BLB and another *v* BLC and others
[2013] SGHC 196

Case Number : Originating Summons No 1006 of 2012

Decision Date : 30 September 2013

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Hri Kumar Nair SC and Teo Chun-Wei Benedict (Drew & Napier LLP) for the Plaintiffs; Chenthil Kumar Kumarasingam and Aston Lai (Lawrence Quahe & Woo LLC) for the 1st, 2nd and 3rd Defendants.

Parties : BLB and another — BLC and others

Arbitration – Award

30 September 2013 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 This application *vide* Originating Summons No 1006 of 2012 ("OS 1006/2012") is to set aside an arbitral award dated 31 July 2012 ("the Award") for the sole arbitrator's purported failure to decide a counterclaim that was submitted to arbitration. The arbitration proceedings followed an unsuccessful joint venture in Malaysia between two groups of companies. For convenience, the parties have referred to the subject arbitration as "the BOA Arbitration". The abbreviation "BOA" stands for the "Business Operations Agreement" as described in [12(c)] below.

2 The first to third defendants viewed OS 1006/2012 as an attempt by the plaintiffs to have the court interfere with and judicially review the merits of the findings of fact and law reached by the sole arbitrator ("the Tribunal"). In such a case, there would be no recourse to the court, and the losing parties would remain contractually bound to accept the Tribunal's decision whether or not they think it right. In contrast, the plaintiffs' principal ground of complaint, *viz*. that the Tribunal's treatment of their counterclaim was contrary to the rules of natural justice, represents the other extreme. On this ground of complaint, the law permits recourse to the courts pursuant to s 24(b) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") and Art 34(2) of the UNCITRAL Model Law for International Commercial Arbitration 1985 ("the Model Law"). The parties' opposing positions embody a tension that is becoming increasingly apparent in the context of curial challenges to arbitral decisions. On one hand, the supervisory function of the court requires it to step in to provide relief in cases of genuine challenges. On the other hand, the linked principles of minimal curial intervention and finality in proceedings demand that this power of intervention be exercised warily and only in meritorious cases where statutorily prescribed grounds for setting aside have been established. This tension is further heightened when the losing party attempts to air its grievances before the court as complaints of breaches of natural justice or other established grounds of challenge and in doing so attempts to re-open the arbitration or traverse over the issues in the arbitration. The court must firmly resist any such attempts.

3 The recent case of *TMM Division Maritama SA de CV v Pacific Richfield Marine Pte Ltd* [2013] SGHC 186 ("*TMM*") exemplifies this tension. There, Chan Seng Onn J declined to set aside the arbitral

award in question, finding that no breaches of the rules of natural justice had occurred in connection with the making of the award. Implicit in the reasoning of Chan J was the finding that curial recourse against the award had been improperly used to invite the court to judge the full merits and conduct of the arbitration (see *TMM* at [126]). The following observations in *TMM* (at [2]) merit citation:

> Although parties have a right and expectation to a fair arbitral process and the courts should give maximum effect to these safeguards in deserving cases, parties must not be encouraged to dress up and massage their unhappiness with the substantive outcome into an established ground for challenging an award. Particularly for international commercial arbitrations under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), it is imperative that an application to set aside an award under s 24 read with Art 34(2) of the UNCITRAL Model Law for International Commercial Arbitration 1985 ("Model Law") is not a guise for a rehearing of the merits. Unfortunately, as this case exemplifies, sieving out the ***genuine challenges*** from those which are effectively ***appeals on the merits*** is not easy under the present law. [emphasis added]

The central issue before me relates to which of the two diametrically opposing scenarios the present application falls into. Nevertheless, due to the concerns just discussed, it is my view that in a borderline case the benefit of doubt would invariably favour the tribunal.

Contractual Background

The parties

4 The second plaintiff ("P2") is a public company incorporated in Malaysia primarily involved in the automotive industry and a component member of the [P] group of companies (loosely referred to by the Tribunal as [P]).

5 The second defendant ("D2") is a company incorporated in Germany in the business of producing butt-weld pipe fittings and bespoke piping components mainly using hydroforming technology. This last-mentioned technology is acknowledged by the parties to be a core competence of the [D] group of companies (hereafter [D]), of which D2 is a component member.

6 The fourth defendant is a Malaysian-incorporated subsidiary of D2 established to undertake manufacturing operations for D2 in Malaysia. D4 is now in liquidation (see below at [10]).

7 The first defendant ("D1") is also a subsidiary of D2 and is in the business of selling and distributing products made by D2.

8 The third defendant was and is the sole shareholder of D2. He is regarded by the first two defendants as the alter ego of the [D] group of companies.

9 The first plaintiff ("P1") is a Malaysian-incorporated company and a joint venture vehicle between P2 and D2. Pursuant to the joint venture, P2 holds 75% and D4 holds 25% of the issued shares in P1.

10 The plaintiffs were represented by Mr Hri Kumar Nair SC ("Mr Kumar"). The first to third defendants were represented by Mr Chenthil Kumar Kumarasingam ("Mr Kumarasingam") who indicated, at the hearing of this present application, that an order had been made to wind up D4. D4 did not participate in the present application even though OS 1006/2012 was served on the liquidator. D4 was not affected by the bulk of the counterclaim but only by a claim for RM 22,185.88.

The agreements

11 In 2002, [P] and [D] negotiated a possible joint venture in which D2 would sell its shares and business operations in D4 to P2, which was desirous of acquiring [D]'s expertise in the aforementioned hydroforming technology.

12 Following negotiations between the parties, a Heads of Agreement dated 3 July 2003 was entered into between D2 and P1. It was followed in time by, *inter alia*, the following agreements:

(a) An Asset Sale Agreement ("the ASA") dated 13 October 2003 between D4 and P1 effecting the sale by D4 to P1 of D4's business;

(b) A Shareholders Agreement dated 3 April 2004 between D4 and P2 pursuant to which P2 subscribed for sufficient shares in the enlarged capital of P1 to constitute P2 as owner of 75% of P1;

(c) A Business Operations Agreement dated 3 April 2004 ("the BOA") between D1 and P1 regulating the obligations of the parties in promoting the commercial success of the joint venture; and

(d) A Licence Agreement dated 3 April 2004 ("the LA") between D1 and P1 granting P1 a licence to use the [D] trademark on products manufactured by P1, subject to the products meeting [D]'s quality standards.

Upon the completion of the ASA on 23 June 2005, the purchase consideration was paid in the following modes: RM14m paid in cash, RM10m by way of an issue to D4 of shares in P2 and RM26m by way of an issue to D4 of shares in P1 (making D4 the owner of 25% of P1).

13 In the context of the present application, the following terms of the BOA and LA are pertinent. Clause 5 of the BOA provided for D1's purchase of a minimum quantity of the annual production of all "[P1] Product Lines" (defined in the BOA) from P1. Clause 5.4.1 of the BOA provided that upon call-offs being made by [D], P1 was to ensure that the products for which call-offs had been sent were ready for delivery within a period of time prescribed by the BOA. Finally, under the LA (see above at [12(d)]), D1 granted P1 a non-transferable and non-exclusive licence to use the [D] trademark on products manufactured and sold by P1 subject to the products meeting D1's quality standards.

The breakdown of the joint venture

14 In or around June 2005, P2 took over operation of P1. Between July and December 2005, D2 made various call-offs for the [P1] Product Lines. However, P1 could not fulfil all the orders and failed to deliver all of the products ordered within the time period prescribed by the BOA. On or about 18 May 2006, D2 issued a Notice of Default in delivery to P1. On or about 11 July 2006, D1 also issued a Notice of Default for purported breaches of the BOA and LA, particularly in respect of delay of supply, failure to adequately stock raw materials, and defective products. Following further correspondence, D1 wrote to P1 on 15 August 2006 to terminate the BOA and LA.

15 Notwithstanding the purported breaches by P1, D1 issued 14 purchase orders to P1 between July 2006 and February 2007 amounting to €6,704,065. On or about 13 February 2007, P1 wrote to D1 to demand payment of RM4,653,604.78 purportedly owed for goods sold and delivered by P1 as of December 2006. On 14 February 2007, D1 responded to this demand as follows: [note: 1]

2. We dispute that there is an outstanding amount of RM4,653,604.78 due from [D1] to [P1].

We are currently undertaking our own verification exercise on the goods/products purchased from [P1] (the "Verification Exercise").

3. Firstly, please note that the anti-dumping cost and the cost for defective products are obviously not taken into consideration in your outstanding amount. Full particulars of these issues are very well known to you and I'd like to remind that we have not received an answer to our letter dated 19th of January 2007.

4. As is obvious from the foregoing and:-

(i) Subject to us receiving a satisfactory clarification from you with regards to the debit notes for the defective products; and

(ii) Without Prejudice to the Verification Exercise and after taking into account and setting-off the outstanding amount of RM4,653,604.78 purportedly due from [D1] to [P1] against a reciprocal amount from the Receivable (the "Set-Off");

there is an amount of RM224,630.00 (USD63,275.98) which is due and outstanding from [P1] to [D1] as at 31st January 2007. Arising from the Set-Off, [D1] is deemed to have settled the amount of RM4,653,604.78 to [P1].

