IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 55

Originating Summons No 534 of 2016

In a matter of Section 10 of the International Arbitration Act (Cap 143A, 2002 Rev Ed)

And

In a matter of Order 69A of the Rules of Court (Cap 322, R 5, 2014 Rev Ed)

And

In the matter of an arbitration between BQQ as Claimant and BQP as Respondent

Between

BQP

… *Plaintiff*

And

BQQ

… *Defendant*

Summons No 4722 of 2017

In a matter of Section 10 of the International Arbitration Act (Cap 143A, 2002 Rev Ed)

And

In a matter of Order 69A of the Rules of Court (Cap 322, R 5, 2014 Rev Ed)

And

In the matter of an arbitration between BQQ as Claimant and BQP as Respondent

Between

BQP

… *Plaintiff*

And

BQQ

… *Defendant*

GROUNDS OF DECISION

[Arbitration] — [Arbitral tribunal] — [Jurisdiction]

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v
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27 June 2017, 20 November 2017; 19 December 2017

14 March 2018

Quentin Loh J:

Introduction

1 In Originating Summons No 534 of 2016 ("OS 534/2016"), the plaintiff, [BQP] ("the Plaintiff"), appealed under s 10 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") against the jurisdictional ruling of the arbitral tribunal ("the Tribunal") entitled "Decision on Bifurcated Jurisdictional Defences" ("the Award") in Singapore International Arbitration Centre ("SIAC") Arbitration No 197 of 2014, where the Plaintiff was the respondent, and the defendant, [BQQ] ("the Defendant"), was the claimant.

2 I heard oral arguments on 27 June 2017 and I gave my decision with 16-page brief oral grounds on 27 September 2017, dismissing the Plaintiff's challenge on the Award.

3 The Plaintiff then sought leave to appeal against my decision under s 10(4) of the IAA in Summons No 4722 of 2017 ("SUM 4722/2017"). Its main ground for leave was that there was a question of general principle to be decided for the first time, and upon which further argument and a decision of a higher tribunal would be to the public advantage. This question was whether pre-contractual negotiations were admissible in evidence to construe written agreements – a point left open by the Court of Appeal (see *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 ("*Xia Zhengyan*"*), Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 ("*Sembcorp Marine*") and *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*")).

4 At the hearing before me on 20 November 2017, I considered, with respect, that both parties' written submissions did not fully address the issues. Having referred counsel to the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA"), some articles and material facts, the most important being Procedural Order No 1 issued by the Tribunal and the SIAC Rules, counsel asked for an opportunity to look at the same and address them by way of written submissions. I agreed and directed that the parties file further simultaneous written submissions by 11 December 2017 and written reply submissions, if any, by 18 December 2017. The parties then informed me they did not need an oral hearing but were content for me to read their further submissions and to make my ruling.

5 Having considered the parties' respective submissions, I dismiss the Plaintiff's application in SUM 4722/2017 for leave to appeal, and now give the full grounds for my decision in two parts:

(a) the facts, findings and ruling of the Tribunal on jurisdiction, the Plaintiff's challenge thereto, and my decision on its challenge, which is an expansion of my brief oral grounds; and

(b) the reasons for my refusing leave to appeal.

Facts

The parties

6 The following largely appears in the Award and are not really disputed.

7 The Plaintiff is a company incorporated in the British Virgin Islands ("BVI"). The Defendant is a company organised under the laws of Indonesia. The Plaintiff and the Defendant ("the parties") and their affiliates have had commercial dealings in the forestry industry since at least 2003, in the course of which various disputes arose.[1]

The various agreements

8 The parties then decided to settle all their disputes and there were extensive negotiations over a short period of time resulting in a suite of agreements being executed.

9 On 30 August 2009, the group of companies to which the Defendant belongs and [CAH], an affiliate of the Plaintiff, entered into a Memorandum of Understanding ("August 2009 MOU"), with the aim of settling all outstanding disputes and issues arising out of the previous dealings between the parties and/or their affiliates.

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[1] RY-1, vol 1, p 64 at para 53.

10 On 18 September 2009, the Plaintiff and the Defendant signed a Master Agreement under which the Defendant agreed, in gist, to sell to the Plaintiff:

(a) an Indonesian forestry licence ("the Forestry Licence");

(b) its interest in a 2003 Joint Operation Agreement with [CAH] ("the JOA Interest"); and

(c) the entire share capital of its subsidiary, [NUS] ("the [NUS] Shares"),

for monetary consideration of US$8 million and the supply of 450,000 cubic metres of round logs over a period of three years. The Master Agreement contemplated implementation through various separate agreements, both onshore (in Indonesia between Indonesian entities) and offshore (between the Defendant and non-Indonesian entities).

11 Recital (C) of the Master Agreement states:

> [The Plaintiff] wishes to enter into an agreement to supply round logs to [the Defendant] ("Round Logs Supply MOA") under the terms and conditions herein.

Recital (E) states:

> [The Plaintiff] and [the Defendant] wish to resolve all outstanding issues ("Outstanding Issues") as set out [*sic*, in] paragraph 3 and 4 in the memorandum of understanding dated 30 August 2009 … annexed hereto in ANNEX 4.

12 In addition to the August 2009 MOU being annexed to the Master Agreement as Annex 4, there were three other Annexes (the "MOAs") attached:

(a) Annex 1: Memorandum of Agreement on the Acquisition of Licence and JOA Rights between the parties dated 18 September 2009 ("JOA MOA") under which the Defendant sold the

Forestry Licence and JOA Interest to the Plaintiff for US$4 million;

(b) Annex 2: Memorandum of Agreement Acquisition of Shares in [NUS] between the parties, [NUS] and one [TU] (a shareholder of [NUS]) dated 18 September 2009 ("Shares MOA") under which the Plaintiff purchased the [NUS] Shares from [TU] and the Defendant for US$4 million; and

(c) Annex 3: The Round Logs Supply MOA ("RLS MOA"), also dated 18 September 2009, under which the Plaintiff agreed to supply 450,000 cubic metres of round logs over a period of three years to the Defendant from its nominated affiliate companies ("the Nominated Companies").

13 Relevant clauses of the Master Agreement include:

(a) Clause 3, "Consideration for the [JOA] MOA and [Shares] MOA":

> In consideration of the acquisition of the License and JOA Rights, and the acquisition of the [NUS] Shares, [the Plaintiff] agrees (i) to pay to [the Defendant] the sum of US$8 million in the manner as set out in the [JOA] MOA and [Shares] MOA; and (ii) to supply 450,000 m3 of round logs over a three-year period in accordance with the memorandum of agreement annexed hereto as ANNEX 3 (the "Round Logs Supply MOA").

(b) Clause 4, "Round Logs Supply MOA":

> [The Plaintiff] agrees to supply to [the Defendant] 450,000 m3 of round logs over a three-year period in accordance with the Round Logs Supply MOA.

(c) Clause 5, "Implementation of Wood Supply MOA":

> The Round Logs Supply MOA will be implemented by way of an onshore wood supply agreement to be

finalized between the parties. The parties agree to enter into a binding legal agreement to be governed by the respective laws, substantially on the terms set out in the Round Logs Supply MOA.

(d) Clause 11, "Legal Effect":

This Master Agreement is a legally binding document on each party hereto and creates a legally binding contractual obligation between the parties.

14 Relevant clauses of the JOA MOA include:

(a) Clause 1, "Effective Date":

1.1 This MOA shall come into legal and binding effect on the date of this MOA and shall continue up to the date of execution of a written agreement between the parties terminating this MOA.

(b) Clause 3, "Consideration":

3.1 The consideration for the sale and purchase of the License and the JOA Rights shall be the sum of US Dollars Four Million Only (US$4,000,000.00).

(c) Clause 6, "Definitive Legal Agreements":

6.1 Upon signing of this MOA, the *Parties agree to enter into bona fide discussions to agree definitive legal agreements* setting forth the full legal terms and conditions to effect the transactions agreed herein, which shall include but not be limited to the provisions hereof. The Parties accept that the definitive legal agreements may also contain such terms as are customary in transactions of this nature or as may be advised by counsel to the Purchaser.

6.2 *This MOA shall continue in full force and effect notwithstanding the execution of any binding onshore legal agreements* concerning the transactions contemplated herein. This MOA *shall terminate only upon the execution of a written agreement to that effect* signed by the Parties hereto.

[emphasis added]

15 The Shares MOA, which closely tracks the JOA MOA, was signed by the parties on 18 September 2009 and as noted above, attached as Annex 2 to the Master Agreement. Its recitals (A) and (B) state that the Defendant and affiliates are to sell all the shares in [NUS] to the Plaintiff.

16 Relevant clauses of the Shares MOA include:

(a) Clause 1, "Effective Date":

> 1.1 This MOA shall come into legal and binding effect on the date of this MOA and shall continue up to the date of execution of a written agreement between the parties terminating this MOA.

(b) Clause 3, "Consideration":

> 3.1 The consideration for the sale and purchase of the [NUS] Shares shall be the sum of US Dollars Four Million Only (US$4,000,000.00).

(c) Clause 6, "Definitive Legal Agreements":

> 6.1 Upon signing of this MOA, the *Parties agree to enter into bona fide discussions to agree definitive onshore legal agreements* setting forth the full legal terms and conditions to effect the transactions agreed herein, which shall be based substantially on the terms set forth herein. The Parties accept that the definitive onshore legal agreements shall also contain such terms and conditions as are customary in transactions of this nature or as may be advised by counsel to the Purchaser.
>
> 6.2 *This MOA shall continue in full force and effect notwithstanding the execution of any binding onshore legal agreements* concerning the transactions contemplated herein. This MOA *shall terminate only upon the execution of a written agreement to that effect* signed by the Parties hereto.
>
> [emphasis added]

17 The RLS MOA, attached to the Master Agreement as Annex 3, differs in several respects from the JOA MOA and the Shares MOA.

18 The purpose of the RLS MOA is set out in Clause 3, "ROUND LOGS Supply":

> *[The Plaintiff] intends to supply* to [the Defendant] round logs for plywood manufacture *from its Nominated Companies* on the following *indicative terms. In the event that the Nominated Companies fail to supply the volume* agreed under clause 4 below, *[the Plaintiff] shall provide the round logs* from its concessions within [Sumatra].
>
> [emphasis added]

19 Certain "*indicative terms*" are set out in the clauses that immediately follow, including:

(a) Clause 3A, "Essential Information":

> [The Plaintiff] shall provide [the Defendant] the following information:
>
> a. Nominated companies with roundlog concession ("Nominated Companies") to supply the round logs.
>
> b. Copy of IUPHKK license of the Nominated Companies.
>
> c. Quantity of round logs at the designated location, the location of the round logs and the three months' delivery schedule.

