IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 278

Suit No 331 of 2018

Between

Haribo Asia Pacific Pte Ltd

… Plaintiff

And

Aquarius Corporation

… Defendant

Counterclaim of the Defendant

Between

Aquarius Corporation

… Plaintiff in Counterclaim

And

Haribo Asia Pacific Pte Ltd

… Defendant in Counterclaim

JUDGMENT

[Civil Procedure] — [Damages] — [Set-off] — [Foreign currencies]
[Contract] — [Breach]
[Evidence] — [Admissibility of evidence] — [Foreign law] — [Assessment of expert evidence]

TABLE OF CONTENTS

Haribo Asia Pacific Pte Ltd
v
Aquarius Corp

[2021] SGHC 278

General Division of the High Court — Suit No 331 of 2018
Lee Seiu Kin J
30 June, 2, 3, 6–8, 14–17 July 2020, 12, 13, 15 July, 3 September 2021

2 December 2021 Judgment reserved.

Lee Seiu Kin J:

Introduction

1 Haribo Asia Pacific Pte Ltd (the "Plaintiff"), a company incorporated in Singapore, is part of a group of companies (the "Haribo Group") in the business of manufacturing and selling confectionaries. The Plaintiff is responsible for the sale and distribution of the Haribo Group's products in the Southeast, West, and East Asian markets.[1] The Defendant, Aquarius Corporation, is a company incorporated in the Republic of Korea ("South Korea"). It is in the business of distributing food and beverage products in South Korea.[2]

2 The present dispute pertains to a distributorship agreement into which they entered on 23 May 2016 (the "2016 DA") for the Plaintiff to supply, and

---

1 Nikolay Karpuzov's (Plaintiff) AEIC (22 Jun 2020) ("PAEIC") at para 4.

2 Eric Hahn's (Defendant) AEIC (1 Jul 2020) ("DAEIC") at para 5.

the Defendant to distribute, the Haribo Group's products in South Korea.[3] It is apposite to highlight from the outset that the 2016 DA was governed by German law,[4] in respect of which the parties called experts to give evidence.

3 The 2016 DA was not, however, the first distribution agreement between the parties. Their relationship was formerly governed by an agreement entered into on 16 October 2014 (the "2014 DA").[5] Certain disputes arose in connection with the 2014 DA, and the parties negotiated a settlement. What followed was a settlement and contribution agreement (the "SCA"),[6] as well as the 2016 DA. Under the SCA, the parties agreed to bring the 2014 DA to an end and settle all outstanding and potential claims arising therefrom. Connectedly, the 2016 DA served to enable the parties to restart their contractual relationship on a clean slate, with certain revised terms.

4 However, even after the 2016 DA and SCA were executed, the parties' relationship continued to be strained. Naturally, they disagree on whose fault this was, but I will only set out their precise complaints later in my judgment. At this juncture, it is sufficient to note that the parties were unhappy – both in respect of some of the same issues which led to the termination of the 2014 DA, as well as new ones – and that the Plaintiff was the one to take the first step to bring their contractual relationship to an end. It did so by invoking cl 7.2 of the 2016 DA which states that parties may terminate the contract "with six (6) months' notice to the end of a calendar month".[7]

---

3 Defendant's List of Documents (Amendment No 1) (9 Sep 2019) ("DLOD") 2.

4 DLOD 2, Appendix 2, condition 13.

5 DLOD 1.

6 DLOD 2, Appendix 1.

7 DLOD 2, clause 7.2.

5 The notice which the Plaintiff gave to effect the termination under cl 7.2 (the "Plaintiff's First Termination Notice") was issued on 25 October 2016,[8] and given the notice period defined, the last day of the contract would have been 30 April 2017. For some time after issuing this notice, the Plaintiff demanded the Defendant to make payment for outstanding invoices totalling €1,526,224.76 for products delivered.[9] However, its demand was not met, and it thus brought the present suit to recover this outstanding sum with interest.

6 The Defendant does not seem to dispute[10] that it owes €1,526,224.76 for the products it received from the Plaintiff (although it disputes an aspect of the claim for contractual interest on this sum: see [13] below). It avers that the Plaintiff committed numerous breaches of the 2016 DA, and counterclaimed for damages (in the form of lost profits) resulting from those breaches which far exceeds, and entirely sets off, the Plaintiff's claim.[11] Indeed, the Defendant's counterclaim for damages in the present suit is pleaded to be for approximately ₩54,719,088,182 or around €42.7 million.[12] In response, the Plaintiff refutes the counterclaim *entirely*.

7 In support of their respective cases, the parties each called one factual witness. Nikolay Karpuzov ("Mr Karpuzov"), a director of the Plaintiff, gave evidence on its behalf. Evidence for the Defendant was given by Eric Hahn ("Mr Hahn"), its sole shareholder and up until April 2016, its president.

---

8 DLOD 143.

9 Statement of Claim (2 Apr 2018) ("SOC") at paras 14 and 21–23.

10 Defendant's Admission of Facts Pursuant to Notice (25 Feb 2020) ("D's Admissions"), Annex at S/N 4; DAEIC at para 125; DLOD 232 at p 2; DLOD 234 at para 3; DLOD 236 at p 1.

11 Defence and Counterclaim (No 3) (23 Mar 2020) ("D&CC") at para 24.

12 D&CC at para 62.

8 The parties also called experts to give evidence on: (a) the quantification of the counterclaim; and (b) issues of German law. In relation to (a), James Nicolson ("Mr Nicolson") and Jenny Teo ("Ms Teo") respectively gave evidence for the Plaintiff and Defendant. Mr Nicolson is a Chartered Financial Analyst and Head of Economic and Financial Consulting (Asia) at FTI Consulting.[13] Ms Teo is a Chartered Accountant and Head of the Forensic Advisory Services Division (Asia) at Sedgwick.[14] As regards (b), Professor Matthias Lehmann ("Prof Lehmann") of the University of Bonn[15] and Professor Hans Christoph Grigoleit ("Prof Grigoleit") of the University of Munich[16] gave evidence for the Plaintiff and Defendant respectively.

9 The parties tendered their written closing and reply submissions on 13 August and 3 September 2021 respectively. No further oral replies were heard. Having considered these submissions and the evidence put before me, I allow the Plaintiff's claim for the principal sum of €1,526,224.76 in full and its claim for contractual interest in part. I allow the counterclaim in part, and order that the Plaintiff pay the Defendant ₩1,969,018,000 with judgment interest of 5.33% from the date of the Defence and Counterclaim, 30 August 2018. I also find that the requirements for set off have been satisfied, and I will explain how the set off is to be applied from [236] to [240] below.

10 I will now detail the reasons for my decision, starting with a summary of the parties' cases in the claim and counterclaim. Thereafter, I will set out the facts of the case, and where relevant, resolve the key factual matters in dispute.

---

13 James Nicholson's (27 May 2020) ("Nicolson's Report") at pp 7 and 13.

14 Jenny Teo's Report (26 Mar 2020) ("Teo's Report") at p 7, para 1.02.

15 Matthias Lehmann's Affidavit (24 Jun 2020) at p 5.

16 Hans Christoph Grigoleit's Affidavit (24 Jun 2020) at p 5.

Finally, I will draw together my factual findings in relation to the issues arising from the parties' cases. I have chosen to structure my judgment in this manner for two reasons. First, there are a substantial number of facts in dispute, and the significance (or lack thereof) of these disputed facts are best understood through the lens of the parties' cases. Second, the parties have framed their cases around numerous alternatives. It is therefore preferable to have a working set of facts before I address each of those alternatives.

The Plaintiff's claim

11 The Plaintiff's case in the claim is straightforward. It asserts a debt of €1,526,224.76 for the Haribo Group's products delivered to and received by the Defendant,[17] with contractual interest provided for by the 2016 DA:[18]

> **10. Default of payment**
>
> If the payment is not made within the time period prescribed according to the provisions above, reserving all other rights available to us, we will be entitled to demand default interest at the rate of 8% over the applicable base interest rate pursuant to Section 247 German Civil Code (BGB) from the expiration of the time provided for payment.

12 The Plaintiff pleads that the "base interest rate" prescribed by section 247 of the *Bürgerliches Gesetzbuch* (the "BGB") – the German Civil Code – is 7.12% and that it is entitled from 1 July 2016 until the date of full payment.[19] Applying this rate and starting date, as at 13 August 2021 – the date on which closing submissions were filed – the Plaintiff calculates that it is entitled to €519,074.76 in interest.[20]

---

17 SOC at para 21.

18 DLOD 2, appendix 2, condition 10 read with clause 6.2.

19 SOC at paras 22–23.

20 Plaintiff's Closing Submissions ("PCS") at para 29.

13 The Defendant does not dispute that the Plaintiff is entitled to 8% over the rate of 7.12%.[21] It contends, however, that the Plaintiff has no basis to claim interest from 1 July 2016.[22] In support of this, the Defendant highlights that interest is only payable "from the expiration of the time provided for payment" (see [11] above). The earliest invoice on which the Plaintiff's claim is based is dated 1 November 2016,[23] and the invoice states that payment is to be made by the "3rd working day of [the] next month".[24] That is, 5 December 2016 – the 3rd and 4th of December being non-working days.

The Defendant's counterclaim

14 As stated at [6], the Defendant has not seriously set out to dispute that it owes €1,526,224.76. Instead, its defence is contingent on the success of its counterclaim, and its consequential entitlement to set off that debt. As such, to resolve the dispute, it chiefly needs to be determined whether the Defendant should succeed in its counterclaim.

15 The case in the counterclaim is, unfortunately, slightly overcomplicated. It could have, in my view, been more simply pleaded. This is not aided by the Plaintiff's many – bordering on excessive – alternative defences. Nevertheless, if distilled, the Defendant's counterclaim can be understood as following two relatively straightforward steps. First, that the Plaintiff's termination of the 2016 DA on 25 October 2016, was legally invalid. Second, that the Plaintiff breached several of its obligations under the 2016 DA, thus giving the Defendant a claim for damages suffered in the form of lost profits.

---

21 D&CC at para 30; D's Admissions, Annex at S/N 5.

22 Defendant's Closing Submissions ("DCS") at para 203.

23 SOC at para 22.

24 DLOD 258.

First step: Validity of the Plaintiff's termination

16 The Defendant contends that the Plaintiff's First Termination Notice was not legally valid, and thus did not have the effect of triggering the termination of the 2016 DA on 25 October 2016.[25] It makes this claim on two alternative bases, one contractual and one statutory:

(a) One, that the Plaintiff failed to initiate, or at least participate in, the dispute resolution process required by the 2016 DA.[26] These, on the Defendant's case, were preconditions which must be met before the right to terminate with notice pursuant to cl 7.2 could be validly exercised.[27]

(b) Two, that the way in which the Plaintiff effected the termination fell afoul of restrictions imposed by sections 138, 226, and 242 of the BGB on the exercise of contractual rights, including termination rights such as that under cl 7.2. Namely, that a contractual right cannot be exercised in a manner which: (i) is contrary to good morals; (ii) amounts to "unlawful chicanery" (*ie*, effected for no reason other than to cause damage to the other party); or (iii) is objectionable according to the standards of good faith and fair dealing.

17 To establish the latter, the Defendant set out to prove three groups of contractual breaches allegedly committed by the Plaintiff (these breaches also form the subject of the second step of the Defendant's case in the counterclaim: see [37] below):

---

25 D&CC at para 15.

26 D&CC at paras 42–44; DCS at paras 178–182; DLOD 2, clauses 7.5 and 8.7.

27 D&CC at paras 42 and 58.

(a) One, that the Plaintiff was obliged under the 2016 DA to aid in the curing or investigating certain issues pertaining to the food safety of the Haribo Group's products, and parallel imports into South Korea, but refused to do so.[28]

(b) Two, that in response to the Defendant's request for aid in respect of these issues, the Plaintiff wrongfully and deliberately halted product deliveries from early October 2016, as well as cancelled the production of the products ordered by the Defendant.[29]

(c) Three, that the Plaintiff did not (as stated at [16(a)] above) even attempt to engage in mandatory dispute resolution before issuing its First Termination Notice. In fact, it took active steps to conceal any purported dissatisfaction from the Defendant.[30]

18 These acts – as well as refusals to act – the Defendant avers, show that the Plaintiff was not interested in securing the continued operation of the 2016 DA,[31] contrary to its preamble which states that they "want[ed] to achieve a long-term partnership-like collaboration based on mutual trust".[32] It claims that, because the Plaintiff was unhappy with it for legitimately seeking aid in respect of the food safety and parallel imports issues, the Plaintiff terminated the 2016 DA to punish it for doing so. This, the Defendant pleads, was a "reprehensible purpose", and the termination therefore: "had no other goal than to cause

---

28 D&CC at paras 34A–37.

29 D&CC at paras 38–41.

30 D&CC at paras 42–44.

31 D&CC at para 59.

32 DLOD 2 at p 2.

damage to [it]"; and/or was effected "in bad faith",[33] in violation of sections 138, 226, and/or 242 of the BGB. These three provisions state, *per* the agreed English translation:

> **138. Legal transaction contrary to public policy; usury**
>
> (1) A legal transaction which is contrary to public policy is void.
>
> (2) In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.
>
> **226. Prohibition of chicanery**
>
> The exercise of a right is not permitted if its only possible purpose consists in causing damage to another.
>
> **242. Performance in good faith**
>
> An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.

19 In response, the Plaintiff disputes that its First Termination Notice was invalid.[34] In full, cl 7.2 states: "This Agreement may be terminated by either party with six (6) months' notice to the end of a calendar month."[35] Emphasising fidelity to the text, the Plaintiff's case is that this clause: (a) provides a no-fault basis to terminate the 2016 DA which may be invoked at any time;[36] and (b) that an invocation of cl 7.2 would be valid unless, *and only unless*, it is found to have contravened the three restrictions imposed by the BGB as set out at [16(b)] and [18] above.[37] Further, as to (b), the Plaintiff avers that the threshold to be met in

---

33 D&CC at paras 57B–61, particularly para 61.

34 Reply and Defence to Counterclaim (No 4) (9 Jul 2020) ("R&DC") at paras 26–27.

35 DLOD 2, clause 7.2.

36 R&DC at para 10.

37 PCS at para 66.

respect of the BGB restrictions is "very high",[38] and in any case, that it has not committed[39] any contractual breaches on which the Defendant can hang its claim that sections 138, 226, or 242 of the BGB were violated (I will describe the parties' factual cases on these breaches from [69] below).

20 As regards (b), the Defendant does not dispute that judicial intervention in respect of the three BGB provisions is "exceptional".[40] However, it avers that, where the parties were in a long-term commercial relationship, the provisions should be applied more strictly.[41] Applying this standard, as stated at [18] above, the Defendant contends that the Plaintiff's termination *was*, on the facts of this case, in violation of these provisions.

21 In respect of (a), the Defendant's case is that, notwithstanding its plain words, the exercise of the right of termination pursuant to cl 7.2 is subject to preconditions in cll 7.5 and 8.7 of the 2016 DA. These provide:

> **§ 7 Duration and Termination of the Agreement**
>
> …
>
> 7.5 If a party fails to perform its obligations or is in breach of its obligations under this Agreement (the "Defaulting Party") then the other party ***shall***:-
>
> > 7.5.1 *give written notice* to the Defaulting Party describing the nature and scope of the breach and demanding that the Defaulting Party remedy the breach at its own cost within a cure period of forty-five (45) days (the "Cure Period");
> >
> > 7.5.2 *if the Defaulting Party fails to remedy the non-performance or breach within the Cure Period, then the other party not in default may terminate this Agreement*,

---

38 Matthias Lehmann's Report (14 Jul 2021) ("Lehmann's Report") at para 196.

39 R&DC at paras 22B(a)–(b), 22D, and 24–25.

40 Hans Christoph Grigoleit's Report (24 Jun 2020) ("Grigoleit's Report") at para 119.

41 Grigoleit's Report at para 121.

> in which case the provisions of this Agreement shall from such date cease and determine, except for the following Clauses (collectively, the "Surviving Clauses"):-
>
> (a) Clause 7 (Termination);
>
> (b) Clauses 3.4 and 3.6 (Confidentiality);
>
> (c) Clauses 8.6 and 8.7 (Governing Law and jurisdiction); and
>
> (d) any other provision of this Agreement which is expressly or by implication intended to come into or continue in force on or after termination.
>
> …
>
> **§ 8 Miscellaneous Provisions**
>
> …
>
> 8.7 If any dispute arises out of or in connection with this Agreement, the respective rights and obligations hereunder and/or the relationship between the parties in general, which cannot be settled by the day-to-day management team of the parties, *the following individuals* ***shall*** *communicate in a good faith effort to resolve the dispute and shall be deemed to have the authority to settle the dispute on behalf of the parties within ten (10) days of a written request from one party to the other*:-
>
> > 8.7.1 on behalf of the Distributor: Eric Hahn and/or any President of the Distributor (whose identity and contact details shall be provided to the Distributor within one (1) week after his/her appointment); and
> >
> > 8.7.2 on behalf of the Principal: Martin Schlatter (or his successor in role).
>
> If the dispute is not wholly resolved within thirty (30) days of the written request, or within such further period as the parties may mutually agree in writing, the dispute may be submitted to the Singapore High Court. In this regard, the parties herein submit to the exclusive jurisdiction of the High Court of Singapore.
>
> [Emphasis added]

22 The Defendant relies particularly on the words "shall" in both clauses in support of its position that they operate as preconditions to which the invocation

of cl 7.2 is subject.[42] It is on these bases – particularly cl 8.7 – that the Defendant avers that the Plaintiff's First Termination Notice was invalid. On 12 and 14 October 2016, the Defendant sent emails to the Plaintiff titled "Official Dispute Escalation Procedure". In these emails, it requested a meeting with the Plaintiff to "begin getting things back on track".[43] The Plaintiff, however, did not respond to these requests.[44]

23 As stated at [19] above, the Plaintiff's position is that cl 7.2 provides a generally unfettered right to terminate, so long as notice is properly given, and the termination does not fall afoul of the requirements in the BGB. It therefore refutes that cll 7.5 and 8.7 impose any form of restriction of cl 7.2.[45] It makes two counterarguments in respect of each clause.

24 I start with cl 7.5. First, cl 7.2 does not expressly refer to cl 7.5. By contrast, cl 7.3 (by which parties may terminate the 2016 DA for cause, with immediate effect) expressly states its operation to be "subject to clause 7.5".[46] Given this lack of express reference, Profs Lehmann and Grigoleit agree[47] that – for the procedure in cl 7.5 to be read into the application of cl 7.2 – German law requires that the parties understood that their contract would operate in a manner contrary to the plain wording of the clause. In this case, save for the mere existence of cl 7.5, the Plaintiff submits that there is no evidence which

---

42 Grigoleit's Report at paras 70–74 and 127–131; DCS at para 176.

43 DLOD 114.

44 DAEIC at paras 104–106.

45 R&DC at paras 26(a)–(b) and 27.

46 DLOD 2, clause 7.3.

47 Lehmann's Report at para 14; Grigoleit's Report at para 27.

indicates the parties intended cl 7.2 to be limited in the manner proposed by the Defendant.[48]

25 For context, cl 7.3 states:

> 7.3 ***Subject to Clause 7.5***, each party shall be entitled to terminate this Agreement with immediate effect by serving written notice to the other party if any party of this Agreement has fundamentally breached any of the obligations of the Agreement. The same shall apply if one or more of the following occurrences arise:
>
> [Emphasis added]

26 Second, there was no practical or logical way in which cl 7.2 could have been limited by cl 7.5. The latter provides that, where breaches have been committed, the innocent party may issue a notice to the defaulting party to cure said breaches. If the defaulting party fails to do so, the *innocent* party may opt to terminate (see [20] above). This, the Plaintiff suggests, does not sensibly apply where the allegedly defaulting party is the one which invokes cl 7.2. Indeed, it is not clear what the Plaintiff's specific obligation would have been if cl 7.5 were to operate in connection with cl 7.2.[49]

27 I turn next to cl 8.7. First, the Plaintiff advances the same argument as stated at [24] above – that cl 7.2 does not expressly refer to cl 8.7.[50] Second, it argues that the words of cl 8.7 plainly show that it relates to the commencement of dispute resolution processes rather than the termination of the 2016 DA.[51] This can be gleaned from the last paragraph of cl 8.7 which refers to the submission of the parties' dispute to the "Singapore High Court".

---

48 PCS at paras 143–144.

49 PCS at paras 147–148.

50 PCS at paras 152 and 155.

51 PCS at paras 159–160.

28 These are the parties' cases in respect of this part of the counterclaim. They engage on and give rise to two broad issues: (a) whether the exercise of cl 7.2 of the 2016 DA is subject to cll 7.5 or 8.7; and if not, (b) whether the Plaintiff's exercise of cl 7.2 was nevertheless in violation of sections 138, 226, and/or 242 of the BGB. Before I go on to describe the second step of the case in the counterclaim, however, it is useful to explain why such emphasis was placed on the validity of the Plaintiff's First Termination Notice.