16 On 28 February 2007, P1 wrote back to D1 denying, *inter alia*, that any monies were due and owing to D1. For purposes of clarity, context and ease of reading, I should point out that D1's reference to the "debit notes for defective products" in its letter of 14 February 2007 related to 10 debit notes issued by D2 for the rectification of defective products supplied by P1, which are hereafter described as "the Group A Goods". It is common ground that the 14 purchase orders referred to above at [15] related to sales of a different set of products, which are hereafter described as "the Group B Goods."

17 On or about 13 February 2007, P1 also wrote to D4 to demand the transfer of bank balances amounting to RM22,185.88 purportedly owed to P1 under the ASA. On or about 14 February 2007, D4 wrote to dispute its liability to transfer this sum to P1. On or about 15 March 2007, P1 wrote to D4 to reiterate its demand for the transfer of the said sum.

The Arbitration

18 On 30 May 2007, D1 commenced arbitration proceedings against P1 and on 25 June 2007, D4 commenced arbitration proceedings against P2 (both arbitration proceedings will hereafter be collectively referred to as "the Arbitration"). On 22 February 2008, by way of an *ad hoc* agreement executed by all parties in these proceedings, it was expressly agreed that:

(a) All claims and/or counterclaims and/or defences available to or against all parties were to be included in the Arbitration; and

(b) All relevant parties were to be included as parties to the Arbitration.

Pursuant to this *ad hoc* agreement, D2 and D3 were added as parties to the Arbitration, and P1 and P2 brought counterclaims against those parties.

19 The present application concerns matters arising out of the BOA Arbitration. In the BOA Arbitration, D1 sought to claim damages from P1 in respect of the following matters:

(a) P1's purported breach of the BOA in failing to deliver D2's call-offs in time as required by Clause 5.4.1 of the BOA;

(b) P1's purported failure to hold the minimum raw materials required per line item pursuant to Clause 5.4.3 of the BOA; and

(c) P1's purported breach of Clause 4.1 of the LA insofar as the goods it supplied were not in accordance with the applicable [D] quality standards. (The 10 debit notes for rectification works referred to above (at [16]) related to this breach.)

Arising from the above purported breaches, D1 claimed, *inter alia*, €500,377.04 for the loss of profits as well as US$43,108.69 and €424,168.33 for rectification works in respect of purportedly defective products supplied by P1. By way of observation as to the nature and extent of D1's complaints, the Tribunal would have to deal with issues relating to liability, as well as concern itself with what remedies and relief should be ordered. To obtain an order for damages, D1 would have to prove breach of contract, ensuing loss, and the quantum of its loss.

20 In response to D1's claims, P1 raised, *inter alia*, the following points:

(a) D1 and/or D2 had misrepresented various material facts which induced P2 to enter into the joint venture partnership with D2;

(b) D1 and/or D2 had acted in a manner inconsistent with the aim and object of the joint venture partnership, and acted to the detriment of P2; and

(c) D1 and/or D2 and/or D4 had acted in a manner to induce a breach of the BOA and the LA and/or to cause loss and damage to P1.

21 P1 counterclaimed for, *inter alia*:

(a) General damages in the sum of RM97,034,078; and

(b) *The sum of RM5,838,956 being receivables purportedly due to P1 as of 31 January 2008* ("the Disputed Counterclaim"). This sum purportedly comprised of the price of the Group B Goods sold to D1 as well as bank balances of RM22,185.88 due from D4 (collectively, "the Receivables") (see above at [16] and [17] respectively). With regard to the former, the trade receivables had purportedly increased from RM4,653,604.78 (as reflected in P1's letter of 13 February 2007) to RM5,816,770.25 (as reflected in P1's audited accounts as of 31 January 2008) due to additional goods delivered to D1 in this period.

The Award

22 The Arbitration was heard from 12 January 2009 to 15 January 2009 and 22 July 2009 to 24 July 2009 before the sole arbitrator, a senior and experienced legal practitioner. The parties' submissions and reply submissions were tendered by 20 November 2009. After an interval of two years, the Award was issued on 31 July 2012. On 1 August 2012, one day after the Award was issued, the arbitrator ceased private practice.

23 In paragraph 1.3 of the Award, the Tribunal listed out the various claims and counterclaims referred to in the Arbitration. It is useful to bear in mind that the defendants were the claimants in the BOA Arbitration and the plaintiffs were the respondents.

24 In paragraph 1.3.3(l) of the Award, the Tribunal noted that the plaintiffs were alleging that the defendants had failed to pay P1 for the goods D1 had purchased (*ie*, the Group B Goods). However, the Tribunal proceeded to adopt, out of convenience, the defendants' framework of issues to be tried in the arbitration proceedings. At paragraph 1.9.1 of the Award, the Tribunal stated: [note: 2]

> [D] submits, and I accept as a convenient framework, that the issues which arise from [P]'s counterclaims in the BOA Arbitration are as set out in the following paragraphs...

25 Despite his remarks, the Tribunal included certain additional issues found in the plaintiffs' list of issues (which were omitted from the defendants' list), for example, whether [D] performed its obligations under the joint venture (Issue #13) and whether D4 and D2 acted in a manner to frustrate the joint venture or to the detriment of the plaintiffs (Issue #14). However, the Tribunal did *not* include, as an issue to be decided, whether D1 and D4 were indebted to P1 in respect of the Receivables pursuant to the Disputed Counterclaim. Instead, the Tribunal set out the Disputed Counterclaim as one of the *remedies* sought by P1 at paragraph 1.9.1(f): [note: 3]

> Issue 16: If the [Tribunal] finds in favour of [P1] in [the BOA Arbitration], whether [P1] is entitled to claim any or all of the following amounts:
>
> (i) loss of profits amounting to RM26,352,000;
>
> (ii) impairment loss amounting to RM69,901,122;
>
> (iii) the amount of RM5,838,956 said to be due and owing; and
>
> (iv) retrenchment costs amounting to RM780,956.
>
> [emphasis added]

Similar to the framework provided by the defendants (see below at [48]), the Tribunal thus framed the issues in such a way that if the plaintiffs were in breach of the BOA and the LA, they would not be entitled to any of the amounts counterclaimed, including the Disputed Counterclaim for the Receivables.

26 Before the Tribunal proceeded to deal with the above issues, he first considered D1's claim in the BOA Arbitration in paragraph 3 of the Award, which pertinent portions are quoted below:

> 3.1 **Issue #1: whether [P1] breached clause 5.4.1 of the BOA.**
>
> ...
>
> 3.1.7 [P1] does not seriously dispute that it failed to deliver the fittings ordered within 8 weeks from the expiry of the notice. Instead, [P1] alleges that the delay was not its fault and that [D] failed to take into account the delivery time for [D] to deliver the raw material for the production of the fittings covered by the call-off. [P1] blames [D] for not delivering the raw materials on time. [D]'s Mr Rainer Floeth [the Co-Managing Director and Chief Financial Controller of [D2], however, testified that the delay was not because of [D]'s failure to deliver raw materials on time and was because of [P1's] failure to hold 40% minimum raw materials per line in inventory. Had [P1] complied with this obligation and maintained the inventory on a per line item basis, says [D], [P1] would have had no problems delivering on time as their raw materials stock would have been balanced and they would have been able to produce whatever products the customer demanded

at any point in time.

3.1.8 Due to the nature of the pipe fittings business and the raw materials required, raw materials cannot be ordered only after receiving the call-offs. Otherwise, [P1] will not be able to meet the delivery targets. Further, due to the special raw materials, [P1] was required to make a minimum order which may exceed requirements either because the suppliers will not supply less or for economies of scale. I accept that [P] failed to understand this and did not heed the advice of [D].

…

3.1.11 Thus it was that [P1] "made a business or commercial decision not to purchase unnecessary raw material". Further, in an e-mail dated 14 April 2006, one Mr Mohamad Razali (a director of [P1]) informed Mr Rainer Floeth that [P1] would only order raw materials based on its needs. …

3.1.12 Having taken this business or commercial decision despite [D] (and not [P]) being the acknowledged technical experts both in the products and in the process of manufacturing the products, [P1] cannot disclaim the consequences of its decision.

[emphasis in the original]

27 The Tribunal then held in favour of D1 in respect of its claim for damages for breach of P1's delivery obligations under Clause 5.4.1. The sum of €500,377.04 was awarded for the loss of profits D1 would have earned on sales of products which were *not* delivered arising out of the shortfall in supply (see paragraph 3.2.9 of the Award).

28 In paragraph 3.3, the Tribunal dealt with another liability question, which was whether P1 had breached the LA in delivering poor quality products. Noting that P1 did not seriously deny that there were quality lapses, the Tribunal made the following remarks:

3.3.9 I accept [D]'s submissions and reject [P1's] submissions. I find that [P1] was in breach of clause 4.1 of the LA in that it failed to manufacture the products in accordance with the contractually applicable standards.

3.3.10 As a result of [P1's] breach, [D2] undertook rectification works in Germany, incurring total expenditure of US$43,108.69 and €424,168.33. This is evidenced by debit notes which remained unpaid. I find that [D2] is entitled to recover these amounts.