(b) Clause 4, "Volume Commitment":

> a. Average 150,000 m^3 per year and an aggregate of 450,000 m^3 over the three-year period.
>
> b. Minimum 33,750 m^3 per quarter and maximum 50,000 m^3 per quarter.

(c) Clause 5, "Period of Commitment":

> … [the Plaintiff] may deliver more than 50,000 m^3 per quarter by giving 3 months notice in writing of such intended delivery … [The Defendant] may request [the Plaintiff] to deliver more than 50,000 m^3 per quarter by giving 3 months notice in writing of such intended increase …

(d) Clause 6, "Specifications":

> Diameter – 30 cm and above
>
> Length – (1) 4.2metre, (2) 5.5 metre and (3) 6 metre and above
>
> Species – As per the attached list in Appendix A below
>
> Quality – Round log peelable quality for plywood manufacture.

(e) Clause 7, "Place of Delivery, Terms":

> FOB alongside concession jetty/jetties within [Sumatra] the location of which will be as agreed between the parties.

(f) Clause 8, "Round Logs Selection, Grading, Scaling, Volume and Quality Verification":

> …
>
> b. [The Defendant] will appoint scaling and grading team at TPN to verify that the round logs meets requirements. [The Plaintiff] (or the Nominated Companies) will render full cooperation in the process of scaling and grading …
>
> …
>
> e. The detailed process of selection, volume and quality verification shall be set forth in the binding legal agreement.

(g) Clause 10, "Compensation for underperformance":

> *In the event the quarterly supply is less than 33,750m^3 per quarter* due to the negligence or default of the obligations under this MOA of [the Plaintiff] and/or the Nominated Companies, *[the Plaintiff] and/or the Nominated Companies shall compensate [the Defendant]* for the amount of shortfall at the following rates: …
>
> [emphasis added]

20 Clause 10A, "Log Shortfall Corporate Guarantee", of the RLS MOA contemplates cross-corporate guarantees:

> As the round logs supply shall be implemented by way of onshore round logs supply contracts between the Nominated Companies and [the Defendant], [the Plaintiff] shall procure that upon the execution of the binding legal agreements by the parties, each of the Nominated Companies for the round logs supply shall provide a corporate guarantee guaranteeing the obligations of each of the other Nominated Companies to [the Defendant] for the 450,000m3 of round logs.

21 Clause 13, "Binding Legal Agreements", which is central to the issue in the arbitral and these proceedings, states:

> Both parties shall use their *best efforts to agree and execute a binding legal agreement* to put into effect the intentions set forth in this Memorandum.
>
> *In the event no definite legal agreement is entered into, the parties agree that this MOA shall continue in force* and be valid and binding on the parties hereto.
>
> Any variation to this MOA shall be binding if it is in writing and signed by and on behalf of each party.
>
> [emphasis added]

22 Clause 14, "Governing Law", provides for Singapore law:

> This MOA shall be governed by and construed in accordance with the laws of Singapore. The related legal agreements contemplated hereunder are governed by Indonesian laws, regulations and practices as applicable. …

23 Clause 16, "Arbitration", calls for SIAC arbitration:

> Any dispute arising out of or in connection with this MOA, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause. The Tribunal shall consist of 3 arbitrators, to be appointed by the Chairman of SIAC, and the language of arbitration shall be English. … All costs of arbitration shall be shared equally among the Parties. …

24 Clause 18, "Termination", provides:

> …
>
> (a) If either of the purchase of the License or the [NUS] Shares is not completed as aforesaid, or, if either of the MOAs are terminated by mutual agreement of the parties, then the volume commitments set forth in this MOA (including the average, aggregate, minimum and maximum volumes) shall be cut by half and this MOA shall be construed accordingly. Any volumes already delivered (and commissions already paid by or on behalf of [the Plaintiff], if any) shall be taken into account in scheduling future deliveries.
>
> (b) *If both the purchase of the License and the [NUS] Shares are not completed* as aforesaid, or, if both MOAs are terminated by mutual agreement of the parties, *then this MOA shall be automatically terminated* and all commissions (if any) paid by or on behalf of [the Plaintiff] in respect of any commission agreement shall be repaid to [the Plaintiff] in full within 14 days of such termination event.
>
> [emphasis added]

25 The Plaintiff nominated [SUM] to supply the round logs. On 10 December 2009, the Defendant and [SUM] entered into the Merchantability Wood Agreement ("MWA") for delivery of round logs. The language of the MWA is Bahasa Indonesia, with the title on at least one English translation appearing as "Agreement of Selling Woods". The MWA, and within it Cl 20 (set out at [28] below), forms part of the critical issue before the Tribunal and these proceedings.

26 Clause 2 of the MWA sets the type of wood to be delivered; Clause 3 and Appendix A, the specifications; Clause 4, the quality; Clause 5, the place of delivery and loading schedule; Clause 6, the price of wood; and Clause 8, the terms of handover inspection.

27 Clause 11, "Penalties/Fines", provides:

> a. If the SECOND PARTY [the Defendant] has fulfilled all his obligations, both with respect to grading/scaling, payment of obligations with respect to woods (e.g. PSDH/DR), as well as retribution, and has delivered a pontoon/vessel in accordance

> with the schedule given by the FIRST PARTY [SUM], but [SUM] fails to fulfil the Loading Schedule and such failure causes [the Defendant] to receive claims, costs, expenses, penalties or liabilities with respect to the vessels (barge demurrage) and/or port charges, transport charges and other additional insurance costs ("Damages"), [SUM] shall be obligated to immediately reimburse for reasonable damages to [the Defendant] which is directly related to the failure of the Loading Schedule.
>
> b. If the minimum target of deliver of 33,750m^3 per quarter fails to be fulfilled by [SUM] in accordance with the point 7 of this Agreement and it is caused by the negligence and faults of [SUM], and the shortage of delivery of woods by [SUM]…[SUM] shall make a payment to [the Defendant] as costs of damages …

28 Clause 20, "Governing Law and Disputes", provides for Indonesian governing law and Indonesian National Board of Arbitration ("BANI") arbitration:

> a. This Agreement is governed by the law of the Republic of Indonesia.
>
> …
>
> d. If the said dispute cannot be resolved amicably within 60 (sixty) days, [SUM] and [the Defendant] agree so that the said dispute to be resolved through Indonesian National Board of Arbitration (BANI) in accordance with the procedures and provisions regarding Arbitration and/or which is stipulated by BANI.

29 It can be seen that the overall transaction was structured so that the Plaintiff fulfilled its total consideration obligations to the Defendant by way of: (i) payment of US$4 million for the Forestry Licence and JOA Interest under the JOA MOA; (ii) payment of US$4 million for the [NUS] Shares under the Shares MOA; and (iii) supply of the round logs in accordance with the RLS MOA.

30 However, for accounting and other reasons, including the uncertainty in relation to regulatory issues, the MWA required the Defendant to pay for the

round logs delivered, but those payments were effectively neutralised through a separate agency relationship and Commission Entitlement Agreement ("CEA") dated 18 September 2009 between the Plaintiff and [PER], an affiliate of the Defendant. The CEA was therefore entered into to neutralise the Defendant's payments under the MWA via the payment of a commission to [PER].[2]

31 On or around 10 December 2009, the Defendant and the Plaintiff's second nominated company, [LES], entered into a performance bond. Under the terms of the Performance Bond, [LES] agreed to guarantee [SUM]'s performance of its obligations under the MWA. Clause 4(a) of the Performance Bond (translated from Bahasa Indonesia) states:

> The performance bond by the Company [LES] based on this Deed will not exceed the obligation of the Seller [SUM] based on provisions of the Timber Sale and Purchase Agreement [the MWA].

The claim before the Tribunal

32 Disputes arose after the signing of these agreements. The Defendant alleged, *inter alia*, that the Plaintiff breached the RLS MOA that was annexed to the Master Agreement. Both these agreements contained Singapore International Arbitration Clauses ("SIAC") arbitration clauses. On 3 November 2014, the Defendant and [PER] commenced SIAC arbitration proceedings against the Plaintiff and [SUM] in Singapore. The Defendant subsequently withdrew both [PER] and [SUM] as parties from the arbitration.[3]

33 In its Statement of Claim, the Defendant alleged breaches of the Master Agreement, the RLS MOA, the CEA and the Reconciliation Deed. The

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2 RY-1, vol 1, p 71 at para 78.

3 Plaintiff's Written Submissions at para 19.

Defendant made the following eight claims ("the Identified Claims") under the RLS MOA:[4]

(a) claim for US$7,219,379.08 as compensation for a 133,235.95m^3 shortfall of logs, pursuant to Clause 10 of the RLS MOA;

(b) claim for US$360,302.70 as compensation for 27,819.09m^3 of defective logs, pursuant to Clause 10 of the RLS MOA;

(c) claim for US$8,648,008.81 as the market value of a 133,235.95m^3 shortfall of logs, after giving credit for the compensation sum due under Clause 10 of the RLS MOA;

(d) claim for IDR 49,304,250,000 as the market value of 45,000m^3 of logs not falling within the scope of Clause 10 of the RLS MOA;

(e) claim for US$2,952,739.25 as the market value of 27,819.09m^3 of defective logs, after giving credit for the compensation sum due under Clause 10 of the RLS MOA;

(f) claim for IDR 8,712,215,399 for taxes and freight expenses arising from the 27,819.09m^3 of defective logs supplied;

(g) claim for US$132,000 and IDR 842,328,960 for demurrage charges and dead freight charges incurred due to the delay by and/or failure of the Plaintiff to load the logs within Sumatra, timeously at the agreed date and time; and

(h) claim for IDR 9,293,662,062 for excess freight charges.

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4 Plaintiff's Written Submissions at para 20.

34 The Plaintiff objected to the Tribunal's jurisdiction on the grounds that (i) the RLS MOA had been superseded by the MWA, which contains a BANI clause, and disputes should be resolved by BANI arbitration in Indonesia, or in the alternative, (ii) the majority of the Identified Claims properly fall only under the MWA and hence under the BANI arbitration clause.

35 On the Plaintiff's application, the Tribunal bifurcated the arbitration into jurisdiction and merits phases. The Tribunal framed the question for resolution in the jurisdictional phase as: "Does the Tribunal have jurisdiction, based on the arbitration agreement in the [RLS MOA], to adjudicate the Identified Claims?" The parties agreed to break this question into two jurisdictional issues:

(a) Jurisdictional Issue 1: Has the MWA superseded the RLS MOA or are the MWA and RLS MOA both valid and separately enforceable?

