AKM *v* AKN and another and other matters
[2014] SGHC 148

Case Number	: Originating Summons No [L]; Originating Summons No [M]; Originating Summons No [N]
Decision Date	: 31 July 2014
Tribunal/Court	: High Court
Coram	: Vinodh Coomaraswamy JC (as he then was)
Counsel Name(s)	: Alvin Yeo SC, Chan Hock Keng, Wendy Lin and Lawrence Foo (WongPartnership LLP) for the plaintiff in OS [L], Davinder Singh SC, Zhuo Jiaxiang, Lum Wei Yuen Isaac and Vishal Harnal (Drew & Napier LLC) for the plaintiffs in OS [M], Philip Jeyaretnam SC, Ajinderpal Singh and June Hong (Rodyk & Davidson LLP) for the plaintiffs in OS [N]; Andre Yeap SC, Adrian Wong and Tang Hui Jing (Rajah & Tann LLP) for the defendants in OS [L], OS [M] and OS [N].
Parties	: AKM — AKN and another

Arbitration – Recourse against award – Setting aside

31 July 2014 Judgment reserved.

Vinodh Coomaraswamy J:

Introduction

Three applications

1 By the three applications before me, the plaintiffs seek to set aside an award issued in favour of the defendants by a three-member tribunal in an arbitration administered by the Singapore International Arbitration Centre. I shall refer to the award as a single award, although in truth it comprises a partial award issued on 9 May 2012 as amended by a further partial award issued on 15 June 2012 and as further amended by a memorandum of corrections issued on 5 July 2012.

2 To maintain the confidentiality attached to the arbitration, the plaintiffs in each application applied for and secured, without objection from the defendants, an order under s 22 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") that the proceedings in each application be heard otherwise than in open court and that the court's electronic file in each application be sealed to prevent public inspection. To maintain that confidentiality, I have used pseudonyms in this judgment to refer to the parties and to any names by which they or their arbitration may be identified. I have also converted all sums denominated in local currency into the approximate equivalent in US dollars at a representative exchange rate.

3 The arbitration arises from the liquidation of a company I shall call the Corporation. The Corporation was the largest regional producer of a product I shall call Mithril. It carried on business in a country I shall call Moria, with its principal production facility in a city I shall call Erebor.

4 In the course of the Corporation's liquidation, all of the following parties entered into an Asset Purchase Agreement ("the APA"): (a) the liquidator, (b) the Corporation's secured creditors, (c) the Corporation's shareholders and (d) the defendants. Under the APA, the defendants agreed to purchase certain assets from the Corporation. Some of these assets were encumbered with security

interests in favour of the Corporation's creditors. In exchange for these secured creditors' agreement to the sale, and as part of the consideration for the assets they purchased, the defendants agreed to issue two notes for the benefit of the secured creditors. The terms of the notes were set out in an agreement between the defendants and the secured creditors known as the Omnibus Agreement ("the OMNA").

5 At the time the parties entered into the APA, the Corporation owed a large amount of unpaid tax to the municipal authorities of Erebor. One of the conditions precedent to the closing of the transactions under the APA was the approval by the municipal authorities of a deferred payment scheme for this unpaid tax. This condition precedent was eventually satisfied when the liquidator delivered to the defendants what the parties referred to as a "tax amnesty agreement" (or "the TAA"). The TAA was liable to be revoked if any taxes in relation to the Corporation's assets, including the assets which the defendants purchased under the APA, were not paid on time.

6 The transactions under the APA closed in 2004. Very soon thereafter, the defendants, the liquidator and the secured creditors of the Corporation became embroiled in disputes with the municipal authorities over the taxes that had to be paid in relation the Corporation's assets, including assets which the defendants had purchased under the APA. The TAA was eventually revoked in 2006 because of the failure to pay certain taxes on time.

7 In 2008, the defendants commenced arbitration against a number of entities. In its final incarnation, the defendants' case in the arbitration was that the liquidator, the secured creditors and the shareholders of the Corporation were in breach of the APA because they had failed to deliver to the defendants clean title to the assets which the defendants had purchased under the APA. The defendants alleged that title was not clean because the assets were subject to a tax lien. The defendants also claimed that the liquidator, the secured creditors and the shareholders were jointly and severally liable to indemnify the defendants for the failure of the secured creditors, in breach of their obligations under the APA, to settle certain property claims ("the Lost Land Claims").