29 I now come to [P]'s counterclaims (see [21] above). The Tribunal dealt with them in the following manner at paragraphs 5.3 to 5.5 of the Award: [note: 4]

5 . 3 **Issue #13: whether [D] performed its obligations under the joint venture agreements**

5.3.1 [P] claims that [D] breached its obligations under the joint venture agreements in the following manner:

a. [D] did not provide the necessary assistance to [P1] to source all necessary equipment and machinery;

b. [D] did not provide the technical know how;

c. [D] did not provide the technical services; and

d. [D] did not take up the minimum 75%.

5.3.2 I am not satisfied on the balance of probabilities that [D] breached the joint venture agreements. Any and all issues involving the equipment provided could have been resolved with cooperation between the parties. The departure of Mr Denial Pragasam and Mr Dirk Te Heesen are not matters for which [D] can be made liable. And [D]'s failure to take up the minimum 75% is not surprising in light of the delay and the quality issues which surfaced very early on.

5.3.3 Unfortunately, the situation here is one of a joint venture which has gone awry not because of any breaches of duty (whether contractual or fiduciary) by either party but as a result of mismatched expectations and the inevitable tensions that arise when two parties are contributing to a single venture.

5 . 4 **Issue #14: Whether [D4], [D2] or both systematically acted in a manner to frustrate the joint venture**

5.4.1 In the light of my findings in the section immediately above, I am not satisfied on the balance of probabilities that [P] has made out this issue.

5.5 **Issues #15 to 18**

5.5.1 ***In light of my findings on Issue #14, these issues do not arise.***

[emphasis in original in bold underline; emphasis added in bold italics]

30 In summary, the Tribunal held that P1 had breached its obligations under Clauses 5.4.1 and 5.4.3 of the BOA and Clause 4.1 of the LA as alleged by D1 in the BOA Arbitration. D1 was accordingly entitled to recover for loss of profits amounting to €500,377.04 and D2 was entitled to recover rectification costs of US$43,108.69 and €424,168.33 in respect of defective products supplied by P1. However, the Tribunal held that [P] had failed to either establish that [D] had breached its obligations under the joint venture agreements (*ie*, Issue # 13), or that D2 or D4 had acted in a manner to frustrate the joint venture (*ie*, Issue #14). Having ruled against P1 on liability in respect of Issue #13 and Issue #14, the Tribunal considered that the remedies and reliefs sought in Issue #16 did not arise for determination. In other words, to obtain an award of damages, P1 had to prove breach and loss. As it failed to prove breach, there was no need to consider the remedies and relief sought.

Outline of this Judgment

31 It is to be recalled that Issue #16 (see above at [25]) concerned remedies in the nature of damages for (a) loss of profits amounting to RM26,352,000; (b) impairment loss amounting to RM69,901,122, and (c) retrenchment costs amounting to RM780,956. In addition thereto, the Disputed Counterclaim for the Receivables in the sum of RM5,838,956 was listed under Issue #16 in paragraph 1.9.1(f) of the Award. The plaintiffs' central allegation is that the Tribunal, in making the Award, failed, by logical inference or necessary implication, to consider and address P1's Disputed Counterclaim for RM5,838,956.

32 The BOA Arbitration was held under the auspices of the Singapore International Arbitration

Centre Rules 2007. In the present setting aside application, the plaintiffs relied on the following provisions, each as a separate and alternative ground:

(a) S 24(b) of the IAA, on grounds that a breach of the rules of natural justice occurred in connection with the making of the Award by which the rights of parties have been prejudiced;

(b) Art 34(2)(a)(iii) of the Model Law, on grounds that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of submission to arbitration; and

(c) Art 34(2)(b)(ii) of the Model Law, on grounds that the Award is in conflict with public policy.

33 In the course of oral arguments, Mr Kumar accepted that if the court was with him on any of the three alternative grounds, the court did not have to set aside the entire Award and could simply remit the Disputed Counterclaim for Receivables as a stand-alone dispute to an arbitrator for his consideration. According to Mr Kumar, the Award in the defendants' favour was for about €1m and, converted into the same currency, the Disputed Counterclaim was for about €1.5m. As such, the eventual outcome of the Disputed Counterclaim may have a bearing on the costs awarded by the Tribunal and Mr Kumar has also asked for costs to be similarly remitted.

34 In this judgment, I shall first examine the circumstances surrounding the Tribunal's purported failure to consider and address the Disputed Counterclaim, before considering the position under the various provisions of the IAA and the Model Law.

35 Before I do so, I feel it is necessary to make a few remarks about the degree of review that is appropriate in such cases, which is ultimately a matter dependent on the type and nature of the challenge. Even so, the review should not involve a re-argument or re-trial of the arbitration. I must emphasise that it is not the role of the court to rake through the award and the record fastidiously with the view to finding fault with the arbitral process. Instead, "an award should be read *generously* such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied" [emphasis added] (see *Soh Beng Tee* at [65(f)]).The same views were expressed by Chan J in TMM at [126], where the review was far more extensive than that undertaken in this case:

> Arbitrations are meant to be an efficient alternative to court litigation. This has, unfortunately, not been the case. In these proceedings, TMM provided a compendious record of the Arbitration by way of two affidavits which ran into about 3,200 pages across eight volumes. Excluding oral submission captured in more than 1,300 pages of transcripts, TMM also tendered several rounds of written submissions which totalled 241 pages from cover to cover. I find this to be both unnecessary and unsatisfactory. Especially for challenges against an award founded on the breach of natural justice, the court's role is, in very general terms, to ensure that missteps, if any, are more than arid, hollow, technical and procedural (*Soh Beng Tee* at [98]). *Any real and substantial cause for concern should be demonstrably clear on the face of the record without the need to pore over thousands of pages of facts and submissions. Otherwise, curial recourse against an award will be used (and abused) as an opportunity to invite the court to judge the full merits and conduct of the arbitration. As a further aside, an over-jealous scrutiny of the arbitral tribunal's decision will also encourage parties to, via the statutorily permitted mechanism of curial recourse, tactically frustrate and delay the enforcement of the arbitral award.* In the present case, taking the commencement of the Arbitration as the date at which the dispute arose, the parties' dispute is already in its fifth year. If my decision is appealed, parties may well

have to wait for several more months to finally resolve this dispute. This runs contrary to one of the original aims of arbitration as an expedient alternative dispute resolution mechanism. [emphasis added]

36 The present case is not complicated and I was content to look at the Award, the pleadings, the evidence and the overall presentation of the parties' respective cases before the Tribunal. This approach was adopted because it was apparent, on the face of the Award itself, that something was amiss in this particular case, and to understand the Award and the opposing arguments of the defendants, some degree of review was required.

The circumstances surrounding the Tribunal's purported failure to consider the Disputed Counterclaim

37 I have already set out above (at [23]-[30]) the various salient parts of the Award. In this part of the Judgment, I shall discuss the Award in the context of the pleadings and evidence before the Tribunal, including the manner in which the parties' presented their respective cases.

38 It is worth repeating several matters. First, the Disputed Counterclaim for the Receivables was in fact presented by the plaintiffs to the Tribunal for determination. Second, it is not in dispute that the Group B Goods were actually delivered. Third, it is similarly not in dispute that the Group B Goods were different purchases from the Group A Goods, and that the rectification works for which 10 debit notes were raised by D2 related to the Group A Goods only (see above at [16] and [28]). In other words, there was no claim for rectification works in respect of the Group B Goods.

The pleadings

39 In P1's Re-Amended Defence and Counterclaim in the BOA Arbitration, P1 pleaded its entitlement to an aggregate sum of RM5,838,956 purportedly being "Amounts owing as at 31 January 2008". [note: 5] This included the sum of RM5,816,770.25 as "Amounts owing for goods sold and delivered". In relation to the latter sum, P1 further pleaded that: [note: 6]

> 57. By a letter of demand dated 13 February 2007, [P1] demanded from [D1] the sum of RM4,653,604.78 due and owing by [D1] to [P1] for the good supplied by [P1] to [D1].
>
> 58. By a letter dated 14 February 2007 from [D1] to [P1], [D1] sought to set off an amount of RM4,653.604.78 purportedly due from [P1] to [D1] in terms of receivables.
>
> 59. By a letter dated 14 February 2007, [P1] denied the contents of the letter dated 14 February 2007 from [D1] to [P1] aforesaid.
>
> 60. Todate [sic], the sum of RM5,816,770.25 is still due and owing by [D1] to [P1].

P1 also pleaded its entitlement to RM22,186 being the bank balances purportedly payable by D4 to P1. [note: 7]

40 In its Amended Reply and Defence to Counterclaim, D1 stated: [note: 8]

> 44. Referring to paragraph 57, [D1] admits that a Notice of Demand for RM4,653,604.78 was sent to [D1] but contends that the said notice is not dated 13.2.2007 as pleaded by [P1]. In fact, the original letter was also wrongly dated "2.11.2006". In any event, it was received by [D1]

on 7.2.2007.

45. Referring to paragraph 58, [D1] contends that it did on 14.2.2007 write to [P1] and disputed that there is an outstanding amount of RM4,653,604.78 due from [D1] to [P1]. [P1] was *inter alia* informed that the cost for defective products supplied have not been taken into consideration in calculating the amount purportedly owed by [D1]. [P1] was also informed that subject to [D1] receiving satisfactory clarification with regard to the debit notes for the defective products and the verification exercise that [D1] was undertaking at the time in respect of products purchased from [P1], an amount of RM224,630.00 was due and owing by [P1] to [D1] after setting off [P1's] purported claim against receivables.