(b) Jurisdictional Issue 2: Even assuming that the MWA has not superseded the RLS MOA, are the Identified Claims properly brought on the basis of the RLS MOA within the scope of the SIAC arbitration agreement or are they in fact premised on the MWA?

36 On 29 April 2016, following a two-day hearing, the Tribunal issued the Award.[5] As to the first jurisdictional issue, the Tribunal determined that the MWA had not superseded the RLS MOA, which remained valid and separately enforceable. As to the second jurisdictional issue, the Tribunal took the view that this could only be definitively determined at the merits phase and decided to carry these claims into the merits phase without prejudice to the Plaintiff's jurisdictional defence that some of these fall properly under the MWA. The

5 RY-1, vol 1, pp 104-105.

Plaintiff does not challenge the Tribunal's decision on this secondary issue before me.

The central issue

37 The essential question is therefore whether the RLS MOA (dated 18 September 2009) has been superseded by the MWA (dated 10 December 2009). If it has, it follows that the Tribunal lacks jurisdiction over the claims[6] submitted to it pursuant to an arbitration clause in the RLS MOA as the MWA provides for arbitration in Indonesia under BANI pursuant to Cl 20(d). If the RLS MOA has not been superseded by the MWA, then the Tribunal has, subject to the second jurisdictional issue, jurisdiction to hear the disputes under Cl 16 of the RLS MOA which provides for SIAC arbitration in Singapore.

38 At the heart of this dispute is the interpretation or construction of Cl 13 of the RLS MOA ("Cl 13"), the material part of which I set out once more for convenience:

> In the event *no definite legal agreement is entered into*, the parties agree that this MOA shall continue in force and be valid and binding on the parties hereto.
>
> [emphasis added]

39 In brief, the Plaintiff interprets Cl 13 to mean that once the MWA, being the "definite legal agreement", was signed, the RLS MOA ceased to be in force and was no longer valid and binding on the parties. The Plaintiff contends, *inter alia*, that this is because:[7]

> (a) The effect of Cl 13 is that the RLS MOA will cease to be in force upon the signing of a "definite legal agreement". The "definite legal

6 Plaintiff's Written Submissions at para 20.

7 Plaintiff's Written Submissions at para 25.

agreement" in Cl 13 refers to an *onshore* legal agreement. The MWA, being an onshore agreement, therefore superseded the RLS MOA by virtue of Cl 13.

(b) In the context of the overall commercial arrangements between the parties, it was clear that the RLS MOA was always intended to be superseded by a more detailed implementation agreement.

(c) The differences and inconsistencies between the RLS MOA and the MWA suggest that the two agreements were not intended to co-exist in parallel, and that one was meant to replace the other.

The Plaintiff's contentions are set out at [119]–[135] of the Award.[8]

40 In brief, the Defendant disagrees and interprets the phrase "definite legal agreement" in Cl 13 as referring only to a subsequent *offshore* legal agreement entered into between the parties. Since the MWA is an onshore legal agreement, and no subsequent offshore legal agreement was entered into, the RLS MOA remained in force and continued to be valid and binding on the parties. As such, the Identified Claims were validly brought under the SIAC arbitration agreement in Cl 16 of the RLS MOA.[9] The Defendant's contentions are set out at [136]–[149] of the Award.[10]

My decision on the Plaintiff's challenge on jurisdiction

41 The rival submissions before the Tribunal and before me illustrate that the meaning of the phrase "definite legal agreement" in Cl 13 is not plain or

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8 RY-1, vol 1, pp 81–86.

9 Defendant's Written Submissions at paras 9, 31.

10 RY-1, vol 1, pp 86–89.

obvious on a perusal of that clause and that phrase alone. In particular, it does not indicate whether the "definite legal agreement" was to be an "onshore" or an "offshore" legal agreement. It is clear that one has to look to the context to derive some assistance. Some of that relevant context must include the provisions within the RLS MOA and the MWA, the various other agreements and their provisions as well as the factual matrix within which the parties entered into a suite of agreements with the aim of settling the disputes that had arisen over their commercial dealings since at least 2003. Those agreements were both "onshore" and "offshore" agreements. The former category contained BANI arbitration clauses and the latter SIAC arbitration clauses. Each party had subsidiaries and affiliates in Indonesia and the BVI. The Plaintiff explained that "offshore" agreements refer to agreements between the Defendant and a non-Indonesian entity chosen by the Plaintiff's affiliate, [CAH], which would be governed by Singapore law, and the "offshore" agreements would then be implemented by "onshore" agreements between Indonesian companies and would be governed by Indonesian law.[11]

42 Given the rival submissions before me, the first important thing of note is that before the Tribunal, the parties' documentary and witness testimony focused on the negotiating history. The Award notes this at [81] and then deals comprehensively with the witness and documentary evidence placed before the Tribunal.[12]

43 I also note that it was the Plaintiff's Statement of Defence on Jurisdiction dated 4 May 2015 which, besides relying on the provisions of the agreements, first pleaded:[13]

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11 RY-1 at para 14.

12 RY-1, vol 1, p 71.

13 RY-1, vol 2, p 306.

(a) the pre-contract negotiations by referring to the emails between the parties dated 9 and 15 September 2009 to show the parties' understanding of the structure and organisation of onshore versus offshore agreements (see [16], [29]); and

(b) the "drafting history" of the RLS MOA (see [31]–[36] and [37], especially the references to "evidence").

In contrast, the Defendant's Statement of Claim did not refer to any pre-contractual negotiations. Also it was the Plaintiff's Witness Statement of [SI] that first placed these pre-contract negotiation emails before the Tribunal.

44 I find that the Tribunal has correctly stated the respective burdens and standard of proof, *viz*, that while it is ultimately the Defendant's burden to prove jurisdiction, the Plaintiff carries the burden to prove, on a balance of probabilities, the facts supporting its affirmative jurisdictional defences.[14]

45 The Tribunal also analysed the evidence, which as noted above, included the pre-contract negotiations, and came to its conclusions. I agree with its analysis and conclusions and set out the following relevant evidence, much of which is taken from the Award.

The pre-contract emails and drafts

46 The relevant backdrop to the parties' negotiations to settle their disputes includes the nature of the parties in this dispute. The Defendant states that the parties and their affiliate companies have had commercial dealings in the forestry industry since 2001.[15] The Plaintiff states that the parties are large

14 RY-1, vol 1, p 81 at para 118.

15 RY-1, vol 2, p 153 at para 14.

commercial institutions with significant experience in the Indonesian timber business and at all relevant times the parties were advised by their respective legal counsel which included the following lawyers:

(a) [SI], [PH] and [TJ] on behalf of the Plaintiff; and

(b) [SA], a partner in Messrs Shook Lin & Bok LLP on behalf of the Defendant.[16]

47 [SI] is Legal Vice-President of [RAA] (a company associated with the Plaintiff) who assisted the Plaintiff in drafting the Master Agreement and the MOAs. [CH], Financial Controller at [KAA] and Personal Assistant to [ED], Chief Commissioner of the Defendant, assisted the Defendant in reviewing the Master Agreement and the MOAs.

48 The Tribunal's chronology of the facts starts at 2 September 2009, when [SI] sent the first drafts of the JOA MOA and the Shares MOA to [CH]. At that time, the draft JOA MOA and the draft Shares MOA carried the title of "Memorandum of Understanding" ("MOU"). The title was eventually amended to "Memorandum of Agreement" as reflected in the final agreements.

49 In the first drafts of the JOA MOU and the Shares MOU, Clause 1.1, "Effective Date", read:

> This MOU shall come into legal and binding effect on the date of this MOU and *shall continue up to the date of execution of definitive legal agreements superseding this MOU.*
>
> [emphasis added]

50 Clause 6, "Definitive Legal Agreements", of the first draft JOA MOU and (in similar language) the first draft Shares MOU read:

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16 RY-1, vol 2, p 313 at para 9.

> 6.1 Upon signing of this MOU, the *Parties agree to enter into bona fide discussions to agree definitive legal agreements* setting forth the full legal terms and conditions to effect the transactions agreed herein, which shall include but not be limited to the provisions hereof. The Parties accept that the definitive legal agreements may also contain such terms as are customary in transactions of this nature or as may be advised by counsel to the Purchaser.
>
> 6.2 *Upon signing of such definitive legal agreements, this MOU shall cease to have effect* save as mentioned in clause 1 above.
>
> 6.3 *In the event no definitive legal agreements are agreed, this MOU shall continue in force and be valid binding and enforceable on the Parties hereto.*
>
> [emphasis added]

51 In the first drafts, Clause 10.4 of the JOA MOU and (in similar language) Clause 11.4 of the Shares MOU, "General", read:

> It is further acknowledged and agreed that this MOU shall be construed as a legal binding document on all of the Parties and as creating a contractual obligation between the Parties.

52 On 3 September 2009, one day after sending the draft JOA MOU and draft Shares MOU, [SI] sent via email the first draft of the RLS MOU to [CH] and others. Like the other drafts, what became the RLS MOA was referred to at that time as an MOU, in particular, the "Memorandum of Understanding Wood Supply" ("RLS MOU") and not as an MOA.

53 Clause 3, "Wood Supply", of the first draft RLS MOU read:

> [The Plaintiff] intends to supply to [the Defendant] roundlog wood for plywood industry on the following indicative terms.

and Clause 13, "Binding Legal Agreements", of that draft read:

> Both parties shall use their best efforts to agree and execute a binding legal agreement to put into effect the intentions set forth in this Memorandum.

54 Two days later, on 5 September 2009, [SI] sent an email to [CH] and others attaching the first draft of the Master Agreement with the annexed MOUs.

55 On 7 September, [SR], a representative of the Plaintiff, sent [CH] and others an email attaching a draft "Wood Supply Onshore Agreement". The email stated:

> As agreed there will be 2 sets of wood supply agreement (a. Onshore agreement and b. Offshore MOU).
>
> a. Draft Onshore agreement
>
> Attached is the onshore agreement as discussed.
>
> b. Draft Offshore agreement
>
> [SI] has sent the offshore MOU last Thursday and its revision will be sent by today.

56 In an email dated 10 September 2009, [SA], external corporate counsel from Messrs Shook Lin & Bok LLP assisting the Defendant in drafting the Master Agreement and the MOUs, sent to [SI] and others a revised draft of the Master Agreement and MOUs. [SA] stated in this email:

> (a) Our preference at this stage is of including an Indonesian party as the purchaser/contracting entity rather than an offshore party utilizing a nominee arrangement (until such time as the foreign investment rules regarding this type of industry investment are confirmed by our enquiries with the relevant authorities.) As a result, we have suggested an assignment/novation clause to be added to enable the Purchaser (being a local Indonesian company) to assign/novate its rights and obligations to another entity if desirable.
>
> …
>
> (d) Article 6 [JOA] MOU and Article 6 [Shares] MOU – consider whether there should be a definition of "definitive legal agreements" given that the MOU is stated to terminate on their signing. Consider whether certain clauses need to remain in effect post signing the definitive legal agreements (eg. conditions precedent, covenants, warranties, dispute resolution, governing law, confidentiality etc…).