8 The tribunal agreed with the defendants. It awarded the defendants US$80m as damages for a lost opportunity to earn profits and an indemnity of about US$23.7m in respect of the Lost Land Claims. It also declared that the defendants were entitled to suspend performance of their payment obligations under the two notes (see [4] above) without consequence for so long as the plaintiffs remained in breach of their obligation to deliver clean title to the assets.

9 Dissatisfied with the award, the plaintiffs now apply to set it aside on two grounds:

(a) That they were unable to present their case in the arbitration within the meaning of Art 34(2)(a)(ii) of the UNCITRAL Model Law on International Commercial Arbitration 1985 ("the Model Law") and/or that their rights were prejudiced by a breach of the rules of natural justice in connection with the making of the award within the meaning of s 24(b) of the IAA.

(b) That the award deals with disputes not contemplated by or not falling within the terms of the submission to the arbitration and/or contains decisions on matters beyond the scope of the submission to the arbitration, contrary to Art 34(2)(a)(iii) of the Model Law.

The parties

10 The plaintiff in Originating Summons No. [L] is the Corporation's liquidator. The liquidator is represented by a team from WongPartnership LLP led by Mr Alvin Yeo SC.

11 The plaintiffs in Originating Summons No. [M] are 11 out of 24 secured creditors of the Corporation. For convenience, I shall refer to these 11 parties collectively as "the secured creditors". They are represented by a team from Drew & Napier LLC led by Mr Davinder Singh SC.

12 The first to third plaintiffs in Originating Summons No. [N] are three investment funds which purchased on the secondary market the notes issued by the defendants (see [4] above) from some of the original 24 secured creditors of the Corporation. I shall refer to these three parties collectively as "the Funds". The fourth plaintiff in this originating summons is the sub-custodian and agent for the Funds. These plaintiffs are represented by a team from Rodyk & Davidson LLP led by Mr Philip Jeyaretnam SC.

13 The two defendants in all three applications are special purpose vehicles incorporated under the laws of Moria. They are subsidiaries of a company I shall call Galaxy, incorporated under the laws of the Isle of Man. The defendants are represented by a team from Rajah & Tann LLP led by Mr Andre Yeap SC.

The parties' cases in a nutshell and my decision

14 A number of the plaintiffs' complaints about the award are common to all of the plaintiffs. The remaining complaints are specific to a particular set of plaintiffs. It suffices for now to list the plaintiffs' seven principal complaints about the tribunal's decision without attributing specific complaints to specific plaintiffs:

(a) The tribunal failed to consider the liquidator's submissions, arguments and evidence in support of his case that the obligation to deliver clean title to the assets under the APA was qualified to the extent of the TAA.

(b) The tribunal failed to consider the secured creditors' and the liquidator's submissions, arguments and evidence in support of their separate cases that it was the defendants – and not the liquidator – who were responsible for the TAA being revoked.

(c) The tribunal exceeded its jurisdiction by determining that the defendants suffered damage in the form of a loss of an opportunity to earn profits as a result of the plaintiffs' breaches of the APA.

(d) As an alternative to (c), the secured creditors and the liquidator were unable to present their separate cases on whether the defendants had suffered damage in the form of a loss of an opportunity to earn profits as a result of the plaintiffs' breaches of the APA.

(e) The tribunal exceeded its jurisdiction by suspending the defendants' payment obligations under the two notes.

(f) The tribunal failed to consider the secured creditors' submissions, arguments and evidence in support of their case in relation to the Lost Land Claims.

(g) The tribunal exceeded its jurisdiction when it held that the Funds – who were merely purchasers of the notes in the secondary market – were liable to the defendants for breaches of the APA; further and in the alternative, the tribunal did not give the Funds an opportunity to present their case as to why they were not, as mere assignees of the notes, liable under the APA.

15 The defendants' response, in short, is to deny that any of the grounds for setting aside the award have been established. They argue that the tribunal considered and rejected the plaintiffs' separate cases on these main issues, leaving no basis on which to set aside the award. The defendants also maintain that the tribunal did have the jurisdiction to determine all of the issues which it did. Further, the defendants contend that the Funds submitted themselves to the jurisdiction of the tribunal voluntarily and without qualification, and therefore cannot be heard to complain about the result.