46. Paragraph 59 is denied in so far as [P1] did reply on 14.2.2007 to [D1's] letter dated 14.2.2007. [D1] does not have any record of [P1's] purported reply dated 14.2.2007.

47. [D1] categorically denies paragraph 60 and contends that it is embarrassed by [P1's] pleading which lacks any particulars. [D1] refers to paragraph 57 where [P1] alleged that only an amount of RM4,653,604.78 is purportedly due and owing pursuant to the letter of demand. [D1] puts [P1] to strict proof of paragraph 60.

48. [D1] denies paragraph 61 and puts [P1] to strict proof.

The evidence

41 The plaintiffs also led evidence in respect of the goods sold (*ie*, the Group B Goods). In the witness statement of Ms Valerie Gan ("Ms Gan"), a witness for the plaintiffs, she stated at paragraph 15.3 that: [note: 9]

> *Receivables is amount owed by [D] as at 31 January 2008 of RM5,838,956.00. The document to support this claim is* [*P1's*] *audited accounts as at 31 January 2008* found at **pages 2940 to 2979 volume 10 of [P1's] Bundle of Documents.** The amount owed by [D] pursuant to trade is RM5,816,770 as seen at note 13 under "an affiliate" **at page 2971 volume 10 of [P1's] Bundle of Documents.** The amount owed by [D] from cash and bank balances is RM22,185.88 as seen **at pages 1122 to 1124 of volume 4 of [P1's] Bundle of Documents.** [emphasis in original in bold, emphasis added in italics]

On 24 July 2009, Ms Gan was subjected to cross-examination in respect of the Receivables. Then counsel for the defendants in the Arbitration, Mr Sivaneindiren, focused his cross-examination on how Ms Gan was able to show the quantum of Receivables due with reference to P1's statement of account and audited accounts.

42 Other than a bare denial of Ms Gan's evidence by the defendants' principal witness, Mr Rainer Floeth ("Mr Floeth") [note: 10], the defendants' witnesses did not address the issue of the Receivables or the Disputed Counterclaim in their evidence.

The submissions in the BOA Arbitration

43 In P1's written submissions in the BOA Arbitration dated 30 October 2009, it was submitted at paragraphs 16.8 and 25.3.3 as follows: [note: 11]

> 16.8 [Ms Gan] in paragraph 15.3 of her witness statement highlighted that the amount owed by [D] as at 31 January 2008 is RM5,838,956.00 which is reflected as "receivables" in [P1's] audited

accounts as at 31 January 2008 **(RBD vol 10 pgs 2940 to 2979)**. The amount owed by [D] pursuant to trade is RM5,816,770 as seen at note 13 under "an affiliate" **at page 2979 (supporting documents and invoices appear at RBD vol 8 pages 2193 to 2232)**. The amount owed by [D] from cash and bank balances is RM22,185.88 **(RBD vol 4 pgs 1122 to 1124)**

...

25.3.3 Receivables is the amount owed by [D] as at 31 January 2008 of RM5,838,956.00. …

[emphasis in original]

44 In its written submissions dated 2 November 2009, [D] submitted on the damages claimed by P1 for loss of profits, impairment loss and retrenchment costs. [note: 12] [D] further submitted on the Receivables at paragraph 363: [note: 13]

363 As regards the receivables amounting to RM5,838,956.00, *we say that the amount has not been proven*. If at all the Tribunal were minded to accept [Ms Gan's] explanation under cross-examination – that the figure is based on the audited accounts, though no breakdown is provided – we respectfully submit that *this amount should be set-off against any amounts that the Tribunal may award to [D1] and/or [D4]*. [emphasis added]

45 In light of the above, the positions of the parties before the Tribunal appear to be as follows. P1 had made it clear in its pleadings, evidence and submissions that it was claiming the sum of RM5,838,956 for the Receivables. On the other hand, based on its pleadings and submissions, D1's position was that the Disputed Counterclaim had not been proven in terms of the quantum sought in pleadings. This is clear from [D]'s further submission that if the Tribunal accepted P1's position that the amount claimed under the Disputed Counterclaim was based on the audited accounts of P1, then this amount was to be set off against any amounts awarded to D1 and/or D4 by the Tribunal. I pause here to flag out Mr Kumarasingam's argument for D1 to D3 which was that the Tribunal did not accept Ms Gan's evidence and as such did not deal with the set off. The short answer to Mr Kumarasingam's contention is that this plainly contradicts paragraph 5.5.1 of the Award which stated that the question of remedies, including P1's entitlement to the Disputed Counterclaim, "[did] not arise" (see above at [29]-[30]).

The statements of issues to be tried

46 On 24 July 2009, the Tribunal instructed parties to furnish an agreed list of issues. However, since the parties could not agree on a common list of issues, separate lists of issues were submitted. On 24 August 2009, the defendants furnished the Tribunal with a statement of issues to be tried ("[D]'s List"). On 26 August 2009, the plaintiffs furnished the Tribunal with their list of issues ("[P]'s List").

47 In [P]'s List, the Tribunal was to determine a number of issues, including (at paragraph 15): [note: 14]

15. Whether [D1] is indebted to [P1] for goods sold and delivered by [P1] to it;

15.1 Whether the defects in the goods so delivered are the responsibility of [D] or [P1];

At paragraph 18, the plaintiffs sought the following reliefs in the BOA Arbitration: [note: 15]

> 18. If the [Tribunal] finds in favour of [P1] in [the BOA Arbitration] whether [P1] is entitled to claim:
>
> 18.1 for loss of profits amounting to RM26,352,000.00;
>
> 18.2 impairment loss amounting to RM69,901,122.00;
>
> 18.3 *the sum owing by [D1] to [P1] of RM5,838,956.00*; and
>
> 18.4 retrenchment costs amounting to RM780,956.00;
>
> [emphasis added]

At paragraph 19, the plaintiffs framed the issues as follows should the Tribunal find in favour of [D]: [note: 16]

> 19. If the Tribunal finds in favour of [D1]:
>
> 19.1 whether [D1] is entitled to claim loss of profits amounting to €500,377.04;
>
> 19.2 whether [D1] is entitled to claim the amount of US$43,108.69 for rectification works undertaken by [D1] in respect of the defective products supplied by [P1];
>
> 19.3 whether [D1] is entitled to claim the amount of €424,158.33 for rectification works undertaken by [D2] in respect of the defective products supplied by [P1].

48 Conversely, [D]'s List omitted explicit consideration of whether D1 was indebted to P1 in respect of the Receivables (*ie*, paragraph 15 of [P]'s List). The issues set out in paragraphs 1 to 6 of [D]'s List related to whether P1 acted in breach of its obligations under the BOA and the LA. However, when framing the *reliefs* claimed by P1 in the BOA Arbitration, the defendants then combined P1's counterclaims for general damages with the Disputed Counterclaim in respect of the Receivables. At paragraph 7 of [D]'s List, it stated (mirroring paragraph 18 of [P]'s List; see above at [47]): [note: 17]

> 7. If the [Tribunal] finds in favour of [P1] in [the BOA Arbitration], whether [P1] is entitled to claim any of the following:
>
> 7.1 loss of profits amounting to RM26,352,000.00
>
> 7.2 impairment loss amounting to RM69,901,112.00;
>
> 7.3 *the amount of RM5,838,956.00 purportedly due and owing; and*
>
> 7.4 retrenchment costs amounting to RM780,956.00
>
> [emphasis added]

In other words, in [D]'s List, the issues were framed such that if the Tribunal found that the plaintiffs were in breach of the BOA and the LA as alleged in the arbitration, they would not be entitled to any of the amounts counterclaimed, including the Disputed Counterclaim for the Receivables. [D]'s List did

not explicitly list the Receivables as a claim for consideration despite the plaintiffs' pleadings.

49 I have already recounted the Tribunal's treatment of the Disputed Counterclaim in the Award (see [29] to [30] above).

The purported omission of the Disputed Counterclaim from the Award

The framework of issues considered by the Tribunal

50 Mr Kumar argued that it was the Tribunal's adoption of [D]'s List that led to the Tribunal's failure to address the Disputed Counterclaim, as the framework of issues put forward by [D] omitted the issues of D1's purported indebtedness for goods sold and delivered by P1 (which, conversely, was set out at paragraph 15 of [P]'s List) and D4's indebtedness to P1. According to Mr Kumar, because Issue #16 in the Award was phrased in a manner which obliged the Tribunal's consideration of the Receivables only if the other substantive issues in the BOA Arbitration were determined in [P]'s favour (*ie*, Issue #13 and Issue #14 in the Award), the Tribunal completely failed to consider the Disputed Counterclaim.

51 Mr Kumar further submitted that the Disputed Counterclaim was a stand-alone issue before the Tribunal and had nothing to do with whether [D] had breached their contractual obligations (Issue #13 in the Award) or had acted in a manner to frustrate the joint venture (Issue #14 of the Award).