57 The revised draft attached to [SA]'s email contained an amendment adding two paragraphs to Cl 13 "Binding Legal Agreements" of the RLS MOU (the Defendant's additions underlined):

> Both parties shall use their best efforts to agree and execute a binding legal agreement to put into effect the intentions set forth in this Memorandum.
>
> In the event no definite legal agreement is entered into, the parties agree that this MOU shall continue in force and be valid and binding on the parties hereto.
>
> Any variation to this MOU shall be binding if it is in writing and signed by and on behalf of each party.

58 In that same set of revisions, the Defendant also proposed that Clause 5 of the Master Agreement be amended to read (the Defendant's amendments underlined):

> The Wood Supply MOU will be implemented by way of an offshore and onshore wood supply agreement to be finalized between the parties. …

59 The next day, on 11 September 2009, [SI] sent an email to [SA], copied to [CH] and others, attaching revised drafts notated with comments by the Plaintiff. In relation to Clause 13 of the draft RLS MOU "Binding Legal Agreements", which read:

> Both parties shall use their best efforts to agree and execute a binding legal agreement to put into effect the intentions set forth in this Memorandum.
>
> *In the event no definite legal agreement is entered into, the parties agree that this MOU shall continue in force* and be valid and binding on the parties hereto.
>
> Any variation to this MOU shall be binding if it is in writing and signed by and on behalf of each party.
>
> [emphasis added]

The Plaintiff commented:

> ISSUES TO CONSIDER
>
> [[The Plaintiff] Comment: *The "definitive legal agreement" refers to a definitive offshore legal agreement.* The onshore legal agreements are separately enforceable.]
>
> [emphasis added]

60 On 14 September 2009, [SI] sent an email to [SA] attaching another revision of the Master Agreement, which changed the title of the annexed draft JOA MOU and draft Shares MOU by referring to the respective agreements as a "Memorandum of Agreement" as opposed to an "MOU". The title to the annexed draft of what became the RLS MOA remained "MOU". The Plaintiff added the following comment to Clause 6, "Definitive Legal Agreements", in the draft JOA MOA:

> [Comment by [the Plaintiff]: It is intended that there be 2 sets of agreements, 1 offshore and 1 onshore. The intention behind this clause is to clarify that there should only be 1 definitive set of *onshore* agreements (whether it is the ~~MOU~~MOA alone or superseded by a formal Sale and Purchase Agreement. The parties may also proceed to complete the transaction on the basis of the ~~MOU~~MOA alone together with the onshore agreements.]
>
> [emphasis added]

I pause to note that the italicised word "onshore" above is clearly an error and should read "offshore".

61 The Plaintiff's prior comment remained in Clause 13 of the RLS MOU, "Binding Legal Agreements", although the phrase "ISSUES TO CONSIDER" was deleted:

> [[The Plaintiff] Comment: *The 'definitive legal agreement' refers to a definitive offshore legal agreement.* The onshore legal agreements are separately enforceable.]
>
> [emphasis added]

62 On 16 September 2009, [SA] sent an email to [SI], copied to [CH] and others, which attached a revised draft of the RLS MOA with the title changed from MOU to Memorandum of Agreement. The Plaintiff's comment (see [61] above) that the "'definitive legal agreement' refers to a definitive offshore legal agreement" was deleted in this draft.

63 In the same email chain, [SA] requested a cross-corporate guarantee to be arranged by the Plaintiff, which [SI] said the Plaintiff was agreeable to.

64 On 17 September 2009, [SI] sent to [SA], [CH] and others a further revised draft of the Master Agreement, in which the Plaintiff commented with respect to Clause 6 of the JOA MOA (the Plaintiff's comments italicised and in bold):

> 6.1 Upon signing of this MOA, the Parties agree to enter into bona fide discussions to agree definitive legal agreements setting forth the full legal terms and conditions to effect the transactions agreed herein, which shall include but not be limited to the provisions hereof. The Parties accept that the definitive legal agreements may also contain such terms as are customary in transactions of this nature or as may be advised by counsel to the Purchaser.
>
> 6.2 Upon signing of such definitive legal agreements, this MOA shall cease to have effect save as mentioned in clause 1 above or unless otherwise agreed by the Parties. ***[Comment by [the Plaintiff]: It is intended that the offshore MOAs will continue to be binding separately from the onshore agreements]***
>
> 6.3 To the extent permitted by law, in the event no definitive legal agreements are agreed, this MOA shall continue in force and be valid binding and enforceable on the Parties hereto.
>
> [emphasis in original]

65 In an email on the same day, [CH] posed a question in relation to the Plaintiff's comment to Cl 6 of the JOA MOA (the Defendant's comments underlined):

> [Comment by [the Plaintiff]: It is intended that the offshore MOAs will continue to be binding separately from the onshore agreements] [what are the amendments ?]

66 On 18 September 2009, [SI] circulated an email internally in the Plaintiff, attaching revisions of the Master Agreement and the annexed MOAs that amended Clauses 1, 6.2 and 6.3 of the draft JOA MOA and the draft Shares MOA (see the earlier draft language at [49] and [50] above) with the language ultimately used in the final versions. Clauses 6.2 and 6.3 were replaced with a new Clause 6.2. The language in Clause 13 of the draft RLS MOA (see the earlier draft language at [53] above) remained unchanged.[17] According to the Plaintiff, it printed hard copies of these amended versions of the Master Agreement and annexes for the Defendant to review.

67 On 22 September 2009, [SR] sent an email to [CH] and others, attaching the checklist the Plaintiff had prepared to track the various agreements being signed. That checklist listed the JOA MOU, Shares MOU and RLS MOU under the Master Agreement as Item 1, signed on 18 September 2009.

68 With respect to negotiating a performance bond, [CH] made the following comments by email dated 14 October 2009:

> Clause 4(c) … In all other respects, the provisions of clause 4 expose the guarantor only to the extent of liability of the supplier under the round logs supply agreement.
>
> …
>
> Clause 12 – the deletion of the guarantor from this provision is not acceptable. Usually the beneficiary would preserve the right to recover against the guarantor if the guarantor went into liquidation/bankruptcy so that it has rights to make a claim on the receiver/liquidator etc … Suggest clarifying why the reference to "or if for any reason the Company indicates that it is unwilling or unable to honor its commitments under this deed" has been deleted. This deletion is probably acceptable as

17 RY-1, vol 4, pp 1115–1116.

> the only way the guarantor is released from the guarantee is if all the obligations under the round logs supply agreement have been fulfilled and [the Defendant] confirms this in writing and the guarantor has completed its obligation under the deed.

69 On 3 November 2009, [PH], Legal Manager and colleague of [SI] at [RAA], responded to [CH]'s email by relaying comments from [FCA], a company affiliated with the Plaintiff:

> Clause 4(c) … [[FCA]: Under the Supply of Roundlog Agreement, Supplier ([LES]/[SUM]) has provided its representations and warranties to [the Defendant] that the source of wood (to be supplied to [the Defendant]) is legal, i.e., it has valid license/source of wood is legal and covenants to supply the roundlog to [the Defendant], failing which the supplier will be penalized, i.e., to compensate. If the supplier fails to supply and refuses to compensate, [the Defendant] will then resort to the corporate guarantee. The obligations of the guarantee should mirror the obligations of the roundlog agreement …
>
> …
>
> Clause 12 … [[FCA]: [The Defendant]'s suggestion that [the Defendant] has a claim against the guarantor in the event that the guarantor is declared bankrupt does not make any common sense. We understand that the arrangement is such that [LES] acts as a guarantor and supplier as well and the same applies to [SUM]. In this regard, *if [LES] or [SUM] does not perform its obligations (does not supply the roundlog or does not compensate [the Defendant])* or [LES] or [SUM] is declared bankrupt, then *we will ensure that [the Defendant] will get compensated for any roundlog that was not supplied by either [LES] or [SUM]] …*
>
> [emphasis added]

70 In a separate email on 3 November 2009, [MU], a representative of the Defendant, wrote to [PH], [SI] and others, stating:

> From the commercial perspective, [the Defendant] will be relying on the Wood Supply Agreement for all its supply of wood for its business

71 On 7 December 2009, [CH] wrote to [TJ], the Indonesian counsel of the Plaintiff's Indonesian affiliates, and [SR]:

> As discussed, we will target to sign all agreements including the roundlog agreement and performance guarantee on Wed afternoon at the notary office.
>
> However, in the event of any delay on Wed, we shall sign on Thursday morning.
>
> Please check with [PH] on the roundlog agreement and let me have your final draft soon.
>
> Please let me know if you have any other comments.

