Neutral Citation Number: [2022] EWHC 2912 (Comm)

Case Nos: CL-2022-000187 and CL-2022-000457

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

Date: 17/11/2022

Before :

MR JUSTICE FOXTON

- -

Between :

AITEO EASTERN E&P COMPANY LIMITED	**Claimant / Respondent in the Arbitration**
- and –	
SHELL WESTERN SUPPLY AND TRADING LIMITED	**Defendant / Claimant in the Arbitration**

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Stephen Houseman KC (instructed by **Stewarts LLP**) for **the Claimant**
Ben Juratowitch KC, Catherine Jung and **Belinda McRae** (instructed by **Freshfields Bruckhaus Deringer LLP**) for **the Defendant**

Hearing date: 9 November 2022
Draft circulated: 10 November 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Thursday 17 November 2022 at 10:30am.

The Honourable Mr Justice Foxton:

1. This is the hearing of two applications by the Claimant (**Aiteo**) under s.67 of the Arbitration Act 1996 (**the 1996 Act**) challenging:

    i) a Partial Award of the tribunal dated 15 March 2022 (**the First Award**), in which the tribunal held that it had jurisdiction to determine the Defendant's (**SWST**'s) claims against Aiteo, and rejected Aiteo's challenge to the tribunal's jurisdiction; and

    ii) a second Partial Award of the tribunal dated 22 July 2022 (**the Second Award**), in which the tribunal made an order for the consolidation of the arbitration with another arbitration.

The background

2. The parties' disputes arise under a facility agreement (**the Offshore Facility Agreement**) entered into between Aiteo and SWST, pursuant to which Aiteo borrowed $512 million from SWST. Aiteo also entered into a facility agreement (**the Onshore Facility Agreement**) with another group of lenders, pursuant to which it borrowed $1.488 billion. These transactions were concluded in connection with Aiteo's acquisition of an interest in certain Nigerian oilfields and associated facilities.

3. Clause 40 of the Offshore Facility Agreement provided that it was governed by English law.

4. The key clauses of the Offshore Facility Agreement for present purposes are the dispute resolution provisions. In those provisions:

    i) Aiteo is referred to as the "Borrower";

    ii) various shareholders in Aiteo are referred to as the "Shareholders";

    iii) Aiteo and the Shareholders are referred to collectively as the "Obligors"; and

    iv) SWST and various other entities on the lending side are referred to as the "Finance Parties".

5. Clause 41.1 of the Offshore Facility Agreement ("Referral to arbitration") provides:

    "41.1.1 Subject to Clause 41.2 (Finance Parties' option), any Party to this Agreement (other than an Obligor) may elect to refer for final resolution any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity, or termination or any non-contractual obligations arising out of or in connection with this Agreement (a 'Dispute') by arbitration under the Rules of Arbitration of the International Chamber of Commerce (the 'ICC') in force at that time (the 'ICC Rules'), which ICC Rules are deemed to be incorporated by reference into this Clause 41.1.

41.1.2 There shall be three (3) arbitrators, one nominated by the claimant(s) in the request for arbitration, the second nominated by the respondent(s) within thirty (30) days of receipt of the request for arbitration, and the third, who shall act as presiding arbitrator, nominated by agreement of the parties to the Dispute within thirty (30) days of the appointment of the second arbitrator. If any arbitrators are not nominated within these time periods, the International Court of Arbitration of the ICC shall make the appointment(s).

41.1.3 The place and seat of arbitration shall be London, England.

…

41.1.7 Where Disputes arise under this Agreement and under any of the Onshore Facility Agreement and Intercreditor Agreement which, in the absolute discretion of the first arbitrator to be appointed in any of the disputes, are so closely connected that it is expedient for them to be resolved in the same proceedings, that arbitrator shall have the power to order that the proceedings to resolve that dispute shall be consolidated with those to resolve any of the other disputes (whether or not proceedings to resolve those other disputes have yet been instituted) ….”

6. Clause 41.2 (“Finance Parties’ option”) provides:

“41.2.1 Before a Finance Party has submitted a Request for Arbitration or Answer as defined in the Arbitration Rules of the ICC (as the case may be), the Finance Party may by notice in writing to the Borrower require that all Disputes or a specific Dispute be heard by a court of law. If the Finance Party gives such notice, the Dispute to which such notice refers shall be determined in accordance with Clause 41.3 (Jurisdiction).”

7. Finally, clause 41.3 (“Jurisdiction”) provides:

“41.3.1 If the Finance Party issues a notice pursuant to Clause 41.2 (Finance Parties' option), the provisions of this Clause 41.3 shall apply. (a) The courts of England have exclusive jurisdiction to settle any Dispute. (b) The Parties agree that the courts of England are the most appropriate and convenient courts to settle any Dispute and accordingly no Party will argue to the contrary. (c) This Clause 41.3 is for the benefit of the Finance Parties only. As a result, no Finance Party shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Finance Parties may take concurrent proceedings in any number of jurisdictions.”

