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**In the name of His Majesty King Hamad Bin Isa Bin Salman Al Khalifa
King of the Kingdom of Bahrain**

**In the public hearing held at the
Court of Cassation, First Circuit – English Chamber
On 09 May 2024**

The formation presided by

Judge Khaled Bin Ali Al Khalifa President of the Court of Cassation
Mr. Adrian Cole Judge at the Court of Cassation
Mr. Michael Grose Judge at the Court of Cassation

With the attendance of the

Tribunal Secretary Noof Khalid Ajaji

**The following judgement is issued
in Appeal No. 5/22/2023/29**

Filed by

Appellant: Bank of Commerce and Development (C.R. 9515)

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Against

Respondent: Arab Banking Corporation (C.R.10299)

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Factual Background

1. The facts, insofar as they are relevant to this appeal and are apparent from the BCDR judgment dated 12 November 2023 (**BCDR Judgment**) and the materials available to this court, are set out below.

Parties and Project

2. The Appellant, Bank of Commerce and Development (**BCD**), is a joint stock company incorporated and registered in Libya under number 9515 and having its main office in Benghazi.

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- The Respondent, Arab Banking Corporation (**ABC**), is a public company incorporated and registered in the Kingdom of Bahrain under registration number 10299. According to ABC's commercial licence the majority shareholder (holding 59.3%) of ABC is the Libyan Central Bank. ABC is duly licensed to trade as a bank by the Central Bank of Bahrain and its' registered office is in Manama, Bahrain.
- The dispute between BCD and ABC arises from a project for the construction of a housing development in Al-Marj, Libya. The main contract was executed in 2007 between the developer, the Organisation for Development of Administrative Centres (**ODAC**), a Libyan entity, and the main contractor, a joint venture between a Singaporean contractor, Boustead Singapore Ltd (**Boustead**), on the one hand and a Libyan contractor, General Buildings and Constructions Co, on the other.

Performance and Advance Payment Guarantees

- As part of the joint venture's engagement by ODAC and in a manner that is common for construction projects of this type, the joint venture was required to procure certain bank guarantees in favour of ODAC. The first was a performance guarantee (**PG**) in respect of the joint venture's obligations under the construction contract; the second was an advance payment guarantee (**APG**) to secure repayment of an advance payment made by ODAC to the joint venture.
- Pursuant to these requirements and at Boustead's request BCD issued the:

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- a. PG on 28 August 2007 in the sum of US\$3,760,387.95 (three million seven hundred sixty thousand three hundred ninety eight US Dollars and ninety-five cents), and
 - b. APG on 10 September 2007 in the sum of US\$18,331,891.37 (eighteen million three hundred thirty-one thousand eight hundred ninety one US Dollars and thirty-seven cents).
7. Both the PG and APG are bank guarantees the crux of which is they are payable on first written demand, but they differ materially as to the form that the demand must take.
 8. To make a demand pursuant to the PG ODAC was required to state that the amount demanded is due and *'that the contractor is in breach of his obligations stipulated in the contract and the respect in which the contractor is in breach.'*
 9. The APG, in contrast, required ODAC to submit a written demand stating that the amount demanded is due and *'that the contractor has failed to repay the advance payment in accordance to the conditions of contract, and the amount which the contractor has failed to pay.'* The latter reflects the fact that the APG secures an advance payment whereas the PG secures performance. The sum secured by the APG was eventually reduced to US\$15,021,093.50 (fifteen million twenty-one thousand US Dollars and fifty cents) reflecting the unrecovered balance of the advance payment.

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10. The PG and the APG are governed by Libyan law and subject to the non-exclusive jurisdiction of the Libyan courts.
11. The validity period of the PG and the APG was extended on several occasions until finally expiring on 28 July 2011 and 30 June 2011 respectively.

Counter-guarantees

12. The PG and APG were issued against a back-to-back security arrangement, namely a facilities agreement between Boustead and ABC (FA) pursuant to which ABC agreed to issue bank guarantees in favour parties nominated by Boustead. The FA is governed by Singapore law and subject to the non-exclusive jurisdiction of the Singapore courts.
13. Pursuant to the FA, Boustead requested ABC to issue two guarantees in favour of BCD:
 - a. Counter-guarantee [Redacted] (CG38) was issued for US\$3,760,387.95 i.e. the same sum as that secured by the PG.
 - b. Counter-guarantee [Redacted] (CG39) was issued initially for US\$18,331,891.37, which was reduced to the same sum as that under the APG (i.e. US\$15,021,093.50).(collectively the CGs).
14. The expiry date for CG38 and CG39 was 30 days after the expiry date of the PG and the APG respectively. Like the PG and the APG, the validity period for each of CG38 and CG39 was extended on several occasions ultimately expiring 30 days after 28 July 2011 (i.e. the date on which the PG was due to

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expire) and thirty days after 30 June 2011 (i.e. the date on which the APG was due to expire) respectively.