52 In response, Mr Kumarasingam countered that the plaintiffs had only made a bare allegation that the Disputed Counterclaim (and the parties' submissions thereon) was not considered by the Tribunal. The Tribunal had the benefit of the parties' pleadings and submissions on the Disputed Counterclaim. Further, the issue of the Disputed Counterclaim was also dealt with in the course of cross-examination of Ms Gan. Mr Kumarasingam submitted that in finding that neither the plaintiffs nor the defendants had acted in a manner so as to frustrate the joint venture, the Tribunal left it to the parties to "come to a consensual resolution to unwind the remainder of their failed joint venture" (paragraph 5.6.3 of the Award). [note: 18] I have to say that I do not see how Mr Kumarasingam's contentions impact the question at issue in OS 1006/2012.

Interaction with the issue of defective goods

53 Sensing the weakness of his arguments, during the hearing of the present application, Mr Kumarasingam came up with a line of argument that was *not* the defendants' case before the Tribunal. He said that the issue of the defective goods before the Tribunal was tied to the issue of the Receivables. In other words, the defendants appeared to assert that the Tribunal had considered (and dismissed) the Disputed Counterclaim for the Receivables with the finding that P1 had been in breach of the LA in failing to manufacture products in accordance to contractually applicable standards (see above at [28]). To repeat, at paragraphs 3.3.1-3.3.10 of the Award (*ie*, Issue #3), the Tribunal had considered the issue of whether P1 had breached Clause 4.1 of the LA in delivering poor quality goods (*ie*, the Group A Goods), and if so, whether D1 was entitled to recover for rectification works for which it had incurred a total expenditure of US$43,108.69 and €424,168.33. The Tribunal ultimately found that P1 was in breach of Clause 4.1 of the LA and was liable to pay for the rectification works.

54 Mr Kumarasingam argued that the fact that the Group A Goods were found to be defective by the Tribunal suggested that the Group B Goods were also defective. Moreover, he submitted that the plaintiffs' own formulation of the issue of the Receivables in [P]'s List at paragraph 15 suggested that the quality of the Group B Goods was in issue (see above at [47]). It is to be recalled that the

relevant issue was formulated in [P]'s List as follows:

> 15. Whether [D1] is indebted to [P1] for goods sold and delivered by [P1] to it;
>
> 15.1 *Whether the defects in the goods so delivered are the responsibility of [D] or [P1].*
>
> [emphasis added]

55 According to Mr Kumarasingam, the Tribunal's finding that the plaintiffs did not consistently produce goods of the required quality logically extended to the Group B Goods as the plaintiffs had raised (in [P]'s List) the question of whose responsibility it was to ensure the quality of the Group B Goods. Mr Kumarasingam also verbally referred me to various portions of the plaintiffs' pleadings [note: 19] and submissions [note: 20] before the Tribunal where the plaintiffs claimed that [D] had alleged that the goods supplied by P1 were defective in order not to pay for the goods. Mr Kumarasingam therefore concluded that the Tribunal, upon finding that the plaintiffs did not consistently produce goods of the required quality, decided that the issue of the Disputed Counterclaim "[did] not arise" (see above at [29]).

56 Mr Kumar disagreed with this analysis and argued that the Arbitration never dealt with the Group B Goods, only with the Group A Goods and the 10 debit notes. Indeed, in respect of the Group A Goods, the defendants had made the requisite payment for the goods and then succeeded in claiming costs for rectification works in relation to the proven defects. In contrast, the Group B Goods were received and accepted by D1 without raising the issue of any abatement in price for rectification works. More specifically, there was no part of the defendants' pleadings or submissions where they had categorically invited the Tribunal to disregard the Disputed Counterclaim on the ground that the relevant goods were defective.

57 Mr Kumar pointed out that the defendants' argument relating to the alleged defects in the Group B Goods was *not* the way the case was run before the Tribunal. The defendants had argued on the basis that the plaintiffs had to prove the *quantum* of the Receivables. According to Mr Kumar, the issue of the Disputed Counterclaim had always been a separate and distinct issue from the purported breaches by the plaintiffs in supplying defective Group A Goods.

58 It is important to bear in mind that P1's alleged breaches of the LA in supplying goods of defective quality related to ten debit notes for rectification costs which were not satisfied (*ie*, the Group A Goods) and not in relation to the Receivables claimed in the Disputed Counterclaim (*ie*, the Group B Goods). Indeed, Mr Kumarasingam conceded during the hearing of this application that the issues of P1's alleged breaches of the LA and D1's liability for the Receivables related to different groups of products. In this regard, averments in the pleadings to P1's supply of defective goods and the refusal of D1 to pay for defective goods were referable only to the Group A Goods.

59 I agreed with Mr Kumar, and rejected this particular argument run by Mr Kumarasingam *viz*. that it had been defendants' case in the Arbitration that they were not required to pay the Receivables because the goods received (ie, the Group B Goods) were defective. As stated, it is significant that there was no claim for rectification costs in relation the Group B Goods. Besides, it was not the defendants' case in the BOA Arbitration that the Group B Goods had no value such that the defendants would not be liable to pay any money at all for them. Having been put to strict proof thereof, P1 sought to prove the quantum of the Group B Goods by referring to invoices for the goods supplied, audited accounts, and evidence from Ms Gan who was cross-examined primarily on proof of the *quantum* of the Disputed Counterclaim (see above at [41]). It followed that in their written submissions before the Tribunal, D1 and/or D4's only argument appeared to be that the quantum of

the indebtedness had not been proven. Critically, the defendants also invited the Tribunal to set off the amount against any amounts the Tribunal might award to D1/D4 (see [44] above).

60 Besides, as Mr Kumar rightly submitted, this particular argument run by Mr Kumarasingam was brought up for the first time at the hearing of OS 1006/2012, and was not alluded to in any of the affidavits filed before the hearing or the written submissions prepared for the hearing by Mr Kumarasingam. Indeed, D1 to D3's case on affidavit was that "[t]hroughout the BOA Arbitration, the position of [D1] in relation to [P1's] counterclaim was consistent i.e. the Purported Sum had to be proven by [P1] to the satisfaction of the Tribunal". [note: 21]

Discussion on the Tribunal's treatment of the Disputed Counterclaim

61 Due to the way the issues were framed in the Award, and the fact that the Receivables were listed under Issue #16 as a *relief sought* (as opposed to an issue of liability), once the Tribunal held that [P] failed to prove [D]'s breaches in Issue #13 and Issue #14, the Tribunal logically concluded that all the remedies listed in Issue #16 did not arise for determination. According to Mr Kumarasingam, [note: 22] "the necessary inference must be that the Tribunal had considered the parties' respective positions and submissions…and come to the conclusion that the Plaintiffs had not satisfied the Tribunal that the Disputed Counterclaim was due and owing".

62 I am not convinced by this. I agree with Mr Kumar that on the face of the Award, the merits of the Disputed Counterclaim had not been listed as an issue of liability and only as a relief the plaintiffs might be entitled to if they succeeded on their other claims (*ie*, Issue #13 and Issue #14). It is quite clear that the plaintiffs' pleaded complaints described at [25] above were rejected by the Tribunal as not having been successfully proven. In contrast, the Disputed Counterclaim was *not* rejected because the Tribunal found that it had not been proven or because of any conclusion relating to the quantum of the Receivables.

63 It is to be recalled that D1, in its letter of 14 February 2007 (see above at [15]), disputed its liability to pay the Receivables and stated that it was undertaking its own "verification exercise" on the goods purchased from P1. At the Arbitration, there was no suggestion or evidence that the verification exercise was carried out. I note that putting the plaintiffs to strict proof with respect to the Disputed Counterclaim is not the same thing as alleging that the goods were defective. Whilst the parties did not agree on the quantum of the plaintiffs' claim, the goods delivered must have been worth something. Notably, it was not D1's case in the BOA Arbitration that the Group B Goods had no value. [note: 23] In addition, there was no evidence that the Group B Goods were returned by D1 for rectification. The only way the plaintiffs would not have been entitled to any payment at all would be if the Tribunal had found that defects in the products should have resulted in an abatement in price which would have extinguished the Disputed Counterclaim. No mention at all was made by the Tribunal of any abatement or extinguishment of the sum, or even of any defects in quality in relation to the Group B Goods. Moreover, it was never even the defendants' case in the BOA Arbitration that the Group B Goods were defective.

64 In these circumstances, the Tribunal's omission to make a ruling on the Discounted Counterclaim could only mean that the Tribunal did not address the substantive merits of the Disputed Counterclaim because the Tribunal had assumed that it was a relief sought pursuant to the plaintiffs' pleaded complaints described in [25]. It had slipped the Tribunal's notice that the Disputed Counterclaim for Receivables was an independent and distinct claim that had to be dealt with independent of his findings on Issue #13 and Issue #14. It is highly likely that this oversight happened because the Tribunal extensively adopted [D]'s List of issues to be determined (see above at [24]-[25]).

65 For completeness, I refer to Mr Kumarasingam's argument that the plaintiffs had at no time objected to the issues formulated in [D]'s List. I accord this argument little weight. It was precisely because the parties were unable to agree on a list of issues that separate lists were submitted for the consideration of the Tribunal.

66 In my view, the Tribunal's oversight for the reasons explained above was not due to a manifest error of law or fact on the part of the Tribunal. This leads me to the next question of whether the oversight falls within the provisions of s 24(b) of the IAA or Art 34(2) of the Model Law.