8. The dispute resolution provisions in the Onshore Facility Agreement were as follows:

“41.1.1 Subject to Clause 41.2 (Finance Parties' option), any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity, or termination or any non-contractual obligations arising out of or in connection with this Agreement (a ‘Dispute’) shall be referred to and finally

> resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce (the 'ICC') in force at that time (the 'ICC Rules') …
>
> 41.2.1 Before a Finance Party has submitted a Request for Arbitration or Answer as defined in the Arbitration Rules of the ICC (as the case may be), the Finance Party may by notice in writing to the Borrower require that all Disputes or a specific Dispute be heard by a court of law. If the Finance Party gives such notice, the Dispute to which such notice refers shall be determined in accordance with Clause 41.3 (Jurisdiction).
>
> 41.3.1 If the Finance Party issues a notice pursuant to Clause 41.2 (Finance Parties' option), the provisions of this Clause 41.3 shall apply. (a) The courts of the Federal Republic of Nigeria have exclusive jurisdiction to settle any Dispute. (b) The Parties agree that the courts of the Federal Republic of Nigeria are the most appropriate and convenient courts to settle any Dispute and accordingly no Party will argue to the contrary …."

9. On 19 August 2019, SWST and the other lenders sent Aiteo a letter alleging that Aiteo had breached the Offshore and Onshore Facility Agreements, and reserving the right to seek accelerated repayment of the loans. Thereafter relations between Aiteo Eastern and Shell Western followed a Kiplingesque path. Aiteo replied on 10 September 2019, challenging that assertion. SWST and the lenders made a formal demand for repayment on 23 October 2019.

10. On 31 October 2019, Aiteo commenced proceedings against SWST and the other lenders, together with four other parties, before the Federal High Court of Nigeria (**the Nigerian Proceedings**). Aiteo also obtained a without notice interim injunction from Ekwo J which restrained the various lenders from "acting in any way or manner or taking any step to interfere with the res of this dispute by giving effect to the content of [the letter of 23 October 2019], or taking any step to enforce any right in respect of the alleged indebtedness of [Aiteo]".

11. In response, on 12 November 2019, SWST and all bar one of the other lenders entered a memorandum of conditional appearance before the Federal High Court, filed a Notice of Appeal (**the NOA**), and filed a motion for a stay of the Nigerian Proceedings and other forms of relief. It will be necessary to consider the terms of the NOA below. On 19 November 2019, Aiteo filed responsive evidence and the record of appeal was transmitted to the Nigerian Court of Appeal.

12. On 11 December 2020, by the service of a Request for Arbitration, SWST commenced what it contends was a valid ICC arbitration against Aiteo. It also sought anti-suit injunctive relief from the Commercial Court, which was granted on a "without notice" basis by Cockerill J on 14 December 2020. The lenders under the Onshore Facility Agreement also served a Notice of Arbitration, and also sought and obtained anti-suit relief.

13. Aiteo lodged an objection to the jurisdiction of the arbitral tribunal constituted by the ICC in respect of the Offshore Facility Agreement. That jurisdictional challenge was the subject of a preliminary hearing before the tribunal. On 15 March 2022, the tribunal issued the First Award rejecting that jurisdictional challenge.

14. On 1 April 2022, Sir Nigel Teare handed down judgment granting final anti-suit relief against Aiteo, on the basis that its commencement and continued pursuit of the Nigerian Proceedings breached an obligation owed by Aiteo under clause 41.1 of both the Offshore and Onshore Facility Agreements to arbitrate the disputes which were the subject of the Nigerian Proceedings.

15. Aiteo applied for permission to appeal against Sir Nigel Teare's judgment. Males LJ granted permission to appeal on one ground – that the judge should either have determined the issue of arbitral jurisdiction himself or adjourned the hearing until the time for bringing a s.67 challenge had expired, or any jurisdictional challenge had been rejected, rather than relying on the First Award to establish the existence of an obligation to arbitrate. Males LJ rejected the application for permission to appeal so far as it concerned the other grounds. That appeal has been stayed by the agreement of the parties pending the determination of the s.67 challenge to the First Award.

16. On 22 July 2022, the tribunal issued the Second Award consolidating the arbitration commenced by SWST in relation to the Offshore Facility Agreement with an arbitration commenced by the lenders in relation to the Onshore Arbitration Agreement.

The applicable legal principles

17. In most cases, a clause like clause 41.1 which provides that one or both parties "may" submit or refer a dispute to arbitration is not itself a fully-formed arbitration agreement, and does not of itself oblige either party to refer a dispute to arbitration. Rather, it gives the relevant party or parties an option to refer a dispute to arbitration: *Russell on Arbitration* (24th), [2-018]. In such a case, an arbitration agreement comes into existence, and with it an obligation to arbitrate the dispute, once the option is exercised in the contractually required manner: *Union Marine v The Government of the Comoros* [2013] EWHC 5854 (Comm), [17]. Clause 41.1 can be regarded as containing an inchoate arbitration agreement, which becomes fully formed in respect of the relevant dispute when the option to arbitrate is exercised.