15. The conditions for making a demand pursuant to the CGs were materially the same:

‘Such demand shall be supported by a written statement specifying that you have received a demand for payment under the above performance bond in accordance with its terms.’

In short, the sums guaranteed under the two CGs and their respective validity periods corresponded with the sums guaranteed under the PG and APG and their respective validity periods.

16. The CGs are governed by English law and subject to the non-exclusive jurisdiction of the English courts.

Substitution of Counter-guarantor

17. There is a complication regarding the background to the CGs on which BCD has relied as a material part of this appeal. The background to this is, therefore, covered below in anticipation of addressing this element of the appeal later.
18. BCD’s case is that in August 2009 there was a substitution of ABC, a Singapore entity, for ABC, a Bahrain entity at ABC’s or Boustead’s request, as the issuer of the CGs.
19. As part of the claimed substitution, a SWIFT message dated 17 August 2009 was sent by “Arab Banking Corporation (B.S.C.), Manama, BH” requesting BCD to issue a replacement PG with a new expiry date of 28 July 2010. Except

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for the new expiry date it was provided that “*All other terms of the performance guarantee not modified, amended, supplemented or affected by this letter shall remain in full force and effect...*”

20. CG38 was reissued on a back-to-back basis with the same wording as before in relation to a demand:

“*Such demand shall be supported by a written statement specifying that you have received a demand for payment under the above performance bond in accordance with its terms.*”

21. As can be seen, the terms of both the PG and CG38 were unaltered.
22. The following day, on 18 August 2009, BCD appears to have issued a new PG in favour of ODAC using a pre-printed form with blank sections completed in handwriting (**PG/2009**). This version was payable on first demand, omitting any reference to the requirement in the original format for ODAC to state ‘*that the contractor is in breach of his obligations stipulated in the contract and the respect in which the contractor is in breach.*’ How or why a new version came to be issued in this form has not been explained by BCD.
23. The position regarding the APG is similar. “Arab Banking Corporation (B.S.C.), Manama, BH” requested BCD by SWIFT message dated 8 September 2009 to issue a replacement APG with a new expiry date of 28 July 2010 on the same terms as the original. The replacement CG39 was reissued (on a back-to-back basis) with the following wording in relation to a demand:

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“Such demand shall be supported by a written statement specifying that you have received a demand for payment under the above performance bond in accordance with its terms.”

24. As with the PG and CG38 the terms of the APG and CG39 were preserved.
25. On 5 January 2011 BCD issued a replacement APG to ODAC in a similar form to the replacement PG i.e. using a BCD pro-forma completed by hand (APG/2011) and payable on first demand. It is not clear why APG/2011 was issued a year and half after PG/2009.
26. The court returns to the significance of BCD’s substitution point below.

Encashment Demands

27. In February 2011 whilst construction of the housing development was still underway there was an uprising in Libya against the government headed by Moaamar Ghaddafi. The joint venture asserted in June 2011 that a *force majeure* event had occurred and that, in consequence, the main contract was terminated along with any ongoing obligation to perform the works.
28. It does not appear that ODAC and the joint venture have finally determined whether by agreement or by a final award or judgment, the amounts due and payable to/from each of them at the date of termination. This appeal does not require any finding on these underlying claims and entitlements.
29. It is not disputed that at the time of the termination the PG, the APG and the CGs were still valid.

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30. On 16 May 2011, ODAC issued an extend or pay notice in respect of the APG. On 19 June 2011, ODAC issued an extend or pay notice in respect of the PG (together referred to as the **ODAC Demands**). Each demand was for the full amount outstanding under the guarantee. It would be fair to say that the ODAC Demands were not drafted with much regard to the formalities required by the PG and the APG.
31. As the BCDR Dispute Resolution Tribunal (**BCDR Tribunal**) aptly observed the ODAC Demands resulted in ‘ricochet’ demands for payment as follows:
- BCD issued an extend or pay demand to ABC under CG39 on 25 May 2011 and another on 20 June 2011, and a further demand without the request for an extension on 23 June 2011,
 - BCD issued an extend or pay demand to ABC under CG38 on 30 June 2011 and another on 3 July 2011, and a further demand without the request for an extension on 11 July 2011, (together the **BCD Demands**), and
 - ABC followed this with a demand under the FA on 3 September 2012.
32. None of these demands resulted in any extension of the PG, APG or the CGs, nor, in the alternative, the demanded payment being made.

Singapore Proceedings

33. Matters developed fairly rapidly following the ODAC Demands and the BCD Demands. On 23 June 2011 Boustead obtained an *ex parte* injunction in

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Singapore, restraining ABC from paying any amounts due to BCD under the CGs.