16 Having considered the parties' written and oral submissions and the material that the parties have placed before me, I allow all three applications and set aside the award in its entirety. I now set out my reasons.

Background

17 As I have alluded to above, at the heart of the parties' dispute is the question of how the existence of unpaid taxes over the Corporation's property sold to the defendants under the APA affected the parties' rights and obligations under the APA and, separately, under the notes. Before I deal with that issue, however, it is useful to flesh out the facts in a little more detail.

The Corporation goes into liquidation

18 In 1999, the Corporation filed a petition with the Securities Commission of Moria ("the Commission") seeking to suspend payments on its liabilities. At that time, the Corporation operated a plant in Erebor and owned assets in the city of Erebor as well as elsewhere in Moria. Only the Corporation's plant and assets in Erebor are relevant for present purposes.

19 The Corporation then owed approximately US$337m to its secured creditors. This debt was secured over certain of the Corporation's assets by a mortgage trust indenture executed in 1990. The mortgaged assets included the Corporation's Mithril plant in Erebor as well as the movable equipment and some (but not all) of the real properties which were used directly for the plant's operations.

20 In 2000, the Commission declared the Corporation insolvent and placed it in liquidation, in one of the largest liquidations in the history of Moria. Eventually, the liquidator took office and the Corporation's assets were transferred to him to hold as trustee. In 2001, the liquidator submitted a liquidation plan to the Commission. This plan was subsequently approved in 2003. Under the plan, the liquidator grouped the Corporation's assets into two categories:

(a) "The Plant Assets" comprising the Corporation's assets. These are the assets which the defendants eventually acquired under the APA; and

(b) "The Retained Assets" comprising all of the Corporation's remaining assets.

21 The Plant Assets were further grouped into two sub-categories:

(a) The Mithril plant, machinery, equipment and other items ("the Plant Non-Land Assets"); and

(b) Four parcels of land on which these assets were situated ("the Plant Land Assets"). These four parcels of land were allocated "ten tax declaration numbers".

22 Under the liquidation plan, the secured creditors of the Corporation were to give up their rights

under the existing mortgage trust indenture in exchange for a new mortgage indenture. The new indenture was to create security over the same property as the existing indenture but would include two additional parcels of land. In exchange for the new indenture, however, the secured creditors of the Corporation had to accept a discount on their debt and had to waive their right to make claims against the Retained Assets for any shortfall between the undiscounted amount of their debt and the amount they received under the liquidation plan.

23 The liquidation plan was designed to allow the liquidator to pay off two different sets of creditors. The Plant Assets (*ie*, the first group of the Corporation's assets) would be sold as an integral facility to a prospective buyer so that the buyer could resume operations as soon as possible after acquisition. The hope was that a sale in this manner would enable the Plant Assets to fetch a better price in total than if its individual parts were sold separately. The sale proceeds from the Plant Assets would then be applied against the discounted debt due to the Corporation's secured creditors. The Retained Assets would be sold separately, with the proceeds applied against the unsecured debts of the Corporation.

Galaxy agrees to purchase the Plant Assets

24 The liquidation plan was eventually approved and the liquidator called a tender for the Plant Assets. Galaxy won the tender in 2003. The liquidator, the secured creditors and the shareholders reached a basic agreement with Galaxy on the terms of the sale of the Plant Assets. The parties were keen to give Galaxy possession of the Plant Assets quickly so that it could begin rehabilitating the plant and resume production as soon as possible. The parties therefore entered into a memorandum of agreement ("the MOA") on 29 January 2004.

25 The MOA was intended only to record the basic terms and conditions of the parties' agreement. The parties planned to enter into a more comprehensive agreement later which was "to be negotiated, executed, and implemented in good faith by the Parties in respect of the … sale and purchase of the … [the Plant Assets], upon substantially the same terms and conditions agreed upon by the Parties [in the MOA]".

The Memorandum of Agreement

26 Under s 2.2 of the MOA, Galaxy agreed to acquire the Plant Assets with clean title except as provided in s 4.2(h). Under s 4.2(h), the liquidator represented that the Plant Assets were encumbered by, *inter alia*, "claims of … the [Lorien]/[Celeborn] group, and the unpaid realty tax due on [the Plant Assets], which may affect clean title over some or all of [the Plant Assets]". I refer to the separate claims of the Lorien/Celeborn group as "the Lorien Claim" and "the Celeborn Claim".