18. In *Anzen Ltd v Hermes One Ltd* [2016] 1 WLR 4098, the Privy Council considered a clause (clause 19.5) which stated that "any party may submit the dispute to binding arbitration". One party had commenced court proceedings, and the Board had to consider whether and how the option to arbitrate should be exercised. Delivering the opinion of the Board, Lords Mance and Clarke held as follows:

    i) Given the permissive language of the clause, either party was entitled to start litigation ([13] and [30]-[31] rejecting "analysis I").

    ii) Litigation having been commenced by one party, the other party had the option to submit the dispute to arbitration. How the option fell to be exercised "depends upon the meaning to be attached in the context of clause 19.5 to the concept of submitting

a dispute to binding arbitration", which, in some contexts "might no doubt connote and require the actual commencement of an arbitration" ("analysis II"), but need not always do so: [32].

iii) In the case before it, that option fell to be exercised either by commencing arbitration itself or by requiring the other party which had commenced litigation to submit the dispute to arbitration ([9], [35]) "by making an unequivocal request to that effect and/or by applying for a corresponding stay" ([9]) ("analysis III").

iv) In reaching that conclusion, and rejecting the argument that the option could only be exercised by commencing an arbitration, the Board noted that if the exercise of the option required the other party to commence an arbitration, it might only be able to seek a declaration of non-liability, and might be required to incur substantial fees in order to do so ([11] and [32]). Requiring a party to commence ICC arbitration in order to exercise its option to arbitrate did "not therefore seem to the Board to make much commercial sense" ([32]).

v) An analysis "whereby notice will trigger the mutual agreement to arbitrate a dispute" was a better fit with what was essentially a consensual scheme than requiring "the artificial construction, and commencement of arbitration in respect of, a cross claim" ([34]).

19. In reaching its conclusion that analysis III was to be preferred, the Board was not offering a view limited to the particular case before it, but reaching a conclusion "as a matter of general principle" ([34]), although clearly it would be possible for particular wording to require the option to arbitrate to be exercised in accordance with analysis II. I do not accept Mr Houseman KC's submission that "*Anzen* is a narrow contextual decision".

20. While I accept that there were aspects of the dispute resolution agreement in that case which differed from those here – the symmetrical nature of the right to submit a dispute to arbitration, and the provisions for pre-arbitration negotiations to which the Board specifically referred – these do not affect the arguments of commercial sense on which the Board principally placed reliance. As is the case with most dispute resolution provisions in loan documentation, clause 41 contemplates the initiation of disputes by the Obligors as well as the Finance Parties, and provides for the options of the Finance Parties in that eventuality. While I accept that SWST would be the more natural claimant in disputes arising under the Offshore Facility Agreement in most cases, this will not always be the case, just as there will be cases in which the party exercising the right to arbitrate under the shareholders' agreement in *Anzen* could themselves be described as a natural claimant. In both cases, the interpretation of the option to arbitrate must cater for both scenarios. For those reasons, I am satisfied that the opinion of the Board offers relevant and valuable guidance when construing the clause 41.1 option in this case.

What is required to exercise the election to arbitrate here?

21. Mr Houseman KC argues that the election to arbitrate in this case can only be exercised by:

i) either commencing an arbitration (i.e. that clause 41 of the Offshore Facility Agreement should be interpreted as requiring the option to be exercised according to analysis II in *Anzen* rather than analysis III); or

ii) "at least an unequivocal and irrevocable commitment to arbitrate the relevant dispute(s) without delay".

22. Elsewhere, that second formulation was described as requiring "a clear and unequivocal promise or undertaking to refer a properly defined arbitrable dispute to arbitration within a reasonable period of time", or notification of an "intention to commence arbitration in respect of identifiable (and arbitrable) disputes". In the course of his reply submissions, it was suggested that there might be no requirement of irrevocability, at least to the extent of the right afforded by clause 41.2.

