above), which has been followed in many other cases).

[584] For these reasons, I am satisfied that the challenges made on both types of serious irregularity fail.

10. Gabriele Gr. 10: *The Tribunals' conclusions in the Additional Award*

[585] Under this ground, Gabriele seeks to challenge both the Partial Award and the Additional Award for serious irregularity under s. 90(2)(a), (c) and (f), and error of law under s. 91. As articulated in the Second Affidavit of Michael Bray filed in support of the legal challenges [para. 10] this Ground is said to be "*a new ground of challenge, which arises out of the manifest inconsistency and incoherence of the Tribunal's treatment of the Restriction in the Partial Award versus the Additional Award, and the uncertainty and ambiguity this creates for the future administration of the trust*."

[586] In the Additional Award, the Tribunal's answer to Gabriele's claim that the Restriction was inconsistent with the October 2006 LoW, which it was argued contemplated a distribution of all the assets in the Trust, was as follows:

> "30. In any event, the Tribunal considers that there is no logical inconsistency between the existence of the Restriction (as interpreted in the Partial Award) and the contents of the "October 2006 Letter of Wishes", as relied on by Gabriele in the Request. The effect of the Restriction did not eliminate the ability of Gabriele to propose a distribution of all the Trust assets insofar as that would be possible for the irrevocable discretionary Trusts. If Gabriele wanted to have all the assets of the Trusts distributed, he would have had to come up with a request whose implementation would have been acceptable to the Trustee, and that request would have had to involve a proposal whose implementation would have been consistent with the duties of the Trustee. To the extent that the Trustee considered to distribute all of the assets of the trust, their duty required them to consider all the beneficiaries. This could have taken the form of making a particular provision for the other beneficiaries, and Gabriele would either have to have included such a provisions for the other beneficiaries in his request, or he would have faced a refusal, or at best, a partial acceptance of his request."

[587] Its conclusion on the "scope of powers rectification claim" (whether the evidence establishes that the Trust Deeds should not contain the Restrictions on the Trustee's powers of distribution) is recorded at para. 37 of the Additional Award:

> "37. Accordingly, the Tribunal concludes that, although the scope of powers rectification claim deserves to be considered by the Tribunal, the Second Respondent's scope of powers rectification claim should be rejected. In view of the discussion in paragraphs 22 to 36 above, and based on the evidentiary record as a whole, the Tribunal finds that the Second Respondent has not established his scope of powers rectification claim by clear evidence of the true intention to which effect has not been given in the instrument."

Parties' submissions

[588] The pith and substance of Gabriele's argument on this point may be distilled from Gabriele's skeleton arguments [GV2/239-241]:

> "239. [T]he Partial Award and the Additional Award are inconsistent with one another. The Partial Award makes it clear that the Restriction exists, and that it delineates something that the Trustee cannot do—it *cannot make a distribution "so such an extent that it would rule out future payments to beneficiaries for their necessities as*

> *understood under Clause 6 of the Trust Deeds*." *Ex hy*pothesi, a distribution of the whole of the Trust Fund would be such a distribution, since it would "*rule out future payments to beneficiaries for their necessities" (including unborn beneficiaries*), such that the Trustee is not empowered to make such a distribution. Indeed, the logical consequences of the Restriction is that the distribution of <u>any</u> of the capital of the Trust Fund would be prohibited, because it would *ipso facto 'rule out'* future payments for the other beneficiaries' purposes, 'whatever those purposes may be'.
>
> 240. In the Partial Award, this led the Tribunal to the conclusion that, in distributing the Trust fund to Gabriele, "*Delanson acted in a manner that went beyond the scope inherently contemplated or justified by the Trust Deeds and thus finds that Delanson acted in breach of trust*", and thus committed a fraud on the power, rendering the distributions void *ab initio*.
>
> 241. By contrast, the Additional Partial Award states in terms that the Restriction does not prevent the distribution of the whole of the Trust Fund: "*The effect of the Restriction did not eliminate the ability of Gabriele to propose a distribution a distribution of all of the Trust assets insofar as that would be possible for the irrevocable discretional Trusts*". It goes on to suggest that the issue in respect of such a proposal is not that it is outside the scope of the Trustee's powers under the terms of the Trusts, but that implementation of such a proposal may not be consistent with the performance of the Trustee's duties…". [Emphasis in the original.]