Interjection: Significance of the Plaintiff's termination

29 If the Defendant is successful in establishing either of the arguments set out at [16] above, the consequence would be my finding that the Plaintiff's First Termination Notice had no legal effect. The invalidity of this notice is crucial to the quantification of the counterclaim. This is because, if the notice *had been* issued validly, any claim the Defendant has for lost profits would be cut-off by the date on which the notice was slated to end, *ie*, 30 April 2017 (see [5] above).

30 The reason for this cut-off, if not immediately apparent, is quite simple. If the Plaintiff properly exercised its right of termination under cl 7.2 of the 2016 DA, it is not open for the Defendant to claim that it has lost profits on the basis that the 2016 DA "would have continued" had the Plaintiff not committed the breaches it allegedly did.[52] This is because, whether the Plaintiff breached the 2016 DA or not, the First Termination Notice would have brought it to an end on 30 April 2017. Thus, any profits which the Defendant says it *could* have earned had the Plaintiff not breached the 2016 DA, it *would no longer* have been able to earn past this date. Put simply, the Plaintiff's valid exercise of cl 7.2

[52] D&CC at para 62(b).

would break any causal link between profits lost after 30 April 2017, and the Plaintiff's alleged breaches of contract.

31 The German law experts do not entirely agree as to the specific threshold of causation which the Defendant must prove. On Prof Lehmann's account, lost profits can be recovered if they "could probably have been expected in the normal course of events".[53] On Prof Grigoleit's account, such foreseeability of the profits need not be proven, and it need only be shown that they would have accrued to the claimant had the "liability event" not taken place,[54] *ie*, simple *sine qua non* causation.[55]

32 The differences in their views on this issue, however, do not have any bearing on this analysis. So long as the Plaintiff's cl 7.2 termination was valid, the point at [30] above would still stand. Applying Prof Lehmann's view, the Defendant cannot say that it would, "in the normal course of events", have earned profits after the date of termination. The normal course of events would simply have been the end of the 2016 DA on 30 April 2017. On Prof Grigoleit's view, assuming that the Plaintiff breached the 2016 DA, but nevertheless validly invoked cl 7.2, the profits lost by the Defendant after 30 April 2017 would have been lost irrespective of the Plaintiff's breach. It thus cannot be said that the profits would have accrued "without the liability event".

33 The Plaintiff makes a similar submission on the basis of the minimum performance principle as applied in the context of distributorship agreements in *Silberline Asia Pacific Inc v Lim Yong Wah Allan* [2006] SGHC 27 at [12] and

---

53 Lehmann's Report at paras 38–40.

54 Grigoleit's Report at paras 49–52.

55 Grigoleit's Report at para 53.

[13].[56] In essence, this principle limits the recovery of damages by assessing it through the lens of what is least costly or most beneficial to the party being sued. Here, that is the Plaintiff, and its least costly method of termination would have been giving six months' notice under cl 7.2 of the 2016 DA. This is a suitable alternative analysis to the above.

34 Accordingly, if the Plaintiff's First Termination Notice had been validly issued, the Defendant would – at most – be able to recover: (a) any profits lost on or before 30 April 2017; and (b) damages for other losses suffered (*ie*, other than lost profits), whether before or after 30 April 2017 so long as they can be proven to have been caused by the Plaintiff's breach(es) of contract. As regards (b), the Defendant does not plead that it suffered any other head of loss.[57] In respect of (a), however, the Defendant's claim for lost profits does include profits which were *specifically* lost during the six-month notice period ending on 30 April 2017.[58] This aspect of its claim stems from its allegation that the Plaintiff halted product deliveries in October 2016 (see [17(b)] above).

35 Following the termination, the Plaintiff did not deliver most of the Defendant's orders placed between July and December 2016, or delivered them late.[59] This, the Defendant avers, caused it to suffer ₩3,678,138,396 (around €2.8 million) in lost profits between October 2016 and April 2017, from being unable to meet the full extent of its customers' orders.[60]

---

56 PCS at paras 469–477.

57 D&CC at para 62 as a whole.

58 D&CC at paras 38–41 and 62(a).

59 D&CC at para 41 read with appendix 1.

60 D&CC at para 62(a) read with appendix 2.

Second step: The plaintiff's breaches of contract

36 I turn now to the second step of the Defendant's case in the counterclaim. It is premised on the successful footing of its first step (the importance of which is emphasised above), *ie*, that the Plaintiff's First Termination Notice did not validly trigger the termination of the 2016 DA. The effect of the success of the first step is that, as on 25 October 2016, this contract would not have ended on 30 April 2017. Rather, it would have continued running "for an indefinite period of time", pursuant to its cl 7.1.[61]

37 On this footing, the Defendant points to the above-mentioned breaches of contract (see [17]) and claims: (a) that those breaches were repudiatory; (b) that it gave the Plaintiff ample opportunity to cure those breaches in December 2016 and January 2017 in accordance with cl 7.5;[62] (c) that the Plaintiff did not cure its breaches; and thus, (d) on the basis of these repudiatory breaches, the Defendant was the party that was entitled to terminate the 2016 DA. This termination – if valid – was effected immediately, by a notice issued on 3 February 2017 (the "Defendant's Termination Notice").[63]

38 Thus, the Defendant avers that it has suffered lost profits flowing from the Plaintiff's repudiatory breaches of contract, which ultimately forced it to terminate the 2016 DA on 3 February 2017. Put simply, the essence of the Defendant's counterclaim is that, had the Plaintiff not acted in the way it did, the parties' contractual relationship would not have ended, and it would have continued making profits from the distribution of the Haribo Group's products for the *indefinite period* the 2016 DA could have run. This accounts for why, as

---

61 DLOD 2, clause 7.1.

62 D&CC at paras 45–46; DLOD 183 at pp 2–3; DLOD 223 at p 1.

63 D&CC at para 17; DLOD 227.

stated at [6] above, the profits which the Defendant claims to have lost amount to a very substantial sum: ₩51,040,949,786, or around €39.8 million from May 2017 onwards (*ie*, not including the losses suffered during the six-month notice period ending on 30 April 2017: see [35] above).[64]

39 Unsurprisingly, the Plaintiff disputes every aspect of the counterclaim. First, it claims not to have committed any of the contractual breaches on which the counterclaim is premised.[65] Second, even if these breaches were committed and are established, it claims that they are not actionable on the basis of the SCA as well as certain terms of the 2016 DA.[66] Third, even if these breaches are found to be actionable, it claims that the quantification of the Defendant's lost profits is based on incorrect assumptions and unsupported by evidence.[67]

40 As suggested at [19], the Plaintiff's first point overlaps substantially with its case that it did not exercise cl 7.2 in violation of sections 138, 226, or 242 of the BGB. In essence, in the course of proving that it did not act in breach of the 2016 DA, the Plaintiff also showed that the provisions of the BGB were not violated. This is logical – the absence of breaches on the part of the Plaintiff would support the conclusion that its cl 7.2 termination was not contrary to good morals, unlawful chicanery, or objectionable according to the standards of good faith and fair dealing.

41 There is, however, a more specific and important point which arises from the Plaintiff's case that it did not – as a matter of fact – commit any breaches of the 2016 DA. On the basis that it did not, the Plaintiff disputes the validity of

---

64 D&CC at para 62(b) read with appendix 3.

65 R&DC at paras 22B(a)–(b), 22D, 24–25, 40A–40B, and 42.

66 R&DC at paras 22A(b)–(d), 22B(c), 22D, 23(e) and 43.

67 R&DC at paras 15 and 43; PCS at paras 481–522.

the Defendant's Termination Notice, and takes the position that such notice was invalid as there was no cause for the Defendant to terminate the 2016 DA with immediate effect.[68] Indeed, beyond its alleged invalidity, the Plaintiff submits that the absence of actual cause rendered the Defendant's attempt at termination, wrongful. Such wrongful termination was then *itself* cause for the Plaintiff to terminate the 2016 DA immediately,[69] which it did by way of a notice issued on 9 February 2017 (the "Plaintiff's Second Termination Notice").[70] Of course, the Defendant disputes the legal effect of the Plaintiff's Second Termination Notice and claims that the 2016 DA was simply terminated by its notice on 3 February 2017.[71]

42 This point is worth emphasising because the validity of the Plaintiff's Second Termination Notice – on top of the First Termination Notice – has a further bearing on the quantification of the Defendant's lost profits. This is because, if I find that the second notice is *also* valid, in line with my reasoning at [30] above, the Defendant's counterclaim would be cut off on the earlier date of 9 February 2017, rather than 30 April 2017. This would in turn further reduce the amount of lost profit which the Defendant can claim for the six-month notice period (see [35] above).

43 With the parties' broad cases, as well as the remedial significance of the Plaintiff's Second Termination Notice in mind, I turn to the facts of this case and the key factual matters in dispute. I did not, in this section, granularly set out the parties' cases as summarised at [37] and [39] above. This is because,

---

68 R&DC at paras 12–13.

69 R&DC at para 12(b).

70 DLOD 230.

71 D&CC at para 51.

without knowing the factual background giving rise to this suit, the breaches of contract alleged and denied will be difficult to appreciate.

The facts and key matters in dispute

44 The background to this matter comprises six events or series of events which I will describe chronologically: (a) the formation of the 2014 DA; (b) the disputes which arose during the 2014 DA; (c) the apparent resolution of these disputes by the SCA and the concurrent formation of the 2016 DA; (d) the disputes which continued into or arose during the 2016 DA; (e) the Plaintiff's decision to terminate the 2016 DA in light of these disputes; and (f) the events after the Plaintiff's First Termination Notice.

Formation of the 2014 DA

45 On the Defendant's account, from around September of 2006, it was the "sole and exclusive" distributor for Haribo Group's products in South Korea.[72] The parties, however, did not have a formal written agreement until they entered into the 2014 DA. On Mr Hahn's account, there was never a need for the parties to have a written agreement, as their contractual relationship had been a good one even without such formalities (at least until the disputes raised at [57] below arose).[73] The 2014 DA therefore, according to him, was not entered to address any lack of clarity as between the parties. Rather, it was needed because of the presence of a significant number of parallel imports into South Korea, which made it necessary for the Defendant to assure its customers that it was still Haribo Group's official distributor in South Korea.[74]

---

72 DAEIC at para 7.

73 DAEIC at paras 8 and 9.

74 DAEIC at para 10; DLOD 25.

46 On the Plaintiff's side, Mr Karpozov was not involved in negotiating or executing the 2014 DA. On that basis, he accepts that he is not in a position to give evidence on *why* the parties entered into the 2014 DA.[75] Nevertheless, this is not a significant gap in the narrative because the Plaintiff does not dispute that it had business dealings with the Defendant since 2006;[76] nor are the terms of the 2014 DA (save for the one discussed immediately below) in issue. As such, the circumstances surrounding the formation of the 2014 DA, as well as the terms of the 2014 DA need not be scrutinised extensively.

47 The only matter which needs to be examined somewhat closely is the Defendant's assertion that it was the "sole and exclusive" distributor for the Haribo Group's products in South Korea under the 2014 DA and before.[77] The Plaintiff does not accept this. Its position is there was no exclusivity under the 2014 DA,[78] and that the Defendant was only appointed the "sole and exclusive" distributor for South Korea under the 2016 DA,[79] where such words were expressly used in cl 1.1 for the first time.[80]

48 At trial, the parties made much of this. During his cross-examination of Mr Karpuzov, counsel for defendant, Mr Vijayendran SC, took pains to suggest, by referring him to the correspondence between the parties, that exclusivity had existed since 2006 or at least under the 2014 DA.[81] Mr Chou, counsel for plaintiff, placing emphasis on the text of the 2014 DA – or more accurately, the

---

75 Notes of Evidence ("NEs") 2 Jul 2020 at p 42, lines 3–14.

76 PAEIC at para 8; NEs 3 Jul 2020 at p 148, lines 6–16.

77 NEs 2 Jul 2020 at p 27, lines 2–14.

78 NEs 2 Jul 2020 at p 19, line 22 to p 20, line 14; NEs 3 Jul 2020 at p 152, lines 22–24.

79 PAEIC at para 11.

80 DLOD 2, clause 1.1.

81 NEs 2 Jul 2020 at p 19, line 22 to p 29, line 20.

absence of the words "sole and exclusive" – did the opposite during his cross-examination of Mr Hahn.[82]

49 This dispute about the facts was not made easier to resolve by Mr Chou erroneously conceding in his lead counsel's statement that the Defendant was the exclusive distributor under the 2014 DA.[83] His error led to a discussion on the status of lead counsel's statements, during which Mr Chou essentially contended that parties are free to renege from concessions made, and positions taken in such statements, as they do not amount to pleadings.[84] Although I agree that lead counsel's statements do not supersede pleadings, I must emphasise that the role of counsel is to *assist* the court in arriving at a decision, *not* to add unnecessary layers of dispute. In fact, counsel hold a unique position. Where they state the factual positions of parties by reference to evidence admitted or to be admitted, especially those of their own client, the court generally accepts the accuracy of such statement. The court's trust in counsel, however, cannot be taken for granted. I therefore take this opportunity to remind counsel to take particular care in ensuring the accuracy of their statements. I would also add that there may well be circumstances in which a statement made in the lead counsel's statement or an opening statement may have been relied upon by the other party in such a manner that it would be unjust to permit the first party to resile from it. I hasten to add, however, that such was not the case here.

50 In any case, despite the parties' efforts, my view is that the attention paid to the issue of exclusivity of the 2014 DA – principally, by the Defendant – was slightly misplaced. Ultimately, its exclusivity is at best, a loosely relevant fact

---

82 NEs 7 Jul 2020 at p 77, line 24 to p 84, line 18.

83 Plaintiff's Lead Counsel's Statement (5 Jun 2020) at p 7, S/N 3.

84 NEs 7 Jul 2020 at p 66, line 11 to p 77, line 22.

on which nothing really turns. To appreciate why I have taken this view, we first need to understand the Defendant's purpose in contending that the 2014 DA was also an exclusive agreement.

51 An allegation the Defendant makes in this case (cross-reference [17(a)] above and [89] below), is that a member of the Haribo Group, Haribo GmbH & Co KG ("Haribo GmbH") (which deals largely with the sales and administration of the Group), had been supporting parallel imports into South Korea from as early as 2012.[85] Relying on certain clauses in the 2016 DA,[86] the Defendant claims that the Plaintiff was obliged to support its investigation into these parallel imports. However, the Plaintiff failed to do so and thus acted in breach of the 2016 DA.[87] It is specifically with respect to this claim, that the Defendant characterises the exclusivity of the 2014 DA as a relevant fact.[88]

52 This characterisation, however, overstates its relevance. The crux of the Defendant's allegation is that the Plaintiff failed to assist it in investigating Haribo GmbH's alleged support of parallel imports. Such assistance was only sought after the Defendant discovered that Haribo GmbH had been supporting and supplying parallel importers in August 2016,[89] three months after the 2016 DA had been entered into. As such, the existence and breach of such a duty should plainly be determined by reference to the 2016 DA, which the Plaintiff accepts was an exclusive agreement.

---

85 D&CC at para 34A.

86 DLOD 2, clauses 8.8 and 8.9.

87 D&CC at para 59, Particulars, sub-para (a).

88 DCS at paras 105 and 108–114.

89 DAEIC at para 37.

53 From this, it is clear that, the issue of whether the parties' agreements prior to the 2016 DA were also exclusive, is not particularly salient. Even if the Defendant proves that its relationship with the Plaintiff was exclusive before the 2016 DA, to make anything of this, it will also need to show that the Plaintiff breached the relevant pre-2016 DA agreement. Even then, this would still not be directly relevant to the actual issue stated above. It would only be indirectly relevant to the extent that it informs the Plaintiff's motives behind its alleged refusal – in late 2016 – to assist the Defendant's investigation.

54 Indeed, this is precisely how the Defendant proposes to make use of the evidence. It suggests that the Plaintiff "historically courted other distributors in South Korea", and points to a portion of Mr Karpuzov's testimony[90] where he stated that, because the 2014 DA was not exclusive, he had asked his colleagues to "find a way to work with" other distributors.[91] This, Mr Karpuzov said, was a way to increase the volume of sales made by the Plaintiff and thus, its profits. Relying on this, the Defendant submits that the Plaintiff, "in the pursuit of greater profits, was ready to engage with other distribution companies".[92] In fact, given its "demonstrable readiness to breach the exclusive distribution agreement it had with [the Defendant] and polyamorous approach towards parallel distributors, it is thoroughly unsurprising that [the Plaintiff] was in the same spirit unwilling to provide any assistance to [the Defendant]".[93]

55 I will return to the question of whether the Plaintiff wrongfully failed to support the Defendant in its investigations of Haribo GmbH's alleged conduct

---

90 NEs 3 Jul 2020 at p 149, line 8 to p 156, line 19.

91 DCS at para 108.

92 DCS at para 109.

93 DCS at para 112.

at [88] below. For now, I will simply observe that, ultimately, the Defendant's allegation needs to be proven by contemporaneous evidence from the time it requested the Plaintiff's assistance in its investigations. For example, Mr Hahn's evidence is that on 30 August 2016, he met with Mr Karpuzov and raised the Defendant's problems with parallel importers.[94] Later, in September and October 2016, he continued to correspond with the Plaintiff's representatives, to no avail.[95] These exchanges are most significant as they directly concern how the Plaintiff responded to the Defendant's request for assistance, and thus, whether it breached its contractual duty to cooperate.

56 Whether the Plaintiff's response is also "thoroughly unsurprising" in the light of past conduct, is entirely ancillary. References to the Plaintiff's past conduct alone is not sufficient to show that it *specifically* refused to support the Defendant's investigations in late 2016. The evidential value of the Plaintiff's alleged past conduct is, as such, minimal. It will only be of some significance if the contemporaneous evidence is equivocal, but not so equivocal that such past conduct cannot do anything to sway the conclusion either way. For these reasons, I do not find it necessary to determine whether the 2014 DA – or the parties' unwritten contractual relationship before the 2014 DA – were exclusive agreements.

Disputes arising during the 2014 DA

57 I turn next to the period following the parties' execution of the 2014 DA in October 2014. For approximately six months thereafter, their relationship as supplier and distributor carried on smoothly. However, sometime in April 2015, one of two issues arose which would ultimately lead to the parties terminating

94 DAEIC at paras 38–39.

95 DAEIC at paras 41–50.

the 2014 DA, executing the SCA (the "settlement and contribution agreement": see [3] above), and entering into the 2016 DA.

58 I will refer these two issues as the: (a) "Misrepresentation Issue"; and (b) "Misdescription Issue". They relate to certain food safety concerns which arose in respect of the Haribo Group's products. Before I set them out, however, it bears noting that – though these were issues which arose whilst the 2014 DA was still in force, and before the parties executed the SCA – they nevertheless form a part of the Defendant's counterclaim based on the 2016 DA.

59 Briefly, the Defendant's case is that these issues went unresolved even after the SCA and 2016 DA were executed; that the Plaintiff remained obliged to resolve them under the 2016 DA, notwithstanding the SCA; and thus, that the Plaintiff acted in breach of the 2016 DA.[96] The Plaintiff refutes these claims on two bases. First, given that they arose during the 2014 DA, they were settled by the SCA.[97] Second, in any event, even if such claims were not compromised by the SCA, the Plaintiff did not breach the 2016 DA.[98] With the relevance of these two issues broadly in mind, I now set them out.