23. This conclusion is said to follow from the expression "elect to refer for final resolution … by arbitration", a phrase which Mr Houseman KC subjected to close textual analysis. As to this:

i) I find the suggested distinction between a party who "submit[s] the dispute to arbitration" in *Anzen*, and a party who "elect[s] to refer for final resolution any dispute… by arbitration" unpersuasive. An election is simply the exercise of a choice by a party who has more than one course open to them. I am not persuaded that there is any particular significance in the fact that the existence of that choice is communicated by the words "the right to elect" instead of "the option of" or the use of non-obligatory language such as "may refer", in which the existence of a choice is implicit. Indeed in *Anzen*, Lord Mance used the language of both election (at [13]) and option (at [14]) to describe the effect of a clause in the latter form.

ii) As to Mr Houseman KC's submission that "the verb 'refer' alludes to an arbitral reference", in the international arbitration lexicon the phrase "refer a dispute" to arbitration has long been used to refer to enforcement of the negative covenant implicit in the arbitration agreement not to pursue a claim elsewhere, rather than a positive covenant requiring an arbitration to be commenced and pursued. Both Article II(3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (United Nations) (1958) and Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration refer to the court in which proceedings have been commenced "refer[ing] the parties to arbitration". However, it is overwhelmingly the case in New York Convention and UNCITRAL Model Law countries that this obligation is performed by bringing the court proceedings to an end, not granting an order mandating the commencement of an arbitration. The basis on which orders of this kind enforce the agreement to arbitrate was explained by the United States Supreme Court in *Anaconda v American Sugar Refining Co* 322 US 42, 45 (1944):

> "the concept seems to be that a power to grant a stay is enough without the power to order that the arbitration proceed for, if a stay be granted, the plaintiff can never get relief unless he proceeds to arbitration".

iii) The practical considerations emphasised in *Anzen* – the inherent unlikelihood and uncommerciality of requiring a party to incur the costs of commencing ICC arbitration and pursuing a claim for negative declaratory relief when it is the other party who has initiated the dispute resolution process – also have force here.

iv) While I accept that a dispute resolution clause could provide that an option to refer to arbitration a dispute which one party has brought to court can only be exercised by the commencement of an arbitration, in my view it would require clear words to achieve that outcome. It has long been noted that an arbitration agreement contains a negative covenant (a promise not to bring proceedings which fall within the scope of the arbitration agreement in a non-contractual forum) and a positive covenant (an obligation to pursue and progress claims in the contractual forum). As Lord Mance JSC noted in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] 1 WLR 1189, [21], "the negative aspect is as fundamental as the positive", and there is "no reason why a party … should be free to engage the other party in a different forum merely because neither party wishes to bring proceedings in the agreed forum". At [23], he noted that "it is, on the face of it, for either party to commence any arbitration it wishes at any time, or not to do so". While the present case is concerned with an option to arbitrate, rather than an arbitration agreement, the construction for which Mr Houseman KC contends would have the effect that it was not possible for the Finance Parties to exercise their option to bring an arbitration agreement into efect, and thereby gain the benefit of the negative covenant implicit in such an agreement, without themselves taking on the burden of active performance of the positive covenant, or at least committing to do so.

24. While some of these difficulties are overcome by Mr Houseman KC's second formulation ([21]-[22]), namely the need for SWST to incur the expense of commencing ICC arbitration when it is Aiteo that wishes to initiate and progress a dispute resolution process, the second formulation brings further difficulties of its own:

i) If exercise of the election required an unequivocal commitment by SWST to commence or refer the dispute to arbitration without delay, this would still involve SWST committing, promising or undertaking to assume an active role in relation to the initiation of the arbitral process, removing its right to require Aiteo to comply with the negative covenant which the exercise of the election brings into being without committing itself to take any active steps to arbitrate the dispute.

ii) There is no textual support in clause 41.1 for this formulation.

iii) In the course of submissions, it became apparent that for all the references to undertaking, commitment or promise, Mr Houseman KC did not allege that the exercise of the clause 41.1 option required SWST to assume any binding obligations in relation to the initiation of an arbitration, still less to do so without delay.

iv) Quite what was required on the second formulation is not entirely clear. At one point, it was suggested that SWST would need to say something to the effect of "I refer to clause 41.1.1. I require, I activate or engage my arbitration option. I hereby

> elect to refer these disputes … by X date or without further delay" (albeit with no commitment that would actually happen). However, Mr Houseman KC submitted that nothing more was required to meet his second formulation than "I invoke clause 41.1. in relation to all of the disputes comprised within your Statement of Claim, full stop" and ""letting your counterparty know you're standing on clause 41.1.1". So phrased, I do not think that this formulation involves anything more than an unequivocal statement by SWST requiring Aiteo to arbitrate the dispute, and the supposed distinction between this case and *Anzen* evaporates.

25. Approached as a matter of construction of clause 41.1 alone, therefore, I am not persuaded that anything more than an unequivocal statement by SWST requiring Aiteo to arbitrate an identified dispute is required.

26. However, Mr Houseman KC argued that his construction derived strong support from the interrelationship between clauses 41.1, 41.2 and 41.3. In summary, he suggested that:

    i) Clause 41.2 provided the Finance Parties with an option as against Aiteo to require that any Dispute be heard by a court of law, provided that notice to that effect is served before the Finance Party has submitted a Request for Arbitration or an Answer to a Request for Arbitration served by Aiteo in the ICC arbitration.

    ii) Unless the option in clause 41.1 required SWST to serve a Request for Arbitration to exercise the option to arbitrate, the combined effect of clauses 41.1 and 41.2 would be that SWST could first elect to refer a dispute to ICC arbitration by some step falling short of the service of a Request for Arbitration, and then, once Aiteo had prepared and filed a Request for Arbitration, exercise a right to refer the same dispute to court for determination under clause 41.2.