27 Under s 3.2(a) of the MOA, the parties agreed that the consideration for the Plant Assets would be approximately US$300m. That consideration was to take the form of (i) an initial down-payment of an equivalent of US$22m and (ii) the issuance of the two notes for the equivalent of the remaining US$278m, payable by equal instalments over eight years. Under s 3.2(b) of the MOA, the parties agreed that the initial down-payment for the Plant Assets was to be paid to the liquidator who would then pay the secured creditors and shareholders in accordance with an agreement to be executed amongst them. It appears that the terms and conditions of the notes were not yet finalised when the parties executed the MOA, as no *pro forma* notes were annexed to it.

28 Under s 5.3(c) of the MOA, the liquidator agreed that "[d]uring the effectivity of [the MOA]" (*ie*, so long as the MOA remained in place), the liquidator would "apply for the waiver by all appropriate Governmental Authority of all tax liabilities of [the Corporation] affecting any or all of [the

Plant Assets], including but not limited to the liability for income and/or real estate taxes".

29 Section 9 of the MOA sets out the dispute resolution provisions. It reads as follows:

> DISPUTE RESOLUTION
>
> 9.1 Amicable Settlement
>
> Any dispute or controversy of any kind whatsoever arising between or among the Parties (such dispute or controversy being referred to herein as a "Dispute") in respect of all matters relating to or in connection with this [MOA] and also in all matters concerning the provisions of this [MOA] and the performance of the obligations provided herein, shall be settled amicably by mutual consultations between or among the Parties as far as practicable.
>
> 9.2 Arbitration
>
> If the Dispute cannot be settled amicably within thirty (30) days by amicable settlement, the same shall be resolved through arbitration in accordance with the arbitration rules of the Singapore International Arbitration Centre for the time being in force.
>
> ...

The legislative body of Erebor passes the Tax Ordinance

30 When the Corporation filed for insolvency with the Commission in 1999, it owed substantial sums of taxes on its real property, on its plant and on its machinery to the municipal authorities in Erebor. Further taxes continued to accrue during the liquidation: *ie*, while the liquidation plan was formulated and approved and thereafter. Thus, the Corporation owed real property taxes to Erebor in respect of (i) the Plant Assets that were the subject of the MOA and (ii) the Retained Assets which would remain with the liquidator. In addition, the failure of the Corporation to pay these real property taxes on time meant that a large amount of interest and penalties also continued to accrue on the unpaid taxes.

31 From the terms and conditions of the MOA described above, it is clear that all of the parties were aware of these tax liabilities. In fact, a few days after the parties signed the MOA, Galaxy asked the liquidator to apply to Erebor to waive the unpaid taxes affecting the Plant Assets or (although this was not strictly an obligation of the liquidator under the MOA) to settle all such unpaid taxes if a waiver could not be obtained.

32 AKP is a secured creditor of the Corporation and is the first plaintiff in Originating Summons No. [M]. On 13 July 2004, AKP wrote, on behalf of all secured creditors including itself, to the municipal legislative body in Erebor ("the SP"). AKP emphasised to the SP, among other things, the need to provide "a conducive and peaceful investment environment" in order to facilitate the "successful rehabilitation and operation" of [the Corporation's Mithril plant] which was a crucial pillar of the Erebor economy. AKP therefore asked the SP to grant "a condonation and/or waiver … of the unpaid business and property taxes affecting [the Plant Assets]".

33 On 28 July 2004, the liquidator followed up on AKP's request. Galaxy's in-house counsel agreed to prepare a draft resolution waiving the Corporation's unpaid realty taxes. The liquidator hoped that the SP would pass that draft into law.

34 The draft resolution did not have the desired effect on the SP. In fact, it had quite the opposite effect. On 3 August 2004, the SP passed a resolution requiring Erebor's city treasurer to levy execution on all of the Corporation's properties for unpaid taxes. The SP drew the conclusion that the liquidator would have sufficient funds in hand to pay the outstanding real property taxes in full as a result of the sale of the Plant Assets to Galaxy.