34. There followed a series of applications and hearings culminating in the Singapore High Court making the injunction permanent on 11 March 2015, restraining ABC from receiving payment from Boustead pursuant to the FA and from making payment to BCD pursuant to the CGs. Central to the judgment was the court's finding, applying English law, that the BCD Demands were made *'fraudulently in the reckless sense, or alternatively, the circumstances are such that it would be unconscionable for ABC to receive payment from Boustead'*.¹
35. ABC's appeal against this judgment was rejected by the Singapore Court of Appeal on 21 April 2016.

Post-demand Dealings between BCD and ABC

36. Shortly after the Singapore Court of Appeal's judgment, BCD and ABC were in communication regarding payment of the amounts demanded. BCD relies on a total of sixteen of these communications as a central part of this appeal.
37. The first is a SWIFT message from ABC to BCD dated 5 January 2017. This refers to the existence of *"an injunction order made by the Singapore Court [which] continues to prevent ABC from making payment under this guarantee."*

¹ *Boustead Singapore Ltd v Arab Banking Corp* [2015] SGHC 65 at paragraph 227

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38. The second communication is a letter dated 23 February 2017 from ABC to the Governor of the Libyan Central Bank.
39. The third document is a letter dated 13 April 2017 from ABC's Group CEO to the Deputy General Manager of BCD. The key part of this on which BCD relies, though not to the exclusion of the whole communication, is an expression of regret that ABC is prevented from complying with BCD's request for payment by the Singapore injunction despite ABC's efforts to resist this through the Singapore court "*in the hope to be able to pay*". The letter commences with the caption "*With All Rights Reserved.*"
40. The remaining thirteen messages were issued between 12 December 2017 and 21 October 2021. The BCDR Tribunal concluded that because none of the first three communications constituted an effective acknowledgement none of these remaining messages could extend the statutory time limit for bringing claims under the CGs.

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BCDR Procedure

41. On 17 May 2023 BCD filed a Statement of Claim in case no [Redacted] with the BCDR Tribunal, requesting an order that ABC:
42. **First:** Pay the amount of US\$1,555,107.53 (One million five hundred fifty-five thousand one hundred seven US Dollars and fifty-three cents), or its equivalent in Bahraini Dinars as commission for the PG and APG for the period of July 2011 until December 2022 along with the commission accruing thereafter.
43. **Second:** Liquidate the Advance Payment Guarantee - [Redacted] (CG39) issued on 08 September 2009, in the value of USD 15,021,093.50 (Fifteen million twenty-one thousand ninety-three US Dollars and fifty cents), or its equivalent in Bahraini Dinars.
44. **Third:** Liquidate the Performance Bond PG [Redacted] (CG38) issued on 18 August 2009, in the value of USD 3,760,398.95 (Three million seven hundred and sixty thousand three hundred ninety-eight US Dollars and ninety-five cents), or its equivalent in Bahraini Dinars,
45. **Fourth:** To pay an amount of USD 778,906.05 (Seven hundred and seventy-eight thousand nine hundred and six US Dollars and five cents or its equivalent in Bahraini Dinars, based on the interest of 8% per annum calculated from the date of the first demand on 01 July 2011.
46. On 12 November 2023 the BCDR Tribunal dismissed the claims for the reasons given in the BCDR Judgment. **The BCDR Judgment is the subject of the current appeal.**

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Form of the appeal

47. As to the form of the appeal:

- **On 12 November 2023** the BCDR Judgment was issued by the BCDR.
- **On 19 December 2023**, the authorized lawyer before the Court of Cassation, Saeed Ali Al Mulla, filed a Statement of Appeal (**BCD Appeal**) on behalf of BCD with the Court's cases register office. The statement included a request for appeal against the BCDR Judgment, signed by him in his capacity as representative of BCD. Accordingly, it contained the legally required information, the grounds for appeal, and the demands of BCD, urging the court to accept the appeal, and, substantively, to overturn the BCDR Judgment and rule in BCD's favor.
- **BCD deposited the fees and the surety.** BCD's representative submitted a certified copy of the attested power of attorney granted by BCD's authorized signatory, authorizing the appeal for cassation.

48. Whereas the appeal was filed within the legally prescribed time against an appealable judgment by the entitled party and against whom it should be contested, and it satisfied the legal formalities and conditions, the appeal is accepted in form.

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Grounds of Appeal

49. This is an appeal filed pursuant to Legislative Decree No. (30) of 2009 regarding the Bahrain Chamber for Economic, Financial and Investment Dispute Resolution, as amended (**BCDR Law**).
50. The BCD Appeal raises twelve grounds in support of its appeal. These do not identify under which of the grounds listed in the BCDR Law, Article 13(a) or (b) they fall. ABC has objected to each of the twelve grounds on the basis that the appeal does not fall within Article 13(a) or (b). Admissibility is addressed in this judgment in relation each ground but without the benefit of any submissions on this issue from BCD.
51. Although the BCD Appeal raises twelve grounds these are in the nature of general themes under which a range of points is advanced, many of which are made under more than one heading. It is generally preferable for an appeal to adhere to the structure of Article 13 and, in the case of 13(b), to identify the specific error of law forming the basis for the appeal together with a concisely drafted argument relating to such error.