27. I would note that this same consequence would follow from Mr Houseman KC's own argument, to the extent that it recognised that something falling short of the service of a Request for Arbitration could exercise the clause 41.1 option. Mr Houseman KC appeared to acknowledge that was the effect of his argument in reply, when removing the requirement for an irrevocable commitment from his formulation of what step, falling short of serving a Request for Arbitration, would be sufficient to exercise the clause 41.1 election.

28. In any event, I am satisfied that the point is not a good one. In reconciling clauses 41.1 and 41.2, it is important to note that they follow the same broad structure as clauses 41.1 and 41.2 of the Onshore Facility Agreement, with the exception that the obligation to arbitrate in clause 41.1 is asymmetric, and is an option for SWST alone. The drafting of clause 41.2 makes perfect sense in the Onshore Facility Agreement – there is a mutual obligation to arbitrate, with the Finance Parties having a litigation "opt out" to be exercised before they take a substantive step in the arbitration. The arbitration proceedings might be commenced by the Finance Parties (in which case, service of the Request for Arbitration will bring the Finance Parties' clause 41.2 option to an end), or by Aiteo (in which case service of the Finance Party's Answer to Aiteo's Request for Arbitration will bring the Finance Parties' clause 41.2 option to an end).

29. The drafting of clause 41.2 has not been amended to take account of the asymmetric nature of the right to arbitrate a dispute in clause 41.1 of the Offshore Facility Agreement, and it undoubtedly gives rise to some infelicities as a result – in particular the reference to SWST having until service of the Answer to Aiteo's Request for Arbitration to exercise its clause 41.2 entitlement, when Aiteo has no entitlement to serve a Request for Arbitration unless and until SWST makes its clause 41.1 election.

30. However, I am satisfied that, on its proper construction, the effect of the exercise of the election in clause 41.1 is to preclude SWST from making a further election under clause 41.2 in respect of the same dispute:

    i) That is the usual effect of exercising an asymmetric right to arbitrate: *Russell on Arbitration*, [2-018] and *Deutsche Bank AG v Tongkah Harbour Public Company Limited* [2011] EWHC 2251, [25] and [29].

    ii) The use of the word "elect" in clause 41.1 serves to reinforce the irrevocability of the choice (cf *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kancehenjunga)* [1990] 1 Lloyd's Rep 391, 398).

    iii) This is a businesslike construction, which avoids the possibility of successive inconsistent elections by SWST, moving a dispute out of and back into court via an abortive arbitration process.

31. Nor am I persuaded that it is necessary to seek a stay to exercise the election (which was the manner in which Aiteo argued its jurisdictional objection before the tribunal, but not before the court):

    i) As noted at [18] above, in *Anzen* the Privy Council referred to exercising the right to arbitrate in that case "by making an unequivocal request to that effect and/or by applying for a corresponding stay as the defendants have done". The reference to "applying for a corresponding stay" was not identified by the Board as a pre-requisite for submitting the dispute to arbitration, something which is also clear from the more general language used by the Board at [35]:

        > "It enables a party wishing for a dispute to be arbitrated, either to commence arbitration itself, or to insist on arbitration, before or after the other party commences litigation, without itself actually having to commence arbitration if it does not wish to".

    ii) The reference to "insisting on arbitration, before or after the other party commences litigation" cannot itself require a stay (which would only become an option once litigation had been commenced and served).

    iii) If a Finance Party has made an unequivocal statement that the dispute should be referred to arbitration, that as a matter of principle should be enough to exercise the election and bring the obligation to arbitrate into being. Provided the necessary unequivocal communication has occurred, the exercise of a contractual choice under English law does not generally require any further step to be taken, and there is nothing in the language of clause 41.1 which would justify requiring the Finance

Parties to instruct lawyers in the relevant jurisdiction and prepare and issue a stay application before the election would take effect.

iv) The effect of the contrary submission would appear to be that if Aiteo had intimated an intention to commence court proceedings in respect of a particular matter, or even issued such proceedings without serving them, to be met with an unequivocal communication requiring it to refer that dispute to arbitration, it would nonetheless be able to commence those proceedings, and the Finance Parties would be required to engage in them, before the inchoate arbitration agreement in clause 41.1 could be brought into being.

v) Further, inherent in Mr Houseman KC's submissions before this court is that serving a Request for Arbitration would sufficiently exercise the election even in the face of court proceedings commenced by Aiteo, without seeking a stay (a conclusion which is clearly correct, albeit I have rejected his submission that it was not only sufficient, but necessary).

vi) I am satisfied that what matters is whether there was an unequivocal statement requiring Aiteo to refer the dispute to arbitration, whether that took the form of serving a Request for Arbitration, seeking a stay or some other communication. This is a context in which it is the message which matters, not the medium.