The grounds for setting aside the Award

67 This form of challenge to the Award under *inter alia* s 24(b) of the IAA, like other types of statutory challenges to arbitral awards, is circumscribed by the judicial philosophy of minimal curial intervention. The oft-cited reasons for the principle of minimal curial interference with arbitral awards are the need to encourage finality in the arbitral process as well as the deemed acceptance by the parties to an arbitration of the attendant risks of having only a very limited right of recourse to the courts (per V K Rajah JA in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [65(c)]). In the context of this case, it is apposite that I quote the statement of principle at [65(f)] of *Soh Beng Tee* as a reminder of the judicial philosophy of minimal intervention with the finality of an arbitral award:

> Each case should be decided within its own factual matrix. It must always be borne in mind that it is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather, an award should be read generously such that *only meaningful breaches of the rules of natural justice that have actually cause prejudiced are ultimately remedied*. [emphasis in original text]

68 It is well-established that the courts will decline to set aside arbitral awards in cases of errors of law or fact on the part of the arbitral tribunal. As stated in *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 ("*Sui Southern*"), a case on Art 34(2)(a)(iii) of the IAA, at [38]:

> …Where an arbitral tribunal correctly states but misapplies the law, this is an error of law (and does not cease to be such even if the error is gross or egregious), in respect of which no challenge lies under the Act…. In so far as SSGC alleged that the Tribunal ignored "the matrix of facts", this was an allegation that the Tribunal committed an error of fact, in respect of which there is also no remedy under the Act…

69 However, in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW*") at [27], the Court of Appeal emphasised that while the courts infrequently exercise their power to set aside arbitral awards, they will nevertheless do so without hesitation if a statutorily prescribed ground for setting aside an arbitral award is clearly established.

S 24(b) of the IAA

70 It is well accepted that Art 18 of the Model Law enshrines the right of the parties to be treated with equality and to be given a full opportunity to present their cases. Singapore has legislated on the right to challenge an award on grounds of a breach of natural justice in s 24(b) of the IAA, which provides that the High Court may set aside the award of the arbitral tribunal if a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

71 The test for setting aside where there is a breach of natural justice was laid down in *Soh Beng Tee*. The Court of Appeal held (at [29]) that a party challenging an arbitration award as having contravened the rules of natural justice must establish:

(a) Which rule of natural justice was breached;

(b) How it was breached;

(c) In what way the breach was connected to the making of the award; and

(d) How the breach prejudiced its rights.

72 While *Soh Beng Tee* was a decision under the Arbitration Act (Cap 10, 2002 Rev Ed) ("the AA"), the test should equally apply to a case brought under s 24(b) of the IAA (see *Soh Beng Tee* at [65] and *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*L W Infrastructure*") at [49]).

Whether there has been a breach of the rules of natural justice

73 In *Soh Beng Tee* (at [43]), the Court of Appeal further explained two pillars of natural justice encapsulated in the maxims *nemo judex in causa sua* and *audi alteram partem*:

> In *Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd* [1978] VR 385 at 396, Marks J helpfully distilled the essence of the two pillars of natural justice in the following terms:
>
> > The first is that an adjudicator must be disinterested and unbiased. This is expressed in the Latin maxim – the *nemo judex in causa sua*. ***The second principle is that the parties must be given adequate notice and opportunity to be heard. This in turn is expressed in the familiar Latin maxim – audi alteram partem.*** *In considering the evidence in this case, it is important to bear in mind that each of the two principles may be said to have sub-branches or amplifications. One amplification of the first rule is that justice must not only be done but appear to be done;* (Lord Hewart, C.J. in *R v Sussex Justices; ex parte McCarthy*, [1924] 1 K.B. 256 at p 259; [1923] All E.R. Rep. 233). ***Sub-branches of the second principle are that each party must be given a fair hearing and a fair opportunity to present its case. Transcending both principles are the notions of fairness and judgment only after a full and fair hearing given to all parties.***
>
> [emphasis in original in italics, emphasis added in bold italics]

74 As recognised by the Court of Appeal in *Soh Beng Tee*, the doctrine of *audi alteram partem* is a fundamental as well as multi-faceted one in the context of arbitral proceedings. The sub-branches referred to by the Court of Appeal are the four "sub-rules" identified in *TMM.* In that case, Chan J considered a setting aside application on *inter alia* the ground of a breach of the rules of natural justice in the context of four further sub-rules (see [63]-[106]):

(a) the duty to not look beyond the parties' submissions.

(b) the duty to deal with essential issues;

(c) the duty to attempt to consider and comprehend the parties' submissions; and

(d) the duty to give reasons and explanations;

I agree that the above formulation provides a convenient framework to consider whether the rules of natural justice have been breached in a particular case. The abovementioned duties of the arbitral tribunal are not exhaustive and should not be considered rigidly or in isolation as there will often be a degree of overlap between the various amplifications of the doctrine. For example, a complete failure on the part of the arbitral tribunal to give essential reasoning may in certain circumstances give rise to a factual inference that it has been remiss in its duty to attempt *bona fide* to consider and comprehend the parties' submissions. Finally, I also note that the question of breach often involves a determination of the *extent* of departure from best practices and/or procedures, and that there is an entire spectrum of conduct ranging from "permissible discretionary decision-making [to] the forbidden territory of impermissible breach of natural justice" (see *TMM* at [60]).

75 In the present instance, the duty most closely engaged is the duty to deal with all essential issues in the arbitration. As noted in *TMM* (at [72]-[74]), an arbitral tribunal is not obliged as a matter of practicality to deal with every argument canvassed by the parties, but it must ensure that all *essential* issues are dealt with. In determining what is considered "essential", tribunals should be given a fair amount of latitude and should be entitled to take the view that the dispute may be disposed of without further consideration of certain issues. Moreover, an issue need not be addressed expressly in an award but may be *implicitly* resolved. Nevertheless, it is remains incumbent on the tribunal to address its mind to the various critical issues in the proceedings. In this context, the High Court in *TMM* drew a distinction between arguments on the one hand and issues on the other. To this, in my view, might be added a further distinction as between a head of claim brought by the parties and an issue that is a part of a head of claim, which distinction we will have reason to return to later (see below at [86]). Suffice to say that an issue that is part of a claim may be either an essential or subsidiary issue. An essential issue is likely to impact on the outcome of the claim whereas a subsidiary or peripheral issue will not.

76 At this juncture, it may be helpful to look at various instances where the courts have either set aside or declined to set aside arbitral awards on the ground of breaches of the rules of natural justice. In *TMM*, as noted, the High Court eventually declined to set aside the award finding, *inter alia*, that the arbitrator had dealt with all the essential issues to the dispute. In that case, the dispute between the parties was over the purported repudiation of two Memoranda of Agreement for the sale and purchase of two vessels. The High Court opined that once the arbitrator took the position that the defendant's failures (if any) in respect of certain contractually required repairs only amounted to a breach of a warranty and not a condition, the plaintiff was accordingly not entitled to reject delivery of the vessels. All the essential issues were therefore addressed and, whilst the defendant submitted that the arbitrator did not deal with certain issues, the resolution of those issues flowed from his decision on other issues.

77 Conversely, in *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row*"), the High Court set aside an arbitral award under s 48(1)(a)(vii) of the AA, which is *in pari materia* with s 24(b) of the IAA. The facts of *Front Row* are worth exploring at some length. There, the plaintiff and the defendant entered into an agreement to jointly organise and run a series of races (the "Asian Cup Series") using 35 specially built Mercedes-AMG SLK 55 cars. The plaintiff's obligations were to purchase the cars from the defendant and provide working capital for the Asian Cup Series. The defendant's obligations were, *inter alia*, to organise and promote up to 20 races per year for two years. In the event, the Asian Cup Series was discontinued after three races as a result of insufficient participation. The plaintiff then attempted to stage a supporting event for the A1 Grand Prix using the SLK 55 cars, only to be informed by Mercedes-AMG that the SLK cars were developed only for use in "driving training programmes...which [did] not involve the cars

competing against each other". The defendant commenced arbitration proceedings against the plaintiff, who counterclaimed on the grounds of misrepresentation, alleging that the defendant had induced the plaintiff to enter into the agreement by three main representations:

(a) That the Asian Cup Series was to be a race series;

(b) That the 35 Mercedes-AMG SLK 55 cars were specially developed, adapted and were appropriate for races conducted under the Asian Cup Series; and

(c) That the defendant would give the plaintiff its full backing and support in marketing, promoting and organizing the Asian Cup Series, and in particular, it would organise 20 races over 10 weekends per annum with 30 cars (the "Representation").

The arbitrator dismissed both the defendant's claim and the plaintiff's counterclaim. On the plaintiff's application to the High Court to set aside the relevant part of the arbitrator's award, Andrew Ang J ("Ang J") found that the arbitrator had failed to accord the plaintiff natural justice by dismissing its counterclaim without considering the grounds of the counterclaim in full. Specifically, the arbitrator had disregarded the issue concerning the defendant's obligation to organise, brand and promote the Asian Cup Series because he was under the misapprehension that the plaintiff had abandoned its reliance on the Representation.

