- JUDGMENT -

Before:

MR JUSTICE HAMBLEN:

Introduction

1. The dispute between the Claimant ("Habas") a company incorporated in Turkey, and the Defendant ("VSC"), a company incorporated in Hong Kong, arises out an alleged contract for the sale by Habas and purchase by VSC of 15,000 mts (+/-5%) of Prime High Tensile Deformed Reinforcing Bars (the "Steel") for shipment from Turkey to Hong Kong (the "VSC contract").

2. No delivery of the Steel was made and VSC commenced arbitration proceedings claiming damages pursuant to the London arbitration clause allegedly agreed. Habas denies that any such arbitration agreement was made.

3. Following a contested hearing, the sole arbitrator, Professor Charles Debattista (the "Tribunal"), issued an Award dated 10 July 2012 (the "Award"). The Tribunal concluded that it did have substantive jurisdiction, that Habas agents, Steel Park and Charter Alpha, had ostensible authority to conclude the VSC contract and the arbitration agreement and that there was a binding contract made containing a binding London arbitration agreement.

4. The Tribunal decided that Habas was in breach of contract for non-supply of the Steel and awarded VSC the sum of US$3,142,500 plus interest and costs (to be assessed).

5. Habas challenges the Tribunal's jurisdiction and its Award pursuant to s. 67 of the Arbitration Act 1996 (the "1996 Act") on the grounds that the Tribunal erred in finding that there was a binding arbitration agreement made between the parties because:

   (1) Steel Park and/or Charter Alpha did not have actual or ostensible authority to conclude the London arbitration agreement on behalf of Habas; and

   (2) there was no binding consensus on the terms of the London arbitration agreement.

6. Habas also has an application under s.69 of the 1996 Act pursuant to which it seeks to

challenge the Tribunal's decision as to the date for assessment of damages.

7. The s.67 application involves a rehearing. Ms Ivy Ho of VSC, Mr Berkan Uzentepe of Habas and Mr Salih Kurtoglu of Steel Park all gave written and oral evidence at the arbitration, and they have each provided written witness statements in these proceedings.

8. The parties agreed that none of these witnesses would be required to give oral evidence at the hearing, but each party reserved their right to challenge their evidence.

9. The Court heard oral expert evidence on issues of Turkish law from Dr Bulent Sozer (on behalf of Habas) and Professor Ilhan Helvaci (on behalf of VSC). Their evidence principally concerned (a) the authority required to conclude an arbitration agreement; (b) ratification; and (c) the extent to which an arbitration agreement and the grant of authority to conclude an arbitration agreement is subject to formality requirements under Turkish law.

10. Both parties made extensive written submissions and I have drawn on those submissions, with adaptations and amendments, in preparing this judgment, particularly in relation to matters of common ground and in setting out the parties' arguments.

Factual background

11. Habas is a Turkish manufacturer of steel. Mr Uzuntepe was its Marketing Manager. He provided two witness statements in the arbitration proceedings, and attended the arbitration hearing to give evidence on behalf of Habas. He provided two further witness statements in these proceedings.

12. VSC is a subsidiary of VSC Holdings Limited. VSC Holdings Limited and its subsidiaries form the VSC Group of companies listed on the Hong Kong stock exchange. VSC's operations comprise the stockholding business of rebars, structural steel and engineering products in Hong Kong and steel distribution in mainland China.

13. Ms Ho is and was at all relevant times, Deputy General Manager of VSC. She reported to the General Manager, Mr Tse. Mr William Ng, Shipping and Logistics Manager, reported to Ms Ho.

14. At the arbitration Mr Kern Lim (CEO and CFO of VSC's parent company at the time), and Ms Ho, gave evidence for VSC. In these proceedings, VSC served one further short witness statement from Ms Ho. Mr Ng had ceased working for VSC before the

arbitration.

15. Steel Park Limited is an English company of which Mr Kurtoglu was a director. Steel Park operated a business acting as agent for manufacturers of steel. Mr Kurtoglu gave evidence for Habas in the arbitration. In these proceedings Habas served two further witness statements from Mr Kurtoglu.

16. Charter Alpha Limited is a Hong Kong company which, like Steel Park, operates a business negotiating contracts for the sale of steel. Relevant personnel at Charter Alpha are Mr Jacky Cheung, and Ms Ada. Neither Mr Cheung nor Ms Ada gave evidence in the arbitration or in these proceedings.

17. In his first arbitration witness statement Mr Kurtoglu explained the relationship between Charter Alpha and Steel Park as follows:

> "[Charter Alpha] source the material all over the world and use the resources of Steel Park Limited when sourcing material from Turkey and the transaction is vice versa; when Steel Park needs to source material from the Far East to Europe, they use Charter Alpha. Steel Park and Charter Alpha mainly bring suppliers and buyers together and take commissions from suppliers. All trade commissions are divided 50/50 in between. Charter Alpha follows up and liaises with Buyer in Hong Kong and forwards them to Steel Park and Steel Park follows up and liaises with Seller, and vice versa."

18. Negotiations for the VSC contract began at the end of October 2009. The chain of communications adhered to during the negotiations involved Habas communicating with Steel Park, Steel Park communicating with Charter Alpha and Charter Alpha communicating with VSC, and *vice versa* . Habas did not communicate directly with Charter Alpha or with VSC and Steel Park did not communicate directly with VSC.

19. On 28 October 2009, at 12:21 Hong Kong time, Mr Kurtoglu of Steel Park sent Mr Jacky Cheung of Charter Alpha an email stating that Habas wanted to confirm an order by VSC for 15,000 mt steel as follows: "Habas wants to confirm 15000 order vsc … just over 477 … incl. Our commissions. Pls advise urgently. … a. +/- 50mm b. Unconfirmed lc c. Shipment not earlier then 15th Jan".

20. On 28 October 2009, at 16:08 Hong Kong time, Mr Jacky Cheung of Charter Alpha sent Mr Tse of VSC, copied to Ms Ivy Ho and Mr Ng of VSC, an email setting out the main terms of the proposed contract, subject to contract, stating: "On behalf of Habas, plsd to confirm having sold 15,000 mt (+/-5 pct) debars … for shipment not earlier than Jan 15, 2010 … Otherwise, subject mutually agreed terms and conditions".

21. On 29 October 2009, at 11:01 Hong Kong time, Mr Tse replied by email to Mr Cheung, copied to Ms Ho and Mr Ng stating: "We confirm accept USD478/mt … CFR FO CQD Hong Kong for 15,000 mt (+/-5 pct) … We will send the Contract Draft for you and the mill's perusal … The L/C will be issued within 1 week after contract being signed by both parties". Mr Tse then set out some initial comments from VSC on the proposed terms set out in Mr Cheung's email of 28 October at 16:08 and said that VSC would prepare a draft contract for the "perusal" of Mr Cheung and "the mill" (Habas).

22. On 29 October 2009, at 12:02 Hong Kong time, Mr Cheung replied by email to Mr Tse, copied to Ms Ho and Mr Ng saying, inter alia: "By the way, ctr draft to be establish by SteelPark, Uk who is my associate and will tender Habas' letter confirming her official agent status. LC will be opened direct to Habas' designated advising bank … ctr will be made from this end and will tender draft soonest". Habas emphasises the fact that Mr Cheung thereby informed VSC that the contract would be drafted by Steel Park.