Did the NOA contain an unequivocal statement requiring Aiteo to refer the dispute to arbitration?

The terms of the NOA

32. The NOA provided as follows:

"**GROUNDS OF APPEAL**

GROUND 1

The Lower Court erred in law and acted without jurisdiction when it entertained the 1st Respondent's suit and granted injunctive orders therein.

Particulars of Error

a. The 1st Respondent's claim before the Lower Court is in respect of a dispute arising out of the following Agreements: (a) the Amended and Restated Agreement relating to the Senior Secured Medium term Acquisition Facility Agreement dated 31 December 2016 ('the Onshore Facility Agreement'); (b) the Amended and Restated Agreement between among others Aiteo Eastern E & P Company Limited and Shell Western Supply and Trading Limited dated 31 December 2016 ('the Offshore Facility Agreement'); (c) the Amended and Restated Onshore Accounts Administration Agreement dated 31 December 2016 ('the Onshore Accounts Administration Agreement'); and the Intercreditor Agreement dated 31 December 2016 ('the Intercreditor Agreement').

b. Clause 41.1 of the Onshore Facility Agreement, Clause 41.1 of the Offshore Facility Agreement, Clause 32.1.1 of the Onshore Accounts Administration Agreement and Clause 16.1 of the Intercreditor Agreement all provide that any dispute arising from these Agreements are to be settled by arbitration, administered by the International Chamber of Commerce (ICC) in London, England.

c. The Federal High Court Practice Directions issued under the hand of the Chief Judge of the Federal High Court of Nigeria, on the 21st day of September, 2017, and relating to the conduct of causes filed 'to enforce a contract or claim damages arising from breach' of the terms of a contract in respect of which the parties, as in the instant cause, agreed to submit to arbitration, places the lower court under judicial obligation to decline jurisdiction in respect of the claims of the 1st Respondent as endorsed on its Writ of Summons and Statement of Claim filed before the lower court. The said Practice Directions specifically provide as follows:

1. That the court shall not entertain any action instituted to enforce a contract or claim damages arising from a breach thereof, in which the parties have by consent, included an arbitration clause and without first ensuring that the clause is invoked and enforced.

2. (i) that the court must insist on enforcement of the arbitration clause by declining jurisdiction.

   (ii) that upon the issue being raised by any of the parties or the court is at liberty to raise the issue suo motu and decline jurisdiction accordingly.

3. (i) where a party institutes an action in Court to enforce breach of Contract containing an arbitration clause without first invoking the clause is himself, in breach of the said contract and ought not to be encouraged by the court.

   (ii) that the court upon declining jurisdiction may award substantial cost against the parties engaged in the practice.

d. The lower court on the 31st day of October 2019 had before it and considered the contents of the agreements referred to in sub-paragraph (a) above, all of which contain arbitration clauses.

e. The lower court was well aware of the existence, intendment and effect of the said Practice Directions and the existence of arbitration clauses in the agreements, the terms of which the 1st Respondent complains the Appellants breached, when it entered the interim orders of injunction against the Appellants on the 31st day of October 2019.

f. By reason of the premise of sub-paragraphs (a) — (e) above, it is manifestly clear that the lower court acted without jurisdiction, when it made the interim orders of injunction on the 31st day of October, 2019.

GROUND 2

The Lower Court erred in law and acted in direct violation of the provisions of Section 36 of the 1999 Constitution of the Federal Republic of Nigeria, when on the 31st of October 2019, it granted orders of interim injunction restraining the Appellants from exercising their legal rights, as contained in the Onshore Facility Agreement, the Offshore Facility Agreement and the Onshore Accounts Administration Agreement all of which were

executed by the Appellants and the 1st Respondent.

PARTICULARS

a In the suit before the lower court, the 1st Respondent disputes the Appellants' Final Demand Letter dated 23 October 2019 which was issued as a result of the 1st Respondent's default in meeting its repayment obligations under both the Onshore Facility Agreement and the Offshore Facility Agreement.

b. By virtue of the terms contained in the said Facility Agreements, the Appellants as Lenders and Security Trustees under the Agreements, have a right to take steps to recover all sums due and payable by the 1st Respondent to the Lenders, as provided for under the Facility Agreements.

c. In the Ruling now under appeal, the lower Court granted orders of injunction restraining the Appellants from taking 'any step to enforce any right in respect of alleged indebtedness of the plaintiff (being contested and disputed in this suit)'. The aforesaid orders of injunction restrain the Appellants from exercising their legal rights, as contained in the Facility Agreements to wit: to recover outstanding sums due from the 1st Respondent under the Facility Agreements. The said orders of injunction also restrain the exercise of the Appellants' constitutional right to commence legal proceedings against the 1st Respondent in respect of the aforesaid indebtedness, either by instituting a claim against the 1st Respondent or by filing a counterclaim in the 1st Respondent's own suit.