60 Early in April 2015, a consumer purchased the Haribo Group's products from a Costco outlet in South Korea ("Costco"), which was the Defendant's largest customer at the time. The consumer complained that a wood contaminant had been found in one packet of the Haribo Group's products, and threatened to file a formal complaint with the South Korean authorities. Costco informed the Defendant about the complaint, and concurrently enquired about the measures the Haribo Group's production factory had put in place to prevent such

---

96 D&CC at paras 34B–34D.

97 R&DC at paras 22B(c), 22D and 23(e).

98 R&DC at paras 22B(b), 22D and 23(b)–(c).

occurrences. In particular, it queried whether x-ray screenings were conducted to identify contaminants. The Defendant then conveyed this query to the Plaintiff, which in turn, extended it to the manufacturer of the Group's products, Haribo Produktions GmbH & Co KH ("Haribo Produktions").[99]

61 Haribo Produktions responded to the Defendant by way of a letter dated 8 April 2015, stating that it *did* conduct x-ray screenings "to sort out any foreign pieces" (the "Representation").[100] The Defendant claims that this assurance was shared with individuals in the South Korean government, businesses, as well as consumers for a period of "nearly one year", before it discovered – in or around March 2016 – that the Representation was false.[101]

62 The Plaintiff accepts that the Representation was false, and that no *x-ray screenings* were conducted on the Group's products. Its explanation, however, is that the employee who prepared the Representation was mistaken as to the screening process, and that *optical sorters* were (and still are) used instead of x-ray screenings. Mr Karpuzov's evidence is that optical sorters are more effective for the purpose of detecting foreign objects in the products.[102]

63 Nevertheless, irrespective of the claimed effectiveness of optical sorters as compared with x-ray screenings, the pertinent fact is that the Representation was inaccurate. This inaccuracy forms the foundation of the Misrepresentation Issue. It is important to note, however, that the issue is not concerned with this

---

99 DAEIC at para 13.

100 DAEIC at para 14; DLOD 23.

101 DAEIC at para 15.

102 PAEIC at para 69.

inaccuracy *per se*. Rather, it relates to the Plaintiff's alleged failure to cooperate with and support the Defendant's efforts to correct the Representation.[103]

64 This brings me to the Misdescription Issue. Separately, sometime in or around February 2016, the Defendant learnt that large quantities of the Haribo Group's products had been made with a "new recipe" but packaged with foils which did not accurately describe the ingredients used. More specifically, the description was provided in both Korean and German, and although the ingredients were correctly described in Korean, the German description was inaccurate.[104] As a consequence, these products could not be lawfully sold in South Korea.[105]

65 On the Defendant's account, when it informed the Plaintiff that its only option was to return the products, a representative for the Plaintiff asked that it falsify its declarations of the products' ingredients.[106] Naturally, the Defendant claims to have refused this alleged request, and instead issued a voluntary recall of the products with the South Korean Ministry of Food and Drug Safety ("MFDS"). This led to the Defendant being placed under investigation by the MFDS,[107] the fact of which is not in dispute.[108] To add straws to the commercial camel's back, the Defendant claims around this time, also to have discovered the Plaintiff contacting two of its customers, in what it believed to be attempts at making direct sales.[109]

---

103 D&CC at para 34D.

104 NEs 2 Jul 2020 at p 39, line 14 to p 40, line 6.

105 PAEIC at para 76; DAEIC at para 19.

106 DAEIC at para 20.

107 DAEIC at para 21.

108 NEs 2 Jul 2020 at p 40, line 11 to p 41, line 11.

109 DAEIC at para 22.

66 These issues, coupled with its later discovery of the inaccuracy of Haribo Produktion's Representation in March 2016, were what eventually led the Defendant to terminate the 2014 DA with immediate effect on 5 April 2016.[110] In its notice of termination, the Defendant cited the Plaintiff's: (a) instigation and perpetration of illegal food distributorship activities; (b) improper handling of food safety claims in South Korea; (c) approaching of the Defendant's customers in South Korea; and/or (d) instigation of a breach of cl 3.7 of the 2014 DA.[111] For completeness, cl 3.7 of the 2014 DA simply provides that the Defendant is responsible for ensuring products do not infringe any South Korean regulations or trademarks in South Korea.[112]

Settlement of disputes and formation of 2016 DA

67 Following the issuance of this notice of termination, the parties entered into negotiations to resolve their disputes under the 2014 DA, as well as discuss the future of their commercial relationship.[113] The negotiations and discussions were successful, and as stated at [3], they resulted in the SCA and the 2016 DA, both executed on 23 May 2016.[114] These two documents lie at the heart of the present dispute, but I will only set out their key terms from [70] below, when I describe the disputes that arose during the 2016 DA.

---

110 DAEIC at para 23.

111 Plaintiff's List of Documents (14 Jun 2019) ("PLOD") 5.

112 DLOD 1, clause 3.7.

113 PAEIC at para 9; DAEIC at para 25.

114 DLOD 2 at pp 24–25 and 32–33.

Disputes during the 2016 DA

68 As stated at [4] above, even after the parties entered into the fresh 2016 DA, their working relationship remained strained. I will begin by explaining how the Misdescription and Misrepresentation Issues – which led to the termination of the 2014 DA – continued to be sources of tension. Thereafter, I will describe three further issues which arose during the 2016 DA: the "MFDS Inquiry Issue"; the "Parallel Imports Issue"; and the "Product Delivery Issue".

Old disputes: Misdescription and Misrepresentation Issues

69 From the Defendant's point of view, notwithstanding the SCA, the Misrepresentation and Misdescription Issues had not been resolved. The food safety Representation (see [61] above) had not been corrected, and the MFDS investigation resulting from the Misdescription Issue (see [65] above) had not been closed.

(1) The Misdescription Issue

70 As such, early in September 2016, the Defendant wrote to the Plaintiff, asking for a representative to attend in South Korea to assist it in addressing the MFDS's investigation into the *Misdescription* Issue.[115] These investigations, Mr Hahn admits, were "not major", and would likely result in the MFDS finding the Defendant to have inadvertently put out products which could not lawfully be sold. However, he claims that there was a small chance that the Defendant could have been found to have acted wilfully.[116]

---

115 D&CC at para 34C; DLOD 80.

116 NEs 8 Jul 2020 p 34, line 7 to p 35 line 16.

71 The bases on which the Defendant made such request, were cll 3.7, 8.8, and 8.9 of the 2016 DA. These clauses provide:

> **§ 3 Competition, Intellectual Property Rights and Confidentiality**
>
> …
>
> 3.7 The [Defendant] shall be responsible for ensuring that the Products infringe no food safety laws and regulations and food marking and labelling rights in [South Korea]. The [Plaintiff] shall be informed in a timely manner in writing about current and envisaged future changes in such regulations in [South Korea], as soon as the [Defendant] is aware of the same, and any potential non-compliance of Products with food safety laws and regulations and food marking and labelling rights in [South Korea]. The [Defendant] shall update itself regularly on developments in food safety laws and regulations, and food marking and labelling rights, in [South Korea]. The [Defendant] will consult the [Plaintiff] prior to any correspondence with authorities, and any public statements or communication to the press, and prior to any recalls (whether mandatory or voluntary, formal or informal). ***The [Plaintiff] will cooperate with the [Defendant] in good faith and provide support to ensure compliance with food safety laws and regulations and food marking and labelling rights in [South Korea] in a timely manner***.
>
> …
>
> **§ 8 Miscellaneous Provisions**
>
> …
>
> 8.8 Neither the [Plaintiff] nor the [Defendant] will conduct itself in a manner that is likely to destroy or seriously damage or undermine the relationship of trust and confidence with each other and the reputation of the other party or any of the Products.
>
> 8.9 The [Plaintiff] and the [Defendant] have a duty to cooperate in good faith with each other in order to fulfil their obligations under the [2014 DA] (to the extent that such obligations remain outstanding), the [SCA] and [the 2016 DA].
>
> [Emphasis added]

72 In the Plaintiff's response to the request, it cited the SCA and stated that it had no obligation to "take any further liability" for issues which arose during

the 2014 DA.[117] This led to the parties engaging in quarrels over correspondence. On 14 September 2016, the Plaintiff wrote – in a letter to the Defendant – that their contractual relationship was in such a state where they ought to "seriously discuss exit scenarios and reasonable ways to unwind [their] partnership".[118] This in turn, caused the Defendant's Mr Hahn to respond rather angrily in an email on 15 September 2016, where he harshly criticised the conduct of the Plaintiff's representative handling this exchange.[119]

73 Ultimately, no assistance was rendered by the Plaintiff to the Defendant in resolution of this issue. The former's explanation for this is that the latter did not show any evidence that the MFDS had made further inquiries as regards the Misdescription Issue, *after* the execution of the SCA and 2016 DA.[120] Therefore, there was nothing which required its intervention or assistance, insofar as its duties under the *2016* DA were concerned. Indeed, during cross-examination, Mr Hahn accepted that the MFDS did not ask further questions relating to the Misdescription Issue after mid-April 2016.[121] It was an entirely unrelated matter which triggered the Defendant's request on 14 September 2016.[122]

74 On this basis, I accept the Plaintiff's account that there was "no real or live issue"[123] in respect of which it needed to support the Defendant, be it under cl 3.7, 8.8, or 8.9 of the 2016 DA. I emphasise, however, the narrowness of my finding. The parties' relationship was, at this point, quite acrimonious and I do

---

117 DLOD 87.

118 DLOD 89.

119 DLOD 90.

120 PAEIC at paras 120–121.

121 NEs 8 Jul 2020 at p 35, line 21 to p 36, line 18.

122 NEs 8 Jul 2020 at p 37, line 12 to p 45, line 21.

123 PCS at para 186.

not ascribe any blame for that state of affairs. All I find is that the Plaintiff could not have breached its duties of cooperation under cl 3.7 or 8.9 given the absence of an issue in respect of which its cooperation was needed to solve. Correlatively, I also find that there was no breach of cl 8.8. If the Misdescription Issue was not a live one at the time the Defendant made its request for assistance, the Plaintiff's failure to provide assistance surely cannot be construed as conduct that is "likely to destroy or seriously damage or undermine the relationship of trust and confidence".

(2) The Misrepresentation Issue

75 At around the same time the parties butted heads over the Misdescription Issue, grievances regarding the *Misrepresentation* Issue were also being aired. The Defendant claims to have met with the Plaintiff's representatives in April 2016 (before the formation of the 2016 DA), where it requested that the Plaintiff correct the Representation in its 8 April 2015 letter (see [61] above).[124] No follow-up action was taken, and on 20 September 2016, the Defendant sent an email asking that the Representation be corrected.[125] Again, no action was taken, and the Defendant sent another request on 3 October 2016.[126]

76 The Plaintiff's inaction was a sore point for the Defendant. In an email on 3 October 2016, the latter remarked that it considered the Plaintiff's failure to reply, "very negligent and a sign of bad faith".[127] Ultimately, on the Defendant's case, the Plaintiff did not act on the Defendant's request until

---

124 DAEIC at para 17.

125 DLOD 95 at pp 3–4.

126 DLOD 101 at pp 5–10.

127 DLOD 101 at p 5.

23 January 2017,[128] quite sometime after it had issued its First Termination Notice on 25 October 2016.

77 In response, similar to its position in respect of the Misdescription Issue, the Plaintiff avers that there was simply no need for it to have taken any action to correct the Representation. In support of this, it relied on two key points. First, contrary to the Defendant's claim (see [61] above), there was no evidence that it used the Plaintiff's 8 April 2015 letter to assure the MFDS, South Korean businesses, and consumers, of the safety of the Haribo Group's products.[129] Second, the MFDS had not requested the correction of the Representation.[130] Accordingly, the Misrepresentation Issue was not a live one which required the Plaintiff's intervention or assistance.[131]

78 In respect of these challenges, Mr Hahn could not state definitively during cross-examination that the Defendant had shared the Plaintiff's 8 April 2015 letter with anyone other than Costco, which made the original query giving rise to this issue (see [60] above).[132] Further, Mr Hahn also accepted that the MFDS had not made any request for correction. Rather, the Defendant wished for the Plaintiff to correct the Representation voluntarily.[133] On these bases, I accept the Plaintiff's account that the Misrepresentation Issue was not a live one in respect of which the Defendant actually required their assistance. Thus, the Plaintiff did not act in breach of cll 3.7, 8.8, and 8.9 of the 2016 DA by failing to issue a letter of correction upon request.

---

128 DAEIC at paras 13–18.

129 PCS at paras 188–189.

130 PCS at para 190.

131 PCS at para 191; NEs 3 Jul 2020 at p 98, lines 8–11.

132 NEs 7 Jul 2020 at p 114, line 15 to p 118, line 16.

133 NEs 14 Jul 2020, at p 61, lines 7–11.

79 Two further points support this finding. First, even on Prof Grigoleit's reading of cl 3.7, the Plaintiff was only obliged "to cooperate in any way necessary *to resolve food safety issues*".[134] The necessary implication of this is that there must have been a food safety issue to resolve. The fact that a false statement was made to the Defendant is not, in my view, sufficient to give rise to such an issue. Based on the wording of cl 3.7, the Defendant would need to show that the misrepresentation caused it to *infringe* "food safety laws and regulations" (see [71] above). Thereupon, the Plaintiff would be obliged to provide support to ensure compliance. Without positive proof that the Representation had been used inadvertently to mislead the public, or that the MFDS had specifically requested a correction, I cannot find that the Plaintiff's specific obligation in cl 3.7 was engaged.

80 Second, in any event, although the Plaintiff does not contest that it only *formally* addressed the Defendant's request on 23 January 2017,[135] it did issue letters on 26 February 2016[136] and 15 March 2016[137] which correctly stated that an "optical sorting machine" was used, rather than "x-ray screenings". These letters were issued in response to other customer complaints that foreign bodies were found in the Haribo Group's products. The Defendant does not dispute that these letters were sent, and that they constitute an "updated version" of the food safety screening process.[138] As such, by the time the Defendant made its request for assistance on 20 September 2016 (see [75] above), it is unclear what

134 Grigoleit's Report at para 58.

135 PAEIC at para 133.

136 Defendant's 2nd Supplementary List of Documents (3 Feb 2020) ("D2SLOD") 15.

137 D2SLOD 17.

138 NEs 7 Jul 2020 at p 126, lines 3–15.

more assistance the Defendant required in correcting the earlier 8 April 2015 letter. It could simply have utilised these newer letters.

81 Before moving to the next section, I should also state clearly that the reasons above apply equally to cll 8.8 and 8.9 of the 2016 DA. One, as regards cl 8.8, I do not find that the Plaintiff's conduct was "likely to destroy or seriously damage or undermine the [parties'] relationship of trust and confidence". If the Misrepresentation Issue was not a live one as on 20 September 2016, I cannot see how the Defendant's trust and confidence in the Plaintiff to fulfil its obligations would have been damaged by its inaction. Two, cl 8.9 obliges the parties to "cooperate in good faith with each other in order to fulfil their obligations under … the [2016 DA]". Clause 3.7 prescribes the more specific obligation to cooperate in good faith to ensure compliance with food safety laws and regulations. If there is no breach of cl 3.7, it follows that cl 8.9 would also not have been breached.

New disputes: MFDS Inquiry and Parallel Imports Issue

82 It is clear from the foregoing that the matters which led to the termination of the 2014 DA – namely, the Misrepresentation and Misdescription Issues – were still areas of friction between the parties. However, they alone did not cause the parties' eventual falling out. This brings me to the three new issues which only arose during the course of the 2016 DA: the "MFDS Inquiry Issue"; the "Parallel Imports Issue"; and the "Product Delivery Issues".

(1) The MFDS Inquiry Issue

83 In sum, as regards the MFDS Inquiry Issue, the Defendant's case is that early in October 2016, it learnt that the MFDS was investigating a complaint made by a South Korean customer earlier in August 2016. The complaint was

that a metallic dental filling had been found in a packet of the Haribo Group's product.[139] The MFDS was, accordingly, requesting an official explanation as to the screening process Haribo Produktions uses to identify foreign contaminants. On this basis, the Defendant wrote to the Plaintiff on 4 October 2016, seeking its assistance in responding to the MFDS.[140] Although this bears resemblance to the Misrepresentation Issue earlier described, it is distinct both in its basal facts as well as the Defendant's precise complaint.

84 As regards the Misrepresentation Issue, the Defendant's averment is that the Plaintiff failed, persistently, to cure the Representation (see [75] above). On the *MFDS Inquiry Issue*, the Defendant's case is that the Plaintiff did not assist it in responding to the MFDS's inquiry, but rather took over the management of the inquiry, and cut it out of the loop.[141] This, the Defendant claims, was contrary to the terms of the 2016 DA – which provided that it was *the Defendant's* role to communicate with the South Korean authorities[142] – and also indicative of bad faith. The Defendant avers[143] that it is indicative of bad faith because it was one of a number of steps the Plaintiff took to cut it off from its functions as a distributor, in preparation for its unlawful termination of the 2016 DA. Another step arises from the Product Delivery Issues (from [93] below).

85 The Plaintiff's response is fourfold. First, that it attempted to cooperate with the Defendant to address the MFDS Inquiry, but that the Defendant did not provide the information needed for such cooperation.[144] Second, that it had sent

---

139 D2SLOD 60.

140 DLOD 104 at p 1.

141 DLOD 104 at p 5.

142 DLOD 2, clause 3.7.

143 DCS at para 103.

144 PCS at para 197(a).

a statement to the Defendant to address the MFDS' inquiry, but this statement was rejected.[145] Third, given the Defendant's response, the Plaintiff was justified in communicating with the MFDS directly.[146] Lastly, that the Plaintiff had kept the Defendant apprised of its communications with the MFDS.[147]

86 Having considered their respective cases, I find that the Plaintiff did not – through its conduct in respect of the MFDS Inquiry Issue – breach cl 3.7, 8.8, or 8.9 of the 2016 DA. My decision is based broadly on the Plaintiff's first three responses.

(a) First, the parties exchanged emails between 4 and 12 October 2016, and these exchanges show that the Plaintiff asked persistently about the product which formed the subject of the inquiry, *ie*, the name of the product as well as its batch number.[148] This, to me, is indicative that the Plaintiff was attempting to cooperate.

(b) Second, on 5 October 2016, the Defendant provided the Plaintiff with the relevant contact point in the MFDS.[149] Although the Plaintiff could have, at this point, cut off the Defendant from the inquiry, it did not. On 7 October 2016, it sent the Defendant a response to the complaint.[150] In fact, after the Defendant expressed concerns about the phrasing of the response,[151] the Plaintiff followed-up with another

145 PCS at para 197(b).

146 PCS at para 197(c).

147 PCS at para 197(d).

148 DLOD 104 at pp 1–2 and 4.

149 DLOD 104 at p 6.

150 DLOD 104 at p 7.

151 DLOD 104 at p 9.

response on 11 October2016.[152] This suggests to me that the Plaintiff was not trying to "usurp"[153] the Defendant's role. To the contrary, it seemed to be cooperating with the Defendant's request.

(c) Third, it was only on 23 January 2017 that the Plaintiff directly communicated with the MFDS to address its inquiry.[154] By this point, the Plaintiff had already issued its First Termination Notice, and seeing as how the MFDS's Inquiry had still not been resolved, it was not in my view, unreasonable for the Plaintiff to take it upon itself to issue a letter to correct any misconceptions about the process its factories use to detect foreign substances. While the Defendant was the appointed distributor for the Haribo Group's products in South Korea, the reputation of the Haribo brand was, ultimately, the Plaintiff's to protect. Further, though cl 3.7 provides that it is the Defendant's responsibility to ensure compliance with food safety requirements, it does not positively exclude the Plaintiff from taking steps in that direction. In fact, the clause obliges the Defendant to "consult the [Plaintiff] prior to any correspondence with authorities, and any public statements or communication to the press" (see [71] above). This statement, in my view, makes it difficult to construe the imposition of responsibility on the Defendant, as excluding the Plaintiff's involvement.

87 Before turning to the Parallel Imports Issue, however, I will explain why I do not accept the Plaintiff's last response. The document on which it relies in support of its claim that it kept the Defendant apprised of communications with

---

152 PLOD 51 and 52.

153 DCS at para 96.

154 PAEIC at para 155; PLOD 188.

the MFDS merely states that it *would* keep the Defendant informed.[155] It does not actually show that it *kept* the Defendant so informed.

(2) The Parallel Imports Issue

88 In relation to the Parallel Imports issue, the Defendant's case as stated at [45] above, is that it was the sole and exclusive distributor for the Haribo Group's products in South Korea since 2006. As an *exclusive* distributor, it was naturally concerned about parallel, unauthorised imports of the Haribo Group's products into South Korea since such imports would affect its business operations. As such, the Defendant regards the Plaintiff's conduct in relation to the Parallel Imports Issue, as a significant breach.[156]

89 Sometime in August 2016, the Defendant claims to have discovered that Haribo GmbH (cross-reference [51] above) had been positively supporting and supplying parallel importers from as early as 2012.[157] It must be emphasised that the allegation is not that the Plaintiff was itself providing such support, but rather its associate in the Haribo Group.

90 In light of this discovery, the Defendant sent an email to the Plaintiff on 20 September 2016, highlighting that such an issue existed.[158] Thereafter, on 3 October 2016, the Defendant asked that the Plaintiff investigate the parallel imports apparently supported by Haribo GmbH.[159] No investigation was ultimately ever conducted into this matter. On the Defendant's case, this was

---

155 DLOD 162 at p 2.

156 DCS at para 107.

157 DAEIC at para 37.

158 DLOD 95 at p 3; DAEIC at para 41.

159 DLOD 101 at p 9.

because of the Plaintiff's lack of willingness, predicated on bad faith.[160] On the Plaintiff's case, there was simply no evidence that Haribo GmbH had been supporting parallel imports into South Korea, and there was thus no basis for an investigation to be commenced.[161]

91 Having considered the evidence, I accept the Plaintiff's account for two reasons. One, the Defendant's request for assistance was premised on its rather bare claim that Haribo GmbH had been supporting parallel importers. It is unclear how it made this discovery, whether there was supporting evidence, or whether its source was even reliable. Accordingly, I agree that more was required to engage the Plaintiff's duty of cooperation. The existence of a duty of cooperation (here, under cll 8.8 and 8.9, but not cl 3.7 as that pertains only to food safety) cannot mean that the obligor must cooperate with all requests, whether grounded or not.

92 Two, as mentioned at [54] above, the Defendant avers that the Plaintiff "historically … actively courted other distributors in [South] Korea".[162] Even if this were true, it is not alone sufficient to prove that the Plaintiff refused to abide by its duty of cooperation for ulterior motives, in breach of contract. I have explained this at [55] and [56] above. For these reasons, I find that there is no evidence that the Plaintiff breached its duty of cooperation under the 2016 DA in respect of the Parallel Imports Issue.