35 On 7 September 2004, the SP had a change of heart. It now passed the Tax Ordinance. The Tax Ordinance enabled Erebor until 31 December 2004 to grant tax relief to taxpayers who were in arrears (such as the Corporation) by waiving accrued interest and penalties on their unpaid real property taxes. Securing that waiver required the principal amount of all unpaid taxes to be paid on 1 December 2004 or at any later time permitted by the city treasurer.

36 Any taxpayer who obtained tax relief under the Tax Ordinance had to comply with the strict requirements of s 6 of the Tax Ordinance and keep current on all tax falling due during the period of relief. Section 6 provides as follows:

> SECTION 6. Any taxpayer who incurs further delinquency in the payment of their current real property taxes while still paying its real property tax obligations due up to 2004 or its approved extended period, and failure to comply with the terms and conditions on the granting of extension to pay their basic real property tax delinquency shall lose the benefit of this relief under [the Tax Ordinance], and all penalties and interests waived and/or subject of this amnesty would be restored and become immediately due and demandable from said delinquent taxpayers.

In other words, the taxpayer had to keep up to date with both (i) its current taxes (which were not subject to any tax relief) as well as (ii) its past tax obligations (*ie*, the unpaid taxes which were the subject of the tax relief). Any failure to make timely payment of either category of taxes would mean that the taxpayer would lose the benefit of the relief granted under the Tax Ordinance.

The Asset Purchase Agreement

37 On 10 September 2004, three days after the SP passed the Tax Ordinance, the defendants (*ie*, subsidiaries of Galaxy), the liquidator, the secured creditors and the shareholders formalised the sale and purchase of the Plant Assets under the MOA by entering into the APA.

38 Section 2.1 of the APA reads:

> Sale and Purchase of [the Plant Assets]
>
> Upon the terms and subject to the conditions of this APA, [the defendants] agree to purchase from [the liquidator], [the secured creditors] and [the shareholders], and [the liquidator], [the secured creditors] and [the shareholders] agree to sell, convey, transfer, assign and deliver to [the defendants], on the Closing Date, [the Plant Assets], free from and clear of all Liens of any kind, which sale and purchase shall be implemented in such a way as to allow the Parties to avail of the benefits of [a certain provision of Morian law] …
>
> ...

39 Under s 3 of the APA, the defendants agreed to pay the purchase price for the Plant Assets to the secured creditors and the liquidator by:

(a) making a US$22m down-payment to the liquidator; and

(b) issuing two zero coupon notes in the aggregate principal amount of US$278m to the secured creditors and to the shareholders. The principal under the notes was payable over a period of eight years. The terms and conditions of these notes were set out in the OMNA (a draft of which was annexed to the APA).

40 In order to secure its payment obligations, the defendants agreed under s 4 of the APA:(i) to issue stand-by letters of credit ("SLCs") and (ii) to execute the new mortgage trust indenture (described above at [22]) in favour of the secured creditors.

41 The security interest created by the new indenture expressly envisaged that the defendants could seek new secured financing to be secured over the same assets *pari passu*. Thus, under s 4.2(b) of the APA, the defendants were entitled to use the Plant Assets, encumbered under the new indenture, as security for new loans or credit facilities up to US$86m. In addition, that limit of US$86m could be increased by the amount of any payment or prepayment of the purchase price. New lenders would be issued mortgage participation certificates under which their right to repayment would be secured *pari passu* by the new indenture. In other words, the parties envisaged that the defendants would need additional secured financing to rehabilitate the plant and permitted them to obtain that financing subject to the new lenders standing on the same footing as all other secured creditors in their security rights over the Plant Assets.

42 At the time of closing, there were several outstanding claims against the Plant Assets. The parties agreed under the APA that the secured creditors should be responsible for settling two of these claims, *ie*, the Lost Land Claims mentioned in passing above at [7]. This claim will be discussed in greater detail at [213] to [242] below.