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Jurisdiction and Applicable Law

52. The CGs expressly provided for the application of the Uniform Rules for Demand Guarantees, (ICC Publication no. 458) (URDG) and the application of English law to matters not explicitly covered by those rules. They further expressly provided that disputes are subject to the non-exclusive jurisdiction of the English courts.
53. Notwithstanding the parties' choice of English law and jurisdiction, proceedings have been conducted in both Singapore and Bahrain but not, it appears, the courts of England.
54. The BCDR Law, Article (11) provides that:
- “Parties to the dispute before the Chamber, in accordance with the provisions of this section, may agree upon the applicable law relevant to the subject matter of the dispute provided that the provisions of the agreed law do not contradict the public order in the Kingdom. If the parties did not agree upon the applicable law, the Law of Bahrain shall be the applicable law to the subject matter of the dispute.”*
55. Accordingly, to the extent that URDG do not explicitly cover the issues raised in the BCD Appeal the provisions of English law apply.

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Main Ground of Appeal

The ninth and tenth grounds of appeal

56. The BCDR Tribunal found that the proceedings are time barred under English law by reason of the Limitation Act 1980. It is common ground that English law applies to this issue by virtue of the absence from the URDG of any provision for limitation periods and English law being applicable by agreement in default of any such provision.
57. If the proceedings are time barred all other grounds of appeal are rendered nugatory. Further, unless the BCDR Tribunal's conclusion that the proceedings are time barred is wrong the appeal must fail. It follows that the time bar issue should be considered first as this court is concerned only with grounds of appeal with the potential to alter the BCDR Judgment
58. The position on the accrual of the cause of action and the duration of the limitation period is largely agreed. The Limitation Act 1980, s5 provides that '*An action founded on a simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.*'
59. On BCD's case, it was entitled to be paid the PG and APG amounts following the BCD Demands made variously on:
- 25 May 2011, 20 June 2011 and 23 June 2011 under CG39, and
 - 30 June 2011, 3 July and 11 July 2011 under CG38.
60. BCD accepts that a six-year limitation period applies to commencing proceedings for this entitlement. Taking the last of the demands for each of CG39 and CG38 the period for commencing the proceedings expired on 23

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June 2017 and 11 July 2017 respectively. BCD calculates the interest claimed from the last of these dates which is consistent with using the latest of the BCD Demands for ascertaining the accrual dates.

61. The current proceedings were commenced on 17 May 2023, which is eleven years and ten months following the accrual of the cause of action under the CGs. This is nearly double the six-year limitation period.
62. BCD sought before the BCDR Tribunal to overcome this difficulty by relying on an extension or extensions to the limitation period. That approach was rejected by the BCDR Tribunal.
63. BCD sets out its appeal on this issue mainly under two headings:
 - a. '9. *Time Bar – wrong application of the law, wrong interpretation of the law, distortion of the facts and evidence and wrong deductions*' at pages 34 and 35 of the BCD Appeal, and
 - b. '10 *The Regime of Acknowledgements and their misinterpretation and the action of "Cherry Picking" by the BCDR Court*' at pages 35 to 46 of the BCD Appeal.
64. Before dealing with BCD's reliance on an extension or extensions to the limitation period, we address the criticisms made of the approach adopted by the BCDR Tribunal, namely that it incorrectly relied on the 2007 version of the CGs instead of PG/2009 and APG/2011, that it denied BCD the right to rely on the resumption of the limitation period and that the language used in the BCDR Judgment indicates bias or prejudice.
65. The critical issue for the purpose of ascertaining the commencement date for the limitation period is the date of the BCD Demands, which were made in

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2011. Even if BCD is correct that the PG and the APG were replaced by PG/2009 and APG/2011 this has no bearing on the commencement of the limitation period. If the expiry date of the CGs rather than the date of the BCD Demands is relevant to the accrual date, this was the same for both the 2007 and 2009 versions of the CGs. Accordingly, no consequence arises from the version of the CGs on which the BCDR Tribunal relied for this purpose either.

66. As the BCDR Tribunal considered the submission that the limitation period had been extended by the acknowledgements there is no basis for the complaint that it denied BCD the right to rely on this submission.
67. Finally, insofar as these preliminary points are concerned, the BCDR Tribunal's view that BCD accepted the accrual date '*as it must*' is no more than an acknowledgement that the accrual date for BCD's cause of action is clear. This is evident from the absence of any significant disagreement concerning the date on which the entitlement accrued. Allegations of bias or prejudice, which are made against the BCDR Tribunal in a number of places in the BCD Appeal, require some basis other than disagreement with a turn of phrase or the conclusions reached. No such basis has been provided let alone any evidence in support of bias or prejudice. Accordingly, this complaint is rejected together with those made elsewhere in the BCD Appeal.
68. Turning to the substantive grounds of appeal, BCD maintains that the BCDR Tribunal misinterpreted the correspondence BCD relies upon as extending the limitation period. BCD argues that the limitation period has renewed because the Respondent acknowledged the debt and submitted sixteen documents attributed to it in support of that acknowledgement. Three of them are dated

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before 23 June 2017 and 11 July 2017 , the original expiry dates of the right to bring the action. This is the crux of the appeal.