[589] In essence, Gabriele makes four central attacks on the alleged dichotomy between the two Awards. The first is the global criticism that the reasoning in the two awards is said to be inconsistent, arising in particular from the clarification (or further reasoning) provided in the Additional Award, as set out in the extracts from his skeleton argument above.

[590] The next line of attack builds on the earlier assertion that the awards are inconsistent. In this regard, it is contended that, if upheld, "…*the Awards would thus introduce an unacceptable level of uncertainty and ambiguity into the administration of the Trusts […] because it would be impossible for the Trustee to know whether any particular exercise of its power involving a distribution of the whole of the Trust fund would be within the scope of its powers, or not*."

[591] In support of this limb of the claim, Gabriele refers to a number of authorities and academic opinion on the very trite and accepted principle that the terms of a trust must be sufficiently certain to enable the Court to enforce it, which do not need to be repeated here. I will only make reference to one of those authorities, which is a passage from *Underhill and Hayton: Law of Trusts and Trustees (19 edn. 2018*). That is cited for the statement that in addition to the requirement to establish the three certainties of a trust (certainty of intention, subject matter and objects), there is also a requirement to establish "certainty" of the way in which the beneficiaries are to be benefitted:

> "intention to create a trust is not of itself sufficient (even where the most direct and imperative words are used), if either the property, or the persons to be benefitted, <u>or the way in which they are to be benefitted be not indicated with reasonable certainty</u>" [Emphasis in the skeleton.]

[592] The case cited for this proposition is said to be *Pension Regulator v. Admin Ltd.* [2014] EWHC 1378 (CH), in which Rose J (as she then was) held that a trust was void for uncertainty because "*…it is impossible in my judgment to work out what pension the Scheme Members could expect to receive under the trust*." In the context of the instant proceedings, it is contended that if the Restriction exists on the Trustee's dispositive power (as per the Partial Award, but "contrary" to the Additional Award) rendering a purported distribution in excess of that limit void, it is too vague and uncertain to be workable.

[593] The third line of attack arises around the way in which the Tribunal dismissed the "*scope of rectification claim*" in the Additional Award, which was the claim by Gabriele for the Tribunal to rectify the Trusts to remove the purported restrictions constraining the scope of the Trustee's powers to distribute, which the Tribunal found in the Partial Award (para. 37 of the Additional Award, *supra*).

[594] The fourth complaint is apparently hinged on a statement by the Tribunal that even if it had granted the scope of rectification claim, it would not have made any difference to any of its other conclusions in the Partial Award.

[595] Matteo's riposte to the claim of inconsistency between the two Awards is that there is none. It has already been submitted that there is no such inconsistency, as the construction given to cls. 6 and 7 of the Trust Deeds by the Tribunal is eminently workable. In this regard, Delanson would have been able to distribute to a single beneficiary, but subject to provisions that would have made provision for "*future payments to beneficiaries for their necessities as understood under Clause 6 of the Trust Deeds*."

[596] In any event, it is contended that even if any inconsistency exists concerning the scope of Delanson's distributive powers, it is settled law that a mere inconsistency or error in a tribunal reasoning cannot give rise to a serious irregularity.

[597] As to the claim of uncertainty and ambiguity, Matteo asserts that the claim is misconceived as the Tribunal resolved the dispute referred to it by holding clearly that the distributions were ineffective. The Tribunal's duty in this regard is not to provide a general advisory opinion on the scope of Delanson's powers for future guidance. In any event, to the extent that the challenge is made pursuant to s. 90(2)(f), it is said that Delanson has lost the right to challenge as no application was made to the Tribunal for any interpretation of the awards on this issue.

[598] Concerning the dismissal of the scope of rectification claim, Matteo contends that there is not very much substance to this argument, because it amounts to a challenge concerning the Tribunal's evaluation of the evidence, and the Tribunal findings of fact cannot be challenged under s. 90 (see cases previously cited). The Tribunal's primary reasons for rejecting this claim in the Additional Award were that "*…both limbs of the first rectification claim and the scope of powers rectification claim all concern an assessment, according to the same principles, of the intentions of the same person at the same time in relation to the same clauses in the same documents*", and that since "*the Tribunal had little difficulty in rejecting the reliability of the*

evidence of the centrally relevant witness, Gabriele on the first rectification claim", Gabriele's claim for the scope of powers rectification claim also failed (para. 36 of Additional Award).