23. On 29 October 2009, at 12:38 Hong Kong time, Ms Ho emailed Mr Cheung, stating: "As discussion over the phone just now, we both agreed below 15000 mt order ship out time at 15 Jan — 10 Feb 2010 (guarantee arrival HK after Chinese New Years Holidays, aiming end Feb/early Mar). We will waiting for your contract draft and Agents letter soon".

24. On 29 October 2009, at 15:30 Hong Kong time, Mr Cheung sent a first draft of the contract to Ms Ho and Mr Tse of VSC, copied to Mr Ng "for your study and comments". The draft contract contained a Chinese arbitration clause and provided:

    "VSC Steel Company Limited/Hong Kong as Buyers, herewith confirm having purchased and Steel Park Limited, herewith acting as agents on behalf of [Habas] as Sellers herewith confirm having sold the following material at the terms and conditions indicated hereafter:

    …Steel Park Limited is merely acting as agent for [Habas], therefore quality claims, if any, should be directed to seller ([Habas])."

25. On 29 October 2009, at 18:27 Hong Kong time, Mr Ng responded by email to Charter Alpha (attention Mr Cheung, Ms Ada), copied to Ms Ho and Mr Tse, setting out VSC's detailed comments on the draft contract, including proposing that there be Hong Kong governing law and Hong Kong arbitration clauses. Mr Ng enclosed a soft copy draft contract containing the terms that VSC was prepared to accept (including Hong Kong law and arbitration) and expressed to be made between VSC and Habas, with

signature boxes for those two parties. Mr Ng asked Charter Alpha to clarify whether Habas would sign the contract as seller or whether Steel Park would sign as agent of the seller.

26. On 29 October 2009, at 14:09 UK time, Mr Kurtoglu of Steel Park emailed Mr Uzuntepe of Habas a draft contract on the same template as VSC's soft copy version sent to Charter Alpha at 18:27 Hong Kong time in that it was in near identical terms and format as VSC's draft, save that there were some minor changes to the spacing and font. This draft provided for Hong Kong governing law and Hong Kong arbitration (as had been proposed by VSC). Mr Kurtoglu's covering message stated: "Please find attached draft contract for you to prepare immediately. Please prepare and send us the contract on your head letter for your opening tomorrow".

27. On 29 October 2009, at 14:50 UK time, Mr Kurtoglu emailed Mr Uzuntepe stating: "We need an agent letter for Singapore and HK projects, to finalize the projects mentioned above and to register in Hong Kong. We will make the registration and payment of approximately 2000/3000 USD will belong to us. It will be enough if you write to your letterhead, the clause mentioned below: "Steel Park Limited … & Charter Alpha … Are our agent to sell our products to stockholder and project owners to Singapore, Hong Kong, Myanmar".

28. By this email Mr Kurtoglu referred to two transactions being negotiated in Hong Kong (being the VSC transaction) and in Singapore (the Panwah Steel transaction). In relation to the Panwah Steel transaction Steel Park and Charter Alpha were acting as intermediaries between Habas and VSC and Panwah Steel Pte Ltd ("Panwah Steel") as prospective purchasers. Mr Kurtoglu also referred to a sale of steel into Myanmar.

29. On 30 October 2009, at 00:42 Hong Kong time, Mr Cheung emailed Mr Ng, copied to Ms Ho and Mr Tse, confirming that he had conveyed VSC's 29 October 2009 18:27 email for Habas' comment.

30. On 30 October 2009, at 12:46 UK time, Mr Cheung sent an email to Mr Kurtoglu stating "As discussed, pls request Habas to issue a side letter confirming Steelpark, UK & Charter Alpha Ltd., HK as their agent representing their interest in HK and Spore."

31. On 30 October 2009, at 13:29 UK time, Mr Kurtoglu repeated his request for an agency letter by email to Mr Uzuntepe: "Could you send me the agency letter urgently".

32. Habas prepared an entirely new draft contract and on 30 October 2009, at 09:00 UK time (11:00 Turkish time), Mr Ekinci of Habas sent it on plain paper to Mr Kurtoglu by email with the request "Please check out". The draft was dated 30 October 2009,

with Contract No. HEX/2009 D-328. It was expressed to be between VSC and Habas, with blank spaces for signatures by buyer and seller, and with disputes referred to arbitration in Turkey under Turkish law and the UN Convention for the International Sales of Goods, 1980 (CISG).

33. On 30 October 2009, at 09:13 UK time, Mr Kurtoglu forwarded Habas' first draft contract by email to Charter Alpha.

34. On 30 October 2009, at 13:24 UK time, Mr Kurtoglu emailed Mr Ekinci, copied to Mr Uzuntepe, with comments, which included re-iterating VSC's request for Hong Kong governing law and Hong Kong arbitration. Mr Kurtoglu said "If you don't accept it, please put not Istanbul but Paris or Switzerland at least".

35. On 30 October 2009, at 12:08 UK time (14:08 Turkish time), Mr Ekinci emailed Mr Kurtoglu, copied to Mr Uzuntepe, a copy of the requested agency letter ("the Agency Letter"). The Agency Letter was dated 30 October 2009, signed by Habas, addressed to whom it may concern and stated:

    "Steel Park Limited … & Charter Alpha Limited … Are our agent to sell our products to stockholder and project owners to Hong Kong, and to apply for certification in Hong Kong Market".

36. Mr Kurtoglu forwarded the Agency Letter to Charter Alpha by email at 12:11 UK time. Charter Alpha forwarded it on to VSC the following day stating: "To satisfy your query, pls find enclosed letter from Habas for your record. Trust attached can meet with your requirement."

37. It was accepted by Habas that as a matter of English law the Agency Letter clothed Steel Park and Charter Alpha with actual and ostensible authority to make the VSC Contract and the arbitration agreement contained within it, subject to developments post-dating the Agency Letter.

38. On 30 October 2009, at 12:40 UK time (14:40 Turkish time), Mr Ekinci emailed Steel Park a revised version of the contract saying "We have done necessary changes to the contract, but we live some of them. We will be very pleased if you can accept as it is". The draft contract stated a different Contract No. (HEX/2009 D-333) from the previous draft, included the buyer's reference (PC-09/10/33), was expressed to be between VSC and Habas, contemplated signature by VSC and Habas, and provided for Turkish law / CISG and Turkish arbitration.

39. On 30 October 2009, at 13:58 UK time (15:58 Turkish time), Mr Kurtoglu emailed Mr Ekinci, copied to Mr Uzuntepe, with comments on the letter of credit and the draft

contract, including that it was a standard term of the buyer that the vessel have a maximum age of 20 years.

40. On 30 October 2009, at 14:25 UK time (16:25 Turkish time), Mr Cem Dedeoglu of Habas emailed Mr Kurtoglu of Steel Park a slightly revised draft contract, stating "Kindly find attached the HABAS ISO Certificate and revised contract as per your request. Pls sign & stamp and revert". In this third draft contract Habas had amended the clause headed "Carrying Vessel" to reduce the maximum age of the carrying vessel from 25 years to 20 years. The draft contract was still expressed to be between VSC and Habas, contemplated signature by VSC and Habas, provided for Turkish law/ CISG and Turkish arbitration and was stamped by Habas.

41. On 30 October 2009, at 15:21 UK time (17:21 Turkish time), Mr Kurtoglu emailed Mr Ekinci, copied to Mr Uzuntepe, asking Habas to make some changes to the "Material" and "Partial Shipments" sections of the draft contract produced by Habas.