72 After execution of the full suite of agreements, the parties and their affiliates referenced them in various ways. For example, on 8 January 2010, after the MWA had been executed, [PER] and the Plaintiff signed an addendum to the CEA referring to round log supply under the RLS MOA:

> 3.1 To amend Clause 3.1 (Commission Fee) of the Principal Agreement to read as follows:-
>
> ***"The commission fee payable by [the Plaintiff] to [PER] is at the rate of IDR320,000 per m3 … based on the actual quantity of round logs supplied to [the Defendant] in accordance with the Round Logs Supply MOA which is in Annex 3 of MA".***
>
> [emphasis in original]

73 In connection with the Defendant's alleged falling behind on payment for wood delivered, the minutes of a meeting on 8 April 2011 stated:

> By 15 November 2011, if there is still outstanding payment from [the Defendant] arises from the delivery of Round Logs, [the Plaintiff]/[SUM] and/or its affiliates reserve the right to initiate the following action(s):
>
> - To cease round logs shipment; *[the Defendant] and its affiliates will fully indemnify [the Plaintiff]*, [SDU], [SUM], [CAH] and its affiliates for not delivering any outstanding Round logs *as stated in the Master Agreement and Memorandum of Agreement Round logs Supply dated 18 September 2009* and Reconciliation and Settlement Deed in December 2009.
>
> - To reduce round logs volume commitments by all [the Defendant]'s outstanding debts. The roundlog volume

> reduction will be derived from dividing the outstanding debt by IDR 320,000/m3.
>
> [emphasis added]

74 On 16 November 2011, the Plaintiff wrote to the Defendant:

> *Pursuant to Memorandum of Agreement for Round Log Supply ("RL Agreement"), dated 18 September 2009,* between [the Defendant] and [the Plaintiff] and its affiliates, *[the Plaintiff] has met its commitments* by delivering a total of 246,422.28m3 of logs to [the Defendant] up to date.
>
> On 8 April 2011 (minutes attached in Annex 1), both parties agree that [the Plaintiff] shall apply interest charges on any outstanding [debts of the Defendant], and [the Defendant] agree to fully repay its outstanding debts on or before 15 November 2011. In the said minutes, it was also agreed that *[the Defendant]'s failure or neglect to pay the said debts will result in reducing [the Plaintiff]'s Round Log ("RL") supply commitment in RL Agreement* by converting [the Defendant]'s outstanding debt to RL volume equivalent.
>
> …
>
> As previously agreed by all the parties on April 8, 2011, *this letter confirms the reduction of [the Plaintiff]'s outstanding RL volume commitment to date (in line with RL Agreement)* by 195,031.41 m3. [The Plaintiff] will deliver any outstanding balance subject to [the Defendant] paying in full any future incurred PSDH/DR and transportation cost.
>
> [emphasis added]

75 On 20 December 2011, the Plaintiff wrote to the Defendant:

> Based on the foregoing, it is evident that *we have fulfilled our obligation* by an excess of 5,338.65m3. In the circumstances, *our obligation in respect of the Round Log Supply for a total of 450,000m3 under the Memorandum of Agreement for Round Log Supply ("RL Agreement"), dated 18 September 2009 (attached) has been fully discharged.*
>
> [emphasis added]

76 And on 21 December 2011:

> The 5,219.68m3 Round Log volume and its respective Freight Cost will be netted off against [the Plaintiff]'s Net Round Log

> Volume Outstanding as stated in [the Plaintiff]'s Letter on 16 November 2011. Therefore, *our obligation in respect of the Round Log Supply for a total of 450,000m3 under the Memorandum of Agreement for Round Log Supply ("RL Agreement"),* dated 18 September 2009 (attached) has been *fully discharged*.
>
> [underscoring in original, my emphasis in italics]

77 And on 5 June 2012:

> As you may note, on 21 December 2011 (copy of our letter attached) we advised you that *we have fully performed our obligations under the RL Agreement* and therefore, any [of the Defendant] payments on and after 16 November 2011 shall be applied to set off deliveries of round logs by [the Plaintiff] to [the Defendant] under the Barter Trade Agreement ("BTA").
>
> [emphasis added]

Interpretation of Cl 13 of the RLS MOA

78 As noted above, the witnesses were extensively cross-examined on the pre-contract emails passing between them. The Tribunal carefully considered all the factual material before it and came to its conclusion on the jurisdictional issues. I agree with the Tribunal.

79 First, in considering the text alone, although the phrase "definite legal agreement" by itself does not indicate whether it refers to an offshore or onshore agreement, it is followed by another phrase: "*this MOA* shall continue in force" [emphasis added]. If "*this* MOA" was to continue in force under Cl 13 absent entry into another agreement, it would tend to follow that the contemplated new "definite legal agreement" must also be another offshore agreement. That new offshore definite legal agreement would then logically supersede the existing offshore RLS MOA.

80 Turning to the context in which the RLS MOA was entered into, I note that the parties entered into a whole suite of agreements in settlement of their

disputes. It was not a simple but a rather complex settlement with different parts and of high value. The agreements encompassed both onshore and offshore agreements. The need for some onshore agreements in relation to aspects of the forestry industry was obvious as there were regulatory considerations. It is accepted that the RLS MOA is an offshore agreement, being entered into by an Indonesian and a BVI entity and the parties did not enter into any other offshore agreement after the RLS MOA was concluded. Considering the context in which the RLS MOA was entered into, it confirms the construction that the phrase "definite legal agreement" must have been, on a balance of probabilities, an offshore agreement.

81 Secondly, when considering the Master Agreement for context, Cl 5 confirms this construction. To recapitulate, Cl 5 states:

> The Round Logs Supply MOA ***will be implemented*** *by way of an onshore wood supply agreement* to be finalized between the parties. The *parties agree to enter into a binding legal agreement* to be governed by the respective laws, substantially on the terms set out in the Round Logs Supply MOA.
>
> [emphasis added in italics and bold italics]

82 The words chosen by lawyers in drafting the Master Agreement were clear – "will be implemented by", *ie*, the RLS MOA would be performed by or carried into effect or given effect to by an onshore agreement. They did not use the word "supersede" as they did elsewhere, as in the first draft of Clause 1.1 of the JOA and Shares MOAs (see [49] above) which referred to "the date of execution of definitive legal agreements *superseding* this MOU" [emphasis added]. These parties were aware in drafting these agreements of the concepts of "supersession" and "implementation". The extra detail in the MWA confirms this process of "implementing" the RLS MOA's comparatively general provisions.

83 The Tribunal also stated, at [161] of its Award, and I agree, that Cl 5 of the Master Agreement was consistent with the parties' dual track onshore offshore structure. Cl 5 expressly states in the first sentence their agreement to implement the RLS MOA by finalising an onshore wood supply agreement. In the second sentence, they agree to "enter into" a binding legal agreement "substantially on the terms" of the RLS MOA. Given the industry they were in, the Plaintiff, as a BVI entity, could not have entered into a binding onshore agreement and hence the binding legal agreement that they agreed to "enter into" in the second sentence of Clause 5 must refer to a subsequent offshore agreement. It follows that by Cl 13 of the RLS MOA, the parties were referring to a subsequent and more definite offshore agreement.

84 Thirdly, the RLS MOA contains several provisions describing the direct role of the Plaintiff in connection with the round log supply to the Defendant and this suggests that the MWA is intended to operate in tandem with the RLS MOA, as opposed to supersede and replace it. The Defendant correctly pointed out that Cl 3 of the RLS MOA, "ROUND LOGS supply", expressly states that if the Nominated Companies fail to supply the agreed volume of round logs, "*[the Plaintiff] shall provide* the round logs from its concessions within [Sumatra]" [emphasis added]. Similarly, but admittedly less directly, Cl 8(b), "Round Logs Grading, Scaling", places an obligation on "[the Plaintiff] (*or* the Nominated Companies)" [emphasis added] to render full cooperation in scaling and grading the round logs. Also Cl 10, "Compensation for underperformance", provides that if the quarterly supply volume of round logs is not met "due to the negligence or default of the obligations under this MOA of [the Plaintiff] *and/or* the Nominated Companies", then "[the Plaintiff] *and/or* the Nominated Companies shall compensate [the Defendant] for the amount of the shortfall" [emphasis added].

85 Fourthly, when we compare the parallel wording in Cl 6, "Definitive Legal Agreement", of the JOA MOA and the Shares MOA, we find that Cl 6.2 expressly mentions a binding onshore legal agreement:

> …
>
> This MOA shall continue in full force and effect *notwithstanding the execution of any binding onshore legal agreements* concerning the transactions contemplated herein. This MOA shall terminate only upon the execution of a written agreement to that effect signed by the Parties hereto.
>
> [emphasis added]

whereas this language is missing in the RLS MOA. Whilst the Plaintiff contends that this shows that the Defendant did not intend to secure a double track regime comprising offshore and onshore agreements for the RLS MOA, as it did for the JOA and Shares MOAs, I agree with the Tribunal that in fact it shows the contrary, *viz*, that the approach for two of the MOAs under the parties' Master Agreement implicitly supports interpreting Cl 13 of the RLS MOA as being focused on a subsequent offshore MOA superseding the RLS MOA rather than a parallel onshore agreement like the MWA.

86 The Plaintiff submitted that [CH]'s testimony showed that Cl 6.3 of the JOA MOA and the Shares MOA "inspired" the Defendant's insertion on 10 September 2009 of the new paragraphs in Cl 13 of the RLS MOA and the Defendant saw fit to retain Cl 13 even after Cl 6.3 had been deleted from the JOA MOA and the Shares MOA. Therefore, according to the Plaintiff, the retention of Cl 13 of the RLS MOA by the Defendant was deliberate as a different regime from that in the JOA MOA and Shares MOA was intended. In response to the Tribunal's questions, the Plaintiff candidly offered an explanation at the hearing for this "different regime", *viz*, the Plaintiff is the beneficiary under the JOA MOA and the Shares MOA as the purchaser of the Forestry Licence, JOA Interest and [NUS] Shares whereas the Defendant is the

beneficiary of the round logs supply commitment in the RLS MOA.[18] Like the Tribunal, I am of the view that this explanation for the difference in wording between Cl 6 of the JOA and Shares MOAs, and Cl 13 of the RLS MOA at best shows that the difference was probably missed by the Defendant which thus failed to make a similar amendment to the RLS MOA. I note that the current wording of Cl 6.2 of the JOA and Shares MOAs were last minute amendments introduced on 18 September 2009 the day of the signing, at 11.06am.[19] The earlier drafts of Cl 6 of the JOA and Shares MOAs were substantially similar to Cl 13 of the RLS MOA. As late as 17 September 2009 (the day before the signing), Cl 6 of the JOA MOA and (in similar language) Cl 6 of the Shares MOA read:[20]

> **6. Definitive Legal Agreements**
>
> …
>
> 6.2 Upon signing of such definitive legal agreements, this MOA shall cease to have effect save as mentioned in clause 1 above or unless otherwise agreed by the Parties.
>
> 6.3 To the extent permitted by law, in the event no definitive legal agreements are agreed, this MOA shall continue in force and be valid binding and enforceable on the Parties hereto.

87 I agree with the Tribunal that while Cl 13 of the RLS MOA would have benefitted from language like that in Cl 6 of the other MOAs, the Plaintiff's candid explanation shows, at best, that the Defendant was out-drafted with the final Cl 6 of the JOA and Shares MOAs. However I would note that even in this form, Cl 6 was clearly intended by the parties to refer to a future *offshore* agreement, see the Plaintiff's comments on Cl 6 at [60] and [64] above. The reference in Cl 6 to an "onshore" agreement was added to make this more

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18 RY-1, vol 5, pp 1447–1448.

19 RY-1, vol 4, pp 1093, 1105.

20 RY-1, vol 4, pp 1049, 1060.

explicit, more clearly sorting out offshore from onshore agreements, and its absence from Cl 13 is therefore inconclusive. In my judgment, the absence of the word "onshore" from Cl 13 does not change the reasonable interpretation of Cl 13 of the RLS MOA.