d. An injunction should not be granted to restrain the lawful enjoyment of a legal right [*C.B.N v. S.A.P (Nig.) Ltd* (2005) 3 NWLR (Pt. 911) pg.152]. The lower Court acted unlawfully, and in clear contravention of the aforesaid established legal principle when it made orders of injunction restraining the exercise of the Appellants legal and Constitutional rights.

e. By reason of the premise of sub-paragraphs (a) to (d) above, it is manifestly clear that the lower Court exceeded its jurisdiction or lacks the jurisdiction to make the interim order of injunction which it made on the 31st day of October, 2019.

GROUND 3

The Lower Court erred in law, when despite the parties choice of London as the seat of any arbitration in respect of any dispute between them, arising from the Onshore Facility Agreement, the Offshore Facility Agreement and the Onshore Accounts Administration Agreement, it assumed jurisdiction over the 1st Respondent's claims and granted orders of interim injunction against the Appellants herein on 31st day of October, 2019.

PARTICULARS

a. The 1st Respondent's claim before the Lower Court is in respect of a dispute arising out of the Onshore Facility Agreement, the Offshore Facility Agreement and the Onshore Accounts Administration Agreement.

b. Clause 41.1 of the Onshore Facility Agreement, Clause 41.1 of the Offshore Facility Agreement, Clause 32.1.1 of the Onshore Accounts Administration Agreement and Clause 16.1 of the lntercreditor Agreement all provide that any dispute arising from these Agreements are to be settled by arbitration in London, England and administered by the International Chamber of Commerce (ICC).

c. The effect of providing that the seat of arbitration shall be London, England is that the parties agreed that English Courts shall have supervisory jurisdiction over any arbitral proceedings between them, including jurisdiction to determine any application for interim reliefs.

d. The lower court therefore erred when in spite of the express provisions of the agreements listed in sub-paragraph (c) above, it proceeded on the 31st day of October, 2019, to grant the interim orders of injunction in respect of the dispute between the parties herein.

RELIEFS SOUGHT FROM THE COURT OF APPEAL

a. To allow this appeal, reverse the ruling of the lower court now under appeal, set aside the injunctive orders entered by the lower court on 31st day of October, 2019 and hold that the lower court had no jurisdiction to make the said interim orders of injunction.

b. An Order dismissing/striking out the 1st Respondent's suit at the Lower Court comprised in Suit No. FHC/ABJ/CS/1310/2019 — Aiteo Eastern E & P Company Limited v. African Finance Corporation & Ors."

33. No application was made to stay the Nigerian Proceedings under s.5 of the (Nigerian) Arbitration and Conciliation Act 1990, the Nigerian equivalent of s.9 of the 1996 Act.

Did the NOA unequivocally require Aiteo to refer the disputes raised in the Nigerian Proceedings to arbitration?

34. I am satisfied that the NOA unequivocally required Aiteo to refer the disputes raised in the Nigerian Proceedings to arbitration, thereby fully constituting the inchoate arbitration agreement in clause 41.1 and placing Aiteo under the negative covenant implicit in that agreement:

i) Ground 1 particulars (a) and (b) unequivocally contend that Aiteo's claim arises under agreements in which the parties have agreed that any disputes relating to those agreements should be settled by ICC arbitration in London.

ii) Ground 1 particular (c) unequivocally asserts that the Court is required to give effect to the parties' agreement to arbitrate by declining jurisdiction.

iii) It is because the parties have agreed to arbitrate disputes under the relevant agreements that SWST contended that the court did not have jurisdiction to grant injunctive relief.

iv) Ground 1 having addressed the issue of jurisdiction, Ground 2 then advanced challenges to the injunctions granted, which prevented SWST from exercising contractual rights or bringing proceedings anywhere (including by way of counterclaim in the Nigerian Proceedings). It is not surprising that SWST illustrated the width of the injunction which Aiteo had sought and obtained by pointing out that it would even have precluded a counterclaim in the proceedings commenced by Aiteo. However, given the clarity of Ground 1, that could not reasonably be understood as an assertion or reservation by SWST, *even if Ground 1 was upheld*, of the right to serve a counterclaim in the Nigerian Proceedings. In short, there was nothing in Ground 2 which made the overall effect of the NOA equivocal on the issue of whether Aiteo was required to refer the dispute to arbitration.

v) That position is even more clear when regard is had to Ground 3, which appears to anticipate an argument that the injunctions granted in the Nigerian Proceedings were by way of interim relief in support of any arbitration, and responding that, as clause 41.1 provides for arbitration in London, it is the courts of England and Wales which are the supervisory courts for the arbitration.

vi) The relief sought included an order striking out the Nigerian Proceedings, which, if such relief were granted, would have come to an end.