Substantial injustice

[599] It was submitted on behalf of Gabriele that the irregularities caused various injustices. First, it is said that on the basis of the purported restrictions the Tribunal (i) declared the 2016 Distributions to be void *ab initio*, and (ii) and made adverse findings as to breach of trust and Gabriele's liability for knowing receipt. It is also submitted that another form of injustice would be the adverse effect on the administration of the Trust if the Tribunal's declaration is allowed to stand, as it would require the parties to the Trust to abide by and operate "an inherently uncertain restriction" which would render the Trust unworkable. As an example, it would make it "*impossible either for Gabriele to request or for the Trustee to accede to, any proposal for the distribution of the whole of the Trust fund*," since this would be *ipso facto* in breach of the restriction and *void ab initio*.

[600] Matteo contended that there was no substantial injustice. In particular, it was argued that even if the "scope of rectification" claim in the Additional Award could hypothetically give rise to a serious irregularity, it would not satisfy the substantial injustice requirement, because even if the claim succeeded, it would not have changed the main conclusions in the Partial Award that the distributions were (i) *"in breach of trust, and (ii) amounted to a fraud on the power, (iii) were inconsistent with the duty to consider the interest of other beneficiaries, and (iv) resulted in Gabriele being liable for knowing receipt*". So the outcome of Phase 1 of the Arbitration would have been the same.

Appeal on point of law (and no error of law)

[601] Gabriele also argues that in addition to constituting a serious irregularity, the finding that the Trustee's dispositive power is subject to the Restriction and the concomitant finding that the Trustee owed "*an <u>overriding duty</u> to consider the needs of the other beneficiaries, and particularly in this case to <u>ensure</u> that the Trust assets were used, and therefore available for use, to pay to any beneficiary for his or her "essential" or "material necessities*", constitute clear errors of law. [Emphasis in original.]

[602] To the extent that Ground 10 is advanced on the basis of s. 91, it is repeated that there is no ability to appeal on a point of law. But in any event, it is contended that the complaint in respect of the "*scope of rectification claim*" really goes to the Tribunal's evaluation of the evidence, and therefore there is no identified error of law asserted under this ground to address.

<u>Court's evaluation and conclusions</u>

[603] I have set out the Tribunal's conclusion on the Restriction and the alleged inconsistency with the settlor's wishes as explicated in the Additional Award above.

[604] I observe at the outset that the challenges to the Tribunal's reasoning of the Restriction and the alleged inconsistency in the two awards are in the main procedural challenges under s. 90. It is therefore no part of the court's function to consider whether the Tribunal's construction of the Deeds was wrong, or whether there is any inconsistency in the reasoning of this point in the two Awards. The complaint is that the "*manifest inconsistency and incoherence*" of the treatment by the Tribunal of the restrictions in the two awards amounts to serious irregularity, which caused substantial injustice to the applicants.

[605] Despite the artful way in which this claim has been advanced, I must admit that it is somewhat novel and rarefied, and I view with some skepticism the degree to which a claim of inconsistency in reasoning (even if made out) can be buttonholed within the closed categories of serious irregularities that the court is entitled to address.

[606] Taken at its highest, it seems that this is a general complaint as to the quality of the Tribunal's reasoning. Viewed from this point, it is hardly likely to give rise to any serious irregularity under s. 90 (a). As Teare J said in the *UMS Holding Ltd*. case [134]:

> "Were the court able to scrutinize the content or quality of a tribunal's reasons the court would have something akin to a general supervisory jurisdiction over arbitrations which it does not have. Such scrutiny would frustrate one of the principal purposes of the Arbitration Act 1996 which was, as explained in Lesotho, to limit the court's intervention in arbitration. As Tomlinson J. said in *ABB v Hochtief Airport* [(2006) 2 Lloyd's Rep 1], at paragraph 80, a tribunal's reasons may be 'unsatisfactory' but that is not a serious irregularity within section 68. 'It is not for this court to tell an international commercial tribunal how to set out its award or the reason therefor'. "

[607] I also add the observation of Colman J. in *Margulead v Exide Technologies* [2005] 1 Lloyd's Rep 324, where he said [41]:

> "41. A deficiency of reasons in a reasoned award is not capable of amounting to a serious irregularity within the meaning of Section 68 of the 1996 Act unless it amounts to a 'failure by the tribunal to deal with all the issues that were put to it' with Section 68(2) (d)."