78 In contrast, the High Court *per* Prakash J in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF Construction*") found that there was no breach of natural justice and declined to set aside the adjudicator's determination under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) on grounds that the adjudicator clearly had regard to the submissions of parties and the material before him in arriving at his decision. In the circumstances, Prakash J held (at [60]) that:

> … ***The fact that he did not feel it necessary to discuss his reasoning and explicitly state his conclusions in relation to the third and fourth jurisdictional issues, though unfortunate in that it gave rise to fears on the part of SEF that its points were not thought about, cannot mean that he did not have regard to those submissions at all.*** It may have been an accidental omission on his part to indicate expressly why he was rejecting the submissions since the Adjudicator took care to explain the reasons for his other determinations and even indicated matters on which he was not making a determination. Alternatively, he may have found the points so unconvincing that he thought it was not necessary to explicitly state his findings. Whatever may be the reason for the Adjudicator's omission in this respect, I do not consider that SEF was not afforded natural justice. ***Natural justice requires that the parties should be heard; it does not require that they be given responses on all submissions made.*** … [emphasis added]

79 Prakash J in *SEF Construction* considered a line of Australian cases, and cited with approval *inter alia* the following passage from *Brookhollow Pty Ltd v R&R Consultants Pty Ltd* [2006] NSWSC 1:

> 5 8 *In some cases, it may be possible to say that the issue overlooked was of such major consequence and so much to the forefront of the parties' submissions that no adjudicator attempting to address the issues in good faith could conceivably have regarded it as requiring no specific examination in the reasons for determination.* ***In other cases, the issue overlooked, although major, may be one of a large number of issues debated by the parties. If the adjudicator has dealt carefully in the reasons with most of those issues, it might well be a possibility that he or she has erroneously, but in good faith, omitted to deal with another***

> ***major issue because he or she did not believe it to be determinative of the result.*** Error in identifying or addressing issues, as distinct from lack of good faith in attempting to do so, is not a ground of invalidity of the adjudication determination. The Court must have regard to the way in which the adjudication was conducted and to the extent and content overall of the adjudicator's reasons: the Court should not be too ready to infer lack of good faith from the adjudicator's omission to deal with an issue when error alone is a possible explanation. [emphasis added in italics and bold italics]

80 Several observations may be made about the decision in *SEF Construction.* First, whilst Prakash J found it superfluous to import a duty to act in good faith from Australian law, she also said (at [58]) that "[w]hat the Australians say in regard to good faith can be applied to the requirements of natural justice as well".

81 Second, Prakash J clearly recognised that there were many reasons why a tribunal might omit to address particular submissions in its decision. It may have been an inadvertent omission, or the tribunal might have considered the argument so wholly unmeritorious as not to necessitate an explicit ruling. To these possible scenarios, there might be added the not altogether uncommon scenario where the tribunal may consider certain strands of argument particularly compelling or even determinative of the result so as to dispose of the matter and render all other arguments nugatory.

82 Third, and more importantly, it is implicit in the decision of *SEF Construction* that the tribunal must nevertheless have regard to the submissions of the parties, even if it does not overtly deal with every single one of them in its decision.

83 This view is in line with the sentiments expressed in *Front Row* by Ang J (at [31]) where he states:

> … ***a court or tribunal will be in breach of natural justice if in the course of reaching its decision, it disregarded the submissions and arguments made by the parties on the issues (without considering the merits thereof)*** . Otherwise, the requirement to comply with the maxim *audi alteram partem* would be hollow and futile, satisfied by the mere formality of allowing a party to say whatever it wanted without the tribunal having to address or even understand and consider whatever had been said. …[emphasis in original in italics; emphasis added in bold italics]

On the facts, Ang J distinguished *Front Row* from *SEF Construction* (at [45]) as the former was not a case where the arbitrator had regard to the submissions on the issue but accidentally omitted to state his reasons for rejecting the same or had found the submissions so unconvincing as to render it unnecessary to explicitly state his findings on it. In particular, Ang J noted that the arbitrator in *Front Row* explicitly stated that he was disregarding the material issue because the plaintiff had ceased to rely on it.

84 In the present application, Mr Kumarasingam sought to distinguish the facts in OS 1006/2012 from that of *Front Row* and portray them as being more in line with the situation in *SEF Construction*. He emphasised that: [note: 24]

> (a) The plaintiffs had not alleged that they were ever prevented from fully presenting their pleadings, evidence, and submissions in relation to the Disputed Counterclaim;
>
> (b) The plaintiffs had not alleged that the Arbitrator ever mis-characterised the plaintiffs' position in relation to the Disputed Counterclaim; and

(c) The plaintiffs had not alleged any misconduct on the part of the Tribunal.

85 I note Kumarasingam's arguments in this respect. I am cognisant of the fact that in borderline cases the difference between a mere error on the part of the Tribunal and an unjustified omission to consider parties' arguments or submissions may appear vanishingly small. Nevertheless, I am unable to ignore the fact that the present case involved a clear oversight on the part of the Tribunal to consider an *entire head of counterclaim* that was specifically referred to the Tribunal by the plaintiffs. As noted above, the Tribunal did not address the substantive merits of the Disputed Counterclaim having regarded it as a question of relief that would follow the breaches alleged by the Plaintiffs in relation to Issue #13 and Issue #14. Indeed, the Tribunal did not even cite the Disputed Counterclaim for the Receivables as an issue in the Award, due (most probably) to his extensive reliance on the defendants' framework of issues, let alone any findings on the Disputed Counterclaim and questions of relief and remedies flowing from the Disputed Counterclaim. As submitted by Mr Kumar, this is not a case of logical inference (such as *SEF Construction*) in which it is clear from the face of the award that the Tribunal had actually considered and dismissed the claim, albeit without explicitly addressing the same: there was no corollary between the Tribunal's findings in the Award and the plaintiffs' counterclaim for the Receivables. In the circumstances, the inference must be that the Tribunal had inadvertently disregarded this particular head of claim.

86 A wholesale omission to deal with a distinct head of claim is in contrast to an omission to deal with particular *issues or arguments* which might be interrelated and/or cumulative in nature. In respect of the latter, arbitrators are often required to consider and balance numerous arguments of differing relevance and/or importance. In such a situation, arbitrators often have a degree of discretion in assigning what they consider to be the appropriate weight to each issue or argument. In *TMM*, Chan J considered the *further* distinction between issues and arguments significant, and explained it (at [75]) as:

> An argument is a proposition that inclines towards a specific conclusion. It typically contains reasons or premises, either factual or legal or both, which are presented as driving one towards a particular conclusion. An issue, on the other hand, is a topic. It is non-prescriptive, and usually expressed as a question.

As stated above (at [75]), an arbitral tribunal is not obliged to deal with every single *argument* brought up by the parties, but has the duty to deal with all ***essential*** *issues*. However, in the present case, the Receivables formed a discrete head of claim that was specifically referred to the Tribunal for determination.

87 The fact that P1 had fully canvassed the Disputed Counterclaim before the Tribunal in the BOA Arbitration does not mean that the counterclaim was in fact considered or that the Award is thereby unimpeachable. As Ang J observed in *Front Row* (at [35]):

> … The failure to allow a party to address the tribunal on a key issue is a corollary to allowing the submission but then ignoring it altogether whether deliberately or otherwise. In both cases, ***the mischief is precisely the same: a party is denied the opportunity to address its position to the judicial mind.*** …
>
> [emphasis added]

88 As noted in *TMM* (at [90]), the central inquiry in all such cases is whether the award reflects the fact that the arbitral tribunal had applied its mind to the critical issues and arguments. In the present circumstances, it appears that this crucial question must be answered in the negative. In my

judgment, the present case is very similar to *Front Row*, where the arbitrator arrived at the erroneous view that the plaintiff was not pursuing a counterclaim based on the Representation and made it clear the he did not consider the Representation in dismissing the counterclaim. Likewise, for the reasons stated earlier, the Tribunal in failing entirely to consider the merits of the Disputed Counterclaim had breached the principle of natural justice reflected in the Latin maxim *audi alteram partem*.

Whether the breach prejudiced the rights of any party

89 The Court of Appeal in *Soh Beng Tee* identified (at [91]) the requisite level of prejudice which had to be shown as one where the breach of natural justice "must, at the very least, have actually altered the final outcome of the arbitral proceedings in some meaningful way".

90 In its recent decision of *L W Infrastructure*, the Court of Appeal reconsidered the required level of prejudice before an award can be set aside, stating (at [51]) that *Soh Beng Tee* "should not be understood as requiring the applicant for relief to demonstrate affirmatively that a different outcome would have ensued but for the breach of natural justice". The Court of Appeal clarified the contextual use of the phrase "real or actual prejudice" in *Soh Beng Tee* and qualified the test of prejudice (at [54]) as follows:

> …[T]he real inquiry is whether the breach of natural justice was merely technical and inconsequential or whether as a result of the breach, the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations. Put another way, *the issue is whether the material could reasonably have made a difference to the arbitrator; rather than whether it would necessarily have done so*. Where it is evident that there is no prospect whatsoever that the material if presented would have made any difference because it wholly lacked any legal or factual weight, then it could not seriously be said that the complainant has suffered actual or real prejudice in not having had the opportunity to present this to the arbitrator (*cf Soh Beng Tee* at [86]). [emphasis added]

91 The preceding passage from *L W Infrastructure* was in the context of parties not having the opportunity to reply or make submissions on a particular issue. The same reasoning applies to the situation where the arbitrator has disregarded or otherwise failed to address specific issues or submissions put forth by the parties. Where the arguments or submissions omitted from consideration could have reasonably made a difference to the final result, the applicant can be said to have suffered the requisite prejudice. In the present case, D1 and D4 had taken the clear position in their submissions that any sums found to be due to P1 in respect of the Disputed Counterclaim should be set-off against the damages awarded to D1 and/or D4. No submission was made nor was any evidence adduced contesting the Disputed Counterclaim save for a bare denial of the defendants' liability to pay the Receivables (see above at [42]). Had the Tribunal applied his mind to the merits of the sum in issue in the Disputed Counterclaim for Receivables, there was a possibility that he could have granted the counterclaim, which would have resulted in a material difference in the Award.