---

160 DCS at para 107.

161 PCS at para 88 and 115(g).

162 DCS at para 108.

(3) The Product Delivery Issue

93 I turn finally, to the Product Delivery Issue. As stated at [17(b)] above, the Defendant's case is that, in response to its requests for assistance for the above-discussed issues, the Plaintiff deliberately halted product deliveries and cancelled production of goods it had ordered. In particular, the Defendant avers that its orders for the months of June to December 2016 (the "Orders") went entirely unfulfilled, or, if they were partially fulfilled, that they were delayed (the "Undelivered Portions").[163] On the Defendant's case, the orders were each supposed to be delivered from October 2016 to April 2017.[164] Before going further, however, I highlight for clarity that the Order for June – despite being described as such – was placed on 14 July 2016 with the Defendant's Order for July.[165]

94 These failures to deliver or delays in deliveries, the Defendant claims, were breaches of cl 9.3 of the 2016 DA, and therefore, that it is entitled to damages for the profits it lost from being unable to fully fulfil its customer's orders by reason of its shortage of inventory. Clause 9.3 provides:

> **§ 9 The [Plaintiff's] Obligations**
>
> 9.3 The [Plaintiff] shall ensure timely delivery of the Products to the [Defendant] in accordance with the timelines as stated in the ongoing and updated Sales Reports transmitted from the [Defendant] to the [Plaintiff] or as mutually agreed upon in writing. The [Plaintiff] shall use reasonable best endeavours to ensure compliance with production lead times to ensure such timely delivery of the Products and shall inform the [Defendant] as soon as possible if such lead times may not be reached. The [Plaintiff] shall bear reasonable and documented additional costs incurred or to be incurred in ensuring such

163 DAEIC at para 59.

164 D&CC at paras 41(a) and 57A; DAEIC at para 58; PAEIC at para 29.

165 DAEIC at para 58; PAEIC at para 29.

> timely delivery, which additional costs are to be agreed upon in advance in good faith.

95 The Defendant's allegation raises a whole host of alternative claims and defences. They can, fortunately, be grouped around two simpler, overarching issues. First, whether the Plaintiff was obliged, in the first place, to deliver the Orders. Second, if it was obliged to deliver, whether it has any alternative basis for its failure to do so.

(A) PLAINTIFF'S OBLIGATION TO DELIVER

96 In respect of the first issue, the Plaintiff chiefly relies[166] on the procedure by which the Defendant is supposed to place orders for products. The minutiae of the ordering process are not salient. That which is crucial, is the application or non-application of appendix 2, condition 2 of the 2016 DA:

> **2. The Offer**
>
> Our offers are subject to change *until the time that the order is confirmed. If we do not issue a written order confirmation, a contractual relationship only comes into being upon our delivery of the goods.* Descriptions and images of our goods are non-binding approximate values subject to a reservation of the right to make changes. If this unreasonably prejudices the interests of the Customer, the Customer will be entitled to cancel the contract subject to the exclusion of rights to claim compensation for damages.
>
> [Emphasis added]

97 Relying on this condition, the Plaintiff avers that it had not given any written confirmation, and therefore, it was not obliged to deliver the Orders. The Defendant has two responses. First, that condition 2 is invalid as a matter of German law; and second, that in any event, the orders *had* been confirmed in writing by the Plaintiff.

---

166 PAEIC at paras 25–44.

98 Having considered the matter, I find that condition 2 is *not* invalid under German law, and consequently that written confirmation is required. However, the evidence, in my view, shows that the Plaintiff had confirmed the Orders. I will address each finding in turn.

99 The Defendant relies on two provisions of the BGB to make its case that condition 2 was invalid, sections 308 and 307(1).[167] They provide:

> **308. Prohibited clauses with the possibility of evaluation**
>
> In standard terms the following are in particular ineffective:
>
> 1. (Period of time for acceptance and performance) a provision by which the user reserves to himself the right to unreasonably long or insufficiently specific periods of time for acceptance or rejection of an offer or for rendering performance; this does not include the reservation of the right not to perform until after the end of the period of time for withdrawal under section 355 subsections (1) and (2);
>
> …
>
> **307. Test of reasonableness of contents**
>
> (1) Provisions in standard terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the term not being clear and comprehensible.

100 In respect of section 308, Profs Lehmann[168] and Grigoleit[169] agree that its application does not directly extend to transactions between businesses ("B2B" transactions). The Defendant's argument can therefore be rejected on this basis alone. Indeed, Prof Grigoleit does not even suggest that it *should* apply, rather,

---

167 Rejoinder (No 2) (21 Jul 2020) ("Rejoinder") at para 25.

168 Lehmann's Report at para 143.

169 Grigoleit's Report at para 87.

his view is that a violation of this provision indicates that the term in question unreasonably disadvantages the other party, contrary to section 307(1).[170]

101 This brings me then to section 307(1). The Defendant's argument is that condition 2 fails the requirements of clarity and comprehensibility. Specifically, such failure stems from fact that the condition empowers the Plaintiff to: (a) take an indefinite period of time to issue a written confirmation; and (b) vary descriptions and images of products, even after written confirmation has been issued. This, the Defendant says, is not tolerable because it is left "hanging on potentially indefinitely".[171]

102 While I can appreciate the Defendant's position, I do not agree that the effect of the condition is quite as dramatic as it suggests. In this regard, I accept Prof Lehmann's view that condition 2 should be read with cl 9.3 of the 2016 DA (text at [94] above). The latter obliges the Plaintiff to use reasonable best endeavours to deliver goods in a timely manner in accordance with the sales reports produced by the Defendant. The result of this, Prof Lehmann states, is that the Plaintiff "does not reserve to itself the right to unreasonably long or insufficiently specific periods of time for acceptance or rejection of an offer or for rending performance".[172] Viewed in this light, it does not appear to me that condition 2 unreasonably disadvantages the Defendant.

103 As regards the Plaintiff's right under condition 2 to vary the description or image of products in a confirmed order, I find this right to be rather limited. Professor Lehmann suggests that this right is necessary for the Plaintiff to

---

170 Grigoleit's Report at para 87.

171 DCS at para 144.

172 Lehmann's Report at para 142; PCS at para 259–260.

update and modernise its packaging.[173] This, in my view, is not a sufficiently wide power to unreasonably disadvantage the Defendant. As such, for these reasons, I find that condition 2 is not invalidated by sections 308 or 307(1) of the BGB.

104 I turn then to whether the Orders were confirmed. The Orders can be sub-grouped into those placed in July to October 2016, and those placed in November and December 2016. In respect of the orders from July to October 2016, the Plaintiff accepts that when the Defendant placed its orders, *pro forma* invoices were issued.[174] Its position, however, is that such invoices do not amount to written confirmation of the Defendant's orders. Rather, they merely acknowledge receipt of the order, prior to the Plaintiff's internal checks as to what can be produced and delivered.[175]

105 I do not accept this. Condition 2 states that "written confirmation" is required, but does not specify a particular form such confirmation must take. It is perfectly possible for written confirmation to take the form of the *pro forma* invoice. If the Plaintiff merely wanted to acknowledge but not confirm the Defendant's order, it could have done so by saying as much. There was no need to issue an invoice in the manner it did. As an aside, I note that the literal meaning of "*pro forma*" – "for the sake of form" – may appear to support the Plaintiff's position. However, I do not think much of this label. The parties were free to title their documents with anything they wished. Their chosen title will not change the underlying inquiry, which is whether the *written confirmation*

---

173 Lehmann's Report at para 137.

174 DLOD 394–405.

175 PCS at paras 266–269.

was given. In fact, contrary to its label, Mr Karpuzov's own evidence suggests that *pro forma* invoices effected confirmation:[176]

> Vijayendran: Let me take you back to your affidavit of evidence-in-chief I think where you also speak to this, paragraph 207 please, the second sentence.
>
> Karpuzov: 207. Yes.
>
> Vijayendran: Do you see that sentence: "HAP was prepared to produce and ship all of the orders placed by AQ up to 2016-TEN." Do you see that?
>
> Karpuzov: Yes.
>
> Vijayendran: So as far as HAP was concerned, Orders SIX to TEN were confirmed, isn't it –
>
> Karpuzov: Yes, correct.
>
> Vijayendran: -- of your own evidence, yes or no?
>
> Karpuzov: Yes, yes, we wanted to ship them all, yes.
>
> Vijayendran: Yes. Confirmed, right?
>
> Karpuzov: ***Okay, if you're looking for the word "confirmed", Mr Vijayendran, you've got it, confirmed***.
>
> [Emphasis added]

106 This appears quite patently to be a concession that the Orders from July to October 2016 were *confirmed in writing*, by way of the *pro forma* invoices. This is further supported by two contemporaneous pieces of evidence.

(a) One, the *pro forma* invoices themselves state at the bottom that the Defendant is to pay for the products ordered by the "3rd working day of [the] next month".[177] If the invoice is not a confirmation of the order, it is odd that it sets out instructions to pay. On the Plaintiff's case, this line would not only be meaningless, but it might also lead the Defendant

---

176 NEs 3 Jul 2020 at p 204, lines 9–25.

177 DLOD 394–405.

to pay when it is not obliged to. Suppose the Plaintiff is correct, and that the Defendant places an order on 14 July 2016. It receives a *pro forma invoice* and on 3 August, it proceeds to make payment. At this point, the Plaintiff has not given what it considers "written confirmation", and it ultimately decides not to give such confirmation. If so, it then needs to return the sum paid. This begs the question, why ask the Defendant to make such payment in the first place? This is commercially illogical, and it supports the conclusion that a *pro forma* invoice must have been the Plaintiff's written confirmation of an order.

(b) Two, in an email from Mr Karpuzov on 23 January 2017, he states, "Please note that we have issued [*pro forma* invoices] for all the orders until order 2016-TEN#4 and *we will deliver all the ordered quantities*".[178] This, in my view, speaks for itself.

107 Accordingly, for the above reasons, I find that the parties entered into binding contracts within the framework of the 2016 DA,[179] and that the Plaintiff was obliged to make delivery on the Orders placed in July to October 2016.

108 In respect of the Orders for November and December 2016, no *pro forma* invoices were issued. However, the evidence suggests that the Plaintiff did not issue such invoices because the parties' payment terms had changed. On 14 December 2016, the Defendant wrote to Mr Karpuzov, highlighting that it had not received a *pro forma* invoice for its November 2016 order. Mr Karpuzov responded on 19 December 2016, querying, "Since the payment terms have been changed from advance payment can you please elaborate why do you need

178 DLOD 195 at p 13.

179 Lehmann's Report at para 148; Grigoleit's Report at para 89.

pro forma invoices?" On 20 December, the Defendant replied, stating that – on that basis – it would simply take it that the Plaintiff has acknowledged its orders for November and December 2016. Mr Karpuzov did not respond.[180]

109 The Plaintiff submits that Mr Karpuzov's response shows that he merely *acknowledged* the orders placed. He did not confirm them.[181] It further relies on an email from the Defendant which stated, "We want [*pro forma* invoices] as a sort of acknowledgment".[182] I do not accept this characterisation in light of Mr Karpuzov's 23 January 2017 email (see [106] above). There, Mr Karpuzov draws a connection between the issuance of *pro forma* invoices and the delivery of ordered quantities. This suggests that the Plaintiff viewed such invoices as the "written confirmation" required for the purposes of condition 2. Thus, when he asked in December 2016 why the Defendant wanted *pro forma* invoices when they were no longer needed, there seems only to be two possible ways to interpret his statement. One, that *pro forma* invoices were no longer needed and, in any case, that the Defendant's orders were not confirmed. Or two, that the *pro forma* invoices were no longer needed, and the Defendant need not ask for them because their orders had, in any case, been confirmed.

110 In my view, the second interpretation of Mr Karpuzov's email is more natural. If he wished specifically to state that the Defendant's orders had not been confirmed, one would expect him to have stated so. By merely asking why the Defendant needed *pro forma* invoices, it seems implied that the orders had been confirmed save without said invoices. The fine distinction which the Plaintiff draws between an "acknowledged" order and a "confirmed" order, in

---

180 DLOD 197.

181 PCS at para 274.

182 PCS at paras 268–269; DLOD 197.

my view, does not hold in this context. On this basis, I find that the Orders for November and December 2016 had also been confirmed, that a binding contract had arisen, and that the Plaintiff was obliged to deliver.

111 Having found that the Plaintiff was obliged to deliver the Orders, I need then to consider the Plaintiff's defences to its late and non-deliveries. Before I do so, however, I note as an aside, that the Defendant sought to rely on a doctrine in German law called "eloquent silence" in respect of Mr Karpuzov's lack of a reply to the Defendant's 20 December 2016 email (see [108] above).[183] This is an exception to the general rule that silence cannot be interpreted as acceptance, and the Defendant raised it to make the argument that his lack of response constituted confirmation. However, given my analysis in the paragraphs above, reliance on this doctrine is unnecessary.

(B) PLAINTIFF'S DEFENCES FOR ITS FAILURE TO DELIVER

112 From the foregoing analysis, the Plaintiff had confirmed the Orders and was therefore obliged to deliver the Undelivered Portions to the Defendant. The question following this is whether it had been absolved from these delivery obligations by any defences. Four were raised by the Plaintiff.

(a) First, that the Defendant had sufficient stock to cover its usual orders until 30 April 2017, *ie*, the date on which the 2016 DA would have ended if the Plaintiff's First Termination Notice was valid (the "Sufficient Stock Defence").[184]

(b) Second, that the Orders for October, November, and December 2016 far exceeded usual sales volumes, and as such, the Plaintiff was

183 Rejoinder at para 25(c); Grigoleit's Report at paras 90 and 92.

184 R&DC at para 15(a)(ii)(2)(B).

not obliged to fulfil them as the Defendant would only have been able to complete sales of the goods *after* 30 April 2017 (the "Unusual Volumes Defence").[185]

(c) Third, that the Plaintiff was not obliged to fulfil the Orders for October, November, and December 2016 on the basis that they were not in accordance with the sales report provided by the Defendant pursuant to cl 9.3 of the 2016 DA (the "Sales Reports Defence").[186]

(d) Fourth, that the Plaintiff had a right of retention which arose as a result of the Defendant's default in payments, and its failure to return the products recalled in connection with the Misdescription Issue (cross-reference [65] above) (the "Right of Retention Defence").[187]

113 For the following reasons, I find that none of these defences apply. As a preliminary point, it should be noted that the burden of proof to establish these defences lies on the Plaintiff. It is not for the Defendant to disprove them. Even though the parties' agreement is governed by German law, it is trite that matters of procedure are governed by the *lex fori* (see, *eg*, *Star City Pty Ltd (fka Sydney Harbour Casino Pty Ltd) v Tan Hong Woon* [2002] 1 SLR(R) 306 at [8] to [14]). It is plain that rules of evidence are matters of procedure, as such, given that the Plaintiff asserts the facts underlying its defences, it bears the burden of proving those facts (s 105 of the Evidence Act (Cap 97, 1997 Rev Ed); *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* ("*Cooperatieve Centrale*") [2011] 2 SLR 63 at [31]).

---

185 R&DC at paras 15(a)(ii)(2)(D) and 25(e).

186 R&DC at paras 15(a)(ii)(2)(C) and 25(f).

187 R&DC at paras 15(a)(ii)(2)(E) and 25(g).

(I) SUFFICIENT STOCK DEFENCE

114 The essence of the Sufficient Stock Defence is that the Defendant had enough inventory to last it until 30 April 2017, and it had no justification for placing more orders which it would not have been able to sell before the end of the 2016 DA. On this basis, the Plaintiff claims it was under no obligation to fulfil the Orders. To make out this defence, the Plaintiff needs to show that the Defendant *in fact* had sufficient stock, and that, *under German law*, it had the legal right to withhold deliveries on this basis.

115 The Plaintiff's submissions were focused on the latter.[188] In this regard, it made two key points. One, that the extent of its obligation under cl 9.3 of the 2016 DA was only to ensure that deliveries were made in accordance with the timelines set out in the Defendant's sales report, or as the parties mutually agreed. It was not to make any and all deliveries at a time requested by the Defendant.

116 Two, that in determining the scope of the Plaintiff's obligation under cl 9.3, the court ought to take into account: (a) the fact that the 2016 DA was coming to an end; and (b) that it is not commercially sensible to allow the Defendant to stock up on products towards the end of the 2016 DA at the expense of the Plaintiff's interests. As regards (a), the Plaintiff suggested, more specifically, that the impending termination of the 2016 DA meant that it was *only obliged* to deliver products that the Defendant would have been able to sell by the date on which the contract was going to end.

117 In my view, the second point is flawed. Commercially, principals and distributors are in business for themselves. The former earns from sales to the

188 PCS at paras 317–325.

latter, and the latter earns from sales to wholesalers and retailers. It is therefore strange for the Plaintiff to argue that it was not commercially sensible for it to sell to the Defendant, the stock it wished to purchase, because the 2016 DA was coming to an end. Whether the Defendant would have been able complete its sales is its own concern. So long as the Plaintiff fulfils its end of the transaction, it is entitled to payment on the goods delivered. If the Defendant is unable thereafter to complete sales before the end of the 2016 DA, it would no longer be entitled to sell the goods pursuant to cl 7.7, and the Plaintiff would not even be obliged to repurchase the balance goods as cl 5.2 provides. Further, if the Defendant attempted to sell its products after the 2016 DA had ended, injunctive relief could be sought.

118 For context, cll 5.2 and 7.7 provide:

> **§ 5 Inventory Holding**
>
> …
>
> 5.2 *At the end of this Agreement, the [Plaintiff's]* ***shall be entitled, but not obliged****, to take back unsold Products from the [Defendant] at the respective prices charged*, but with a maximum of the current market value, together with all reasonable logistical and warehousing costs incurred (properly documented) by the [Defendant] in relation to the unsold Products, whereby the relevant Products must have an outstanding shelf life of at least 12 weeks (best before date).
>
> …
>
> **§ 7 Duration and Termination of the Agreement**
>
> …
>
> 7.7 After the termination of the Agreement the [Defendant] shall no longer act as [Plaintiff's] Distributor in the Territory.
>
> [Emphasis added]

119 I am bolstered in my view by Mr Karpuzov's own evidence that, after the 2016 DA actually ended, it had "1.2 million products for [the Defendant]"[189] which it ended up having to sell at a bulk discount because it faced difficulty in finding a buyer for such large quantities.[190] As I mentioned at [37] above, in December 2016 and January 2017, the Defendant issued notices under cl 7.5 of the 2016 DA, demanding that the Plaintiff make deliveries on some of the Orders. It was only after the Plaintiff failed to do so that the Defendant issued its own Termination Notice on 3 February 2017. Accordingly, if the Plaintiff had simply acted on the demands for delivery, it would not have needed to sit on goods tailor-made for the South Korean market which had not been spoken for. It could have passed on the burden of finding customers to the Defendant. It was by their failure to deliver, that they took on that onus.

120 I therefore do not think these points support the Plaintiff's position that cl 9.3 of the 2016 DA should be construed as conferring on it the right to withhold delivery from the Defendant. Such an interpretation is neither commercially sensible for the Plaintiff, nor the Defendant.

121 In support of the Plaintiff's position, Prof Lehmann cites a case heard by the *Oberlandesgericht Frankfurt am Main* (the Court of Appeal of Frankfurt) which he says decided that "where a distribution contract is coming to an end, the principal is 'at the most' obliged to deliver products that can be sold until this moment".[191] This may well have been the court's view. However, German cases do not create binding precedent, and without an accompanying provision of the BGB which suggests this rule, or at least a closer analysis of the court's

---

189 NEs 6 Jul 2020 at p 42, lines 5–8.

190 PAEIC at para 208.

191 Lehmann's Report at para 126.

reasons for its conclusion – which Prof Lehmann does not provide – I do not accept this as being an appropriate way to construe cl 9.3. Indeed, there is nothing about the text of cl 9.3 which suggests that the Plaintiff's obligation should be relieved in this manner. The ordinary principles of interpretation in German law can simply be applied, and I will turn to them momentarily, after I address a point of expert evidence raised by the Plaintiff.

122 In its written reply submissions, the Plaintiff argues that, since Prof Grigoleit has not contested the above-mentioned Frankfurt Court of Appeal case, this point of undisputed German law "*must* be accepted by this Court".[192] I reject this submission. First, Mr Chou did not question Prof Grigoleit on this case.[193] Second, it is well-established that the court does not blindly accept an expert's evidence simply because it is not contradicted (see *Saeng-Un Udom v PP* [2001] 2 SLR(R) 1 at [26] and [27]; *Sakthivel Punithavathi v PP* [2007] 2 SLR(R) 983 at [76]; and *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2010] 1 SLR 1129 at [22] and [23]). Although the court ought not to substitute its own view for that of an uncontradicted expert, it is entitled to scrutinise the premises adopted by and analytical reasoning of the expert. Here, Prof Lehmann's view that the Plaintiff was, "at the most", obliged to deliver goods which the Defendant would have been able to sell by the end of the 2016 DA, stands on rather shaky ground.