[608] As far as can be discerned, the claim under 90(2)(c) is being advanced on the basis that, in rejecting the evidence of Gabriele as to his intentions with respect to setting up the Trust on the first rectification claim, and rejecting the scope of powers rectification claim based on that same evidential hypothesis, the Tribunal contravened the duty to conduct the proceedings in accordance with the procedure agreed (e.g., to consider all the evidence).

[609] Again, this is essentially a challenge concerning the Tribunal's evaluation and findings of fact, which cannot be challenged under s. 90 and in no way amounts to an irregularity. I rely on the numerous authorities already cited by the court on this point; they apply equally here.

[610] As to the challenge that this creates uncertainty and ambiguity in the "effect" of the award, within the meaning of s. 90(2) (f), there is an insuperable procedural hurdle. Firstly, a challenge alleging uncertainty and ambiguity must first be made with the tribunal. Section 95(2) provides

in relevant part that "*an application or appeal may not be brought if the applicant or appellant has not first exhausted* […] (b) *any available recourse under section* 79 (correction of award or additional award)". Section 79 provides in part that the Tribunal "*either of its own initiative or on the application of a party*" may "(a) *correct any award so as to…remove any ambiguity in the award*." Such applications must be made with 28 days, unless a longer period is agreed (s.79(4)).

[611] Matteo argues that as no such application was made to the Tribunal for the interpretation of the Awards on *this* issue the application is precluded by s. 95(2). I agree.

[612] But even if the challenge were not precluded, it is clear that the mischief s. 90(2)(f) is directed to is the "*effect*" of the award. Delanson argues that the awards would cause uncertainty and ambiguity in how the trusts were to be administered, since it would be difficult for the Trustee to know the scope of its powers. I agree with Matteo's submission that there is no ambiguity in the effect of the award. In finding that the distributions were ineffective and in granting relief based on its findings, the Tribunal resolved the legal issues submitted to it. The way in which it expressed its reasoning with respect to any step in the reasoning leading to that conclusion does not make the *effect* of the award unclear.

[613] The remaining question, even if any irregularity had been established, is whether the applicants can show that such irregularity would cause or has caused substantial injustice. In fact, this matter was expressly dealt with by the Tribunal [at 40] of the Additional Award:

> "IV. EFFECT OF SCOPE OF POWERS RECTIFICATION CLAIM SUCCEEDING
> 40. The Tribunal is of the view that, contrary to Gabriele's submissions, even if the scope of powers rectification claim had succeeded, it would not have altered the Tribunal's conclusions in the Partial Award that the decision to make, and the implementation of, the October 2016 Distributions (1) were in breach of trust and (ii) amounted to a fraud on a power, (iii) were inconsistent with the duty to consider the interest of other beneficiaries, and (iv) resulted in Gabriele being liable for knowing receipt. It is only fair to add that one of the grounds on which those conclusions was based would have been weakened, but not to the extent of undermining those conclusions.
> 41. [...]The Tribunal accepts that the reasoning in paragraphs 31-637 of the Partial Award [breach of trust] would not apply, or, at the very least, the reasoning would have to be significantly recast if it was to apply."

[614] Normally, in looking at this matter, the court is required to consider whether the result might well have been different if the irregularity had not occurred. It is rare that the Tribunal itself would do the honors of looking at the hypothetical result were it not for the irregularity. But this Award was obviously written with an eye to the future and to inoculate the Award as far as possible against judicial intervention. In light of the Tribunal's own statement of the position, "*goodnight Vienna*". I therefore do not accept that Gabriele can make a case for substantial injustice.

[615] For the reasons given, I do not find that any of the grounds of serious irregularity is made out.

Error of law

[616] On the issue of an appeal of law, again I refer to the court's previous finding that no leave to appeal is available, except by consent. For completeness, however, if an appeal were available, I do not accept Matteo's characterization that a complaint in respect of the "*scope of rectification claim*" really goes to the Tribunal's evaluation of the evidence. At the very least, it would be a question of mixed fact and law, as the construction of the Trust (the finding of the Restriction issue, as opposed to the evidence relating to the settlor's intention) is eminently a legal question. And there may be powerful points that can be made in respect of this issue if an appeal were possible. But Parliament in its wisdom to short circuit and limit judicial scrutiny of awards, has not provided for such a right.