69. ABC characterizes this as a repetition of the objection to the expert evidence on foreign law and lacking any identification of an error of law.

70. Interpreting the correspondence is a matter for the BCDR Tribunal. The test adopted in doing so is, however, a matter of law and may form the basis for an appeal to this court. Although not clearly framed in these terms this court understands that the appeal is, at least in part, directed at the BCDR Tribunal’s approach to interpreting and applying the acknowledgements on which BCD relies. This issue is considered below.

71. The Limitation Act 1980, s29(5) provides that:

“Subject to subsection (6) below, where any right of action has accrued to recover:

a. any debt or other liquidated pecuniary claim, or

b. ...

and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it the right shall be treated as having accrued on and not before the date of the acknowledgment or payment.”

72. The Limitation Act 1980, s30 further provides that:

“(1) To be effective for the purposes of section 29 of this Act, an acknowledgment must be in writing and signed by the person making it.

(2) For the purposes of section 29, any acknowledgment or payment—

a.,

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b. shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.”

73. The BCDR Tribunal heard evidence from Jonathan Davies-Jones KC, a member of the English bar, as to the application of the Limitation Act 1980, including the above provisions. Whether this evidence is treated as expert evidence or as part of the Respondent’s submissions and the weight to be given to this if treated as expert evidence, is a matter for the BCDR Tribunal. Either way, this court is concerned only with whether the BCD Appeal has identified an error of law and takes no view of the evidence presented to the BCDR Tribunal for this purpose.
74. As described above, BCD relies on a total of sixteen communications as acknowledgements for the purpose of the Limitation Act, s29(5) but as the accrual date cannot be extended after it has expired the initial exercise is to ascertain whether any of these communications pre-date the expiry of the initial limitation period i.e. 23 June 2017 for CG39 and 11 July 2017 for CG38. If not, the remaining communications are of no assistance to BCD. This is the exercise that the BCDR Tribunal rightly undertook.
75. If any of these three communications constitutes an acknowledgement within the meaning of s.29(5) such that a new accrual date was created, the next task is to consider whether these proceedings were commenced within six years of the new accrual date or whether there was a further acknowledgement, within six years of the new accrual date, and so on until either the limitation period

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expired without a further acknowledgement or proceedings were commenced within six years of the new accrual date.

76. The first message on which BCD relies is a SWIFT message from ABC to BCD dated 8 January 2017. This refers to the existence of “*an injunction order made by the Singapore Court [which] continues to prevent ABC from making payment under this guarantee.*” The BCDR Tribunal found that this was merely a statement of fact and not an acknowledgement of a debt. BCD asserts that this clearly expresses ABC’s underlying desire to pay and, likewise, constitutes an admission of liability.
77. The second communication is a letter dated 23 February 2017 addressed to the Governor of the Libyan Central Bank. The BCDR Tribunal found that this letter failed to meet the requirement at s30(2)(b) that any acknowledgement ‘*shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged.*’ BCD does not challenge this finding and this court agrees that for the reasons given by the BCDR Tribunal the letter dated 23 February 2017 cannot constitute a valid acknowledgement.
78. The third document is a letter dated 13 April 2017 from ABC’s Group CEO to the Deputy General Manager of BCD. The BCDR Tribunal concluded that this letter was even less consistent with an acknowledgement of a debt and ‘*is perfectly consistent with the proposition that the prevention might be permanent, and indeed that nothing is due*’. This letter is the main focus of BCD’s challenge to the BCDR Judgment, at least in terms of the extent of the submissions devoted to it.

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79. The exercise undertaken by the BCDR Tribunal when considering the effect of the communications presented was primarily an evidentiary one and it is not the role of this court to substitute its own view of the evidence for that of the BCDR Tribunal. This court will not disturb the findings of the BCDR Tribunal unless the BCDR Tribunal misdirected itself as to the law or how to apply or interpret the law.
80. BCD cites *Phillips & Co v Bath Housing Cooperative* [2012] EWCA Civ 1591, *Dungate v Dungate* [1965] 1 W.L.R. 1477 and *Surrendra Overseas Ltd v Government of Sri Lanka* [1977] 2 All ER 481 in support of its submission that the BCDR Tribunal took the wrong approach and reached the wrong conclusion.
81. *Phillips v Bath* was concerned with the situation where the amount of a solicitors' invoice had not yet been finalized by way of the assessment process applicable under English law and the court was concerned, therefore, with whether a general acknowledgement of a liability where the amount has not been fixed is capable of satisfying the statutory basis for extending the limitation period. The court found that it is. But that is not the situation here. The amount of ABC's liability if the BCD Demands were valid, is and was always known.
82. Of passing note, the Court of Appeal in reaching its conclusion cited the following dicta from *Spencer v Hemmerde* [1922] 2 AC 507:
"everybody agrees that comparison with the words of other debtors is of little use"

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It is a common theme of the authorities on acknowledgements that a mechanical approach to their interpretation should be avoided.