123 His report does not set out the reasoning of the Frankfurt Court of Appeal; whether it stated its decision to be a general rule thereafter applicable to all distribution contracts; the specific words of the principal's delivery obligations in that case, or even what the facts of that case were. Though Prof

---

192 Plaintiff's Reply Submissions (3 Sep 2021) ("PRS") at para 54.

193 See NEs 13 Jul 2020 at pp 6–47.

Lehmann refers to the German courts' decisions as "case *law*",[194] Prof Grigoleit's evidence is that judicial decisions "are not qualified as elements of the law".[195] I therefore cannot simply accept that the Frankfurt Court of Appeal's decision has the legal effect Prof Lehmann suggests. Thus, without more details about the case, it seems that the only suitable course is to interpret cl 9.3 of the 2016 DA using the principles the experts have set out.

124 Before I leave the issue of foreign law, I make one final observation. Although the Plaintiff may not appreciate the significance of its submission that the court *must* accept the uncontradicted evidence of a foreign law expert, it is one which goes to the very heart of how one sees the court's role *vis-à-vis* such an expert. To explain this, I can do no better than quote Evans LJ in *MCC Proceeds Inc v Bishopsgate Investment Trust plc* [1999] CLC 417 at [13] (followed by the Court of Appeal in *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 391, though this passage was not referenced there):

> In our judgment, the answer varies according to the nature of the issue which arises in the particular case and the kind of decision which the trial judge and now the Court of Appeal is called upon to make. Sometimes the foreign law, apart from being in a foreign language, may involve principles and concepts which are unfamiliar to an English lawyer. The English judge's training and experience in English law, therefore, can only make a limited contribution to his decision on the issue of foreign law. But the foreign law may be written in the English language; and its concepts may not be so different from English law. Then the English judge's knowledge of the common law and of the rules of statutory construction cannot be left out of account. He is entitled and indeed bound to bring that part of his qualifications to bear on the issue which he has to decide, notwithstanding that it is an issue of foreign law. There is a legal input from him, in addition to the judicial task of assessing the weight of the evidence given.

---

194 Lehmann's Report at para 5.

195 Grigoleit's Report at para 12.

125 The notion that the Frankfurt Court of Appeal may have relieved principals of their contractual obligations to deliver when their distributorship agreements with their distributors are approaching an end, is not a concept beyond the grasp of this court. I can fully appreciate how this would operate. What I require from Prof Lehmann, is not his bare assertion of such a rule, but rather his proof that the court did in fact lay down such a rule. Such proof could have come in the form of an explanation as to the basis on which such rule overrides the express obligations in the parties' contract, the rationale for the rule (especially in light of my observations at [117] above), and so on. Without this, I cannot accept that such rule applies contrary to the plain words of cl 9.3.

126 Having addressed the Plaintiff's argument on proof of foreign law, I now return to cl 9.3, the full text of which is set out at [94] above. Saliently, it provides that the Plaintiff "shall ensure timely delivery of the Products … in accordance with the timelines as stated in the ongoing and updated Sales Reports … or as mutually agreed upon in writing". The latter half of this sentence can be ignored; it is not either parties' case that they had agreed to any specific delivery dates in writing. We are only concerned with the statement in the first half of the clause.

127 From the evidence, despite cl 9.3, it does not seem that the expected delivery dates were ever stated expressly in the sales reports. Those tendered to the court only contained difficult-to-decipher sales volumes and percentages.[196] In cross-examination, Mr Karpuzov similarly testified that delivery timelines had never been strictly agreed upon or set out. However, he accepted that it was "a rule of thumb" for the Defendant to submit its purchase orders four months in advance of the expected delivery. Although he suggests that this timeframe

196 DLOD 385–388.

was not strict, it was "more or less" followed. Further, he also accepted that the Defendant "more or less" placed orders in accordance with quantities forecasted in its sales reports.[197] The question which arises from this, is whether the parties' practice affects how cl 9.3 should be read.

128 Professor Lehmann explains that the "most important rules of interpretation for private contracts are laid down in [sections] 133 and 157 [of the] BGB. German courts must interpret the parties' declarations in light of their intent. 'Declarations' are, in particular, offer and acceptance, which together amount to a contract. According to [section] 157 [of the] BGB, contracts must be interpreted in line with the requirements of good faith *and any custom existing between the parties*" [emphasis added].[198] This, in my view, squarely addresses how cl 9.3 should be interpreted.

129 The Defendant did not, over the course of their agreement, seem to have expressly set out the expected date of delivery in its sales reports. However, they did eventually come to an understanding that orders would be placed "more or less" four months in advance. Mr Karpuzov's evidence shows that the Plaintiff also regarded this as customary. Accordingly, I find that cl 9.3 obliged the Plaintiff to deliver the Defendant's confirmed orders within approximately four months from the date of the order. It was therefore obliged to deliver the Orders – which were placed from July to December 2016 – from October 2016 to April 2017 respectively.

130 This obligation is a strict one – as contractual obligations are – and the Plaintiff must make *timely* deliveries (as prescribed by cl 9.3), bearing in mind

---

197 NEs 6 Jul 2020 at p 20, line 15 to p 22, line 19.

198 Lehmann's Report at para 11.

the four-month custom. A failure to do so, subject to the Plaintiff's other defences considered below, amounts to a breach of contract. However, an issue which arises – given the slight ambiguity in the word "timely", coupled with the fact that the four-month timeline is described as applying "more or less" of the time – is how far off from four months would be considered "untimely".

131 In my view, a period of four months to the end of the month is reasonable. That is, if the Defendant placed its order sometime in August 2016, the Plaintiff would have had to make delivery by 31 December 2016. This is consistent with the custom of the parties. All seven Orders were placed around the middle of the month, with the Defendant requesting that most deliveries be made four months later, but without any particular date. For example, the Order for August 2016 was placed on the 18th that month, and the request was for it to be delivered by "December 2016".[199]

132 In sum, for the reasons above, I find that the Sufficient Stocks Defence fails, and the Plaintiff was obliged under cl 9.3 of the 2016 DA to deliver within a period of four months to the end of the month from the date on which the Order was placed. On the evidence, that means:

(a) The Orders for June and July 2016, both placed on 14 July 2016, were to be delivered by 30 November 2016;

(b) The Order for August 2016, placed on 18 August 2016, was to be delivered by 31 December 2016;

(c) The Order for September 2016, placed on 13 September 2016, was to be delivered by 31 January 2017;

---

199 DAEIC at para 58; PAEIC at para 29.

(d) The Order for October 2016, placed on 14 October 2016, was to be delivered by 28 February 2017;

(e) The Order for November 2016, placed on 18 November 2016, was to be delivered by 31 March 2017; and

(f) The Order for December 2016, placed on 19 December 2016, was to be delivered on 30 April 2017.

133 On this last delivery, I note that 30 April 2017 is the same day on which the 2016 DA would have ended *if* the Plaintiff's First Termination Notice was valid. However, as I have stated at [121] above, there is nothing about cl 9.3 which suggests that the Plaintiff's obligation to deliver should be limited by the 2016 DA coming to an end. If the Defendant was willing to place and pay for an order it may not have been able to sell, and for which the Plaintiff was under no obligation to buy back, it was free to take that risk. However, liability and quantum are distinct issues. The Plaintiff could have breached its obligation to deliver by 30 April 2017 (subject to my consideration of the other defences below), but that does not necessarily mean the Defendant should be entitled to any damages if it cannot show that it would have been able to profit from this final order within the day. I will return to this at [200] below.

134 Before I turn to the next defence, I make a further observation about the Plaintiff's case. Even if I had preferred their interpretation of cl 9.3, I was not satisfied that the Defendant *in fact* had sufficient stock. Two points in particular suggest this. One, the Plaintiff relies on its own stock calculations of the Defendant's stock levels in March 2017.[200] However, it is not clear how these

---

200 R&DC at paras 15(a)(ii)(2)(B) and (D), read with Further and Better Particulars of the Reply and Defence to Counterclaim (26 Oct 2018) ("F&BP (26 Oct 2018)") at paras 5 and 6(c).

calculations were derived, and whether they are accurate. Mr Karpuzov testifies that the numbers were taken from the Defendant's sales reports,[201] but he does not explain how they correspond to the underlying sales reports.[202] I am therefore hesitant to accept that the quantities accurately reflect the Defendant's actual stock levels.

135 Two, even if these alleged stock levels are accepted as true and accurate, they only explain the Plaintiff's failure to deliver, at the earliest, from January 2017. The Plaintiff did not put forth evidence of the Defendant's stock levels from October 2016. To the contrary, the Defendant points to contemporaneous evidence showing that they had, in November 2016, brought to the Plaintiff's attention that they were short on stock.[203]

(II) UNUSUAL VOLUMES DEFENCE

136 The Unusual Volumes Defence – which only relates to the Orders for October, November and December 2016[204] – is quite closely connected to the Sufficient Stock Defence. Under this defence, the Plaintiff claims that the Defendant's orders for these months increased by anywhere between 38% and 19900%. Relying on the *prima facie* force of these percentage increases, the Plaintiff suggests that it is "undeniable" that the Defendant's orders for these three months was "unusually high".[205]

---

201 NEs 6 Jul 2020 at p 30, line 10 to p 33, line 3.

202 DLOD 385–388.

203 DCS at paras 169–170; DLOD 170.

204 R&DC at paras 15(a)(ii)(2)(D) read with 25(e).

205 PCS at para 295; F&BP (26 Oct 2018) at pp 8–11.

137 On this basis, the Plaintiff claims not to be obliged to make deliveries because the delivered stock "could only be sold off after the end of the 2016 DA".[206] Apart from the Frankfurt Court of Appeal case discussed at [121] above, the Plaintiff also specifically relies on Prof Grigoleit's "concession" that, if an order is "100 times as much" as can be expected from previous dealings, then it is "probably a fair reason" for the Plaintiff to reject an order.[207]

138 I have already analysed the Frankfurt Court of Appeal's decision above. I do not accept that it creates a rule which allows a principal to refuse to *fulfil* orders for this reason. In this regard, I do not think Prof Grigoleit's "concession" meaningfully assists the Plaintiff. If the principal had not wished to accept such an order, it was free to do so upon the distributor's offer to purchase being made. However, once it is accepted – and I have found that the Plaintiff did accept the Orders in this case (see [104] to [110] above) – the parties ought to be bound by their contractual obligations. The Plaintiff has not pointed to any clear rule or principle in German law which suggests otherwise.

139 Apart from the legal difficulty, which is enough to dispose of the matter, the Plaintiff's case also lacks the necessary factual grounding. Similar to the issue I discussed at [134] in respect of the Sufficient Stock Defence, the Plaintiff does not prove how its calculations of the "unusually high" volumes were derived. These values are stated to be based on its "own internal calculation[s]" with no reference to primary documents.[208] Their failure to prove the increase, in fact, is rather curious. The Defendant's monthly sales reports were marked

206 PCS at para 317.

207 PCS at para 294.

208 PCS at p 161, footnote 488.

and admitted,[209] yet, it was not explained how these spreadsheets were to be read, whether the Plaintiff's calculations relied on them, and if so, how. I therefore cannot see how its suggestion that the Defendant ordered usually high volumes, is "undeniable". Given that the burden lies on the Plaintiff to establish its defence, I do not accept its assertion as to the percentage increases in the Defendant's Orders.

140 Connectedly, the Plaintiff also attacks the Defendant's explanation as to why there was an alleged increase in the volume of its orders.[210] Namely, that the Defendant was anticipating growth as a result of new marketing strategies;[211] that increases in the size of orders were meant to accommodate Valentine's and White Day;[212] and that the Defendant had outstanding, unfulfilled orders which it could complete – these stemming from the shortage of goods the Defendant faced when it had to issue a voluntary product recall (see [65] above).[213] These attacks may well be valid, but I need not consider them because it is not even clear to me, in the first place, the exact extent of the increase in the volume of the Defendant's orders (if any). That needs to be established before I can meaningfully consider whether the Defendant's explanations should or should not be accepted.

(III) SALES REPORT DEFENCE

141 By its Sales Report Defence, the Plaintiff claims to have no obligation to fulfil the Orders for October, November, and December 2016, to the extent

---

209 DLOD 385–388.

210 PCS at paras 297–311.

211 DAEIC at paras 89–95.

212 DAEIC at para 96.

213 DAEIC at para 96 read with DCS at para 161.

they were not in accordance with the sales reports provided by the Defendant. The basis of this claim is cl 9.3.[214] I cannot accept this. As set out at [94], the reference to "sales reports" in the clause plainly relates to "timelines", not quantities. There is no basis to read in a right to refuse to make full delivery for confirmed orders (as I have found on the facts), when appendix 2, condition 2 of the 2016 DA expressly states that offers are "subject to change *until the time that [they are] confirmed*" [emphasis added]. Such a reading would create an odd inconsistency within the 2016 DA.

(IV) RIGHT OF RETENTION DEFENCE

142 Lastly, I turn to the Right of Retention Defence. For this, the Plaintiff relies on two provisions: appendix 2, condition 11 of the 2016 DA; and section 273(1) of the BGB. These provide:

> **11. Right of rescission and right of retention (Appendix 2)**
>
> … If the Customer is in arrears with due payments, we may refuse to perform further deliveries until it has fulfilled all its existing liabilities to us. We may also make subsequent deliveries provisional on the advance payment of the purchase price. …
>
> **273. Right of retention (BGB)**
>
> (1) If the obligor has a claim that is due against the obligee under the same legal relationship as that on which the obligation is based, he may, unless the obligation leads to a different conclusion, refuse the performance owed by him, until the performance owed to him is rendered (right of retention).

143 I begin with condition 11. Preliminarily, the Defendant objects to its consideration on the basis that it was not pleaded,[215] and that the Plaintiff only

---

214 R&DC at paras 15(a)(ii)(2)(C) and 25(f).

215 DCS at para 119.

raised section 273(1) of the BGB.[216] I agree that it was not pleaded, and given that: (a) section 273(1) also raises a right of retention; (b) the Plaintiff amended its Reply and Defence to Counterclaim *four* times without thinking to plead the application of condition 11;[217] and (c) the litany of claims and defences already put into issue, I decline to consider whether the condition applies. In fact, given that condition 11 and section 273(1) prescribe different requirements for the right of retention to be invoked, it is incumbent on the Plaintiff to plead each provision on which it relies. For completeness, I highlight that the Plaintiff does not address its failure to plead condition 11 in its reply submissions.[218]

144 As regards section 273(1) of the BGB, the applicability of the defence can be dismissed on the grounds that the Plaintiff did not expressly invoke it at the time it purported to exercise its right of retention. Professor Lehmann's position, which the Plaintiff accepted in a bid to bolster its unpleaded case on condition 11,[219] is as follows:[220]

> Superficially seen, [condition] 11 seems similar to [section] 273(1) [of the BGB], which gives the debtor a right to retain performance where it has a claim against the creditor under the same legal relationship on which its obligation is based. Yet they are not identical. Importantly, under [section] 273(1) a party cannot merely withhold payment but it must also be clear to the other party that such a right is exercised and the amounts involved.

145 Here, the Professor is saying that while the right under section 273(1) of the BGB needs to be expressly invoked, that under condition 11, need not be. It

---

216 R&DC at paras 15(a)(ii)(2)(E).

217 On 10 Apr 2019, 24 Jan 2020, 11 Jun 2020, and 9 Jul 2020.

218 PRS at paras 61–67.

219 PCS at para 333.

220 Matthias Lehmann's Affidavit (14 Feb 2019) at p 25, para 70.

is not the Plaintiff's case that it expressly invoked section 273(1), so on the evidence of its own expert, this defence fails.

Plaintiff's First Termination Notice on 25 October 2016

146 I return now to the chronology of the parties' dispute. It can be seen from the section above that the Misdescription, Misrepresentation, MFDS Inquiry, and Parallel Imports Issues came to a head sometime in early October 2016. The Defendant had raised these issues in an email sent on 3 October 2016.[221] Thereafter, board members of the Plaintiff communicated *internally* that its relationship with the Defendant "[had] reached the end of the road" (the "End of the Road Pronouncement").[222]

147 Shortly after this pronouncement, the following also took place – the Plaintiff: (a) halted delivery of the Haribo Group's products to the Defendant, as well as cancelled planned production of products ordered by the Defendant (this being connected to Product Delivery Issue discussed above);[223] and (b) instructed its employees to cease communications with the Defendant.[224] Then, on 25 October 2016, these issues and disputes culminated in the Plaintiff issuing its First Termination Notice.

Events following Plaintiff's First Termination Notice

148 Given the Defendant's interpretation of the 2016 DA – that cl 8.7 operated as a precondition to the right of termination under cl 7.2 – at the time

---

221 DLOD 101 at pp 5–10.

222 PLOD 43.

223 D&CC at paras 38–41.

224 PLOD 40.

the First Termination Notice was issued, it refused to accept the validity of such notice. Instead, on 31 October 2016, it wrote to the Plaintiff and demanded its retraction.[225] The Plaintiff responded with *its* position that the notice was effective, and that it was not willing to rescind it.[226]

149 Unsurprisingly, given the acrimony between the parties at this stage, the Defendant maintained its position. On 1 December 2016, it then issued a cure notice to the Plaintiff in accordance with cl 7.5.[227] Therein, it requested that the Plaintiff: (a) retract its wrongful issuance of the First Termination Notice; and (b) deliver the Undelivered Portions of the Orders placed in July and August 2016. In other words, the Defendant was insisting on the continuation of the 2016 DA.

150 The Plaintiff, through its lawyers at the time, responded on the deadline stipulated in the cure notice (2 February 2017). Therein, it refuted each of the Defendant's allegations that the Plaintiff had breached the 2016 DA.[228] In light of this response, the Defendant exercised its right under cll 7.3 and 7.5 to terminate the 2016 DA with immediate effect on 3 February 2017 (*ie*, by issuing its own Termination Notice: see [37] above).[229] Thereafter, in what can only be called a "battle of the terminations", the Plaintiff issued its Second Termination Notice on 9 February 2017.[230] As stated at [41] above, this notice was primarily issued on the grounds that the Defendant's Termination Notice was *itself* a repudiatory breach of the 2016 DA, though other breaches – such as the

225 DLOD 153 at p 1.

226 DLOD 153 at p 2.

227 DLOD 183.

228 DLOD 226.

229 DLOD 227.

230 DLOD 230.

Defendant's refusal to make payment on the invoices which form the subject of the Plaintiff's claim – were also cited.[231]

151 Finally, on 17 February 2017, in an attempt to rescue whatever that was left of their thrice-terminated 2016 DA, the Defendant issued a request to the Plaintiff under cl 8.7 to initiate dispute resolution discussions.[232] From then until 20 March 2017, the parties corresponded regarding their dispute and attempted to arrange a meeting.[233] However, the parties remained extremely positional in the manner which they viewed the events which transpired, and ultimately, their attempt at dispute resolution proved unsuccessful.

My analysis and decision

152 In the previous section, I set out the background to this suit and resolved most of the important factual disputes. Saliently, I found that the Plaintiff did not breach its contractual duties of cooperation in respect of the Misdescription, Misrepresentation, MFDS Inquiry, and Parallel Imports Issues. These hooks, on which the Defendant hangs aspects of its claim for breach of contract, therefore fall away. I found, however, that the Plaintiff was obliged by cl 9.3 to deliver the seven Orders placed by the Defendant between July and December 2016; and that none of the defences it raised applied.

153 With these facts and findings in mind, I turn to seven outstanding issues necessary for me to dispose of this suit:

(a) Whether cll 7.5 and 8.7 restrict cl 7.2.

---

231 DLOD 230 at p 2.

232 DLOD 232.

233 DLOD 233; DLOD 235; DLOD 239.

(b) Whether sections 138, 226 or 242 of the BGB were breached.

(c) Whether the Defendant's Termination Notice was valid.

(d) Whether the Plaintiff's breach of cl 9.3 is actionable.

(e) If so, the Plaintiff's liability for such breach.

(f) The proper calculation of the Plaintiff's claim for interest.

(g) Whether the parties' claims can be set off against each other.

Issue 1: Preconditions to clause 7.2

154 The parties' arguments in respect of the alleged preconditions to cl 7.2 are set from [19] and [21] to [27] above. I accept the Plaintiff's position that the right of termination under cl 7.2 is not restricted by cll 7.5 and 8.7 of the 2016 DA.

155 In relation to cl 7.5, my decision is premised on three points. First, as stated at [24], cl 7.3 expressly provides that its application is subject to cl 7.5. This qualification does not appear in cl 7.2. Thus, interpreting the clause *objectively* – which both Profs Lehmann[234] and Grigoleit[235] accept is the general approach German law takes towards contractual interpretation – that must mean that the parties did not intend cl 7.5 to restrict the application of cl 7.2.

156 Second, as an exception to the general objective approach, the Professors agree that where the parties subjectively understand the operation of a term in the same sense, their understanding prevails, even if contrary to the objective

234 Lehmann's Report at para 12.

235 Grigoleit's Report at para 23.

meaning of the term.[236] They refer to this rule using the Latin, *falsa demonstratio non nocet*, which translates literally to "a false demonstration does not harm". In other words, the falsity of the written term *vis-à-vis* the parties' subjective understanding does not vitiate the contractual effect of such understanding. The common law analogy would be the doctrine of mutual mistake, given effect by the equitable remedy of rectification. I cannot find, however, that this applies because there is no evidence that the parties understood cl 7.2 as limited by cl 7.5 at the point at which the 2016 DA was executed.