88 Fifthly, given that the phrase "definite legal agreement" presents an ambiguity in the context of the rival interpretations advanced by the parties, *ie*, whether it refers to an offshore or onshore agreement, I turn, as the Tribunal turned, to the negotiating history which constituted a large percentage of the factual record.

89 The evidence, as set out above, shows that the parties drafted and executed a large number of agreements in a comparatively short period of time. One thing stands out clearly from these negotiations, *viz*, the Plaintiff originally took the *unequivocal* position that phrase "definite legal agreement" in Cl 13 meant a different, and presumably more detailed, *offshore* agreement to follow the offshore RLS MOA (see [59] and [61] above).

90 The Tribunal did not accept, as I do not, the Plaintiff's contention that this meaning somehow silently evolved into a "definite legal *onshore* agreement". If so, one would expect to see documents, documented discussions, email exchanges or some credible evidence that the intention changed and that change was consistent with good commercial sense, given that the parties were exchanging emails almost daily and expressly discussing draft onshore agreement language for Cl 6 of the JOA and Shares MOAs. I also agree with the Tribunal that the technical switch of the title from MOU to MOA, even though it occurred later for the RLS MOA than the JOA and Shares MOAs, could not have somehow added "onshore" to the phrase "definite legal agreement" in Cl 13 of the RLS MOA.

91 Like the Tribunal, I also find the Plaintiff's argument of silent evolution undermined by its acknowledged concession at the hearing before them, that Cl 18(b) of the RLS MOA ("Termination") must have survived post-MWA, for its own contractual protection. This is inconsistent with its original case that the entire RLS MOA had been superseded by the MWA and if "definite legal agreement" in Cl 13 meant *only an onshore* agreement, then with the execution of the MWA some three months after the RLS MOA, given that there were no obligations that had to be performed by either party in the interim, then nothing in the RLS MOA survived.

92 I also note that the Plaintiff has now changed its case regarding Cl 18(b) of the RLS MOA. To recapitulate, Cl 18 essentially ensures that the Plaintiff would not be put in the position of having to deliver the same amount of round logs to the Defendant despite not having acquired the Forestry Licence and/or [NUS] shares. While it had previously taken the position before the Tribunal that Cl 18(b) was somehow 'carved out' and survived the supersession of the RLS MOA, the Plaintiff now argued, before me, that Cl 18(b) would not survive, and is not required for the Plaintiff's protection because its contractual obligations under the RLS MOA would be discharged upon the MWA coming into effect, while the Nominated Companies could simply insist on payment for the round logs supplied under the MWA.[21] Be that as it may, the point remains that there is no credible evidence on which to found the Plaintiff's argument that the parties' intentions regarding the meaning of "definite legal agreement" had undergone such a drastic evolution.

93 Indeed, it is difficult to see why the parties would have signed the RLS MOA on 18 September 2009, if some three months later, it was going to be superseded, given there were no obligations to be performed by either party in

[21] Plaintiff's Written Submissions at paras 95 and 98.

the meantime.[22] Moreover, had the parties intended the RLS MOA to be superseded by the MWA, they would have referred to the MWA in the CEA. Instead the CEA was stated to terminate "upon the termination or completed performance of the [RLS MOA]".[23] If the RLS MOA was superseded as the Plaintiff contends, then the CEA must also have been terminated. That cannot have been intended by the parties, because the purpose of the CEA was to neutralise payments due from the Defendant for the round log supply under the MWA. It is not disputed that the Defendant has never paid [SUM] for the supply of round logs under the MWA.[24] If the CEA were terminated, the Defendant would be put in the disastrous position of having to pay the Plaintiff about US$10m[25] for the logs supplied under the MWA, over and above having transferred the Forestry Licence and [NUS] Shares.

94 Sixthly, the Plaintiff submits that Cl 8 of the Master Agreement, which permits novation, shows that the Defendant did not intend the Plaintiff to remain separately liable under the RLS MOA once an onshore agreement was executed between the Defendant and the Plaintiff's Nominated Companies.[26] The Plaintiff sought to rely on an e-mail sent on 10 September 2009 by [SA], corporate counsel assisting the Defendant in drafting in the Master Agreement and MOUs.[27] The e-mail expressed a preference to have an Indonesian party as the purchaser or contracting entity, and to that end proposed an assignment/novation clause in lieu of a nomination clause (see [56] above). The

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22 Defendant's Written Submissions at para 116.

23 RY-1, vol 3, p 737.

24 Defendant's Written Submissions at para 261; Plaintiff's Written Submissions at para 98.

25 RY-1, vol 5, p 1247 at lines 7–13.

26 Plaintiff's Written Submissions at para 41.

27 RY-1, vol 4, p 847.

Plaintiff submitted that this showed that the parties did not intend the Plaintiff to remain separately liable under the RLS MOA after an onshore agreement was entered into. I find it would be inappropriate to draw any conclusion about how Cl 13 of the RLS MOA should be interpreted from [SA]'s comments about a novation clause in the Master Agreement. The nexus between the two was not strong enough to support such an inference. Moreover, the Plaintiff's submission is flatly contradicted by the JOA and Shares MOAs, in respect of which the Plaintiff remains liable notwithstanding the execution of onshore agreements. In any event it is not disputed that neither party novated its contractual rights and obligations.

95 The Plaintiff also submitted that the corporate guarantee arrangements show that the Defendant did not intend the Plaintiff to remain liable after the MWA came into force. Clause 10A of the RLS MOA calls for cross-corporate guarantees between the Defendant and the Plaintiff's Nominated Companies, and the performance bond was entered into between the Defendant and [LES]. But this again is inconclusive: just because the Defendant sought certain contractual protections under the MWA from the Nominated Companies does not mean that it did not also intend the Plaintiff to remain liable under the RLS MOA.

96 Finally, I do not see any difficulty with the RLS MOA and the MWA concurrently having legal effect. Many of the so-called inconsistencies identified by the Plaintiff are simply instances of the MWA containing more detail than the RLS MOA. Where there are true inconsistencies, one possible resolution may be in Cl 19(d) of the MWA where it is provided that the MWA shall prevail in the event of contradiction, incompatibility or difference with other agreements.[28] However that is something that the Tribunal will deal with

[28] RY-1, vol 3, p 749.

and decide at the merits hearing; what I state here is just in answer to an argument put forward by the Plaintiff for the purposes of this jurisdiction challenge. For the avoidance of doubt, nothing I say here is to bind the Tribunal in the merits or any other phase of the arbitral proceedings. Notwithstanding that Cl 3 of the RLS MOA uses the phrase "indicative terms", the RLS MOA contains agreement on essential matters in sufficient detail to constitute a binding agreement. In any event, the Plaintiff does not dispute that the RLS MOA was a binding agreement; it only says that it was superseded by the MWA.

97 Like the Tribunal, and for the reasons set out above, I agree that Cl 13 of the RLS MOA refers to a definite offshore legal agreement and that the Defendant's entry into the onshore MWA did not supersede the RLS MOA in its entirety or in part. The RLS MOA and the MWA co-exist and the RLS MOA is valid and separately enforceable from the MWA. The Tribunal therefore had jurisdiction to hear these disputes. The scope and impact of the separate enforceability of the RLS MOA is a different matter. The Tribunal accepts that it has jurisdiction only over disputes brought under the RLS MOA, and to decide liability for the alleged breaches of the RLS MOA and not the MWA.

The parties' reliance on evidence of pre-contractual negotiations

98 I find it germane to point out that the parties appeared to take the admissibility of the pre-contractual negotiations for granted during the proceedings before the Tribunal. The Defendant points out that: (i) the Plaintiff had never objected to the admissibility of evidence of the negotiating history of the agreements, and (ii) the Plaintiff had *itself* relied on such evidence to advance its case.[29]

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[29] Defendant's Further Submissions for Leave to Appeal at para 166.

99 In reply, the Plaintiff highlighted certain extracts from the transcripts of the jurisdictional hearing before the Tribunal purporting to show that it had indeed made objections to the admission of the pre-contractual negotiations.[30]

100 On the first day of the hearing, Mr Paul Tan ("Mr Tan"), counsel for the Plaintiff, said:[31]

> MR TAN: […] The third is to look at the drafting comments which they place some reliance on. We say that, first of all, *that may well be irrelevant as a matter of law, because what we're interested in is to look at what eventually happened in terms of the documents that were signed.* But we say that, in any event, those drafting comments really assist the respondent rather than the claimant.
>
> [plaintiff's emphasis in italics]

101 In relation to the second day of the hearing, the Plaintiff highlights the following passages:[32]

> MR TAN: Well, I think the documentary trail, in a sense, is not perfect. I think that's why there is a danger in trying to go back to various versions of the agreement and looking at the comments, and things like that. That's also why, *certainly as a matter of Singapore law, the courts are hesitant about having reference to prior negotiations, because things could have happened between the parties, some of which are recorded, some of which may not be recorded.*
>
> …
>
> MR TAN: […] But I'm not going to be the first one who says that it's extremely clear what this comment is referring to. That's why I say *there's a lot of danger in placing too much emphasis on these drafting comments*, when things were quite clearly between the parties, moving at a relatively fast pace.
>
> *Unless they can show that this represents some kind of a common understanding that then syncs with what the final resting position was and finalised position was between the*

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30 Plaintiff's Supplementary Submissions for Leave to Appeal at para 86.

31 RY-1, vol 5, p 1220, lines 3-9.

32 RY-1, vol 5, p 1413, lines 7-15, p 1452, lines 15-25 to p 1453, lines 1-5.

> *parties,* ***I'm not sure that – and I would submit that this comment here, one cannot place too much emphasis on****.*
>
> ***There is clear Singapore law authority in terms of the effect of these pre-contractual negotiations and comments that are made****. The real focus, at the end of the day, is what is the text and what does it say. …*
>
> [plaintiff's emphasis in italics, my emphasis in bold]

102 In my view, the exchanges cited above do not amount to an objection against the admissibility of evidence of pre-contractual negotiations:

(a) First, Mr Tan did not expressly object to the admission of evidence of the parties' negotiations. For example, Mr Tan only stated that "courts are hesitant" to have reference to evidence of negotiations, not that courts *cannot* have reference to such evidence, nor that the evidence of negotiations put before the Tribunal *in those proceedings* was inadmissible. The exchanges cited above disclose, at best, words of caution to the Tribunal against placing *heavy weight* on evidence of pre-contractual negotiations, and *not* a resolute objection to the admissibility of the evidence.

(b) Secondly, these words of caution seem directed at the proper *weight* that should be accorded to the evidence, and not their *admissibility*; Mr Tan spoke of the proper "emphasis" that should be placed on the evidence, and the "effect" that that evidence should have on the interpretation of the RLS MOA.