42. On 30 October 2009, at 15:28 UK time (17:28 Turkish time), Habas emailed Mr Kurtoglu a fourth revised version of the draft contract, which included the alterations Mr Kurtoglu had requested, but otherwise was materially in the same terms as the earlier version provided by Habas at 14:25 UK time that day The draft contract was signed and stamped by Habas.

43. On 30 October 2009 at 16:32 UK time, Mr Kurtoglu sent Mr Cheung an email stating "Attached is Habas draft revised contract which will be signed by steelpark As agent only. This is for your records. I am sending also as steel park contract as per VSC is required. Please check and deliver vsc …". Mr Kurtoglu enclosed with his email Habas' fourth draft contract. Although the draft sent by Steel Park to Charter Alpha was Habas' fourth draft, it was only the second draft sent by Steel Park to Charter Alpha.

44. Mr Kurtoglu also enclosed with his email a further draft contract on Steel Park's letterhead, the terms of which were mainly back to back with the Habas contract, but which was made by Steel Park on behalf of Habas and was so signed by Steel Park. The draft:

    (1) stated in the preamble that "VSC … confirm having purchased and Steel Park Limited, herewith acting as agents on behalf of HABAS … herewith confirm having sold …";

    (2) provided for shipment "During 15 Jan to 10 Feb, 2010 (guarantee arrival HK after Chinese New Years Holidays, aiming end Feb/early Mar)";

(3) provided for Turkish arbitration and Turkish law / CSIG, as had been stipulated by Habas; and

(4) was signed and stamped by Mr Kurtoglu of Steel Park as agent for and on behalf of Habas as Seller, with Habas' name typed under "Seller" in the signature block.

45. On 30 October 2009, at 18:06 UK time, Mr Kurtoglu sent Habas an email, referring to the draft contract, stating "I sent it and I am waiting, I will send it as soon as I receive it."

46. On 2 November 2009 at 12:24 (04:24 UK time) Hong Kong time, Ms Ada of Charter Alpha emailed Mr Tse, copied to Ms Ho and Mr Ng, enclosing the draft contract signed by Steel Park that had been sent by Steel Park to Charter Alpha at 16:32 (UK time) on 30 October 2009. Charter Alpha asked VSC to return the contract countersigned in due course.

47. On 2 November 2009 at 17:50 Hong Kong time (09:50 UK time), VSC's Mr Ng responded by email to Charter Alpha, copied to Mr Tse and Ms Ho, with various comments on the draft contract, suggesting that the Turkish arbitration clause be replaced by Hong Kong arbitration under UNCITRAL rules and requesting, *inter alia* , the following further amendments / alterations:

"(e) Under GOVERNING LAW, we request to REVISE the term to read "This agreement is governed by the BRITISH LAW." (i.e. Instead of "Turkish Law" proposed by the seller or "the laws of Kong Kong" as proposed by the buyer") …

(g) Please also provide the space for the signature(s) by the Authorized Signatories of the Manufacturer – "HABAS SINAI VE TIBBI GAZLAR ISTIHSAL ENDUSTRISI A.S." and arrange the Manufacturer to sign in the Contract."

48. On 2 November 2009 Ms Ada of Charter Alpha sent Mr Kurtoglu of Steel Park an email timed at 10:05 UK time, with comments on the "Material", "Quality" and "Shipment Period" of Habas' fourth draft contract (in which respects Habas' draft contract differed from VSC's draft contract), stating:

"Glance through Habas ctr, spot below: 1. Material: Prime High Tensile Steel Deformed Reinforcing Bars i/o [instead of] Hot rolled deformed reinforcing steel bars 2. Quality BS4449:1988, Grade 460 & HKCS2:1995 i/o [instead of] BS4449/1988, Grade 460 & K CS2:1995 3. Shipment Period: During 15 Jan o 10 Feb, 2010 (guarantee arrival HK after Chinese New Years Holidays, aiming end Feb/early Mar). Please request Habas to amend them in order to support the back to back biz".

49. By email of 2 November 2009, at 10:16 UK time (18:16 Hong Kong time), Ms Ada of Charter Alpha emailed Mr Kurtoglu passing on VSC's comments on the Steel Park draft contract that had been sent to her at 17:50 Hong Kong time, including that there be Hong Kong arbitration under UNCITRAL Rules and "British" governing law. Ms Ada concluded her email by requesting that Steel Park: "Pls pass on to Habas for their approval. Pls revert overnight and I will push for the countersigned ctr first thing tomorrow".

50. By email of 2 November 2009, at 11:17 UK time (13:17 Turkish time), Mr Kurtoglu passed on VSC's comments to Messrs Ekinici and Uzuntepe for approval and requested that Habas reconsider its insistence on Turkish arbitration and Turkish law / CSIG in the following terms: "The important thing here is arbitration cls. Couldn't we make any change on this? Please review and write me back urgently."

51. Habas responded the same day, 2 November 2009, at 12:36 UK time (14:36 Turkish time), rejecting Steel Park's request to change its requirement for Turkish arbitration and Turkish law / CSIG, stating "Pls note that arbitration and governing law issues are not subject to change". Habas enclosed a signed copy of a fifth revised version of the contract made on its own template, but this version bearing Contract No. "HEX/2009 D-327".

52. Habas' revised draft contract did not incorporate the comments suggested by Ms Ada of Charter Alpha to Steel Park at 10:05 on 2 November 2009. Habas' fifth draft of the contract provided for a shipment date latest by 25 January 2010, named VSC and Habas as contracting parties, contemplated signature by VSC and Habas, and provided for Turkish arbitration and Turkish law/ CISG . This was the last draft contract signed by Habas.

53. On 2 November 2009, at 13:06, Mr Kurtoglu forwarded Habas' email of 12:36 UK time and its signed fifth draft contract to Mr Cheung with a cover note saying:

    "Habas revised and signed the contract to us. See the comment only for arbitration and governing law issues. Others are all ok Also don't worry for material description I spoke to them and vsc will insert it to lc so they will name it "Prime high tensile steel deformed bars. (it is not a big issue) Also shipment period don't worry last date of shipment I put 25th Jan so shipment will be done between 15 to 25 and will be guaranteed after Chinese new year. Others are all ok I am waiting signed contract to send to them."

54. Habas submits that Steel Park and Charter Alpha thereby both knew that (i) Habas would only accept Turkish arbitration and Turkish law; and (ii) that Habas proposed to contract on the terms of its signed 2 November 2009 draft. It submits that this

remained the position at all material times thereafter and that neither Steel Park nor Charter Alpha had actual authority to agree any other arbitration clause. Thereafter there were no disclosed communications between Steel Park and Habas relating to the contract or its terms.

55. On 3 November 2009, at 10:33 UK time, Charter Alpha sent VSC an email stating that "Habas comments that except arbitration and Governing law, others are all OK" and asked for a countersigned copy of the contract "asap".

56. On 3 November 2009, at 11:25 UK time (03:25 Hong Kong time), Mr Ng forwarded Charter Alpha's 10:33 email on internally to Mr Tse and Ms Ho at VSC saying "As per the comment by the supplier in the following e-mail, they insisted their proposal for Arbitration and Governing law (i.e. by Turkish [sic] Lay / Arbitration by Istanbul Chamber of Commerce in Istanbul/Turkey)."

57. On 3 November 2009, at 12:16 Hong Kong time, Mr Ng emailed Mr Cheung and Ms Ada at Charter Alpha referring to discussions between VSC and Charter Alpha and waiting for "your REVISED contract for signing".