157 Third, based on the wording of cl 7.5, there is no practical or logical way it can be applied in relation to cl 7.2. The former obliges the *innocent* party to issue a cure notice, and empowers it to terminate with immediate effect if the defaulting party fails to cure its breaches within 45 days (see text at [21] above). It is incredibly awkward to extend this to a case where the allegedly defaulting party is the one seeking to exercise cl 7.2. This further supports the conclusion that the parties could not have subjectively intended cl 7.5 to restrict cl 7.2.

158 I turn next to cl 8.7. The key issue on which the parties engaged, was whether this clause operated in connection with termination or litigation. Professor Grigoleit position is that cl 8.7 served to "avoid the unnecessary escalation of disputes and thereby protect[s] the relationship of trust and the continuance of the contractual exchange".[237] I respectfully disagree. The second half of this statement does not follow from the first. Suppose, for example, that the Plaintiff and Defendant were *not* in dispute about any issue. However, the Defendant wished to bring the 2016 DA to an end to pursue other commercial ventures. If the Defendant is right about cl 8.7, it would have needed to initiate

---

236 Lehmann's Report at para 14; Grigoleit's Report at para 27.

237 Grigoleit's Report at para 71.

dispute resolution processes before it could serve notice of termination under cl 7.2, *even though* there would have been no disputes to resolve. This is wholly illogical.

159 I therefore prefer Prof Lehmann's evidence that the function of cl 8.7 is to avoid litigation, as opposed to termination.[238] This, in my view, is a more coherent reading of the clause as a whole. The first half of cl 8.7 (see text at [21] above) empowers and obliges specified individuals to communicate in good faith to resolve disputes which cannot be settled by the parties' day-to-day management teams. The second half then states that *if* such disputes cannot be resolved within 30 days (or such other period as the parties agree in writing), their dispute may then be submitted to the Singapore High Court.

160 This is reminiscent of clauses which oblige parties to attempt mediation before commencing either litigation or arbitration (compare, *eg*, *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 130 at [7] and [62]). Such clauses are relatively commonplace given the general shift towards cheaper, non-adversarial means of dispute resolution. However, the reading proposed by Prof Grigoleit – which results in incongruity between the first and second half of cl 8.7 – is quite novel. Therefore, absent some evidence that the parties subjectively intended cll 7.2 and 8.7 to be applied together (cross-reference [156] above), I do not accept his view.

161 For these reasons, subject to my finding as regards the Plaintiff's alleged violation of sections 138, 226, and 242 of the BGB (in the next paragraph), the Plaintiff's *First* Termination Notice was valid.

---

238 Lehmann's Report at para 90.

Issue 2: Breaches of sections 138, 226 or 242 of the BGB

162 In light of my factual findings that the Plaintiff did not breach its duties of cooperation in respect of the Misdescription, Misrepresentation, MFDS Inquiry, and Parallel Imports Issues, I find that sections 138, 226 or 242 of the BGB are not engaged, and therefore the Plaintiff's First Termination Notice is not invalidated by the application of any of these three provisions.

163 While I have found the Plaintiff to have been in breach of cl 9.3 of the 2016 DA, this is not in my view sufficient to substantiate allegations that the Plaintiff's conduct was either contrary to good morals, amounted to unlawful chicanery, or objectionable according to the German standards of good faith and fair dealing. I will address each in turn.

164 First, the threshold to be met for a claim of "contrary to good morals" is, expectedly, quite open-textured. However, in support of the manner in which the Defendant has developed its case, Prof Grigoleit suggests that reprehensible motives such as vengeance would suffice.[239] Though I am content to accept that vengeance is sufficient, I do not find sufficient evidence that the Plaintiff acted for this purpose. The first key piece of evidence on which the Defendant relies in support of its claim is the End of the Road Pronouncement in response to its requests for assistance (see [146] above). However, this appears far less an internal plan to exact vengeance than an exasperated declaration that the parties could no longer continue working together, given the acrimony. In fact, having considered the exchanges between the parties, it does seem to me that their communications were far from friendly or collegiate.[240] This exasperation can,

239 Grigoleit's Report at para 120.

240 See, for example, DLOD 87, 89, 90, and 101.

and in my view does, explain why the Plaintiff exercised its right to terminate under cl 7.2 shortly thereafter.

165 The second key piece of evidence is the fact that the Plaintiff failed to complete delivery of the Orders as I have discussed from [93] to [145] above. Though I have found the Plaintiff to have been in breach of contract for this, I do not accept that it was effected for vengeance, or any in other manner contrary to good morals. In my view, the Plaintiff may and probably genuinely believed it was entitled to refuse delivery, and – on the advice of in-house counsel, of which it had the benefit[241] – acted accordingly. Stronger, more direct evidence of a desire to take vengeance, or some malice, is necessary. There is, however, no such evidence. Accordingly, I find that this is not enough to prove that the Plaintiff acted contrary to good morals when it came to exercise its right under cl 7.2 to terminate the 2016 DA.

166 On the second ground, Prof Grigoleit accepts that unlawful chicanery can only be established if the Plaintiff acted for "no other purpose than causing damage to the [Defendant]".[242] On the facts, this is broadly similar to the first ground considered above, in that it alleges that the Plaintiff acted with wrongful or illegitimate intent. As such, for the same two reasons, I also dismiss this allegation.

167 Finally, on the third ground, Prof Grigoleit suggests that a breach of "good faith and fair dealing" "may be based upon the particular requirements of *loyalty to the other party and of trust in the continuance of the exchange*" [emphasis added]. More than this, in fact, he submits that the standards of good faith increase

---

241 NEs 6 Jul 2020 at p 15, line 7 to p 26, line 8.

242 Grigoleit's Report at para 119.

even further when the court is concerned with contracts which have lasted for a long duration.[243]

168 Respectfully, I cannot accept this. The Professor's suggestion seems to lead to the conclusion that section 242 of the BGB operates to impose a fiduciary-like duty to bear in mind the counterparty's interest in preserving the contract, and act in furtherance of that interest, even if it may not align with the actor's own interests. This, in my view, goes slightly too far in the field of contract – even when we take into account notions of good faith in German law.

169 Professor Lehmann presents a much more balanced view. He cites a case in which the principal (also under a distribution agreement) attempted to force the distributor to accept a variation to their contractual terms which would have seriously disadvantaged it. When the distributor refused to do so, the principal exercised its right of termination. The German Federal Court found that the single determinative reason for the principal's termination was the distributor's refusal to accept those varied terms. This, it held, was conduct which violated the standards of good faith and fair dealing.[244] The facts of this case are quite different, and prohibits the kind of conduct which is antithetical to ordinary good faith and fair dealing. By contrast, the kind of conduct Prof Grigoleit says should be proscribed suggests that a kind of *uberrimae fidei* (or "utmost good faith") is required. This is a threshold which the text of section 242 of the BGB does not seem to envision.

170 Furthermore, the mere fact of a lengthy contractual relationship – on which Prof Grigoleit relies to bolster the Defendant's position on the facts – is neither here nor there. He suggests that length is a relevant consideration because a distributor

---

243 Grigoleit's Report at para 121.

244 Lehmann's Report at para 197.

may have undertaken considerable expense in preparing for its role, and a baseless, arbitrary termination would result in these expenses being thrown away.[245] This is not necessarily true. Contrary to the Professor's view, a lengthy relationship may have allowed the distributor to turn a sizeable profit, and the costs incurred may be relatively insignificant in the grand scheme of things. On the other hand, the costs incurred in a short relationship may be proportionately far greater than the amount the distributor may have been able to earn.

171 For these reasons, I also find that that section 242 of the BGB was not engaged, and that the Plaintiff's First Termination Notice was not invalid on this basis.

Issue 3: Validity of Defendant's Termination Notice

172 The validity of the Defendant's Termination Notice and opposingly, the Plaintiff's Second Termination Notice, turns on whether the Defendant had a valid basis to terminate the 2016 DA with immediate effect on 3 February 2017. Given my finding on the Misdescription, Misrepresentation, MFDS Inquiry, and Parallel Imports Issues, the only ground on which the Defendant could have effected termination validly, was the Plaintiff's breach of cl 9.3 in respect of the Product Delivery Issue.

173 As stated at [117] above, distribution agreements operate on the simple premise that principals supply and distributors resell. This premise, in my view, quite plainly suggests that the Plaintiff's breach was a repudiatory breach for which the Defendant could, subject to cl 7.5, terminate the 2016 DA with cause. Afterall, the absence of deliveries breaks down the fundamental purpose of a distribution agreement.

---

245 Grigoleit's Report at para 121.

174 Prof Lehmann argues the contrary position, but his evidence relies too heavily on contingent defences and thus, does not squarely address the issue. In essence, he points to the Plaintiff's claims that the Defendant had sufficient stock; that it was only obliged to use best reasonable efforts to make deliveries in a timely manner; and that the Defendant had ordered in excess of its sales reports. On these bases, he suggests that the Defendant had no cause to terminate the 2016 DA with immediate effect on 3 February 2017.[246] However, as I have found from [112] to [145] above, the Sufficient Stock, Unusual Volumes, Sales Report, and Right of Retention Defences fail, and the Plaintiff was obliged to deliver the Orders pursuant to the timelines set out at [132]. As his submissions do not address the legal position in the event of such a finding, it does little more to aid the Plaintiff's case.

175 I accordingly turn to the application of cl 7.5 of the 2016 DA. The clause is set out in full at [21] above, but for present purposes two portions are salient. One, the clause provides that, the party who wishes to terminate with immediate effect for cause (*ie*, the Defendant) must first give written notice to the other party (*ie*, the Plaintiff), describing the nature and scope of that party's alleged breaches, and demanding that those breaches be remedied within 45 days. Two, if those breaches are unremedied after 45 days, the notifying party may then terminate the 2016 DA with immediate effect.

176 The evidence shows that the requirements in this clause have been met. On 1 December 2016, the Defendant issued a notice to the Plaintiff expressly invoking cl 7.5. In this notice, it cites a number of breaches, including the Plaintiff's failure to deliver two of the Orders placed in July and August 2016.[247]

---

246 Lehmann's Report at paras 244–251.

247 DLOD 183 at pp 2–3.

These orders, as I state at [132] above, ought to have been delivered by 30 November 2016 and 31 December 2016, respectively. Though the August 2016 order was not yet due (and so the Defendant could not demand performance at this point), the July 2016 order *was* overdue.

177 The Plaintiff only responded on 2 February 2017, where it denied each of the Defendant's allegations of breach.[248] It was in light of this response, that the Defendant terminated the 2016 DA with immediate effect by a notice issued on 3 February 2017 which expressly cites cll 7.3 and 7.5.[249] Given: (a) my finding that the Plaintiff was in breach of its obligation to deliver the balance of the Defendant's July 2016 order; and (b) that more than 45 days had elapsed since 1 December 2016, I hold the Defendant's Termination Notice to be valid. Consequently, the Plaintiff's Second Termination Notice was a nullity.

Issue 4: Actionability of a breach of clause 9.3

178 Before I can address whether the Plaintiff is liable for breaches of cl 9.3 of the 2016 DA, the validity of a clause in the 2016 DA purporting to exclude the Plaintiff's liability for the Defendant's loss of profits, must be considered.

179 Appendix 2, condition 7 of the 2016 DA provides:[250]

> **7. Disclaimer**
>
> *All claims for damages* on the part of the Customer against us or our vicarious agents, particularly due to impossibility of delivery for which we are at fault, breach of contractual and pre-contractual duties and claims based on tort, *are excluded, particularly in respect of damage not resulting from the goods delivered by us or for consequential damage such as lost profit or other financial loss. This does not apply in the event that we or*

248 DLOD 226.

249 DLOD 227.

250 R&DC at para 43; DLOD 2, appendix 2, condition 7 read with clause 6.2.

> *our vicarious agents have acted intentionally or with gross negligence*, in cases of death or personal injury and in cases where strict liability is imposed by statute. *The duty to pay damages will however he limited to reasonably foreseeable damages.* Disclaimers and limitations on liability will apply likewise in respect of the personal liability of our employees and vicarious agents.
>
> [Emphasis added]

180 The Defendant contends that this condition is invalid under German law and naturally, the Plaintiff opposes. Their respective positions on this issue can be understood, broadly, as going towards two key questions. First, what are the *types* of liability which can and cannot be excluded under German law. Second, whether the invalidity of *part* of the clause, invalidates the entire clause.

181 In respect of the first question, Profs Lehmann and Grigoleit agree that section 276(3) of the BGB precludes the exclusion of liability for intentional damage.[251] Thus, to the extent that condition 7 excludes or limits liability for intentional damage in any manner, it is invalid. In this regard, it is pertinent to highlight that the third sentence of condition 7 purports to limit the Plaintiff's liability for intentional damages to those which are "reasonably foreseeable". Professor Lehmann concedes that such restriction is prohibited.[252]

182 The Professors, however, disagree on whether German law precludes the exclusion of liability for *simple* negligence (note that gross negligence is not in issue and therefore is not considered). On Prof Lehmann's account, the answer is not a categorical 'yes' or 'no', but rather determined by reference to sections 307(1) and (2) of the BGB:[253]

> **307. Test of reasonableness of contents**

---

251 NEs 15 Jul 2021 at p 83, line 8 to p 87, line 7.

252 NEs 15 Jul 2021 at p 83, lines 8–17.

253 Translation from Lehmann's Report at para 33, footnote 49.

> (1) Provisions in standard terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the term not being clear and comprehensible.
>
> (2) An unreasonable disadvantage is, in case of doubt, to be assumed to exist if a term:
>
> 1. is not compatible with essential principles of the statutory provision from which it deviates, or
>
> 2. limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised.

183 Although Prof Grigoleit agrees that the validity of an exclusion clause which seeks to exclude liability for simple negligence is to be determined by reference to the sections 307(1) and (2) of the BGB, he says that there are "no recent cases" in which the German Federal Court has upheld such exclusion clauses.[254] On this basis, he suggests that, although the BGB does not preclude the exclusion of liability for simple negligence as a category (unlike intentional harm), it is "settled case law" that such clauses are invalid when they pertain to essential (or "cardinal" as the Professor uses) contractual duties.[255]

184 I do not accept Prof Grigoleit's view. Sections 307(1) and (2) seem to prescribe a general test for determining the validity of contractual clauses, and absent a provision prohibiting a specified specie of clause (like section 276(3)), it is logical that general test should simply be applied. This is Prof Lehmann's approach,[256] and I prefer it to Prof Grigoleit's. While I appreciate that numerous German Federal Court cases may be aligned in striking down exclusion clauses for simple negligence, accepting that these decisions amount to a general rule is

---

254 Hans Christoph Grigoleit's Note (13 Jul 2021) ("Grigoleit's Note") at para 7.

255 NEs 15 Jul 2021 at p 92, line 17 to p 95, line 25.

256 NEs 15 Jul 2021 at p 108, line 6 to p 109, line 10.

to accept that they override the fundamental inquiry laid down in section 307(1) of the BGB. No doubt, the cases may be useful and significant, but the starting point must be to apply the provisions of the BGB as stated.

185 In any event, applying Prof Lehmann's approach, I find that condition 7 unreasonably disadvantages the Defendant, and therefore falls afoul of section 307(1) of the BGB. More specifically, I find that it limits an essential right of the Defendant which is inherent in the nature of the 2016 DA to such an extent that attainment of the purpose of the contract is jeopardised (*ie*, section 307(2), sub-paragraph 2).

186 Prof Lehmann argued the contrary on two bases. First, he contended that condition 7 only excludes intangible losses, *ie*, a loss of profits. Second, in any event, such exclusion only applies to cases of simple negligence, and does not permit exclusion of liability in respect of damage arising from intentional acts or grossly negligent conduct.[257]

187 I do not agree with his first point. The plain words of condition 7 (see [182] above) clearly excludes "*all* claims for damages", and reference to "lost profits" is made only to illustrate "consequential damage". This has the effect of depriving the Defendant of recourse for all remedies, not just for lost profits. Further, even if I take Prof Lehmann's argument at its highest, I cannot see why "intangible loss" and "lost profits" should be treated lightly when concerned with a *distributorship* agreement. As I have stated multiple times by this point, such agreements are fundamentally simple – the principal supplies goods, and the distributor resells them for a profit. The main loss a distributor suffers when his principal fails to abide by the terms of their agreement, *is lost profits*. Indeed,

---

257 NEs 15 Jul 2021 at p 78, lines 2–20.

this is the case here. Excluding the recovery of lost profits does away with most of what an aggrieved distributor can hope to recover in the event of a breach on the part of his principal.

188 As regards the Professor's second point, while I agree that condition 7 does not entirely absolve the Plaintiff of liability, I think his reliance on the fact that the Plaintiff remains liable for intentional damage and gross negligence is beside the point. The Plaintiff cannot, as a matter of law, exclude such liability in any case. It is not as though the Plaintiff benevolently chose to retain liability when it did not need to.

189 Viewed against the background of these two points, it appears to me that excluding the Plaintiff's liability for simple negligence does limit an essential right of the Defendant. As stated, the claims which the Defendant can feasibly make are likely to be for lost profits, and although other provisions of the BGB protect its interest in cases of intentional damage, such cases would be considerably rarer than those concerning simple negligence. This is particularly so in respect of distributorship agreements, where it is in the principal's interest not to intentionally harm its distributor. Where a distributor suffers damage, it more likely than not arises from his principal's inadvertent rather than deliberate conduct. Accordingly, I find that section 307(1) read with section 307(2), sub-paragraph 2 is satisfied.

190 In light of this, there is no need for me to consider the second issue (see [180] above). I will nevertheless address it briefly. As stated at [181] above, Prof Lehmann concedes that the third sentence of condition 7 is invalid because it seeks to limit the damages recoverable for intentional breaches by imposing a requirement that such damages need to be "reasonably foreseeable". On this basis, Prof Grigoleit, suggests that the invalidity of the second and third

sentence read together, invalidates the whole condition.[258] By contrast, Prof Lehmann argues that this invalidity "does not infect the whole clause" because it stems from a mandatory rule, *ie*, section 276(3) of the BGB.[259]

191 If I had not found that condition 7 is invalid, I would have agreed with Prof Lehmann that the reference to "reasonably foreseeable" damages could have been severed from condition 7. Professor Grigoleit points to "settled" cases in support of his position,[260] but absent the context and the specific rule which the German court was applying, I do not accept that as representing the German law on this issue.

Issue 5: Plaintiff's liability for breach of clause 9.3

192 In light of my finding on issues 1 and 2 above, the Defendant's claim for lost profits *after* 30 April 2017 fails (see [34] above). However, given my finding in respect of issue 3, its claim for lost profits during the six-month notice period (*ie*, until 30 April 2017) is not further cut off after 9 February 2017 (see [41] and [42] above).

193 Accordingly, I will assess the Defendant's counterclaim for lost profits, resulting from the Plaintiff's failure to complete deliveries of the Undelivered Portions by the timelines set out at [132]. Professors Lehmann[261] and Grigoleit[262] agree that damages for breach of cl 9.3 can include lost profits, and that such a claim can only succeed if it can be shown: (a) that the Defendant has suffered a

---

258 Grigoleit's Note at paras 9 and 11.

259 NEs 15 Jul 2021 at p 84, line 18 to p 85, line 1.

260 Grigoleit's Note at para 9.

261 Lehmann's Report at para 38 read with para 161.

262 Grigoleit's Report at para 94.

loss which can be specified precisely; and (b) that such loss is causally connected to the Plaintiffs' breach of contract.

194 In satisfaction of these requirements, I find in favour of the Defendant – that it suffered a loss from the Plaintiff's failure to deliver the Undelivered Portions of the Orders. More specifically, that it lost the profits it *could have* earned had those deliveries been completed in a timely manner, which would have allowed it to make a higher volume of sales before the end of the 2016 DA.

195 The reasons for my conclusion are as follows. As I explained at [117] above, commercially, the Defendant bore the risk of ordering goods which it needed to sell by the end of the 2016 DA. Whether or not it was successful in selling off those goods was not a matter with which the Plaintiff should have been concerned since it was entitled to payment in any event; and it would have been entitled to injunctive relief had the Defendant continued to sell its goods *after* the contract came to an end. On this basis, I find that the Defendant would not have acted against its own interests by incurring debts for purchases on which it had no hope of turning a profit.

196 In this regard, I refer to Mr Hahn's evidence: (a) that the Defendant was anticipating growth as a result of new marketing strategies;[263] (b) that it was also expecting increases in orders for Valentine's and White Day;[264] and (c) that, stemming from the shortage of goods it faced when it had to issue a voluntary product recall, there were also outstanding, unfulfilled orders which it could complete.[265] Seen in the light of the above paragraph, I am content to accept

---

263 DAEIC at paras 89–95.

264 DAEIC at para 96.

265 DAEIC at para 96 read with DCS at para 161.

Mr Hahn's evidence on these business expectations, and that the Defendant *would have* been able to make greater profits had the Plaintiff completed delivery of the Orders.