83. *Dungate v Dungate*, similarly, is authority for the proposition that it is not essential that the amount of the debt is known at the time of the acknowledgment as long as this can be ascertained by extrinsic evidence. For the same reasons as *Phillips v Bath* there is nothing in this judgment to indicate that the BCDR Tribunal adopted the wrong approach.
84. *Surrendra Overseas Ltd v Government of Sri Lanka* [1977] 2 All ER 481 is primarily a judgment that supports the proposition that where it has been made clear that part of the claim is disputed, any acknowledgment relates only to the undisputed balance.
85. In passing, the court in *Surrendra* noted that the correct approach is to conduct an objective interpretation of each purported acknowledgement and each such document must be read as a whole, “without picking out parts and ignoring others” and, likewise, in *Ross v McGrath* [2004] EWCA Civ 1054 “the letter must be construed as a whole and in its context.”
86. The case that is perhaps closest to the facts of the present claim is *Habib Bank Ltd v Central Bank of Sudan* [2007] EWHC 1767 (Comm) as this was a claim brought against an issuing bank by a confirming bank for reimbursement in respect of payments made under two confirmed letters of credit dating back to 1982. The proceedings were not commenced until 2003 so the question of whether the proceedings were time barred arose for determination and, specifically, whether the time limit had been extended by the defendants’

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acknowledgements. Introducing this issue Justice Sir Richard Field stated (at p.56):

“To amount to an acknowledgement, a document must contain a sufficiently clear admission of the title or claim being acknowledged.”

87. As the Central Bank of Sudan wrote to ‘*confirm our liability*’ and to ‘*inform that the balance of the above credits is a sum of 82,069,177.50 US dollars*’ Field J had no difficulty concluding that the limitation period had been extended.
88. The role of the BCDR Tribunal was, thus, to determine whether any of the communications presented contains a sufficiently clear admission of the claim being acknowledged, having regard to the entirety of the words used and their context.
89. The text contained in ABC’s short SWIFT message to BCD dated 8 January 2017 on which BCD relies is ‘*please note that an injunction order made by the Singapore Court continues to prevent ABC from making payment under this guarantee.*’ The only question of relevance is whether ABC was acknowledging its liability to pay. BCD invites this court to infer a desire to pay from the reference to being prevented from paying. Even if such an inference could be drawn this is not the correct approach based on the authorities cited above. The BCDR Tribunal, applying the correct approach, determined that this was not an admission of the claim.
90. BCD challenges the BCDR Tribunal’s conclusion that ABC’s letter dated 13 April 2017 also did not amount to an admission of the claim. This letter was a

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more substantial communication than the brief SWIFT message dated 8 February and BCD's challenge based on it can be summarised as follows:

- a. ABC maintained throughout the relevant period that the demands were valid, contesting the Singapore proceedings '*in defence of their position that the demands were valid*',
- b. The letter is an acknowledgement by analogy with *Dungate*, as the failure to pay in that case and here was attributable to an inability to pay not on a denial of a liability to do so,
- c. the fourth and fifth paragraphs contain a clear admission that a debt exists and a desire to pay relying in particular on ABC's expressly stated '*hope to be able to pay*', and
- d. relying on the letter, as a whole, and the surrounding circumstance, this expresses an acknowledgement of liability and intent to pay.

91. It is apparent from the BCDR Judgment that the BCDR Tribunal considered ABC's letter dated 13 April 2017 holistically and in search of a sufficiently clear admission of the claim being acknowledged, having regard to the entirety of the words used and the context. This court agrees with the conclusion that the BCDR Tribunal reached. None of the references relied upon by BCD amounts to an admission or acknowledgement of a liability to pay. As with the SWIFT message dated 8 January, ABC's letter dated 13 April does not deal with liability at all. Instead, ABC reminds BCD of the efforts made - without BCD's support - in the hope of securing a payment that could be passed on to BCD. ABC expresses regret about the failure of those efforts but

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certainly does not state that it has a liability to pay despite the unsuccessful outcome.