58. On 3 November 2009, at 12:22 Hong Kong time, Mr Ng emailed Mr Tse and Ms Ho saying "… as per the call with their Ms. Ada, their Revised Contract will be issued by their Europe office (which will be opened late this afternoon – 5:00pm)". The reference to "their Europe office" was a reference to Steel Park.

59. On 3 November 2009, at 13:09 Hong Kong time, Mr Cheung emailed Mr Ng, copied to Mr Tse and Ms Ho, suggesting wording for a Paris arbitration clause: "While for governing law, suggest the following and let's cross the bridge / Controversy or claim arising out of or relating to this contract or any breech thereof, will be settled with the International Chamber of Commerce in Paris in accordance with the rules applied by that organization".

60. On 3 November 2009, at 13:37 Hong Kong, Mr Cheung emailed Mr Kurtoglu asking if he could please try and live with VSC's proposals for British governing law and Hong Kong arbitration.

61. On 3 November 2009, at 14:58 Hong Kong time, Ms Ada emailed Mr Kurtoglu saying:

"For your easy ref, I have amend the ctr draft with VSC's comment for your doing needful. Understand Habas is not willing to change the arbitration and governing law. To bridge the biz, VSC now willing to accept
Quote
Any controversy or claim out of or relating to this contract or any alleged breech [sic]

thereof, will be settled with the International Chamber of Commerce in Paris in accordance with the rules applied by that organization
Unquote
Hope abv can satisfy all parties.
…Pls revert with a signed ctr copy within our closing today."

62. Later on 3 November 2009, Mr Kurtoglu of Steel Park stamped and signed a further version of the contract on its letterhead, providing for ICC arbitration in Paris (as proposed by Charter Alpha) but with no express choice of law clause, and sent it to Charter Alpha that day. The contract provided that Steel Park was "acting as agents on behalf of [Habas] … herewith confirm having sold the following material at the terms and conditions indicated hereafter". Mr Kurtoglu signed and stamped under Habas name and under the words "as Agent and on Behalf of". It is Habas case that this was the final draft contract signed by Steel Park ("the signed 3 November draft contract") and that Habas had not been aware of and had not approved this draft.

63. On 4 November 2009, at 10:27 Hong Kong time (02:27 UK time), Charter Alpha sent the revised draft contract stamped and signed by Mr Kurtoglu on 3 November 2009 to Ms Ho and Mr Tse, copied to Mr Ng, and asked for VSC to countersign and return it, together with an application draft for the letter of credit.

64. On 4 November 2009, at 11:32 Hong Kong time, Mr Ng emailed Mr Tse and Ms Ho saying that the contract was only signed by Steel Park as agent; the manufacturer (Habas) did not sign the contract; for arbitration / laws they propose ICC arbitration in Paris; and asked whether the contract could be signed as per the attached.

65. On 4 November 2009, at 12:07 Hong Kong time, Mr Ng emailed Mr Tse and Ms Ho saying that after discussions with Ms Ho, "we amend to read "London" (instead of "Paris") under Arbitration".

66. On 4 November 2009, at 15:19 Hong Kong time, Mr Ng emailed Mr Cheung and Ms Ada of Charter Alpha a countersigned pdf version of the draft contract ("the 4 November pdf draft contract") signed by Steel Park on 3 November 2009, but with two unilateral amendments made by VSC to that draft. In the document signed by VSC, VSC had scored through a typographical error "dult" on page 2 and retyped it as "duly" and scored out "Paris" in the arbitration clause on page 6 and typed in "London". VSC stamped each of those alterations.

67. On 4 November 2009, at 15:44 Hong Kong time (07:44 UK time), Ms Ada emailed Mr Kurtoglu the 4 November pdf draft contract. Ms Ada said in the cover email "VSC now request settled with ICC in London i/o Paris. (Presume it should be ok) Pls advise if you have different views."

68. Mr Kurtoglu's evidence at the arbitration was that neither he nor Charter Alpha were aware of the change from Paris to London. The above email (which was not produced at the arbitration) shows that this is untrue. His evidence in these proceedings offers no explanation for this. His evidence now is that he did not respond to that request and nor did he seek Habas' approval to that amendment or tell Charter Alpha or VSC that it was agreed. The credibility of that evidence was very much in issue.

69. After incorporating comments from Habas, on 5 November 2009, Mr Cheung confirmed to VSC that the terms of its proposed letter of credit were agreed. Accordingly, on the same day, VSC opened a letter of credit with the Shanghai Commercial Bank in favour of Habas (the "Letter of Credit"). The Letter of Credit provided for a shipment time of 15 January 2010 to 10 February 2010, ex Turkey. The Letter of Credit did not contain any arbitration or governing law clause.

70. On 6 November 2009, HSBC in Turkey, the confirming bank, emailed Habas to confirm that the Letter of Credit had been opened in its favour by VSC with Shanghai Commercial Bank.

71. VSC's primary case is that the contract was made on or about 5 November 2009, when the Letter of Credit was opened in favour of Habas, the terms of which were agreed by Habas. This was disputed by Habas who relied in particular on the fact that the 4 November pdf draft contract was a counter-offer.

72. On 10 November 2009, at 10:36 UK time, Mr Ng of VSC emailed Mr Cheung and Ms Ada of Charter Alpha saying that they were still waiting for "your original contracts by courier / by hand". At 10:38 UK time that day, Ms Ada replied to Mr Ng by email saying they were following this up and would pass on the original contract once in hand.

73. On 10 November 2009, at 10:41 UK time, Charter Alpha emailed Mr Kurtoglu requesting a copy of the original contract which they said VSC needed for auditing purposes.

74. On 20 November 2009 Mr Ng emailed Mr Cheung and Ms Ada copied to Ms Ho and Mr Tse stating that they were still waiting "for your Original Contracts by courier/by hand".

75. On 23 November 2009 Ms Ada emailed Mr Ng copied to Ms Ho and Mr Tse stating "we have just received original ctr from Habas and shall pass on tmr".

76. VSC stresses that these exchanges show it was seeking the "original" contract and that

it was being told that this was what was being passed on to it.

77. On or around 24 November 2009 Charter Alpha sent the "original" contract to VSC. This was a hard copy contract signed and stamped by Steel Park. It was in the same terms as the 3 November signed draft contract which Steel Park had signed and stamped save that there were two handwritten amendments, reflecting the typed alterations made to the 4 November pdf draft contract by VSC, in which the word "dult" on page 2 and the word "Paris" in the arbitration clause on page 6 were crossed out in hand and replaced with "duly" and "London" (respectively). VSC countersigned the contract and stamped the handwritten amendments, before sending the countersigned hard copy contract back to Charter Alpha.

78. There was an issue as to whether the handwritten amendments to the hard copy contract were made by Steel Park or Charter Alpha. At the arbitration it had been contended that they had been made by VSC. This allegation was not persisted in.

79. If no contract had been concluded on 4 or 5 November 2009, it is VSC's alternative case that it was concluded when VSC received this hard copy of the VSC Contract, and Habas' acceptance of the London arbitration clause was communicated to VSC. In the further (and final) alternative, VSC's case is that the VSC Contract was concluded when it countersigned the hard copy and stamped the amendments.

The issues

80. The principal issues may conveniently be addressed under the following headings:

(1) Whether and, if so, to what extent Habas has lost the right to object to the Tribunal's jurisdiction.
(2) Whether there was a binding consensus to a London arbitration agreement.
(3) Applicable law.
(4) Ostensible authority/actual authority/ratification.
(5) Conclusion on section 67 application.
(6) The section 69 application.