J. CONCLUSION AND DISPOSITION OF APPLICATIONS/APPEALS

[617] I have indicated my findings on the various challenges and grounds of appeal in the foregoing analyses and discussion and given my reasons for so doing. Neither considered individually nor together do the grounds relied on by the applicants demonstrate that the Tribunal made any errors with respect to its substantive jurisdiction under s. 89 or committed any serious irregularities either in contravening the general duties at s. 44 or falling foul of the closed list of irregularities at s. 90. Further, as leave to appeal on points of law is not available, necessarily none of the matters said to constitute errors of law can be appealed. Even if I am wrong on that point, there is no guidance as to the applicable test for leave, and by analogy many (although I cannot say all) of the legal grounds would not meet the test for leave and are unlikely to succeed on the merits.

[618] For convenience, I summarize my conclusions as follows:

<u>Challenge to jurisdiction:</u>

(1) I dismiss the claim that the Tribunal lacked substantive jurisdiction pursuant to s. 89 on the basis that the Trusts were authorised purpose trusts and that the statutory pre-conditions for instituting a claim in respect of such Trusts were not fulfilled. I do not find that the Trusts were properly to be classified as APTs and, even if they were, compliance with statutory pre-conditions goes to admissibility and not jurisdiction; therefore, s. 89 is not engaged.

(2) I dismiss the claim that the Tribunal was not competent to rule on its jurisdiction to determine Gabriele's counterclaim for mistake and thus lacked substantive jurisdiction under s. 89. The claim for the court to hear the mistake claim *de novo* is not properly before the Court, and in any event is outside the limited review jurisdiction of the supervisory court.

(3) Properly construed, The Arbitration Act 2009 excludes the ability to seek leave to appeal on questions of law; the only route of appeal on points of law is the parties' express opt-in by consent. As Matteo did not consent to such an appeal, there is no ability for the applicants (appellants) to appeal on points of law.

Grounds of Challenge/Appeal

For the reasons given above:

(4) As to the claim that the Tribunal's construction of the scope of Delanson's powers amounted to errors of law (Delanson's Gr. 1 and Gabriele Gr. 1), I dismiss this claim as no appeal on a point of law is available under s. 91.

(5) The claims that the Tribunal's determination of the APT issue constituted an error of law and/or amounted to serious irregularities (Delanson Gr. 2 and Gabriele Gr. 7) are also dismissed. No appeal on a point of law is available under s. 91 and no serious irregularity giving rise to substantial injustice is made out.

(6) As to Delanson's Gr. 3, and Gabriele Gr. 4, I dismiss the claim that the Tribunal's determination that there was inadequate deliberation for the distributions amounted to serious irregularities giving rise substantial injustice.

(7) I dismiss the claim that the Tribunal's findings on the reasons for the distribution (Delanson's Gr. 4) constitute seriously irregularity giving rise to substantial injustice.

(8) I dismiss the claim that the Tribunal's decision on the exercise of its discretion to set aside the distributions on the basis that they were voidable and not void (Delanson's Gr. 5, Gabriele's Gr. 4) amounted to a serious irregularity giving rise to substantial injustice.

(9) Gabriele's challenge on the failure of the Tribunal to determine the "scope of powers rectification claim" (Gabriele's Gr. 2) on the grounds of serious irregularity also falls to be dismissed (if not rendered moot), as it was contingent on the issue being determined in the Additional Award, which it was. Necessarily no serious irregularity can be made out and still less a serious irregularity which has caused or will cause the applicants or any of them substantial injustice.

(10) The Tribunal's determination that a fraud on a power makes the exercise of the power void rather than voidable (following the UK CA authority of *Cloutte v Storey*) (Gabriele's Gr. 3), does not amount to a serious irregularity giving rise to substantial injustice under s. 90.

(11) The Tribunal's findings that Gabriele knowingly received Trust assets (Gabriele Gr. 6) does not constitute any serious irregularity giving rise to substantial injustice.