197 Having accepted Mr Hahn's evidence, the "tactical onus to contradict, weaken or explain away" the fact that the Defendant would have been able to sell the goods – had they been delivered – shifts to the Plaintiff (*Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [59]; also see *Cooperatieve Centrale* at [30] to [32]). The Plaintiff attempts to meet this onus by highlighting that the Defendant has no documentary proof that it could not meet any of its customer's orders *because* of the Undelivered Portions of the Orders.[266] In this connection, it attacks Mr Hahn's evidence that the Defendant would verbally discuss with its customers any foreseeable inability for orders to be met; and thus, those customers would not place orders in the first place. This, the Plaintiff says, "simply beggars belief".[267]

198 I, however, can believe Mr Hahn. Such a practice appears to me to be a sensible one. It avoids disappointing customer expectations, and also serves to maintain good relations with said customers. The purchasers, I am sure, would have appreciated knowing in advance, the quantities of goods which they could expect to be delivered. It would have been more cumbersome for them to place orders with the expectation that they would be fulfilled, only to be later notified that short or no deliveries would be made. Indeed, the annoyance of the Defendant in this very case, reflects the benefit of the Defendant's own practice with its customers.

---

266 PCS at para 454.

267 PCS at para 456.

199 Furthermore, the attack which the Plaintiff mounts on the Defendant's case does not answer the more fundamental point I raise at [195] above. Namely, that it contradicts common sense for the Defendant to place and expect to pay for orders it believed it had no hope of reselling before 30 April 2017. The Plaintiff's submissions do not have an answer to this, and I accordingly find that the Defendant suffered lost profits *as a result of* the former's failure to complete its delivery obligations in a timely manner, as required by cl 9.3 of the 2016 DA. I now turn to the question of quantification. Or, as the Plaintiff puts it in their submissions, having been satisfied of the *fact of* damage, I must now be satisfied as to the *amount*.[268] The most important question in this regard is *how much* of the undelivered goods the Defendant would have been able to sell by 30 April 2017. The more it can prove it would have sold, the more damages it can recover.

200 Of course, the Defendant submits that I should assess its lost profits on the basis that it would have been able to sell all the items, had deliveries been completed. In fact, this is the basis on which their expert on quantification, Ms Teo, proceeded. The Plaintiff, expectedly, refutes this.

201 Ms Teo's approach was to rely on stock and purchase data for 2015 to 2017, provided to her by the Defendant.[269] However, such data, as the Plaintiff points out, was not proven.[270] Indeed, contrariwise, the Plaintiff submits that the Defendant's sales expectations were lower in 2017, and that it would have needed to double its sales from the first nine months of 2016 to fully sell off the

---

268 PCS at paras 481–482.

269 Teo's Report at paras 3.02.6 and 3.02.6; NEs 16 Jul 2020 at p 131, lines 1–23.

270 PCS at para 493.

Undelivered Portions of the Orders if they had been delivered.[271] This, the Plaintiff submits, are "wildly optimistic and unsubstantiated" expectations, citing *JWR Pte Ltd v Edmond Pereira Law Corporation* [2020] 4 SLR 832 ("*JWR*") in support of its argument that such expectations ought not to attract an award of damages.

202 Before I address these arguments, I should state that the quantification of damages is to be determined by Singapore law as the *lex fori* (*Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR 367 at [16]). Now, turning then to the Plaintiff's arguments; my view is that *JWR* does not quite support its case.

203 In *JWR*, the claimant sued its lawyers, Edmond Pereira Law Corporation ("EPLC"), for negligence in respect of the way it rendered legal advice and conducted legal proceedings on its behalf. Those legal proceedings were against a one Helen Lee ("Lee"). It was the claimant's case that Lee represented to it that she was a director of a company called Immunotec Research (S) Pte Ltd ("IRS"), which was the sole distributor of Immunotec products in Singapore. Such products were manufactured by Immunotec Incorporated ("Immunotec Inc"), a Canadian company operating in Singapore. This induced the claimant to enter a distributorship agreement with IRS, to distribute Immunotec products, in Singapore. Subsequently, Lee told the claimant that IRS's name needed to be changed to United Yield International Pte Ltd ("UYI"), which required a new agreement to be executed. The claimant duly did so.

204 After some time, the claimant discovered that the representations made by Lee were false. One, IRS and UYI were distinct companies. Two, neither IRS nor UYI were the sole distributor for Immunotec products in Singapore, as

---

271 PCS at paras 494–495.

there were, in fact, other distributors. Following this discovery, the claimant terminated the agreement and sued Lee and UYI a few years later. This suit was struck out and thus, the claimant brought a claim against EPLC for professional negligence.

205 In the suit against EPLC, it sought to recover the losses it would have been able to recover in its suit against Lee and UYI, had EPLC not been negligent. As to quantity, it submitted a report (prepared by the claimant's own director) which projected the market for Immunotec products. The valuation in this report varied quite substantially from the claimant's earlier positions, and it was in any case, derived by the claimant's own calculations. It was in this context that Aedit Abdullah J remarked that the valuations in the report "were not substantiated … [and] at the very least, wildly optimistic" (at [99]).

206 This is not remotely akin to the present case, where the Defendant sought to commit itself to pay for actual orders. In *JWR*, the claimant put down nothing, and its valuation relied on numbers out of thin air in an attempt to justify the highest possible quantum in its claim for damages. Whereas, here, the very *fact of* the Defendant's Orders suggests that it was ready and able to sell what it had purchased, and could therefore, have turned a profit. Put colloquially, it was ready to put its money where its mouth was, and this, in my view, gives the Defendant's valuation strong ground to stand on. This is unlike the valuation in *JWR*, which was pure, risk-free conjecture.

207 From cl 5.2 of the 2016 DA, the Defendant must have known that the Plaintiff was not obliged to buy back any unsold goods, and from cl 7.7, it must also have known that once the 2016 DA ended, it no longer would have the right to sell unsold goods. At the same time, the Defendant did not need to place any particular volume of orders. If its sales were going to be low, it offends common

sense to think that the Defendant would have been willing to put down money knowing it would not get any back. On this basis, rather than Ms Teo's reliance on historical, unproven data, I accept that the Defendant would have been able to completely sell the Undelivered Portions of the Orders had they been delivered.

208 Indeed, I extend this even to the Order for December 2016, which I have found the Plaintiff was only obliged to deliver by 30 April 2017, the last day of the 2016 DA (see [133] above). The Defendant's Order for December 2016 indicated that it expected delivery sometime in April 2017,[272] and by this point, it was clearly aware that the Plaintiff's position – as stated in an email from Mr Karpuzov on 1 November 2016 – was that its First Termination Notice was "irreversible".[273] This suggests that it was confident in its ability to complete sales for the reasons set out at [196] above, *ie*, improved marketing, Valentine's Day, *etc*, and it may well have been able to pre-sell those goods it expected to receive at the eleventh hour of the 2016 DA.

209 For avoidance of doubt, I am not conjecturing that the Defendant would have been able to sell all the goods delivered, despite an absence of data in support of such a conclusion. The basis of my finding is, analytically, much narrower. I find that the Defendant would not have acted against its own commercial interest in ordering, and demanding the delivery of goods it had no hope of selling before the end of the 2016 DA on 30 April 2017. This, in my view, is a sufficient basis to find – on a balance of probabilities – that the Defendant would have been able to pull off a complete sale. Having made this

---

272 DAEIC at para 58; PAEIC at para 29.

273 DLOD 153 at p 2.

finding, the tactical burden shifts to the Plaintiff to explain why this would not have been possible.

210 In this regard, the Plaintiff makes numerous submissions against the Defendant's ability to completely sell the products.[274] Its three positive points are: One, the Defendant's own records show that sales for the second half were 34% lower than the expectations in its 2015 sales plan.[275] Two, the Defendant adjusted down its own sales forecast in October 2016.[276] Three, the Defendant did not have the structure needed to complete the sale of the Orders.[277] Having considered these submissions, I am not convinced that they tipped the balance back in favour of the Plaintiff.

211 First, none of these submissions address the fundamental query I have. That is, if the Defendant's sales were really so poor, why then would it have placed the orders it did, if it could not come remotely close to reselling them before 30 April 2017. There is no basis for me to think that the Defendant would have acted contrary to its own interests. Second, I do not place substantial weight on the decrease in sales. A consequence of my finding that the Sufficient Stock Defence is not made out (see [134] above), is that the Defendant's lower sales in the second half of 2016 can probably be explained by the fact that they were short on stock. Third, although the Defendant lowered its sales forecasts for January to April 2017 in October 2016, it adjusted them *up* for the months of October to December 2016.[278] The total adjustment for the whole period of

---

274 PCS at para 495.

275 PCS at paras 299 and 464.

276 PCS at para 464.

277 PCS at para 465; PAEIC at para 290(a); NEs 6 Jul 2020 at p 52, lines 5–20.

278 Nicholson's Report at para 4.21, Table 4-3.

October 2016 to April 2017 only amounted to a 6.5% decrease, and I do not find this sufficiently indicative. Lastly, the assertion that the Defendant was incapable of making such volume of sales, without at least some particulars as to the Defendant's lack of capabilities is, in my view, not sufficient.

212 Thus, viewed as a whole, I am satisfied on a balance of probabilities that the Defendant would have been able to completely sell the Undelivered Portions of the Orders, and accordingly, ought to be compensated on that basis. The final question then, is how much profit the Defendant would have been able to make from such sales. This requires a determination of: (a) the revenue which the Defendant would have made from; and (b) the expenses it would have needed to incur in making these sales.

213 In respect of (a), having found that damages ought to be quantified on the basis that the Defendant would have been able to sell *all* the undelivered goods, the issue which stands to be addressed is the *price* at which these goods would have been sold. The Plaintiff submits that the prices should be the *actual* prices of the Defendant's sales from October 2016 to April 2017.[279] It should not be surprising that this position results in a lower unit price, and thus, a lower revenue. By contrast, the Defendant's expert, Ms Teo, suggests that the price ought to be the *average* unit sales price of products sold between January and September 2016.[280] Ms Teo explains that this average price should be preferred because there was an interruption in the Defendant's supply from October 2016 (from the late or non-deliveries), and this would have "tainted" the selling price.[281] The Defendant supplements this explanation with its averment that it

---

279 PCS at paras 510–513.

280 Teo's Report at para 3.06.4 read with NEs 16 Jul 2020 at p 28, line 17 to p 29, line 11.

281 NEs 16 Jul 2020 at p 29, line 9 to p 30, line 7.

"would have had key clients [it] would have needed to protect and selling prices would [thus] be lower". This, it suggests, is a "fair and reasonable explanation" as to why prices dropped after October 2016.[282]

214 I prefer the Plaintiff's position. It would have been straightforward for the Defendant to prove that its prices were *in fact* lowered because it needed to protect its key customers. In this regard, I note that the Defendant intended to call one Lee Jonggun ("Mr Lee") as a witness. Mr Lee was, from May 2016, the Defendant's sales manager, and would have been able to give evidence on its sales operations. However, the Defendant withdrew him as a witness to save time and costs.[283] If called, he would have been able to give evidence on this issue, and there would have been no need for the Defendant to hypothesise on why there was a price decline. Even if the need to protect its key customers is a "fair and reasonable explanation" for the change in price, I cannot conclude as a *matter of fact* that such change was a result of the interruption.

215 On this basis, I will apply the *actual* prices of the Defendant's sales from October 2016 to April 2017. At trial, when the parties dealt with their dispute over quantification during the examinations of Mr Nicholson and Ms Teo,[284] I directed Ms Teo to prepare alternative calculations[285] for each scenario that was in play. Though the Plaintiff makes a specific point to highlight that Ms Teo's calculations are not conceded,[286] it does not actually appear to dispute that her calculations as to *revenue* (*ie*, not including expenses and other costs which it

---

282 DCS at para 218.

283 NEs 7 Jul 2020 at p 61, line 18 to p 62, line 5.

284 NEs 16 and 17 Jul 2020.

285 Summary Matrix of Net Losses by Scenarios (17 Jul 2020) ("DE3").

286 PRS at p 46, S/N 77.

also disputes)[287] may be used to assess the Defendant's losses.[288] Its contention in this regard is a more substantive one, as to the appropriate selling price which should be used and the quantities which the Defendant would have been able to sell. I have already addressed these issues above, and accordingly, I accept Ms Teo's calculation on this: that he Defendant's lost revenue was ₩2,297,856,000 (or around €1.7 million).[289]

216 This brings me then to question (b), the expenses which the Defendant would have incurred in making these additional sales until 30 April 2017. The Plaintiff disputes three categories of expenses. One, administrative expenses such as utilities, rent, wages, employee benefits, travel costs, and so on.[290] Two, the severance pay of employees.[291] Last, what the parties have called "overseas payment fees" which feature in the Defendant's audited accounts.[292] Having considered the experts' evidence and the parties' submissions on these points, I find in favour of the Plaintiff on all categories.

217 On administrative expenses, the key point of dispute between the parties is how these expenses would have scaled against the sales which the Defendant would have made.[293] The Plaintiff's point is simple. It argues that, if the sales of

---

287 PCS at paras 514–525; PRS at paras 90–91.

288 PRS at paras 81–82.

289 DE3, column labelled "Sch 1C", first row under "Head 1". For Ms Teo's explanation on this document, see NEs 17 Jul 2020 at p 6, line 3 to p 11, line 20.

290 PCS at paras 514–515 and 521–522; PRS at para 90(a). The full listing of the individual of administrative expenses can be ascertained from the Defendant's audited accounts: see Teo's Report at p 62, "Schedule 12".

291 PCS at para 520; PRS at para 90(b).

292 PCS at paras 516–519; PRS at para 90(c).

293 NEs 16 Jul 2020 at p 50, line 13 to p 62, line 2.

the Defendant would have increased until the end of the 2016 DA on 30 April 2017, so too would *all* its expenses.[294]

218 Contrary to this view, Ms Teo's original calculations only applied such an increase to six out of the 18 administrative expenses stated in the Defendant's audited accounts (except for the "severance pay" and "overseas payment fees" which are considered separately).[295] She did so on the basis that some of these expenses were fixed, or at least "relatively stable".[296] For example, she treated vehicle expenses as being fixed because, she says, it did not vary significantly after the 2016 DA came to an end. Therefore, it appeared to her to be unrelated to the Defendant's sales activities.[297] Another example is rent, which Ms Teo also treated as a fixed cost,[298] on the basis that it would have been incurred in the ordinary course of the Defendant's business, irrespective of sales. Again, this conclusion relies on the fact that the Defendant's actual rent did not vary significantly from 2016, to 2017 and 2018.[299]

219 I do not accept these characterisations. By relying on the expenses that the Defendant *actually* incurred, Ms Teo seems to be reasoning backwards. She assumes that the lack of a variation after the Defendant ceased to sell the Haribo Group's products, means the unvaried (or lowly varied) expenses are fixed. This may be true at or below the level of the Defendant's sales operations in 2017 and 2018. However, the opposite conclusion, that these administrative expenses would have remained fixed had the Defendant's business expanded to complete

---

294 Nicholson's Report at para 3.38; PCS at para 514.

295 Teo's Report at p 62, "Schedule 12"; NEs 16 Jul 2020 at p 50, line 16 to p 52, line 5.

296 NEs 16 Jul 2020 at p 54, line 7 to p 60, line 3; also see DCS at para 226(a).

297 NEs 16 Jul 2020 at p 54, line 22 to p 55, line 14.

298 NEs 16 Jul 2020 at p 51, lines 16–19.

299 Teo's Report at para 4.07, read with p 62, "Schedule 12".

sales of the Undelivered Portions of the Orders, does not follow. Put simply, Ms Teo's analysis treats such expenses as a ceiling when they could have been a floor.

220 In this regard, I prefer Mr Nicholson's view that it is not realistic for the Defendant to assume that these administrative expenses would have remained unchanged despite the proposed increase in sales.[300] Accordingly, without a granular analysis of why each expense would not have increased – which neither the Defendant nor Ms Teo offers – I find that all the administrative expenses (save for "severance pay" and "overseas payment fees", which I will turn to in a moment) ought to be scaled with the Defendant's increase in sales.

221 I turn next to the question of "severance pay". The issue which arises in respect of this head of expense – which appears in the Defendant's accounts – is straightforward. In essence, the Plaintiff contends that this expense, like the rest of the Defendant's administrative expenses, should scale with its sales.

222 On this, Mr Nicholson suggests that severance pay varies with the number of people the Defendant hires,[301] and in my view, the number of people it hires varies with its volume of sales. The more the Defendant sells, the more people it will need to engage. This seems axiomatic unless some other explanation, such as the automation of the Defendant's processes, exists. There is no such explanation, but the Defendant nevertheless contends that severance pay is an extraordinary expense which may or may not be incurred in a given year.[302] I do not accept this argument, and given that Ms Teo agrees that wages

---

300 NEs 16 Jul 2020 at p 50, line 16 to p 52, line 5.

301 NEs 16 Jul 2020 at p 71, lines 4–11.

302 DCS at para 226(b).

and employee benefits are affected by volume of sales,[303] it does not seem to have a reasonable footing.

223 Finally, the issue in respect of the "overseas payment fees" is whether it ought to be treated as an expense relating to the Defendant's sales of the Haribo Group's products in South Korea. The Defendant's position is that it ought not to be,[304] and the Plaintiff's position is that the Defendant has no evidence which supports such a conclusion.[305] I agree with the Plaintiff on this. The Defendant's sole factual witness, Mr Hahn, took the stand in the first half of July 2020.[306] He did not, either in his affidavit of evidence-in-chief ("AEIC") or his testimony, explain what "overseas payment fees" were, and thus why they were irrelevant to the Defendant's sales of the Haribo Group's products. It was only on 6 August 2020 that Mr Hahn affirmed another affidavit addressing this topic.[307] The Defendant did not ultimately pursue an application to adduce further evidence, and Mr Hahn was not recalled for further cross-examination.

224 For this reason, I decline to take into account Mr Hahn's further affidavit. The Defendant attempts to explain that it did not have an adequate opportunity to respond on this point because it arises from a query first made by Mr Nicholson on 27 May 2020.[308] This argument is, in my view, made in poor form. From the time of the query until Mr Hahn took the stand, the Defendant had more than a month to advise Mr Hahn to file a supplemental AEIC to address the point. He could then have been cross-examined on it by Mr Chou.

---

303 Teo's Report at paras 3.07.01, 3.07.04, and 4.07 read with p 61, "Schedule 11".

304 DCS at para 226(c).

305 PCS at paras 516–519.

306 NEs 7, 8, 14, and 15 Jul 2020.

307 Eric Hahn's (Defendant) Affidavit (6 Aug 2020).

308 DCS at para 226(c).

225 I therefore accept the Plaintiff's submission that "overseas payment fees" should be treated – as with the other administrative expenses – as an expense which would have been incurred in connection with the Defendant's sales of the Haribo Group's products until 30 April 2017. Based on the alternative calculations prepared by Ms Teo, this would take the Defendant's revenue of ₩2,297,856,000 down to ₩1,969,018,000 in profits.[309] To avoid doubt as to the veracity of these calculations, I reiterate that, though the Plaintiff makes a point to state that it does not concede Ms Teo's calculations (see [215] above), it does not actually seem to dispute the numbers she puts forth *if* I prefer the calculations in their favour.[310] Accordingly, I find the Plaintiff liable for the sum of ₩1,969,018,000 in damages for the Defendant's lost profits.

Issue 6: Plaintiff's claim and interests

226 As stated from the outset, the Defendant does not seriously dispute that it received the products which form the subject of the Plaintiff's claim. Having considered the invoices placed into evidence, I am satisfied that the Defendant owes the Plaintiff €1,526,224.76. This comprises the principal invoice sums set out in the table at [228] below, less a credit note dated 20 October 2016 for the sum of €16,958.96.[311] This credit note should be applied to the payments based on a simple first-in, first-out rule.

227 In relation to the Plaintiff's claim for contractual interest, however, I do not accept that they are entitled to interest from July 2016 (see [12] above). Appendix 2, condition 10 of the 2016 DA,[312] clearly provides that interest is

309 DE3, column labelled "Sch 1C", second row under "Head 1"

310 PCS at paras 514–515, 521–522, and also see para 516.

311 PAEIC at para 46.

312 DLOD 2 at p 37.

payable "from the expiration of the time provided for payment". Each invoice is dated and provides that payment is to be made by the "3rd working day of next month". Based on the date of the earliest invoice on which the Plaintiff is claiming,[313] I agree with the Defendant that interest on this invoice is only payable from 5 December 2016 (see [13] above).