(1) Whether and, if so, to what extent Habas has lost the right to object to the Tribunal's jurisdiction.

81. At the arbitration no reliance was placed by Habas on matters of Turkish law. VSC contends that Habas' contention in these proceedings that the issue of authority to enter into the arbitration agreement is governed by Turkish law and that there was no requisite authority constitutes a new ground of objection to jurisdiction which it is not open to Habas to make. Further or alternatively, VSC contends that Habas case that there was no valid arbitration agreement because the formal requirements under Turkish law for making such an agreement were not met is a new ground which is not open to it.

82. Section 73 of the 1996 Act provides:

"(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 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 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."

83. In the DAC Report on the Arbitration Bill, the Committee said this provision was intended to deal with:

"Recalcitrant parties or those who have had an award made against them [who] often seek to delay proceedings or to avoid honouring an award by raising points on jurisdiction etc which when they have been saving up for this purpose or which they could and should have discovered and raised at an earlier stage."

84. In *Primetrade AG v Ythan Ltd [2006] 1 Lloyd's Rep 457* , Aikens J, following Colman J's judgment in *JSC Zestafoni G Nikoladze Ferroalloy Plant v Ronly Holding Ltd [2004] 2 Lloyd's Rep 335* , held that the term "any objection" in s.73(1) was intended to mean "any ground of objection." He stated as follows:

"50 [In JSC Zestafoni G Nikoladze Ferroalloy Plant v Ronly Holding Ltd Moore–Bick J (as he then was) made in *Rustal Trading v Gill & Duffus SA.[Ltd [2000] 1 Lloyd's Rep 14* Colman J began his discussion of this point by referring to remarks Moore–Bick J had described section 73(1) as being designed to ensure that if a person believes he has grounds for objecting to the constitution of the tribunal or the conduct of the proceedings, he raises those objections as soon as he is aware of them or ought to be aware of them. It would, he said, be unfair if he took part in an arbitration yet kept an objection to jurisdiction up his sleeve and only attempted to deploy it later.

51 Colman J agreed with those observations. Then he said:

"I would go further. 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 issue 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 previously have been raised before the arbitrator if it is to be raised under a s.67 application challenging the award".

He then referred to the decision of Mr Field QC in Athletic Union of Constantinople v National Basketball Association , and said that the concession of counsel was "clearly correct". Colman J continued:

"Were it otherwise, the policy of the sub-section could be frustrated by introducing at the last minute grounds of challenge not hitherto raised and thereby potential causes of delay and disruption of the application to the prejudice of the opposite party".

52 Colman J went on to hold that if a party sought to raise a new point on a section 67 appeal, it had the burden of showing good reason why the point was not raised before the arbitrator and it would usually have to do this by evidence, e.g. a statement.
….
59 It is clear that the intention behind section 73 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. I agree with Colman J that this intention reflects a principle of "openness and fair dealing"http://www.bailii.org/ew/cases/EWHC/Comm/2005/2399.html — note76 between parties who may, or may not, be bound by an arbitration clause. I also agree with Colman J, therefore, that to fulfil this intention and to accord with that principle, the words "any objection" and "that objection" in section 73 must mean "any ground of objection" and "that ground of objection".

85. Habas challenges this interpretation of section 73 . It submits that what is required is that an objection to jurisdiction is made. Provided such an objection is made there is no loss of the right to object. To require the objection to be made on the ground later relied upon is unduly prescriptive and involves reading words into section 73 . I do not agree. I respectfully consider the approach of Colman J and Aikens J to be consistent with both the wording of section 73 , the intention behind it and the policy of finality reflected in the 1996 Act.

86. In order to decide whether a new ground of objection is being raised "the 'grounds of objection' should not be examined closely as if a pleading, but broadly" – per Aikens J in Primetrade at [112]. The fact that it raises different and broader arguments or new evidence does not mean that it is a new ground – *ibid* at [61]-[62].

87. Adopting a broad approach I agree with Habas that in the circumstances of this case its

arguments on actual and ostensible authority based on Turkish law falls within the ground of objection based on lack of authority made at the arbitration. However, as Habas itself stressed in oral argument, its objection based on failure to comply with the formal requirements for an arbitration agreement under Turkish law has nothing to do with authority. It derives from the Turkish International Arbitration Act and Code of Obligations. In my judgment this is a new ground of objection and as such is not open to Habas on its application by reason of section 73 of the 1996 Act.

(2) Whether there was a binding consensus to a London arbitration agreement.

88. It was common ground between the parties that in considering whether there was a consensus in fact the English law objective approach was to be followed.

89. Habas contends that it was contemplated by the parties both in the 3 November signed draft contract and correspondence between VSC and Charter Alpha leading up to the purported conclusion of the arbitration agreement that the contract, including the arbitration agreement contained therein, would have to be (i) signed by or on behalf of both Habas and VSC, and (ii) signed by Habas or by Steel Park on behalf of Habas. Habas further contends that the parties' mutual understanding was that they would not be bound unless and until the contract was so signed. In this case, the alleged London arbitration agreement was not included in a formal contract signed by Habas or Steel Park. Accordingly, there was no consensus and no intention to create legal relations.

90. I accept that it was contemplated by the parties that there would be a signed contract, and that it would be signed by Steel Park on behalf of Habas. I do not, however, accept that it was agreed that that would be the only way a binding contract could be made. The Agency Letter made it clear that both Steel Park and Charter Alpha had authority to make a contract on behalf of Habas. As far as VSC was concerned, there was no revocation of that authority. Although it was contemplated that it was Steel Park who would be signing the contract on behalf of Habas, it was never stated or made clear that that meant Charter Alpha could not do so pursuant to the authority conferred on it as set out in the Agency Letter.

91. Even if that be wrong, the fact that the parties contemplate that there will be a signed contract does not necessarily mean that there can be no binding agreement until the contract is so signed. There will be cases where that is the parties' intention, as exemplified by the cases upon which Habas relies, such as *Okura & Co Ltd v Navara Shipping Corp SA [1982] 2 Lloyd's Rep 537* , 541–542; *Cheverny Consulting Ltd v Whitehead Mann Ltd [2007] 1 All ER (Comm) 124* , para. 42-46; *Investec Bank (UK) Ltd v Zulman [2010] EWCA Civ 536* , para. 16-21; Benourad v Compass Group plc [2010] EWHC 1882 (QB), para. 106. However, each case depends on its facts. In the present case there was no term dealing with when the contract would be effective, nor were

negotiations ever stated to be "subject to contract" or something similar, nor were solicitors involved. The payment clause did state "L/C will be issued 1 week after contract being signed by both parties", but in the event the L/C was issued well before that occurred. This indicates a willingness to proceed with the transaction prior to the production of a signed contract. There was a degree of urgency about the negotiation of the agreed written terms which is to be contrasted with the fairly leisurely manner in which the signed contract was then produced, which contract was described by Charter Alpha as being needed for auditing purposes. In all the circumstances, I do not accept that this is a case in which mutual signature was required before there could be a binding contract.

92. Even if, however, a signed contract was required, there was an objective consensus on that basis when VSC countersigned the hard copy contract (at the latest). That was presented to it as a signed "original" contract for its countersignature. The fact that the handwritten amendments were not stamped or initialled did not prevent them from being part of the signed contract as presented. Even if it be the fact that the amendments were made by Charter Alpha rather than Steel Park, that would not have been reasonably apparent to VSC. As far as it was concerned, it was being presented with an "original" hard copy contract for signature which included those amendments and which had been signed on behalf of its counterparty. When it countersigned that contract any requirement of mutual signature was satisfied.