(12) I dismiss the claim that the Tribunal's finding that the transfer of the assets held by Adiana to the Winter Trust (Gabriele's Gr. 9) was valid amounted to a serious irregularity because of the view the Tribunal took of expert evidence on Liechtenstein law, still less a serious irregularity giving rise to substantial injustice.

(13) The challenge that the Tribunal's conclusion in the Additional Award created an inconsistency with the Tribunal's determination of the scope of powers in the Partial Award amounted to a serious irregularity giving rise to substantial injustice (Gabriele's Gr. 10) is also dismissed.

[619] My conclusions may appear to be little consolation for the prodigious efforts of Mr. Black and Mr. Simms, who ably and skillfully argued what they must have appreciated at the outset was an uphill case, considering the high threshold for a s. 90 challenge, which Matteo correctly telescoped as the primary basis for the claims.

[620] In my judgment, the Partial Award and Additional Award were comprehensive, well-reasoned and impressive documents emanating from an eminent and highly experienced Tribunal (whether one agrees with all of their findings and conclusions or not). This is not to give undue deference to the Tribunal, which Mr. Simms cautioned me against at the outset of the hearing, particularly having regard to the fact that one of its members is a former law lord and member of the Privy Council—the apex court for this jurisdiction. I have borne this in mind, but as (as indicated earlier in the Ruling), what I have paid deference to is not the subjective composition of the tribunal, but to the requirements of the Arbitration Act and case law principles that arbitration awards are not be read in a hypercritical way. In other words, the court should not seek to accentuate 'motes' where there is no 'beam'.

[621] Having said that, these Awards did not invite or justify the multiple and overlapping challenges made under the numerous grounds and heads of challenge. For example, it is clear that to the extent that challenges were fashioned on what were substantially evidential matters or attacks on the reasoning of the Tribunal or its *ex gratia* reasoning on assumed findings, these were grievance points which really ought not to have been pursued.

[622] I therefore dismiss all of the challenges and appeals and confirm the Partial Award and the Additional Award of the Arbitral Tribunal.

POSTSCRIPT

[623] There is no gainsaying that this was a demanding case which placed a tremendous burden on the Court. At the end of the day, the parties submitted over 500 pages of written submissions; well in excess of 10,000 pages of material in bundles and case law; and the hearings occupied 2 full weeks of hearing time, all conducted via the Zoom platform because of the different location of counsel. Aside from the construction arguments, the grounds of challenge were numerous and many, although sometimes overlapping. I counted upwards of 40 specific complaints of lack of substantive jurisdiction, serious irregularities or errors of law grouped under 16 grounds and numerous sub-grounds. In fact, I have not come across a single other reported case in the UK Law Reports or elsewhere where the challenges even remotely approached the number of grounds and complaints made here in respect of a single arbitral award.

[624] Necessarily, in the interest of keeping within the limited review jurisdiction of the supervisory court and not unduly extending the length of this judgment, I could not repay in full the detailed and multi-layered arguments deployed by both sides in the hearings. In doing so, no disrespect is intended to the effort, skill and erudition of counsel. However, to have attempted to deal with the submissions in kind would have lured me into a minute textual and hypercritical review of the Awards, which was not merited, and which would have subverted the principle of limited court intervention. In any event, a large chunk of the challenges fell by attrition because of the court's conclusion that Parliament did not grant any right of appeal on points of law, in absence of the consent of the parties.

[625] Matteo was right to point out the disproportionate ratio between the time taken for the evidential hearing before the Tribunal and the hearing before the court, although this observation clearly overlooks the fact that the construction points and other arguments arising under the Act and the Trust legislation, which were wide ranging as they concerned matters of first impression, were not canvassed before the Tribunal. Delanson and Gabriele took every conceivable point on behalf of their clients, and they cannot be criticized for this, and Matteo responded in kind. It also did not help that the domestic statutory scheme was untested and the drafting of the Arbitration Act revealed lacunae which provided scope for legitimate argument on the question of a right of appeal, the scope of arbitration disputes covered by the legislation and the effect of the abrogation of the separability principle.

[626] Before I conclude, I must also commend and thank all counsel (and their instructing solicitors) for the quality of their submissions (written and oral) and able assistance throughout this matter, on what were difficult and novel questions of law.

[627] I end this judgment with the melancholy observation that there has been considerable delay in its delivery, which is regretted.

Klein, J.

28 December 2023