I find that the admissibility of the pre-contractual negotiations was accepted by both parties.

103 The Defendant's second point is that the Plaintiff had *itself* relied on the evidence of pre-contractual negotiations to advance its case:

(a) As early as the Plaintiff's Witness Statement of [SI] dated 4 May 2015, reliance was placed on several emails from [SA], the Defendant's external legal counsel, to advance its submission that the round logs supply was to be implemented by way of an onshore agreement only. The Plaintiff stated that this intention was "confirmed by the drafting history of the RLS MOA", and referred to draft agreements circulated by [SA] in emails dated 9 and 10 September 2009.[33] In the course of the arbitral hearing, Mr Tan cross-examined the Defendant's witness, [CH], on [SA]'s email of 9 September 2009 (see also references in the Plaintiff's Statement of Defence dated 4 May 2015 at [43] above).[34]

(b) In the Plaintiff's Opening Statement on Jurisdiction before the Tribunal, dated 29 February 2016, the Plaintiff positively relied on the "drafting history of the RLS MOA":[35]

> Even assuming that there is any ambiguity in Clause 13, one can easily determine what the parties had intended by reviewing the drafting history of the RLS MOA. The drafting history shows that the RLS MOA, at its inception, was not intended to be a legally binding document. …

(c) In [RY]'s Affidavit dated 27 May 2016, the Plaintiff referred to evidence of the parties' negotiations (*eg*, email correspondence between the parties' respective representatives, draft agreements, *etc*) as "The Relevant Documents". The Plaintiff explained:[36]

> As the determination of the Jurisdictional Issues depended on how the relevant agreements should be

33 RY-1, vol 2, p 371 at paras 28-29; Defendant's Further Submissions for Leave to Appeal at para 167.

34 RY-1, vol 5, p 1394, lines 18-22.

35 RY-1, vol 2, p 624 at para 10; Defendant's Further Submissions for Leave to Appeal at para 20.

36 RY-1 at para 44.

> interpreted, the documents tendered by the parties in the jurisdictional phase consisted mostly of emails and earlier drafts of the Master Agreement, the annexed MOAs, the MWA and the Guarantee. …

104 In response to my question during the hearing on 20 November 2017 as to why he had cross-examined the Defendant's witnesses on the issue of pre-contractual negotiations, Mr Tan said that he had done so because the Defendant had relied heavily on various comments on the draft agreements, and he therefore had to cross-examine the Defendant's witnesses to show that those comments were taken out of context. Essentially, the Plaintiff's position is that it had only relied on the pre-contractual negotiations to the extent that it was necessary to meet the Defendant's case.[37]

105 With respect, I find this explanation to be implausible given the matters set out above. I note that the Plaintiff had referred to and relied on [SA]'s emails and comments on the draft agreements as early as the first round of witness statements (see [103(a)] above), which was prior to any witness statements being filed by the Defendant.[38] I have also noted, at [43] above, the Plaintiff's references to the pre-contract emails and "drafting history" of the RLS MOA in its Statement of Defence on Jurisdiction dated 4 May 2015.

106 For the reasons discussed above, I find that the RLS MOA was not superseded by the MWA.

The Plaintiff's application in SUM 4722/2017

107 I now give my reasons for the dismissal of the Plaintiff's application in SUM 4722/2017 seeking leave to appeal against my decision on jurisdiction.

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37 Plaintiff's Supplementary Submissions for Leave to Appeal at para 85.

38 Defendant's Further Submissions for Leave to Appeal at para 170.

The law

108 It is not disputed that an applicant seeking leave to appeal must demonstrate that there exist questions falling within at least one of the following three limbs (*Lee Kuan Yew v Tang Liang Hong* [1997] 2 SLR(R) 862 at [16]):

(a) *prima facie* case of error ("the Error Limb");

(b) question of general principle decided for the first time ("the First Time Limb"); or

(c) question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage ("the Public Importance Limb").

109 The Plaintiff submits that there are three questions which fall into one or more of the limbs enumerated above:[39]

(a) Are pre-contractual negotiations admissible? ("question (a)")

(b) Where there is a dispute resolution clause in a subsequent agreement, with the subsequent agreement also containing a supremacy clause, should that dispute resolution clause take precedence over other dispute resolution clauses contained in prior contracts? ("question (b)")

(c) Would interpreting "no definite legal agreement" to mean "no definite offshore agreement" impermissibly trespass into rectification? ("question (c)")

110 I find that question (b) and question (c) are, in essence, appeals against the arbitral tribunal's and my construction of the clauses within the special facts

[39] Plaintiff's Submissions for Leave to Appeal at para 2.

of this case. Given the central issue in this case and the contextual approach adopted, such questions are very fact-sensitive and the factual context in which they arise are unique to these parties. We have before us two groups of companies who have had commercial dealings in the forestry industry since 2001, or at least 2003, who, with the aim of settling all disputes between them, entered into a slew of specially drafted agreements. In doing so, they were advised and assisted by legally qualified persons who attended to the drafting of these bespoke agreements.

111 Additionally, in relation to question (b), the entities to the agreements, and therefore the parties governed by the two arbitration clauses, are dissimilar. The RLS MOA was entered into between the Plaintiff and the Defendant but the MWA was entered into between [SUM] and the Defendant. The Plaintiff also seems to advance the ground that if the MWA did not supersede the RLS MOA and the latter therefore remains valid and binding as well, then the claims that were brought under the RLS MOA should be brought under that MWA. However, the Tribunal has not made a decision on this issue as there were insufficient facts to do so and instead reserved it to the merits hearing.

112 Question (c) is again without any merit. It was common ground before the Tribunal and before me that "definite legal agreement" should either be read as a definite *offshore* legal agreement or a definite *onshore* legal agreement. It cannot be right that the Plaintiff can now ask for leave to appeal on the ground that the arbitral tribunal and the court strayed into rectification by saying that "definite legal agreement" means an offshore legal agreement and when they contend it should read "onshore" legal agreement.

Admissibility of pre-contractual negotiations

113 As to question (a), the Plaintiff submits that the question of whether pre-contractual negotiations are admissible falls within the First Time and Public Importance Limbs. The Plaintiff points out that this question was left open in the Court of Appeal decisions of *Zurich Insurance* (at [132(d)]), *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd* [2015] 5 SLR 1187 ("*Soup Restaurant*") (at [39]–[40]), *Xia Zhengyan* (at [62], [69]) and *Sembcorp Marine* (at [75]).[40] It further submits that this is an issue of public importance due to its potential impact on the conduct of pre-contractual negotiations; for example, a rule of permitting general admission of such evidence may result in defensive practices being adopted.[41]

114 In its Supplementary Submissions for Leave to Appeal, the Plaintiff explained that question (a) could be described in terms of three sub-issues, all of which fall within the First Time and Public Importance Limbs:[42]

(a) The existence (and desirability) of a blanket rule against pre-contractual negotiations.

(b) The mandatory applicability of such a rule, either as a rule of the substantive law of the contract, or as a rule of the law of the arbitration agreement, or as a matter of the exercise of discretion.

(c) Whether arbitral tribunals are technically bound by the judicial characterisation of such rules, and if not, whether a court is entitled to review the tribunal's decision *de novo* and apply the judicial characterisation.

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40 Plaintiff's Submissions for Leave to Appeal at paras 4, 5 and 14.

41 Plaintiff's Submissions for Leave to Appeal at para 15.

42 Plaintiff's Supplementary Submissions for Leave to Appeal at para 82.

115 In relation to question (a), I accept that at first blush, the question of whether an absolute exclusionary bar against the admissibility of pre-contractual negotiations exists is one of great public importance which has not yet been decided by the Court of Appeal. This was made clear in the judgments of *Zurich Insurance* (at [132(d)]), *Soup Restaurant* (at [39]–[40]), *Xia Zhengyan* (at [62], [69]) and *Sembcorp Marine* (at [75]). However, there is an important difference because these were all cases commenced in the Singapore courts, *ie*, domestic litigation, whereas these proceedings before me arise from an international arbitration and a challenge to an award on jurisdiction. It comes before our courts because Singapore is the seat, thereby making our courts the curial court.

116 I brought counsel's attention to a number of articles which debate whether the admissibility of evidence is an evidentiary rule or whether it is a substantive rule in *international arbitration*. At the first hearing for leave to appeal, the authorities relied upon by counsel were all cases involved in *domestic litigation*.

117 In considering these articles, authors like Jonas Rosengren in "Contract Interpretation in International Arbitration" (2013) 30(1) Journal of International Arbitration at p 6, put forth the view that the current role of exclusionary rules of common law systems stirs up confusion in international arbitration. The learned author says the proper characterisation of these rules is a fundamental issue. He opines that:

> … *despite the title of the parol evidence rule and the reference to evidence not being 'admissible' or 'allowed' as a result of it or any related exclusionary rules, it is generally accepted that these kind of rules are not procedural but rather substantive rules. They are rules of contract interpretation which exclude certain evidence from being considered* and insofar as any question of admissibility arises, it arises because evidence that is irrelevant will not be considered. Although modern arbitration laws and

> rules grant the arbitrators broad discretion to 'determine the admissibility, relevance, materiality, and weight of any evidence', the circumstances that the arbitrator is allowed to consider in interpreting the contract are controlled by the applicable law. *To let the procedural rules determine which facts should be allowed to throw light on the intention of the parties will not result in a faithful application of the substantive law; it could in fact be tantamount to distorting it.*
>
> [emphasis added]

118 There are authors who hold the contrary view that the admissibility of evidence is an *evidentiary*, not *substantive* rule, see Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Wolters Kluwer 2012, at para 10.16, although he seems to moderate his view in the context of parol evidence at para 10.16.4, where he refers to Lew, Mistelis and Kroll's suggestion that the treatment of parol evidence is "in the grey zone between substance and procedure". Patrick Ostendorf, in "The exclusionary rule of English law and its proper characterisation in the conflict of laws" (2015) 11(1) Journal of Private International Law 163 holds the view that the prevailing opinion that the admissibility of extrinsic evidence is directly concerned with the decision on the merits and hence functionally belongs within the realm of contract interpretation, is flawed. He opines that "only issues *concerned* with the decision on the merits rather than merely *affecting* it should be governed by the *lex causae* instead of the *lex fori*" [emphasis in original] since almost any procedural rule "may in some way or other affect the material outcome of a given case" (at 172). In Mr Ostendorf's view, the "characterisation of the exclusionary rule as a matter of substantive law can only be justified if its *function* is more closely intertwined with principles of contractual interpretation, such as the objectivity principle, the *contra proferentem* rule, the holistic approach or the contextual dimension, rather than with matters of evidence and procedure" [emphasis in original] (at 175). Mr Ostendorf cites [65] of *Sembcorp Marine* to support his view that the "admissibility of extrinsic

evidence is not directly *concerned* with the interpretation of contracts though it may certainly *affect* the material outcome of a given case" [emphasis in original] (at p 177).