92. Since s29 (7) of the Limitation Act 1980 stipulates that "*a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgment or payment*" and because the subsequent communications on which BCD relies as acknowledgements were not issued until more than six years after the demands were made, these subsequent communications are not capable of establishing a new accrual date.
93. Against this backdrop, this court finds no error of law in the interpretation adopted by the BCDR Tribunal and agrees that BCD's claim was time barred after 23 June 2017 and 11 July 2017 being six years after the latest of the CG39 and CG38 demands respectively.
94. BCD's claim for commission for the period from 11 July 2017 up to the commencement of the proceedings relies on an agreement between BCD and ABC contained in the SWIFT messages exchanged between them and specifically ABC's SWIFT message dated 22 October 2009, which itself refers back to an earlier SWIFT message 21 August 2007. The BCDR Tribunal concluded that these '*fail both as a matter of substance and because they are time barred.*'²
95. The BCD Appeal states that the claim for commission is inexorably linked with the CGs. There is no suggestion in the correspondence relied upon by BCD that ABC acknowledged any liability to pay these amounts

² BCDR Judgment, paragraph 124.



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independently of any liability pursuant to the CGs themselves. The claim for commission is, therefore, time barred.

96. Judgment interest does not accrue unless and until BCD establishes a liability and, therefore, this element of the appeal also fails along with the principal claim.

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Other Grounds of Appeal

97. As the proceedings are time barred there is no need to determine the other grounds of appeal. However, the court has considered these as part of the appeal and addresses these briefly for completeness. The determination of these grounds of appeal does not affect the primary basis on which the appeal is dismissed above. All grounds of appeal are dismissed whether or not addressed below for the reasons given in relation to the ninth and tenth grounds of appeal.

The first ground of appeal

98. Resolution 134/2021 promulgating the procedural rules governing disputes under the jurisdiction of the BCDR (**BCDR Rules**), Article 30A provides that a Respondent may request dismissal of a case, effectively by way of a preliminary issue, on various grounds including ‘for having been filed after the expiry of the statutory limitation period.’ The BCDR Rules, Article 30B further provide that:

*“If the respondent relies in their response **exclusively** on one of the inadmissibility defenses listed in the previous paragraph without submitting any other defense on the merits, the Case Manager shall prepare a report containing the facts of the case, the parties’ arguments, claims, defenses, evidence, and requests, and the case file shall be transferred to the Tribunal along with such report. In such cases, and once the case has been referred to the Tribunal, the latter may not refer it back to the Case Manager.”*

[emphasis added]

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99. **BCD argues** that the BCDR Tribunal wrongly allowed ABC to present its substantive defenses and dismissed BCD's inadmissibility defence despite ABC's exclusive reliance on one of the inadmissibility defences in its' initial response to BCD's Statement of Claim. The challenge is based on two grounds:
- Public policy that procedural law is to be strictly complied with, and
 - ABC's admission that no alternative arguments were made in the form of the expressed intention to submit substantive arguments if no Article 30A preliminary issue was accepted.
100. BCD argues that even though ABC reserved its right to provide the BCDR Tribunal with future substantive defences, the submission at the time did not contain any substantive defenses. Therefore, the Tribunal erred in law in its application of the BCDR Rules, Article 30 and the appealed judgment is flawed and should be reversed.
101. This court is concerned only with whether or not the BCDR Judgment is based on an error of law. Although procedural law falls within the scope of a potential appeal this does not extend to the exercise by the BCDR Tribunal of the powers vested in it to manage the procedure itself. The powers conferred on the case manager and the BCDR Tribunal are discretionary and are not in the nature of matters of public order.
102. The purpose of Article 30 is to provide for an efficient resolution of a case where the Respondent objects solely on one of the preliminary grounds and does not wish to advance any defence in relation to the substance of the claim.

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103. This is a discretionary matter with which this Court will not interfere.
104. As ABC did not indicate an intention to rely exclusively on the grounds at Article 30A and did not refer the case to the BCDR Tribunal pursuant to Article 30B, the BCDR Tribunal's rejection of BCD's request to overturn the decision of the case manager with regards to the extension, during which ABC submitted its statement of defense in which ABC sought the dismissal of BCD's claim on the merits, as well as asserting that BCD's claims were time-barred, is a case management matter that is solely for the BCDR Tribunal.
105. Therefore, BCD's first ground of appeal lacks a valid basis and is rejected.

The second and third grounds of appeal

106. **BCD argues that** the BCDR Tribunal admitted the expert's report, notwithstanding that it deals with matters that are purely legal in nature, and which fell solely under the BCDR Tribunal's jurisdiction.
107. The expert presented foreign law for interpretation and application to the dispute. In its reasoning, the Tribunal emphasized that foreign law is a matter of evidence requiring proof, which the expert provided through the report he submitted. However, it was the Tribunal's responsibility to apply the relevant foreign law to the facts of the dispute, or, in the absence of it, the national law.
108. Additionally, BCD's request to set aside the expert report was dismissed despite the asserted formal irregularities in it, such as improperly attested documents and the absence of the expert's signature.

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109. This, BCD contends, constitutes a flaw in the appealed judgment and warrants its annulment.