43 Under s 7.2 of the APA, the liquidator made certain representations and warranties to the other parties to the APA about the status of the Plant Assets. The relevant parts of s 7.2 read as follows:

> Representations and Warranties of [the liquidator]
>
> [The liquidator] hereby represents and warrants to the other Parties as follows:
>
> …
>
> (f) To the best of his knowledge and after due inquiry, no event has occurred and is continuing which might materially and adversely affect the carrying out of [the liquidator's] obligations under this APA other than those which have been disclosed in writing at the time of this APA.
>
> (g) [The defendants] will acquire [the Plant Assets] completely free from and clear of all claims, Liens and encumbrances of whatever kind and nature.
>
> …
>
> (i) There are no unpaid taxes which have accrued or will accrue on or prior to the Closing Date which constitute or at any time on or after the Closing Date will constitute a Lien on [the Plant Assets].
>
> (j) [The defendants] will have no liability whatsoever for or in connection with any taxes in respect of [the Plant Assets] for any period on or prior to the Closing Date, and all such liabilities will be duly discharged by [the liquidator].

…

(n) At the Closing, full legal and valid title and ownership over [the Plant Assets] will be transferred and conveyed to [the defendants] free from and clear of all claims, Liens, and encumbrances whatsoever.

44 The parties agreed that the warranties and representations above were true and correct as at the date of signing and were deemed to be repeated on the date of closing. I should point out that the above warranties and representations were given against the background of the Tax Ordinance. This is clear from s 7.2(j) of the APA where the liquidator represented that the taxes owing on the Plant Assets for the period prior to closing "will be duly discharged." Although it is phrased as a representation, the liquidator promised by that provision to discharge these taxes following on or prior to the closing.

45 The dispute resolution provisions of the APA are central to one of the issues in the applications. I will consider them in greater detail at [243] to [265] below.

The liquidator obtains the Tax Amnesty Agreement

46 Several conditions precedent set out in s 5.3(b) of the APA had to be satisfied before the defendants came under an obligation to execute the necessary documents to bring about the closing of the transaction. I will go on to discuss some of the relevant conditions precedent later. For the time being I shall focus on s 5.3(b)(iii)(4), which reads:

(iii) [The liquidator] shall have delivered to [the defendants], in form and substance reasonably satisfactory to [the defendants] and their counsel, the following:

…

(4) A copy of the agreement duly signed by the appropriate Governmental Authority approving a deferred payment scheme for the unpaid realty taxes affecting [the Plant Assets].

...

47 I ought now to explain the significance of this condition precedent. As mentioned above, the parties signed the APA on 10 September 2004. That was three days after the Tax Ordinance was passed. Closing under the APA was originally scheduled to take place on 8 October 2004. However, the parties were unable to close on that day because this condition precedent had not yet been satisfied. The parties therefore agreed to delay the closing until 15 October 2004.

48 On 1 October 2004, the liquidator wrote to Erebor's city mayor to seek relief under the Tax Ordinance from having to pay interest and penalties on the Corporation's unpaid taxes. The liquidator asked further that the Corporation be allowed to pay its remaining basic real property tax liability by instalments, beyond 1 December 2004.

49 On 11 October 2004, the defendants wrote to the liquidator, chasing him to obtain "from [the city mayor] a formal letter of settlement, giving effect to [the Tax Ordinance] passed by his council".

50 On 13 October 2004, the city treasurer and the city mayor sent the liquidator a crucial letter. This is the letter which the parties have called the TAA (first referred to at [5] above). At that time, the Corporation owed unpaid taxes amounting to about US$4m on all of its properties in Erebor. The

TAA granted the Corporation relief from the payment of interest and penalties for these unpaid taxes and permitted the Corporation to settle them in eight equal instalments of an equivalent of US$500,000. Each instalment was to be paid every December between 2004 and 2012 (save for 2005). The TAA therefore covered tax arrears over both the Plant Assets and the Retained Assets. The TAA permitted the Corporation to pay its taxes by instalments rather than requiring a lump sum payment in total discharge. Thus, Erebor did not waive the principal amount of tax liability but simply deferred the payment of unpaid tax to permit the agreed instalment plan and without imposing any penalties or interest as a result of the deferred payment.

51 The TAA also made it clear that there would be serious consequences if the annual instalments of tax were not paid. As mentioned above, under s 6 of the Tax Ordinance, all deferred tax would become immediately due and demandable together with all penalties and interest that had been previously waived if the taxpayer failed to pay its current liability for any tax or failed to pay an instalment due against its deferred past tax liabilities. Put another way the TAA would be revoked should the current taxes or past taxes on both the Plant Assets and the Retained Assets not be paid on time. Two consequences followed from the revocation of the TAA:

(a) the instalment payments on all previous unpaid taxes would all become due and payable at once; and

(b) the amount of all tax payable on all the Corporation's properties (that is, the Plant Assets and the Retained Assets) would balloon to include all the interest and penalties previously waived.