119 I referred counsel to further academic discussions of this issue, see Carol Mulcahy, "What Does It Mean – Contractual Interpretation in International Commercial Arbitration" (2015) 9 Dispute Resolution International 15; Joshua D. H. Karton, "International Commercial Arbitrators' Approaches to Contractual Interpretation" (2012) International Business Law Journal 383 and also "The Arbitral Role in Contractual Interpretation" (2015) 6(1) Journal of International Dispute Settlement 4; James Spigelman, "The centrality of contractual interpretation: a comparative perspective" (2015) 81(3) Arbitration 234; V K Rajah JA writing extra-judicially in 2010: "Redrawing the Boundaries of Contractual Interpretation" (2010) 22 Singapore Academy of Law Journal 513; and Darius Chan, "Interpreting Contracts under Singapore Law in International Arbitration: HSBC Trustee v Lucky Realty Co" <htttp://arbitrationblog.kluwerarbitration.com/2016/05/25/interpreting-contracts-under-singapore-law-in-international-arbitration-hsbc-trustee-v-lucky-realty-co> (25 May 2016)).

120 Mr Tan, counsel for the Plaintiff, points to the first instance judgment in *HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd* [2015] 3 SLR 885 ("*HSBC Trustee (Singapore) Ltd*") where the learned Judge said (at [57]):

> There is only one body of principles applicable to construing contracts in our substantive law of contract. No doubt that body of principles is independent of the law of evidence. But there should also be only one body of principles which determines what evidence that body of contractual principles can operate upon. … A dispute over how a contract is to be construed must yield the same final judicial determination whether the contract is construed at trial in an action (to which Pt II of the Evidence Act does apply) or whether it is construed on a summary

> judgment application, on a striking out application, on an originating summons or even in arbitration (to all of which Pt II of the Evidence Act does not apply).

121 I would first point out that in *HSBC Trustee (Singapore) Ltd*, the learned Judge there was dealing with the construction of a lease in proceedings to which Part II of the EA did not apply, but he was doing so as a court of first instance in Singapore, *ie,* in the context of domestic litigation; secondly, his comment "or even in arbitration", is with respect *obiter* and was certainly not a point argued before him.

122 I am of the view that the law on this issue, *ie*, the characterisation of admissibility of evidence as a rule of evidence or procedural law as compared to substantive law, has been made clear, and in that sense settled, by the Court of Appeal in *Sembcorp Marine*. The following principles are clearly stated in the judgment of the court delivered by Sundaresh Menon CJ:

> (a) "The law governing the admissibility of extrinsic evidence in Singapore is primarily statutory in the form of the EA [Evidence Act]." Since jurisdictions such as the United Kingdom, Hong Kong and New Zealand do not have equivalent provisions of the EA their cases on construction of contracts must be treated with a degree of caution (at [39]).
>
> (b) "We begin with a fundamental, even obvious, proposition of law. The EA only governs the *admissibility* of evidence. It is not concerned with and so does not prescribe rules of contractual construction. The province of the EA is the treatment of evidence, and this is conceptually independent and distinct from rules of contractual construction. Of course, the rules of *evidence* under the EA may affect the *application* of specific rules of contractual interpretation; but they

do not prescribe how a contract should be interpreted and construed" [emphasis in original] (at [40]).

(c) Referring to s 94(*f*) and Part II of the EA, and after citing from the drafter of the Indian Evidence Act of 1872, Sir James Fitzjames Stephen, *An Introduction to the Indian Evidence Act* (Thacker, Spink & Co, 1904), the CA stated: "The distinction between rules of contract law, *viz*, the substantive law which determines rights and liabilities, and rules of evidence, *viz*, the procedural law which determines what and how facts may be proved, could not be clearer" (at [43]).

(d) "A lingering question remains: what exactly is extrinsic evidence of surrounding circumstances that is admissible without restriction under s 94(*f*) of the EA? The short answer … would be such extrinsic evidence of 'facts and circumstances which were (or ought to have been) in the mind of the [drafter] when he used those words' [citation omitted]. Parol evidence of the drafter's subjective intention does not constitute such surrounding circumstances" (at [64]).

123 At the substantive level, Singapore adopts the contextual approach to the construction of contracts. This is settled law. In any case, it would be useful to set out again the relevant *dicta*, as stated in *Sembcorp Marine* as follows:

(a) "… [I]nterpretation is the ascertainment of the meaning which the *expressions in a document* would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of the contract" [emphasis in original] (at [33]).

> (b) "We have largely adopted the contextual approach to interpretation under our law in [*Zurich Insurance*] where this court held (at [132(d)]) that extrinsic evidence is admissible if it '[goes] towards proof of what the parties, from an objective viewpoint, ultimately agreed upon', subject only to the limitation that the extrinsic evidence 'is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context'" (at [34]).

I pause to note that in this case, the requirements in [123(b)] above have been clearly satisfied.

124 However, there are fundamental differences when we examine the applicability of these principles to international arbitration cases with Singapore as the seat and where Singapore law is the governing law of the contract. First and foremost, s 2(1) of the EA provides:

> Parts I, II and III shall apply to all judicial proceedings in or before any court, *but not … to proceedings before an arbitrator.*
>
> [emphasis added]

125 Part I of the EA covers the relevancy of facts, Part II deals with proof of facts and documents and Part III deals with the production and effect of evidence. Sections 94 to 100 EA, which featured heavily in *Zurich Insurance*, *Sembcorp Marine*, *Soup Restaurant* and *Xia Zhengyan*, fall within Part II and cover the exclusion of certain kinds of oral or extrinsic by documentary evidence. *None* of these provisions are applicable to proceedings before an arbitrator.

126 Parliament's deliberate preclusion of our EA to proceedings before an arbitrator is unsurprising. Parties resort to arbitration, especially in the context of international trade and commerce, *precisely* because they wish to avoid the

national laws of countries shackling their quest for a speedy, commercial and practical outcome to their dispute, and preclude the application of laws and procedures which may be alien to them. To a businessman from a civil law country, concepts like the parol evidence rule, the hearsay rule, common law discovery or the rule in *Browne v Dunn* (1893) 6 R 67 do not make much sense.

127 Secondly, and of equal importance, is the fact that the parties agreed that any dispute arising out of or in connection with the RLS MOA shall be referred to and finally resolved in accordance with the SIAC Rules for the time being in force and those rules were specifically incorporated by reference under Cl 16 of the RLS MOA. Rule 16.2 of the SIAC Rules 2013 states:

> The Tribunal shall determine the relevance, materiality, and admissibility of all evidence. Evidence need not be admissible in law.

Under Rule 16.2, admissibility clearly lies within the sole province of the tribunal, as do relevance and materiality. The second sentence in Rule 16.2 makes this even clearer by allowing an arbitral tribunal to decide whether to admit evidence that is not admissible *in law*. In Procedural Order No 1 dated 13 March 2015 it is recorded that by agreement between the parties, the arbitration is to be conducted in accordance with the Arbitration Rules of the SIAC (5th Ed, 1 April 2013) save for Rule 28.9 therein (which is of no relevance to these proceedings).

128 To underscore the different underlying premises in international arbitration as compared to national court procedures on the admissibility and treatment of evidence, Rule 16.2 of the SIAC Rules 2013 does not stand alone. Many other arbitral institutions have a similar rule, *eg*:

(a) London Court of International Arbitration Rules 2014, Art 22.1: "The Arbitral Tribunal shall have the power, upon the application of any party … or its own initiative … (vi) to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion …"

(b) UNCITRAL Arbitration Rules 2010, Art 27.4: "The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered."

(c) Hong Kong International Arbitration Centre Administered Arbitration Rules 2013, Art 22.2: "The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence."

(d) American Arbitration Association International Dispute Resolution Procedures 2014, Art 20.6: "The tribunal shall determine the admissibility, relevance, materiality and weight of the evidence."

(e) Korean Arbitration Act (revised on 31 December 1999 and again on 30 November 2016 to incorporate the UNCITRAL Model Law on International Commercial Arbitration), Art 20 confers on the arbitral tribunal the "power to determine the admissibility, relevance and weight of any evidence" (see also Doo-Sik Kim *et al*, "Commercial Arbitration 2017: Korea" Global Arbitration Review <https://globalarbitrationreview.com/jurisdiction/1000194/korea> (22 May 2017)).

(f) Although the International Chamber of Commerce Rules do not contain a specific provision like those above, it is generally accepted that it is inherent in its powers under Art 25, "Establishing the Facts of the Case" (formerly Art 20): "The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means". This discretion enjoyed by the tribunal has been described as being "extremely broad", and subject only to (i) Art 19, "Rules Governing the Proceedings" (formerly Art 15): "The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration" and (ii) Art 21, "Applicable Rules of Law" (formerly Art 20): "The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate…" (see Nathan D. O'Malley, *Rules of Evidence in International Arbitration* (Informa, 2013) ch 7 at para 7.06; Yves Derains & Eric A. Schwartz, *Guide to the ICC Rules of Arbitration* (Kluwer Law International, 2nd Ed, 2005) at pp 270–272).

129 Concerns that the admission of pre-contract negotiations or subsequent conduct could vastly expand discovery obligations and consequently the volume of evidence in common law systems, see *Sembcorp Marine* at [66]–[70], are usually not valid in the arbitration context as most international arbitrations now adopt the International Bar Association Rules on the Taking of Evidence in International Arbitration (this aspect was also included in Procedural Order No 1, issued by the Tribunal, at [7.3]). Arbitral tribunals invariably retain control over discovery. Be that as it may, these are all

considerations that arbitral tribunals in international arbitration take into consideration when a dispute is referred to them and they then have to adopt such procedures and conduct the arbitration in a manner that is the most expeditious and cost-effective.

130 There is therefore no general principle to be decided for the first time or question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage. I therefore refuse leave to appeal.

Conclusion

131 For the reasons given above:

(a) I dismissed the Plaintiff's challenge to jurisdiction in OS 534/2016 on 27 September 2017.

(b) I dismiss the Plaintiff's application in SUM 4722/2017 for leave to appeal.

(c) Costs are to follow the event; to be agreed. If parties are unable to agree, parties are to file submissions on costs for assessment before me, no later than 14 days from the date of this judgment.

Quentin Loh
Judge

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Hee Theng Fong, Toh Wei Yi, Poon Pui Yee, Leong Shan Wei

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