228 As such, I find that the Plaintiff is entitled to 8% interest over the rate of 7.12% on each of their invoices, starting from the day after the amount fell due on that particular invoice. The following table sets this out:

Invoice Marking	**Sum of Invoice (€)**	**Date of Invoice**	**Payment Due Date**	**Interest From**
DLOD 258	14,602.92	1 Nov 2016	5 Dec 2016	6 Dec 2016
DLOD 260	17,812.50	5 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 262	5,314.68	10 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 264	58,704.00	10 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 267	60,301.44	10 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 270	60,301.44	11 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 273	31,056.48	11 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 276	1,007.00	12 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 279	8,320.40	12 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 282	68,942.33	12 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 285	55,463.20	12 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 287	56,565.60	12 Jan 2017	3 Feb 2017	4 Feb 2017

313 DLOD 258; also reference PAEIC at para 46.

Invoice Marking	Sum of Invoice (€)	Date of Invoice	Payment Due Date	Interest From
DLOD 289	30,563.52	13 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 292	32,045.00	17 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 295	32,087.50	17 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 298	32,087.50	18 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 301	32,087.50	18 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 304	32,087.50	19 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 307	32,087.50	19 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 310	32,087.50	19 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 313	32,087.50	24 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 318	22,692.00	25 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 321	3,173.76	25 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 323	5,443.20	25 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 326	38,179.29	25 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 329	45,750.00	25 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 331	65,284.55	25 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 334	66,563.20	26 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 336	60,512.00	26 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 339	3,025.60	26 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 342	30,240.00	26 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 345	32,709.50	26 Jan 2017	3 Feb 2017	4 Feb 2017

Invoice Marking	Sum of Invoice (€)	Date of Invoice	Payment Due Date	Interest From
DLOD 349	16,724.70	31 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 352	63,449.37	31 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 355	69,779.00	31 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 358	49,187.14	31 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 361	51,300.00	31 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 364	57,797.50	31 Jan 2017	3 Feb 2017	4 Feb 2017
DLOD 367	13,615.20	1 Feb 2017	3 Mar 2017	4 Mar 2017
DLOD 371	51,897.90	2 Feb 2017	3 Mar 2017	4 Mar 2017
DLOD 373	70,246.80	2 Feb 2017	3 Mar 2017	4 Mar 2017

229 After accounting for the credit note by deducting it from the sums payable in respect of the first two invoices above, the Defendant owes the Plaintiff: (a) €1,390,464.86 with contractual interest payable from 4 February 2017; and (b) €135,759.90 with contractual interest payable from 4 March 2017. I shall deal with the issue of the date to which the contractual interest is payable after dealing with the issue of the set off below.

Issue 7: Setting off the parties' claims

230 Professors Lehmann[314] and Grigoleit[315] are in agreement as to the requirements for set off under German law. These are provided by sections 387

314 Lehmann's Report at paras 252–256.

315 Grigoleit's Report at paras 142–145.

and 388 of the BGB, and the effect of a successful claim to set off is stated in section 389:

> **387. Requirements**
>
> If two persons owe each other performance that is substantially of the same nature, each party may set off his claim against the claim of the other party as soon as he can claim the performance owed to him and effect the performance owed by him.
>
> **388. Declaration of set-off**
>
> Set-off is effected by declaration to the other party. The declaration is ineffective if it is made subject to a condition or a stipulation as to time.
>
> **389. Effect of set-off**
>
> The effect of set-off is that the claims, to the extent that they correspond, are deemed to expire at the time when they are set against each other as being appropriate for set-off.

231 Professor Lehmann does not appear to dispute that the performance owed by the parties were of "substantially the same nature". I would not think otherwise. Although the Plaintiff's claim arises in debt and the Defendant's in damages, they are both contractual in nature. The Professor does, however, suggest that section 388 is not satisfied on the grounds that the Defendant's declaration of set off "did not specify the counterclaim … with sufficient precision".[316] I do not agree with this view. In three letters sent to the Plaintiff on 17 February 2017,[317] 3 March 2017,[318] and 12 February 2018,[319] the Defendant expressly stated that it would be setting off its debt with its claim for breach of contract. In fact, in the second of these letters, the Defendant

316 Lehmann's Report at para 179 read with para 256.

317 DLOD 232 at p 2.

318 DLOD 236 at pp 1–2.

319 DLOD 242 at p 1.

specifically writes that it is "quantifying the full estimate of [its] losses and damages".

232 In my view, this is a sufficient declaration of set-off. It cannot be that a party must present its precise calculations of loss and damages simply to trigger the right to set off, which is what Prof Lehmann suggests is required.[320] This is a rather extreme view, given that he accepts – as a matter of German law – that an explicit declaration is not necessarily required. A set off, he says, can "follow from the circumstances".[321] If an explicit declaration is not even needed, it follows, *a fortiori*, one given explicitly need not be so specific as to disclose the particulars of the cause of action that will be brought, and the quantification of the relief to be sought. Certainly, it is difficult to imagine how such specificity would feature in an implicit declaration. In this respect, I find Prof Grigoleit's evidence as to the state of German law, more convincing;[322] and I hold that it is enough for the party receiving the declaration to know the character of the claim and the type of relief sought.

233 The second, more substantive contention which Prof Lehmann makes is that set off cannot be invoked because the Defendant has to prove: (a) that it suffered a precise pecuniary loss; (b) that such loss was caused by the Plaintiff's breach of contract; and (c) that the Plaintiff acted intentionally or in a manner that was grossly negligent.[323] These objections only stand if I did not find against the Plaintiff on these matters. Specifically, that the Defendant did in fact suffer damage and that such loss was caused by the Plaintiff (at [196] above); and that

---

320 Lehmann's Report at para 257.

321 Lehmann's Report at para 255.

322 Grigoleit's Report at para 154.

323 Lehmann's Report at para 257.

appendix 2, condition 7 of the 2016 DA is not invalidated by section 307 of the BGB (at [189] above). However, given my findings, these objections peter out. Indeed, the Professor accepts that, if these requirements are met, "the [Defendant's] declaration of set off results in the extinction of the Plaintiff's payment claim … [and] the Defendant would thus not be obliged to make the respective payments".[324] Accordingly, I find that the Defendant is entitled to set off the Plaintiff's claim.

Other issues

234 It will be observed that my analysis does not address two issues which were raised by the parties. First, whether the SCA settled the Misdescription, Misrepresentation, MFDS Inquiry, and Parallel Imports Issues (see [39], [58] and [59] above). Given my findings that the Plaintiff did not commit breaches in respect of these issues, the point was moot.

235 Second, the manner in which the issues surrounding the quantification of the Defendant's lost profits *after* 30 April 2017 should be resolved. In light of my firm finding that the Plaintiff's First Termination Notice was valid (see [154] to [171] above), there was no need for me to consider these issues. The Defendant was simply not entitled to damages after this date because, causally, any losses of profit it suffered thereafter, could not be attributable to a breach of contract on the part of the Plaintiff.

Conclusion, orders, and observations on set off

236 The Plaintiff had prayed for contractual interest to apply until the date of payment, but I think that it is just, on the facts of this case, to terminate the

---

[324] Lehmann's Report at para 258.

contractual interest at an earlier date for the following reasons. First, the contractual interest rate of 15.12% is rather high, and in the context of the present-day interest rate environment, it behoves this court to be cautious in making any such award. Second, I have found that the Defendant is entitled to a counterclaim that is of a similar order of magnitude to the Plaintiff's claim. After setting off the counterclaim, the sum for which the Defendant is indebted to the Plaintiff would be greatly diminished. In these circumstances, I am minded to exercise the discretion vested in me under s 12(1) of the Civil Law Act (Cap 43, 1999 Rev Ed) to order the Defendant to pay the contractual interest rate on the Plaintiff's claims up to 30 August 2018, the date of filing of the Defence and Counterclaim, with interest thereafter to run at 5.33%. I also order interest at 5.33% on the sum ordered under the Counterclaim to run from the same date, 30 August 2018.

237 For the foregoing reasons, I allow the Plaintiff's claim for the principal sum of €1,526,224.76 and its claim for contractual interest of 8% over the base BGB-prescribed interest rate of 7.12% (*ie*, 15.12%) for the following sums from the following dates: (a) €1,390,464.86 with interest payable from 4 February 2017 until the date of the Defence and Counterclaim, 30 August 2018; and (b) €135,759.90 with interest payable from 4 March 2017, also until the date of the counterclaim. In respect of (a), there are 573 days between 4 February 2017 and 30 August 2018, both dates inclusive. As such, interest amounts to €330,045.31. For (b), there are 545 days and interest payable amounts to €30,649.75.

238 Thereafter, from the day after the counterclaim, 31 August 2018, to the date of this judgment, 2 December 2021, I order that the Plaintiff shall only be entitled to interest at the usual rate of 5.33% on the full principal sum of €1,526,224.76, as provided for in para 77(9) of the Practice Directions. There

are 1190 days in this period (this takes into account the Leap Day in 2020), and interest amounts to €265,216.05. Thus, in total, *as of the date of this judgment*, the Plaintiff is awarded the sum of €2,152,135.87. I will denote this sum (P_1).

239 On the other end, I allow the counterclaim in part, and find the Plaintiff liable to pay the Defendant ₩1,969,018,000 with judgment interest of 5.33% from the date of the Defence and Counterclaim, 30 August 2018, until the date of this judgment. There are 1190 days in this period, and the Defendant is therefore entitled to ₩342,161,383 in interest. The total award to the Defendant under the Counterclaim is, therefore, ₩2,311,179,383 (which is roughly €1.7 million). I will denote this sum (D).

240 With sums (P_1) and (D) in mind, I turn then to the issue of set off involving a complication concerning currency exchange rates. The starting point is that I order that the parties determine the applicable exchange rate and set off their respective judgment debts on the *date of this judgment*. That is, (D) should be converted to Euro based on the exchange rate on 2 December 2021 and deducted from (P_1). As such, as of this date, the Defendant would only owe the Plaintiff ($P_1 - D$), a sum in Euro, which I will denote (P_2). Thereafter, the Plaintiff would only be entitled to 5.33% interest on (P_2) – as opposed to (P_1) – from the day after this judgment, 3 December 2021, to the date of full payment.

241 As is apparent, (P_1) and (D) are sums expressed in different currencies. The question which calls for an answer in respect of this complication, is whether the date of judgment – as I have decided – is an appropriate date for the Defendant's smaller judgment debt to be converted to Euros and set off against the Plaintiff's larger judgment debt. The crux of the problem which arises in cases like these, where parties have crossclaims for different currencies, is that the underlying value of the plaintiff's claim fluctuates as against the defendant's

counterclaim or set off, and vice-versa. As Charles Proctor, *Mann on the Legal Aspects of Money* (OUP, 7th Ed, 2012) explains, "the date with reference to which the set-off is effected can, of course, have a significant impact on the amount payable, because exchange rates between the relevant currencies may have fluctuated between the date on which the respective liabilities were incurred" (at para 8.20).

242 This is not likely to be a particularly difficult problem to resolve on the facts of most cases. Indeed, in the present case, the date of judgment seems to be the only viable choice because the Defendant's counterclaim only succeeds for a sum lower than the Plaintiff's claim (barring any sudden, wild variations in the exchange rate between the Euro and South Korean Won). The lower sum must clearly be set off against the larger sum, and so, given that the Defendant's counterclaim for *damages* only accrues on the date of this judgment, the earliest a set off can be applied is this date.

243 That said, as there seem to be no local cases which have dealt with this issue, I will endeavour to set out some of the relevant principles for determining the date of set off in cases involving crossclaims for different currencies. I do so by answering three questions which arise from my decision in *this* case: (a) why I applied the date of judgment; (b) why not a later date; and (c) why not an earlier date. Questions (a) and (b) can be addressed together. A later date *could* possibly be fixed, but – absent a good reason for postponing set off – I would suggest, as a matter of principle, that this should not be done.

244 The very function of a set off is, *procedurally*, to extinguish a debt or claim for damages fully or partially. Though the underlying value of set off is derived from a contractual or equitable right, the right to set off as a feature in the litigation process *itself* has independent value because – if successfully

invoked – it enables the judgment debtor to absolve or reduce his liability *notionally* rather than actually. In other words, there need not be a real exchange for the claim against him to be offset. A notional exchange is not always desirable or possible, and this is why, for a set off to be successfully invoked, requirements beyond the basic counter cause of action need be established. As can be seen from [230], this is also the case in German law.

245 The salient question which arises then is how the Defendant may most effectively realise the *procedural* value gained from successfully establishing set off. Given that it is fairly typical for the courts to award post-judgment interest, my view is that the best way to do so, would be to apply the set off *as soon as the right (to set off) arises*. In cases like the present, where the party who pleads set off makes a claim for damages to be assessed, this would be the date of the judgment in which the entitlement to damages is determined. If the set off is delayed, the overall judgment debtor (*ie*, the party with the smaller successful claim) unnecessarily continues incurring post-judgment interest on a principal sum larger than his own judgment debt.

246 Since the right to set off is a notional one which requires no time to execute or enforce, there is no reason for its application to be delayed. Indeed, not only is there no reason to do so, doing so is antithetical to the function of a set off as I have just explained, and also does not accord with its nature as a *defence* (see *Stooke v Taylor* (1880) 5 QBD 569 at 577 and *Gathercole v Smith* (1881) 7 QBD 626 at 628). A defence operates to shield a defendant from liability upon being found to be applicable. It is therefore unprincipled to forcefully hold such shield down upon the conclusion of proceedings, unless, as stated, there are good reasons for doing so.

247 I turn then to question (c) – why should the conversion and set off not be applied earlier? The answer is again, is that there must be a good justification, which may not be easy to find. For this, I turn to the case of *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 ("*Miliangos*"). Most will be familiar with this case, so I can set out what it decided quite simply.

248 The court was faced with a claim for a sum expressed in a foreign currency (but no issue of set off), and it ultimately decided to do away with the "breach-date rule". Originally, where a claim in contract was made for a sum of foreign currency, pursuant to the line of authorities following *Di Ferdinando v Simon, Smits & Co* [1920] 3 KB 409, the breach-date rule provided that the sum had to be converted – before judgment was entered – to the local Pound sterling. The rate of conversion was taken to be that either on the date on which: (a) the debt was payable; (b) the relevant breach of contract occurred; or (c) the damage being claimed was suffered, whichever was applicable. By its decision in *Miliangos*, the House of Lords allowed judgments to be entered for a sum expressed in a foreign currency, and only where it was necessary to execute the judgment in England, would that currency be converted to Pound sterling *on the date which execution is authorised* (at 497H to 498A).

249 In *Indo Commercial Society (Pte) Ltd v Ebrahim* [1992] 2 SLR(R) 667 ("*Indo Commercial*"), Michael Hwang JC confirmed that the Lords' decision had been applied by the Court of Appeal in *Tatung Electronics (S) Pte Ltd v Binatone International Ltd* [1991] 2 SLR(R) 231 (see *Indo Commercial* at [10] and [16]) and was therefore binding on him. He then went on to determine that *Miliangos* could not be applied in reverse. That is, if a claimant prays for relief in a foreign currency, he cannot then: (a) elect for it to be entered in the local currency of the court if the foreign currency depreciates against that local currency; nor can he (b) ask for the conversion (for the purposes of execution)

to be calculated based on the rate of exchange on any date other than the date on which execution is authorised (see [19] to [39]).

250 Whilst reasoning why the claimant in *Indo Commercial* should not have the right to elect, Hwang JC cites two passages by Lords Wilberforce and Fraser respectively (at [35(d)] to [37]):

> 35 Quite apart from authority, I believe that there should be no right of election open to the plaintiff for the following reasons:
>
> …
>
> (d) The short answer to what the plaintiff seeks to do in this case is to be found in *Miliangos* itself. Once the breach-date rule was abandoned, an alternative date for conversion of the foreign currency into the local currency had to be found. Lord Wilberforce said (at 468) that the choice:
>
> > is between (i) the date of action brought, (ii) the date of judgment, (iii) the date of payment [meaning the date on which the court authorised execution].
>
> 36 He went on to say (at 469) that of these, the date of payment undoubtedly "gets nearest to securing to the creditor exactly what he bargained for".
>
> 37 Lord Fraser put the matter thus (at 502):
>
> > Any conversion date earlier than the date of payment would, in my opinion, be open to the same objection as the breach date, viz that it would necessarily leave a considerable interval of time between the conversion date and the date of payment. During that interval currency fluctuations might cause the sterling award to vary appreciably from the sum in foreign currency to which the creditor was entitled. In my opinion, it would not be justifiable to disturb the existing rule of taking the breach date, merely to substitute for it some other date rather nearer to the date of payment but still more or less distant from it. If the date of raising an action in this country were taken for conversion, a period of a year or more might easily elapse, allowing for appeals, before payment was made. The date of judgment would be better but there seems no reason why one should stop short of the latest practicable date, which seems to be

> the date when the court authorizes enforcement of the judgment.

251 In essence, Lords Wilberforce and Fraser seem to be saying that, if the rate of exchange is applied immediately before the payment, the effect would be that the winning party gets exactly what he bargained for, *ie*, a stated quantum, paid in the currency of his claim. As Lord Wilberforce said elsewhere in *Miliangos*, "[t]he creditor has no concern with pounds sterling; for him what matters is that a Swiss franc for good or ill should remain a Swiss franc" (at 466). This, in my view, is sound. The more time there is between the date of conversion and the date of payment, the more time there is for the exchange rate to fluctuate. For example, suppose P succeeds in obtaining judgment against D for US$1 million in Singapore, and on the date of the judgment, the exchange rate is US$1 is to S$1.35. Applying the conversation rate on this date would render D liable for a sum "locked in" at S$1.35 million. Suppose then by the date of payment, the rate increases to US$1 is to S$1.4. By this time, D's payment of S$1.35 million does not satisfy a debt of US$1 million, and so P turns up short. Conversely, if the Singapore dollar had instead appreciated against the US dollar, D would then be obliged to pay more than he owes. Neither situation is desirable and can be avoided, as the Lords suggest, by carrying out conversion on or as close as possible to the date on which payment is made.

252 How then does the Lords' reasoning apply to a case involving set off? Given that set off is, as I have suggested at [244] above, a kind of notional payment, the conversion should be effected as close to the date of "payment" as possible, *ie*, the date of set off. Ideally, they should both be carried out on the same day. Consequently, if the set off cannot be effected before the date of judgment, there would likely be no convincing justification for the conversion to be backdated either. This is particularly true in cases such as the present one,

where the right to set off is premised on a claim for *damages*. An entitlement to damages is determined by the court, and thus, can only be said to accrue upon decision (also see [242] above). So, it would be difficult to argue, in such a case, that the conversion and set off should be applied even before the entitlement is determined as a matter of fact. As Deputy Judge George Leggatt QC in *Fearns (trading as Autopaint International) v Anglo-Dutch Paint & Chemical Co Ltd* [2011] 1 WLR 366 ("*Fearns*") notes (at [39]):

> Ordinarily the date at which a set-off ordered by the court will be effected will be the date of the order. No doubt the court has power to order the set-off to be effected at an earlier or later date. *I cannot, however, see justification for back-dating the set-off to any earlier date than the earliest date at which a set-off would have been possible*, that is when the existence and amount of the two liabilities was finally determined by judgment or agreement. Equally, *if the amount of one or both liabilities has not yet been finally determined at the date when the order is made, the date of the set-off should be the date on which that determination takes place.*
>
> [Emphasis added]

253 In *Fearns*, the claimant sought to recover damages for trademark infringement and passing off. On the other end, the defendants claimed a debt owed for certain goods which had been delivered. The debt arose sometime in 2005 and the suit concluded in 2010, whereupon the claim for damages was allowed. The difficulty, however, was that the exchange rate of the Pound to the Euro varied quite significantly from 2005 to 2010. In 2005, the rate was £1 is to €1.45, and by 2010, the Pound fell to £1 is to €1.20. The consequence of this difference was that, if the 2005 rate was adopted, the defendants would owe the claimant around £36,000 after their respective claims were set off; and if the 2010 rate was adopted, the claimant would owe the defendants around €68,000. Naturally, the claimant (who was British), argued that the set off should be effected using the 2005 exchange rate while the defendant argued the opposite.

254 The court, applying the principles quoted two paragraphs above, concluded that the defendants' liability was only determined in 2010 and so the set off should be applied then. In coming to this conclusion, it also gave the following procedural guidance, which is useful in the present case (at [50(5)]):

> The approach which the court should adopt when ordering such a set-off between amounts payable in different currencies is: (i) to assess and add to each principal amount any interest accruing up to the date of the set-off; (ii) to convert the smaller amount into the currency of the larger amount at the exchange rate prevailing at that date; and (iii) to order payment of the balance.

This is the approach I have applied (see [240] above), and even if I had not had the benefit of considering *Fearns*, I would still have reached the same conclusion. It accords most closely with common sense and what parties should be entitled to recover in the face of a successful opposing claim. I would simply add that payment of the balance sum owing would be in the currency claimed by the overall judgment creditor, and where he seeks to enforce payment of that balance, the process in *Miliangos* should be applied accordingly.

255 It is for these reasons that I held (at [240]) that the parties set off their claims on the date of this judgment, and consequently, that the Plaintiff is only entitled to receive 5.33% interest on (P_2) from the day after this judgment.

256 I will hear parties on costs.

Lee Seiu Kin
Judge of the High Court

Chou Sean Yu, Oh Sheng Loong Frank, Daniel Lee Wai Yong, and Eve Dana Ng Shi Ying (WongPartnership LLP) for the Plaintiff;
Gregory Vijayendran *SC*, Kevin Tan, Devathas Satianathan, Low Weng Hong, and Ng Shu Wen (Rajah & Tann Singapore LLP) for the Defendant.