93. Habas contends that the casual manner in which the London arbitration clause appeared to be inserted into the contract was at odds with the intention of the parties that the formal contract be signed by VSC and Habas or Steel Park. It stresses that the typed alterations made by VSC in the draft pdf contract were never counter-stamped, signed, or authenticated by Steel Park or by Habas; that the handwritten amendments in the hard copy contract were similarly not signed, stamped or authenticated by Steel Park or Habas, and that VSC should have known that the hard copy contract had not been signed by Steel Park as it was precisely the same document as the 3 November draft signed contract, with the signature and initials in precisely the same place.

94. It was not, however, incumbent on VSC to carry out a forensic comparison of the signatures of Steel Park on the 3 November draft signed contract it had earlier received and those on the hard copy "original" contract it was presented with for countersignature. It was presented to it as a final, signed contract and there was no reason for VSC to consider it otherwise. It was presented with a signed "original" contract, signed by the person whom it expected to sign and forwarded to it without qualification by the agent with whom it had always dealt. From VSC's perspective, and from an objective perspective, all the terms of that contract had been agreed on behalf of Habas by its signatory, Steel Park.

95. If it be relevant to determine whether Steel Park had in fact agreed to the amendment of the arbitration clause from Paris to London, I am satisfied that it did, notwithstanding Mr Kurtoglu's evidence to the contrary. The evidence he gave on this issue at the arbitration was clearly untrue, as shown by Charter Alpha's email of 4 November. He has given no adequate explanation as to why such untruthful evidence was given. Charter Alpha's 4 November email referred to the change, said "Presume it should be ok" and asked "Pls adv if you have different views". Mr Kurtoglu said that he never responded to that email, but given the terms of the email, any failure to do so would amount to acquiescence. In any event, I consider it far more likely and find that Mr Kurtoglu did agree the change. There was no reason for him not to do so. As far as he was concerned there was no material difference between Paris and London arbitration, and at around the very same time he had signed/initialled a contract on behalf of Habas with a London arbitration clause (the Panwah contract). I find that either it was Mr Kurtoglu who made the manuscript amendments to the hard copy contract, or, if he did not, he approved Charter Alpha doing so before the contract was sent to VSC. Either way he specifically agreed and approved those changes.

96. If it be relevant to determine whether Habas itself approved the change I find that Habas has failed to prove that it did not do so. Habas placed particular reliance on its written response to VSC's assertion in its 17 February 2010 letter that the contract was governed by English law and arbitration, which was to assert by return that it was governed by Turkish law and arbitration, and to make reference to the number of one of the versions of the contract Habas itself had signed. It was Habas case and evidence (and the evidence of Mr Kurtoglu) that Habas never saw the Steel Park signed contract at the time, and that it first saw it when it was sent to Habas by VSC's solicitors in May 2010. Against that is the very surprising fact that there are no documents disclosed passing between Habas and Steel Park after 2 November 2009. Nor has there been any proper explanation in evidence of that lack of documentation. On Habas case it was apparently content to proceed without asking for or seeing any contract signed by VSC, although on any view signed contracts were contemplated throughout. In circumstances where it has not sought to back up its case with oral testimony, I am not prepared to accept the assertion made that it did not know of or approve the amendment to London arbitration. I do not make a positive finding that it did, but I do not accept that it has been proved that it did not do so.

97. For all these reasons I reject Habas case that there was no binding consensus to the London arbitration agreement.

(3) Applicable Law

98. The main applicable law issue related to the law applicable to the arbitration agreement. However, applicable law issues also arose as to the main or matrix contract, the issues

of authority and formal validity, and the issue of ratification.

The arbitration agreement

99. I shall address this issue on the assumption, as contended for by Habas, that there was no choice of law in the matrix contract and that it is governed by Turkish law as the law with which the matrix contract is most closely connected.

100. The question of which law governs the arbitration agreement is to be determined by the English common law, since the Rome Convention excludes arbitration agreements by Article 1(2)(d) .

101. The leading authority is the recent *Court of Appeal decision in Sul América Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A. [2012] 1 Lloyd's Rep 671* . Moore-Bick LJ (with whom Hallett LJ and Lord Neuberger MR agreed), summarised the test for determining the law applicable to arbitration agreements at [26]-[32]. The *Court of Appeal's decision was considered but distinguished by Andrew Smith J in Arsanovia Ltd v Cruz City 1 Mauritius Holdings [2013] 2 All ER 1* . The guidance provided by these authorities may be summarised as follows:

(1) Even if an arbitration agreement forms part of a matrix contract (as is commonly the case), its proper law may not be the same as that of the matrix contract.

(2) The proper law is to be determined by undertaking a three-stage enquiry into (i) express choice, (ii) implied choice and (iii) the system of law with which the arbitration agreement has the closest and most real connection.

(3) Where the matrix contract does not contain an express governing law clause, the significance of the choice of seat of the arbitration is likely to be "overwhelming". That is because the system of law of the country seat will usually be that with which the arbitration agreement has its closest and most real connection.

(4) Where the matrix contract contains an express choice of law, this is a strong indication or pointer in relation to the parties' intention as to the governing law of the agreement to arbitrate, in the absence of any indication to the contrary.

(5) The choice of a different country for the seat of the arbitration is a factor pointing the other way. However, it may not in itself be sufficient to displace the indication of choice implicit in the express choice of law to govern the matrix contract.

(6) Where there are sufficient factors pointing the other way to negate the implied

choice derived from the express choice of law in the matrix contract the arbitration agreement will be governed by the law with which it has the closest and most real connection. That is likely to be the law of the country of seat, being the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective.

102. In relation to point (3), I would add that the terms of the arbitration clause may themselves connote an implied choice of law. It is recognised that they may operate as an implied choice of law for the matrix contract itself – see, for example, *Cie. Tunisienne v Cie d'Armement [1971] A.C. 572* , Lord Wilberforce at page 596 and Lord Diplock at 604 to 605; and *Egon Oldendorff v Liberia Corp [1996] 1 Lloyd's Rep 380* at 388–390, Clarke J. In such cases they must surely equally operate as an implied choice of law for the arbitration agreement.

103. The present case is one where there is no express choice of law in the matrix contract. In such a case the Sul America decision is clear authority that the applicable law will be that of the country of seat. This was acknowledged by Habas who reserved the right to challenge the decision should this case go further.

104. Habas argues, however, that there is in this case good reason why the Court ought to disregard the seat of the arbitration agreement when identifying the law with which it has the closest connection. It stresses that Charter Alpha and/or Steel Park exceeded their actual authority when agreeing to the London arbitration agreement and it was only because they did so that it was possible to say that the arbitration agreement had its closest connection with English law. It submits that English private international law rules ought to determine the law governing the validity of the arbitration agreement without regard to the London arbitration agreement agreed in excess of authority and that in this case that law is Turkish law, being the law with the closest connection to the matrix contract.

105. In support of its argument Habas relies in particular on the following:

(1) *Dicey, Morris & Collins* (15th ed) at 33–447 where the editors state as follows: "… it may be thought unlikely that P could be bound and entitled by virtue of a law which governed the contract with the third party only because A, in excess of his actual authority, agreed to its selection as the applicable law. The problem is similar to that raised by the question of capacity and can be resolved in a similar way. Where the agent exceeds his authority in choosing the law to govern his contract with the third party, P should only be regarded as entitled or bound if he would be so under the law applicable in the absence of choice"

Habas submits that if this is the correct approach to agreement to a choice of law clause, the same approach should be adopted to agreement to a clause that has the

effect of determining the system of law with which the contract has its closest connection.