92 As noted above, the Tribunal had overlooked an entire and discrete head of claim by the plaintiffs, which, if considered, might have made a substantive difference to the final award. Had the Tribunal considered this head of claim for the Receivables, an outcome in favour of P1 could alter P1's position from the paying party in the BOA Arbitration to the receiving party as the damages awarded to D1 were less than the quantum of the Disputed Counterclaim (see above at [33]).

93 In the premises, I find that there was a breach of natural justice under s 24(b) of the IAA. The Tribunal's wholesale failure to consider the Disputed Counterclaim could not be said to be a merely "technical and inconsequential" breach, but was one which could have reasonably resulted in

prejudice to the plaintiffs.

Art 34(2)(a)(iii) of the Model Law

94 Having reached the conclusion that there was a breach of natural justice, Art 34(2)(a)(iii) of the Model Law would also be engaged on the facts as the pertinent questions and answers for both grounds in cases such as this are the same (see *CRW* at [96]).

95 Art 34(2)(a)(iii) states that an arbitral award may be set aside by the court if the party making the application furnishes proof that "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside".

96 The legal principles underlying the application of Art 34(2)(a)(iii) were considered in *CRW* at [31] to [33]:

> ... First, Art 34(2)(a)(iii) is not concerned with the situation where an arbitral tribunal did not have jurisdiction to deal with the dispute which it purported to determine. Rather, it applies where the arbitral tribunal improperly decided matters that had not been submitted to it ***or failed to decide matters that had been submitted to it*** . In other words, ***Art 34(2)(a)(iii) addresses the situation where the arbitral tribunal*** exceeded (or ***failed to exercise***) ***the authority that the parties granted to it*** (See Gary B Born, *International Commercial Arbitration* (Wolters Kluwer, 2009) at vol 2, pp 2606-2607 and 2798-2799). …
>
> Second, it must be noted that a failure by an arbitral tribunal to deal with every issue referred to it will not ordinarily render its arbitral award liable to be set aside. The crucial question in every case is whether there has been real or actual prejudice to either (or both) of the parties to the dispute. …
>
> Third, it is trite that mere errors of law or even fact are not sufficient to warrant setting aside an arbitral award under Art 34(2)(a)(iii) of the Model Law (see *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [19]-[22]). In the House of Lords decision of *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221, which concerned an application to set aside an arbitral award on the ground of the arbitral tribunal's "exceeding its powers" (see s 68(2)(b) of the Arbitration Act 1996 (c 23) (UK) ("the UK Arbitration Act")), Lord Steyn made clear (at [24]-[25]) the vital distinction between the erroneous exercise by an arbitral tribunal of an available power vested in it (which would amount to no more than a mere error of law) and the purported exercise by the arbitral tribunal of a power which it did not possess. Only in the latter situation, his Lordship stated, would an arbitral award be liable to be set aside under s 68(2)(b) of the UK Arbitration Act on the ground that the arbitral tribunal had exceeded its powers. ***In a similar vein, Art 34(2)(a)(iii) of the Model Law applies where an arbitral tribunal exceeds its authority by deciding matters beyond its ambit of reference or fails to exercise the authority conferred on it by failing to decide the matters submitted to it, which in turn prejudices either or both of the parties to the dispute*** …
>
> [emphasis added]

97 Relevant to the case before me, *CRW* appears to allow for awards to be set aside where the arbitral tribunal fails to decide the matters submitted to it, which proposition was also recognised in

TMM at [41]. Also, reference to "real or actual prejudice" in the preceding paragraphs must be understood in context, and can be given the same interpretation as set out in *L W Infrastructure* (see above at [90]). As such, the court's exercise of discretion to set aside cannot be exercised for a mere technical breach but only where there is cogent evidence of prejudice such that it would have reasonably made a difference to the arbitral tribunal.

98 In *International Commercial Arbitration* (Wolters Kluwer, 2009), the textbook cited by the Court of Appeal in *CRW* at [96] above, the learned author explained at pp 2606 to 2610:

> An award may be set aside in most developed legal systems if the arbitral tribunal has 'exceeded its authority'. Article 34(2)(a)(iii) of the Model Law is again representative, providing that an award may be annulled if it 'deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration' …
>
> …
>
> The most common basis for annulling awards under Article 34(2)(a)(iii) is where the arbitrators 'rule[d] on issues not presented to [them] by parties' — so-called extra petitia or ultra petitia. …
>
> …
>
> ***Conversely, if a tribunal fails to consider all of the issues that have been submitted to it (so-called infra petitia), the award may be annulled under most national laws.*** As one French Authority explains, ***"[i]ndependently of any issue of jurisdiction, the arbitrators may also be held to have ruled infra petitia on the grounds that they failed to reach a decision on any one of the parties' claims, whether by omission or by deliberate refusal to do so."***
>
> [emphasis added]

99 As stated above, the Tribunal appeared to have overlooked the issue of the Receivables and in the event failed to reach a decision on the Disputed Counterclaim. The Tribunal thereby failed to exercise the authority granted to it by the parties and the doctrine of *infra petitia* clearly applied. Moreover, the test of prejudice was satisfied for the reasons explained above.

Art 34(2)(b)(ii) of the Model Law

100 This is the third ground relied upon by Mr Kumar. Having reached the conclusions I did in relation to s 24(b) of the IAA and Art 34(2)(a)(iii) of Model Law, I do not consider it necessary to deal with the third ground, *viz*. Art 34(2)(b)(ii) of the Model Law, which provides that an arbitral award may be set aside if the court finds that "the award is in conflict with the public policy of this State". I say no more about this ground except to note (without deciding) that the courts have repeatedly held that it must be shown that upholding the award would "shock the conscience" or be "clearly injurious to the public good". In *Sui Southern Gas* (at [48]), the court made it clear that the mere contention that an award was "perverse" or "irrational" could not of itself amount to a breach of public policy. To avail of this provision, there must instead be some demonstrably "egregious circumstances such as corruption, bribery or fraud which would violate the most basic notions of morality and justice." In the present application, there have been no indications or allegations of such circumstances. Indeed, I have noted that the Tribunal's omission to deal with the Disputed Counterclaim appeared to have been the result of pure oversight or inadvertence in the face of two differing lists of issues.

The appropriate order

101 Having set out my findings in respect of s 24(b) of the IAA and Art 34(2)(a)(iii) of the Model Law, I considered it appropriate to remit the Dispute Counterclaim for the Receivables and costs thereof to a new tribunal (which is to be constituted) for determination.

102 The part of the Award that is set aside is limited to the Tribunal's finding in Issue # 16 that relates to the Receivables.

103 I note, parenthetically, that this would have been the type of case that Art 33(3) of the Model Law would have been intended to provide redress for. Art 33(3) permits parties to request (within a specified time period) the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. It is to be hoped that parties in future cases of a similar nature would first attempt to avail themselves of any available opportunities to seek redress from the tribunal itself, before turning to the courts (assuming of course that this is possible in the circumstances).

104 The plaintiffs shall have their costs of OS1006/2012 taxed if not agreed.

[note: 1] CB at pp 24-25.

[note: 2] CB at p 55.

[note: 3] CB at p 56.

[note: 4] CB at pp 59-60.

[note: 5] CB at p 37, para 63.

[note: 6] CB at pp 34-35, paras 57-60.

[note: 7] CB at p 35, para 61.

[note: 8] CB at pp 39-40, paras 44-48.

[note: 9] CB at p 42.

[note: 10] CB at p 43, para 65.

[note: 11] CB at pp 48-49.

[note: 12] Defendants' Bundle of Pleadings, Vol 2, p 1134 at paras 360, 361, 364.

[note: 13] CB at p 50.

[note: 14] CB at p 67.

[note: 15] CB at p 69.

[note: 16] CB at p 69.

[note: 17] CB at p 65.

[note: 18] CB at p 61.

[note: 19] Bundle of Affidavits, Vol 1, Plaintiffs' Amended Reply to Defence to Counterclaim before the Tribunal at pp 621-640, paras 24.10, 28, 30.

[note: 20] Bundle of Affidavits, Vol 2, Plaintiffs' written submissions before the Tribunal at pp 834-987, paras 12.16, 15.5, 16.1, 16.9, 23.3, 25.3.

[note: 21] Bundle of Affidavits, Vol 3, 1st Affidavit of Mr Floeth dated 12 December 2012 at paras, 34, 38.

[note: 22] Defendants' written submissions at para 27(d).

[note: 23] Plaintiffs' Submissions at para 54 (c).

[note: 24] Defendants' written submissions at para 19.