52 It is not disputed that the liquidator's delivery of the TAA to the defendants satisfied the condition precedent in s 5.3(b)(iii)(4) of the APA (see [46] above).

The close of the transaction

53 The closing took place as rescheduled on 15 October 2004. At closing, the parties executed and delivered several documents which have significance for the parties' dispute.

The parties execute the Omnibus Agreement and the defendants issue the notes

54 First, the defendants and the secured creditors (but not the liquidator) entered into the OMNA which sets out the terms and conditions upon which the secured creditors agreed to accept the notes.

55 I make the following observations about the OMNA:

(a) The OMNA provided a mechanism for the defendants to "set off from time to time any claims it may have against any [secured creditor of the Corporation]" against the amount that each secured creditor was due under the notes: s 4.01(a) of the OMNA.

(b) Pursuant to s 6.01(e) of the OMNA, the defendants undertook that so long as the notes remained outstanding, it would duly pay all tax levied on its properties:

> Taxes – Duly pay and discharge all legal and valid taxes, assessments and charges of whatsoever nature levied upon it or against its properties by any Governmental Authority prior to the date on which penalties attach thereto, and also pay and discharge when due all lawful claims which, if unpaid, might become a lien or charge upon any of the its [*sic*]

properties … For avoidance of doubt, this provision shall not cover unpaid realty taxes and business taxes and/or fees already existing prior to the purchase by [the defendants] of [the Plant Assets] and which taxes continue to be the liability of [the Corporation] and/or [the liquidator] in accordance with the terms of the [APA].

(c) The OMNA provided at s 9.04 that the secured creditors were entitled to assign all or any portion of their rights and obligations under the OMNA or under any other "Relevant Document". That term was defined to include the notes, the SLCs, the new mortgage indenture and other documents required or otherwise contemplated to be executed pursuant to the OMNA.

(d) The OMNA contained a distinct dispute-resolution mechanism from the one in the APA. I shall describe this further at [248].

56 The defendants issued the two notes on the same day, 15 October 2004. They are described as the Tranche A note and the Tranche B note.

Other documents executed or delivered at closing

57 Second, the liquidator, the secured creditors and the shareholders agreed formally to amend a Purchase Price Sharing Agreement ("the PPSA") which they had previously executed on 10 September 2004. The PPSA regulated the manner in which the interested stakeholders would share in the payments made by the defendants and was one of the conditions precedent required by the defendants before closing could take place. Under the amendment to the PPSA, the parties agreed that the liquidator could use part of the defendants' initial down-payment of about US$22m to pay the first of the eight instalments due to Erebor under the TAA.

58 Third, by a letter dated 15 October 2004, the secured creditors agreed to guarantee the instalment payments under the TAA:

[s]ubject to the prompt receipt of payment on the Tranche A and Tranche B Notes from [the defendants], the Secured Creditors, through the Facility Agent, likewise guaranty the payment of the deferred Real Property Taxes which has been accepted by the Mayor of the City of [Erebor] in his letter dated 13 October 2004.

59 The liquidator maintains that he gave this letter to the defendants in order to satisfy his obligation under the condition precedent to closing in s 5.3(b)(iii)(6) of the APA. Indeed, the liquidator maintains that this was the only document the defendants asked for to satisfy that condition precedent. Section 5.3(b)(iii)(6) reads:

(iii) [The liquidator] shall have delivered to [the defendants], in form and substance reasonably satisfactory to [the defendants] and their counsel, the following:

...

(6) Such other documents as [the defendants] may reasonably require from [the liquidator] prior to Closing Date to give [the defendants] full, good, legal, valid, and valuable title to [the Plant Assets] and to enable [the defendants] to become registered owners thereof free from and clear of all claims, Liens, and encumbrances.

...

60 Fourth, the liquidator's legal counsel issued a legal opinion for the benefit of the defendants which stated its opinion that "[a]t Closing, full legal and valid ownership of, and to, [the Plant Assets] shall be transferred and conveyed to [the defendants], free from and clear of all claims, liens and encumbrances, except as previously disclosed". This legal opinion addressed the condition precedent at s 5.3(b)(iii)(8) of the APA which required:

> [a] legal opinion issued by the legal counsel of [the liquidator] satisfactory to [the defendants] and the legal counsel of [the defendants] that ... at Closing, full legal and valid ownership of, and to, [the Plant Assets] shall be transferred and conveyed to [the defendants] free from and clear of all claims, Liens and encumbrances whatsoever ...