(2) The English law conflicts of law approach to questions of capacity as referred to above by way of analogy by the editors of *Dicey, Morris & Collins*. That is summarised at 32–176 as follows: "If one applied without modification the normal definition of the governing law to the questions of capacity, one would arrive at the result that a minor could, by agreeing to the choice of a system of law as the law of the contract, confer contractual capacity upon himself. For this purpose, it is submitted, the criterion should be the connection of the contract with a given system of law, i.e. the system of law with which the contract is most closely connected."

(3) Article 8(2) of the Rome Convention (now reproduced in identical terms in Article 10(2) of the Rome 1 Regulation (EC No 593/2008)) which recognises an exception to application of the putative applicable law to determine the validity of the contract under Article 8(1) in the following circumstances: "2. Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph."

Habas submits that this has the effect of disapplying the application of the putative applicable law where it is commercially unreasonable to apply it, that English common law should adopt a similar approach and that it would be unreasonable to apply the putative proper law in this case for the reasons given under (1).

106. In my judgment there are a number of difficulties with Habas' novel argument.

107. First, the approach suggested by *Dicey, Morris & Collins* only applies to the agreement to a choice of law clause. Habas' argument goes far further than that. It applies to the agreement to any clause which determines or affects implied choice or the system law with which the contract has its closest connection. This potentially applies to a wide range of clauses and indeed parts of clauses. Its ambit is far reaching and its boundaries uncertain.

108. Secondly, there is no logical or principled link between the issue of authority and the issue of the law with which a contract has its closest connection. Determining the latter question involves a consideration of the terms of the contract as made, rather than the authority with which it was made.

109. Thirdly, it potentially makes major and uncertain inroads into the well established common law doctrine that validity is determined by the putative proper law of the contract. Further, there is no obvious reason why the principle should be limited to issues of validity arising out of lack of actual authority.

110. Fourthly, it involves English law according special treatment to actual authority for conflicts of laws purposes. But as a matter of English law actual authority is not a stronger or more effectual form of authority than ostensible authority. As between the principal and the third party there is no difference between actual and ostensible authority.

111. Fifthly, it would potentially affect the validity of many contracts which would otherwise be valid and binding because the agent had ostensible authority as a matter of English law as the putative applicable law, and for reasons outside the knowledge and control of the third party and contrary to the representations made to him as to that authority.

112. Sixthly, it presupposes that there is a question of validity which needs to be considered prior to any determination of the applicable law. But, logically, the first question that should be asked is what is the applicable law of the putative agreement. All other questions then follow. The alternative approach involves an element of bootstrapping.

113. Seventhly, the "problem" identified by the editors of *Dicey, Morris & Collins* is not mentioned by the leading textbook on agency, *Bowstead & Reynolds on Agency* (19th ed). It states that whether an agent has ostensible authority is a matter for the law of the putative contract, and that law "also governs apparent authority to subject a contract, whether directly or indirectly, to a particular system of law." – at para. 12-016.

114. Eighthly, there is no authority which supports Habas' argument, or for that matter the more limited argument put forward by *Dicey, Morris & Collins.*

115. Ninthly, there are a number of decisions in which ostensible authority has been treated as being governed by English law as the result of putative agreement to a clause in a contract without any consideration of actual authority to agree that clause and notwithstanding that it was being alleged that there was no actual authority to enter into the contract – see, for example, *Marubeni Hong Kong and South China Ltd v The Mongolian Government [2002] 2 All E.R. (Comm) 873* ; Sea Emerald v. Prominvest (2008) EWHC 1979 (Comm) at [100] and [106] and *Merrill Lynch Capital Services Inc. v. Municipality of Piraeus [1997] CLC 1214* at 1229 to 1231; *Rimpacific Navigation Inc v Daehan Shipbuilding Co Ltd [2010] 2 All ER (Comm) 814* .

116. Finally and importantly, there are authoritative decisions in which arguments similar to that advanced by Habas have been rejected. In *The Parouth [1982] 2 Lloyd's Rep. 351* it was argued that where the very issue between the parties was whether a contract was made it would be wrong to allow the English arbitration clause to be a factor pointing towards English law and that it should be treated neutrally. This argument was rejected

by the Court of Appeal who held that it was inconsistent with the common law conflicts rule that the formation of a contract is governed by the putative applicable law of the contract if validly concluded.

117. The Parouth was *followed in the Court of Appeal decision in The Atlantic Emperor [1989] 1 Lloyd's Rep. 548* . In that case the issue was not whether a binding contract had been made but rather whether the arbitration clause had been incorporated into the contract. The argument that this distinguished the case from The Parouth was rejected. Lloyd LJ stated at p554:

"…The facts of The Parouth were similar to those of the present case the question being whether there was a binding contract between the parties. The court held that that question would be decided by an English court in accordance with putative proper law which, since there was an English arbitration clause, would in all probability be held to be English law. Accordingly the case fell within R.S.C. Order 11, rule 1(1)(f) .

Mr. Gross sought to distinguish The Parouth on the ground that in that case the question was whether there was a contract at all, whereas in the present case it is common ground that there was a contract; the question here is whether the contract contained an arbitration clause. I accept that this is a distinction on the facts. But it makes no difference to the principle stated and applied by the court in the Parouth, by which we are of course bound, as was the judge."

118. As Hirst J put it at first instance in that case (at p533): "Dicey's rule as to the formation of a contract as a whole must (perhaps a fortiori) apply to the formation of a disputed part."

119. For all these reasons I reject Habas' argument and hold that even if it was the case that there was no actual authority to agree the London arbitration clause, the applicable law to the arbitration agreement would remain English law.

The matrix contract

120. In the light of my conclusion that the applicable law of the arbitration agreement is English law, even if the applicable law of the matrix contract is Turkish law, this issue is of little significance. This question falls to be determined pursuant to Article 4 of the Rome Convention and I am prepared to assume, without deciding, that, as Habas contends, the applicable law is Turkish law on the basis that the contract is most closely connected with Turkey which is where the performance characteristic of the contract is to be performed and notwithstanding the ICC London arbitration clause.

Authority/Ratification

121. Habas accepts that the law governing the question whether Charter Alpha (or, if relevant, Steel Park) had ostensible authority to bind Habas to an arbitration agreement with VSC, and any issues of ratification of their authority so to do, is the same as the law governing the putative arbitration agreement. On my findings that is English law. In relation to actual authority, Habas accepts, subject to its argument on the Overseas Companies (Execution of Documents) Regulations 2009 , that it would be governed by English law, pursuant to *Dicey, Morris & Collins* Rule 244(2).

The Overseas Companies (Execution of Documents) Regulations 2009

122. Habas submits that if, contrary to its primary submissions, the applicable law to issues of authority is English law, the effect of these Overseas Regulations (the "Regulations") is to make issues of actual authority and compliance with formalities subject to Turkish law, as the law of the territory in which Habas is incorporated.

123. The Regulations provide that:

"PART 2
Execution of Documents ETC
Application of Part
3. This part applies to all overseas companies.
Formalities of doing business under the law of England and Wales and Northern Ireland
4. Section 43, 44 and 46 of the Companies Act 2006 apply to overseas companies, modified so that they read as follows –

"Company contracts

(1) Under the law of England and Wales or Northern Ireland a contract may be made —

(a) by an overseas company, by writing under its common seal or in any manner permitted by the laws of the territory in which the company is incorporated for the execution of documents by such a company, and

(b) on behalf of an overseas company, by any person who, in accordance with the laws of the territory in which the company is incorporated, is acting under the authority (express or implied) of that company.