35. The clear effect of the NOA was that Aiteo was required to arbitrate the disputes giving rise to its claims in the Nigerian Proceedings. That included the dispute as to whether Aiteo was indebted to SWST under the Offshore Facility Agreement and whether SWST had been entitled to accelerate repayment (Aiteo seeking declarations in respect of both matters). The disputes which Aiteo were required to refer to arbitration are clear.

36. Nor does it matter that the drafters of the NOA appear not to have been alive to the fact that, under English law, the obligation to arbitrate under the Offshore Facility Agreement did not arise by virtue of clause 41.1 alone, but by virtue of the exercise of the option to arbitrate conferred on the Finance Parties by that clause. That error is, perhaps, not entirely surprising in circumstances in which the NOA was filed with reference to the arbitration agreement in the Onshore Facility Agreement (which was not dependent upon the exercise of an option to bring it into being) as well as the arbitration agreement which was inchoate in the Offshore Facility Agreement. In any event, a party who states that the court should never have exercised jurisdiction because the disputes had to be referred to arbitration is unequivocally communicating that the other party is obliged to refer the disputes to arbitration, just as much as a party who asserts after the commencement of proceedings that the court should *now* decline jurisdiction because the dispute must *now* be referred to arbitration.

37. That conclusion is also supported by the conditional appearance entered by SWST and the other lenders in the Nigerian Proceedings on the same date the NOA was filed (which made it clear that they were not submitting to and did not accept the jurisdiction of the Nigerian courts), and by the motions filed with the Nigerian courts that day which referred to the arbitration agreements and their alleged effect on the jurisdiction of the Nigerian courts.

38. For those reasons, I agree with Sir Nigel Teare's observation when granting the final anti-suit injunction (*Africa Finance Corporation v Aiteo Eastern E&P Company Limited* [2022] EWHC 768 (Comm), [57]) that in the NOA, SWST was "insisting upon the merits of the claim being determined in arbitration."

Arbitrability

39. There were occasional hints in Mr Houseman KC's skeleton that not all of the matters raised in the Nigerian Proceedings were arbitrable (or at least "not necessarily arbitrable", or having "a potential for a penumbra of non-arbitrability"). However, no issues of arbitrability were raised as jurisdictional objections before the tribunal, and, understandably given s.73(1) of the 1996 Act, there was no attempt to advance an arbitrability objection before me. No issue of arbitrability leapt off the pages of the Statement of Claim in the Nigerian Proceedings, which appears only to seek *in personam* injunctive relief against the parties to the Offshore Facility Agreement.

The Request for Arbitration

40. In the alternative to his argument by reference to the NOA, Mr Juratowitch KC argued that the service of the Request for Arbitration had effectively exercised the clause 41.1 election. Forced to walk a fine line on this issue by determinations in the anti-suit proceedings, Mr Houseman KC's answer to that argument was that clause 41.1 would lapse on its own terms after a reasonable period, that conclusion said to follow as a matter of implication.

41. I am not persuaded that any such implication is appropriate:

    i) While clause 41.2 identifies a point by which the option to require the dispute to be heard by a court of law must be exercised, clause 41.1 does not.

    ii) Given that clause 41.1 may apply in circumstances in which Aiteo has not commenced court proceedings, it is necessary to identify the point when the reasonable time will start to run. Mr Houseman KC suggested that this would be when the relevant dispute "crystallised". However, that seems to me apt to generate uncertainty and confusion – would a failure to admit an assertion, or any challenge to it, in correspondence be sufficient to start the clock running?

    iii) Clause 36 of the Offshore Facility Agreement, which provides that "[n]o failure to exercise, nor any delay in exercising, on the part of any Finance Party, any right or remedy under the Finance Documents shall operate as a waiver", does not sit well with the suggestion that mere delay in exercising the clause 41.1 option will extinguish it.

    iv) The doctrines of waiver and estoppel will provide sufficient protection against any unfairness (cf Lord Sumption in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC, [16]). In particular, if Aiteo commences court proceedings, events in those proceedings may well generate a point in time when a failure to act will amount to a waiver of the clause 41.1 right. As Lord Goff noted in *The Kanchenjunga*, 398, "the time may come when the law takes the decision out

> of his hands, … by holding him to have elected not to exercise the right which has become available to him …".

Conclusion on the s.67 challenge to the First Award

42. Those conclusions are sufficient to dismiss the s.67 challenge to the First Award.

The s.67 challenge to the Second Award

43. The s.67 challenge to the Second Award was parasitic on the success of the s.67 challenge to the First Award, and fails for that reason. In those circumstances, it is not necessary to address Mr Juratowitch KC's (challenging) argument that even if the clause 41.1 right had never been exercised, such that no right or obligation to arbitrate ever came into existence, the tribunal appointed in the Offshore Arbitration nonetheless had jurisdiction to make the Second Award.