110. Both grounds are rejected.

111. Since BCDR Law, Article (11) stipulates that:

"B) If the parties have agreed to choose a law other than the Law of Bahrain in accordance with the provisions of Paragraph (a) of this Article, parties are obliged to submit that law to the Dispute Resolution Tribunal in accordance with the regulations and procedures cited in the regulation."

112. Furthermore, the BCDR Law, Article (29) states that:

*"The opposing party must take the necessary steps to present what is required for the resolution of the lawsuit. They are required to submit the following:
18- Submission of applicable legal provisions related to the subject of the dispute, if the parties have agreed to a law other than Bahraini law."*

113. Additionally, the BCDR Rules, Article (31) stipulates that:

" B) If the parties to the lawsuit agree on a law other than Bahraini law, they are required to submit the texts of that law to the Case Manager within the specified timeframe according to the issued Timetable. D) They also may provide, evidence supporting their defense or arguments, such as judicial rulings or legal opinions regarding the legal provisions of the law that must be applied."

114. Consistent with the preceding context, Law No. (6) of 2015 regarding Conflict of Laws in Civil and Commercial Matters with a Foreign Component, Article (6), specifies that:

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"a) Parties to a dispute shall submit the provisions of the applicable law. b) In support of their defence or arguments, parties to a dispute may present before the body examining the dispute, judicial judgements, or jurisprudence in relation to the provisions of applicable law. c) The body examining the disputes shall take into account the principles of application and interpretation of the applicable law if the parties of the dispute had submitted such principles."

115. As the law applicable to the CGs is a foreign law the parties are required to provide the provisions on which they rely, in accordance with Article 6.
116. Evidence of foreign law may be provided in the form of an expert report or submissions and may be supported by relevant authorities. It is a matter for the BCDR Tribunal to decide whether the form is permitted and the weight to be attached to the material submitted. BCD did not provide any expert report or evidence in opposition to that supplied by ABC, despite having the opportunity to do so.
117. Therefore, BCD's second and third grounds of appeal lack a valid basis and are rejected.

The fourth to the eighth and eleventh to twelfth grounds of appeal

118. **BCD argues, first, that the BCDR Tribunal erred by adopting the Singapore court's definition of fraud instead of English law and, second, by disregarding the governing documents and the substitution of the PG and APG with PG/2009 and APG/2011 respectively.**
119. In support of the first of these grounds, BCD asserts that the Singapore courts found that BCD was guilty of fraud constituting primary recklessness, while

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the applicable English law does not contain a similar provision. According to the URDG Rules, such documents are autonomous instruments payable upon demand. BCD further asserts that the judgment delved into the conduct of both Boustead and ODAC, which is irrelevant to the case. The primary issue is identifying the legal position under the CGs.

120. In support of the second of these grounds BCD provided documents indicating the replacement of ABC, a Singapore entity, by ABC, a Bahrain entity, under the CGs and also PG/2009 and APG/2011. The latter omit the conditions required to be met for a valid demand as set out in the PG and APG. BCD also submitted documents to support its innocence of fraud, including the Public Works Contract annex which was not presented before the Singaporean court and pointed out that Boustead received an unrecovered advance of USD 15,021,093.50 which justified the ODAC Demands.
121. As the Singapore courts and the BCDR Tribunal relied on the formalities for a valid demand contained in the PG and APG which required demands to be made in a certain form this court recognizes that judged against PG/2009 and APG/2011, a different conclusion might have been reached. This court also recognizes that the nature of the underlying obligation under each of the PG and the APG differs such that if the factual circumstances of the ODAC Demands is relevant, the merits of these ought to be considered separately. Notably, the APG taken at face value, secured an unearned advance of USD15,021,093.50 paid to Boustead which would ordinarily be repayable in circumstances where it is not recovered via works executed to the value of the advance.

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122. The position with regard to the 2009 substitution has been set out for completeness in the ‘facts’ section above.
123. The replacement of ABC, a Singapore entity, by ABC, a Bahrain entity, under the CGs does not alter the obligations arising from them and, accordingly, does not have any bearing on the issues raised in this appeal.
124. BCD has not explained why PG/2009 and APG/2011 were issued in substantially different forms (using a pre-printed form with blank sections completed in handwriting payable on first demand), contrary to the instructions from ABC, nor why APG/2011 was issued a year and half after PG/2009. Accordingly, BCD’s challenge based on the substitution of the PG and APG is rejected.
125. As the proceedings are time barred, the scope and application of the fraud exception under English law does not need to be determined.
126. Therefore, BCD's fourth to the eighth and eleventh to twelfth grounds of appeal are rejected.

The following judgment was rendered:

After due deliberations, having reviewed and duly considered all written and oral submissions of both parties in the present appeal, and for the reasons set forth above, the Court rules to accept the appeal in form but dismisses it on the merits. The Appellant is ordered to bear all costs, including the confiscation of the surety.