(2) Any formalities required by law in the case of a contract made by an individual also apply; unless a contrary intention appears, to a contract made by or on behalf of an overseas company."

124. Habas submits that the effect of the Regulations is that the arbitration agreement will not be treated as having been made with the authority of Habas, unless it is made by an agent that is authorised under Turkish law, being the law of the territory in which Habas is located.

125. There is clear authority that the Regulations do not affect the question of ostensible authority – see, *Azov v Baltic Shipping Co [1999] 2 Lloyd's Rep 159* , 170; Rimpacific Navigation Inc v Daehan Shipbuilding Co Ltd [2012] 2 All ER 814 at [30]-[31]; *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd [2011] 2 All ER (Comm) 95* at [160]-[161].

126. In the Azov case Colman J stated as follows:

> "…the **manner** of foreign corporations entering into binding contracts is as regards matters of formal validity under English law governed, like questions of capacity to contract, by the law of the place of incorporation … [citing the Overseas Companies Regulations] … The substance of these provisions is that a foreign corporation may make a contract in any manner permitted by the law of the place of incorporation and by any person who by that law is acting under the authority (express or implied) of that corporation. A document may be executed in any manner permitted by such law and, if it is expressed to be executed by the company, it will have the same effect as a document executed by an English company. If a document purports to be signed by persons having express or implied authority (under that law) of the company, the documents will be deemed to be duly executed by such foreign company." (Emphasis in original.)

127. *Dicey , Morris and Collins* suggests that the Regulations may best be viewed as applying to questions of the formal validity of contracts, and do not determine the law applicable to questions of authority at all (at 33–451). This is consistent with the heading of Regulation 4 , which is "Formalities of doing business under the law of England". This is also the heading given to ss.43 and 44 of the Companies Act 2006 , which are amended in relation to overseas companies, by the Regulations.

128. Habas did not seek to challenge the authorities to the effect that ostensible authority falls outside the Regulations. It was right not to do so, not least because ss.43 and 44 of the Companies Act 2006 are expressed in similar terms and cannot possibly have been intended to abolish ostensible authority for English companies.

129. That ostensible authority is not covered by the Regulations despite the general language in which they are expressed lends support to the view of *Dicey* , *Morris and Collins* that they are not applicable to questions of authority at all. It also provides some support for VSC's argument that ss. 43(1)(a) and (b) of the Regulations are permissive. Contracts "may" be made by the means set out in (a) and (b), but those means are not exhaustive.

130. On either view they do not affect issues of authority and, whether or not the means set out are exhaustive, I accept and follow the guidance provided by the Azov case and *Dicey, Morris and Collins* that the Regulations are concerned with the formalities of execution.

(4) Ostensible authority/actual authority/ratification

Ostensible authority

131. As a matter of English law it is clear that Charter Alpha and Steel Park had ostensible authority to agree the London arbitration clause pursuant to the Agency Letter. The Agency Letter is a clear representation of that authority and that authority never purported to be and was not revoked.

132. In so far as Habas disputed this it was on the basis of its arguments on lack of consensus, which I have rejected.

133. The argument put forward by Habas at the hearing was that, even if there was ostensible authority to enter into the arbitration agreement, by reason of the Regulations the Turkish law requirements for the formal validity of arbitration agreements had to be met, and they were not met in this case.

134. I have already held that this new ground of objection is not open to Habas. However, even if it was open to it, and even if Habas is correct (which I am prepared to assume without deciding) that the effect of the Regulations is to render the making of the contract subject to Turkish law formal requirements for the conclusion of arbitration agreements (a requirement relating to how all persons enter into such contracts rather than one regulating how companies execute), I would reject it on the facts. The Turkish law evidence was that an arbitration agreement had to be in writing and signed. In this case it was in writing and it was contained in a signed contract. On my findings the amendment to refer to London was either inserted by the signatory, Mr Kurtoglu, or expressly approved by him. That would satisfy the formal signature requirements under Turkish law. Indeed it was the evidence of Dr Helvaci, which I accept, that those requirements would be met if Mr Kurtoglu had simply failed to raise any objections to the change which he was alerted to by Charter Alpha's email of

4 November.

135. I accordingly conclude that there was ostensible authority to conclude the arbitration agreement.

Actual authority

136. In the light of my conclusion on ostensible authority this does not need to be determined. However, for reasons already given, I am not satisfied that it has been shown that there was no actual authority to enter into the arbitration agreement. The burden lies on Habas to establish the alleged lack of authority and in the light of the limited disclosure provided and the lack of supporting oral evidence I am not satisfied that they have discharged that burden.

137. Further, if and in so far as Turkish law is relevant to the issue of actual authority I find that there is no requirement that the authority to enter into the arbitration agreement be given in writing. That was the view of Dr Helvaci and it reflected the "overwhelming majority" view, as Dr Sozer conceded. His contrary view was more a reflection of what he considers Turkish law should be, rather than what it is.

Ratification

138. In the light of my conclusion on the authority issues, the issue of ratification does not arise.

(5) Conclusion on section 67 application

139. For the reasons set out above, I conclude that a valid and binding arbitration agreement was made as between Habas and VSC. There was a binding consensus to that agreement and there was ostensible authority to enter into it. In any event it has not been shown, if relevant, that there was no actual authority to do so. The section 67 application must accordingly be dismissed.

(6) The section 69 application

140. The VSC contract contained a clause entitled "NON-DELIVERY" which provided:

"If the Seller fails to deliver the goods to the Buyer or fails to deliver on time … the Buyer may terminate this contract and claim against the Seller for the difference between the prevailing market price and the contract price hereof, without prejudice to other claims or remedies which the Seller has in addition to or in the alternative to that claim."

141. Habas submits, by analogy with the position under Section 51 of the Sale of Goods Act 1979 , that, on its proper construction, the non-delivery clause required VSC to quantify its loss by reference to the difference between the market price, and the VSC contract price, at the date of breach (which it says was 10 February 2010, this being the last date for delivery originally designated under the VSC contract) rather than, as the Tribunal found, on the date of termination.

142. The short answer to this application is that it was not a question of law which the Tribunal was asked to determine. Although the Tribunal had to decide on the appropriate date for determining damages there was no argument before him that it should be the date of breach. Permission accordingly has to be refused pursuant to s.69 (3)(b) of the 1996 Act.

143. Even if that be wrong, the issue of construction is of a one-off clause and Habas would have to show that the Tribunal's decision was obviously wrong. Given the inclusion of the right and fact of termination within the damages clause I am not satisfied that his decision is obviously wrong. Further, it would be surprising for damages to be assessed by reference to a date pre-dating termination, as Habas' argument asserts. Yet further, if there is anything in Habas' argument it would lead to the conclusion that the proper date for damages was the agreed extended date of delivery of 10 April 2010, rather than the original delivery date. Prices then were at least as high, and indeed higher, than on the date of termination.

144. For all these reasons permission to appeal is refused and the section 69 application is dismissed.

Conclusion

145. For the reasons outlined above I conclude that Habas' challenges to the Tribunal's jurisdiction and the Award fail and that its applications under ss. 67 and 69 of the 1996 Act must be dismissed.