Disputes over the unpaid realty taxes after closing

61 Three different categories of taxes were due to Erebor which are relevant for present purposes.

62 The first category of taxes I shall refer to as the "Pre-Closing Taxes". These taxes consisted of the arrears of the taxes accrued from 1999 to 15 October 2004, the closing date, over all of the Corporation's *real property*. The Pre-Closing Taxes therefore related to all of the Corporation's real property, whether that real property was comprised in the Plant Assets or in the Retained Assets. The Pre-Closing Taxes remained the responsibility of the liquidator despite closing pursuant to his warranty and representation in s 7.2(j) of the APA that "all such liabilities will be duly discharged by [the liquidator]".

63 The second category of taxes I shall refer to as the "Post-Closing Plant Asset Taxes". These taxes comprised amongst other things, (i) ten tax declaration numbers over the four parcels of land which formed the Plant Land Assets; and (ii) real property taxes over Plant Non-Land Assets. I observe at this point that even though the Plant Land Assets were transferred to the defendants at closing, title could not immediately be registered in the defendants' name. The Plant Land Assets thus remained registered in the Corporation's name even after closing. As far as Erebor's municipal authorities were concerned, therefore, the Corporation remained the registered owner and therefore the taxpayer responsible for the Post-Closing Plant Asset Taxes. Further, unlike the Pre-Closing Taxes, the APA was silent as to who was liable for the Post-Closing Plant Asset Taxes.

64 The third category of taxes I shall refer to as the "Post-Closing Retained Assets Taxes". These taxes were payable on the Retained Assets (*ie*, all of the Corporation's assets which were not sold to the defendants) which remained in the name of and administered by the liquidator.

65 In early 2005, the liquidator and the secured creditors became embroiled in disputes with Erebor over the taxes that were payable in respect of the Plant Assets and the Retained Assets as well as the defendants' application for various tax exemptions. I will touch on this in greater detail later in this judgment. For now, it suffices to note that there were two main disputes:

> (a) The first related to the first instalment of the Pre-Closing Taxes (the first category of relevant taxes) which had been paid by the secured creditors of the Corporation on behalf of the liquidator in December 2004.
>
> (b) The second related to the payment of the Post-Closing Plant Assets Taxes (the second category of relevant taxes).

As a result of these disputes, Erebor eventually revoked the TAA, with disastrous consequences for the parties' transaction.

66 In 2005 and 2006, the defendants, the liquidator and the secured creditors entered into negotiations with Erebor concerning the outstanding taxes over the Plant Assets. Those efforts were unsuccessful. In November 2006, Erebor declared that it intended to conduct a public auction of the Plant Assets in order to satisfy the tax arrears. The liquidator made an urgent application to the Commission and secured an order on 30 November 2006 enjoining the city treasurer from proceeding with the auction. As a result, the auction was forestalled.

67 On 14 October 2008, the city treasurer applied to the Commission for permission to conduct a forced sale of the Plant Assets. By an order dated 17 November 2008 made pursuant to an application by the liquidator, the Commission denied the city treasurer's application.

The Funds purchase the notes on the secondary market

68 While all this was going on, through a number of transactions between 2005 and 2008, the Funds purchased in the secondary market the right to receive payments under the notes. They currently hold 22.2254% of the Tranche A note and 17.7804% of the Tranche B note.

Events leading up to the commencement of arbitration

69 The defendants paid the first two instalments under the terms of the notes in 2006 and 2007. [note: 1] However, shortly before it was due to pay the third instalment under the notes on 15 October 2008, it filed an application before a Morian court on 9 October 2008 seeking an injunction restraining AKP (the first plaintiff in Originating Summons No [M] and the facility agent of the notes for the secured creditors) from:

(a) issuing a certification that the payment due under the APA and OMNA has not been received;

(b) declaring the defendants to be in default under the APA and OMNA; and

(c) encashing one of the SLCs.

AKP opposed the defendants' application for an injunction. On 10 October 2008, the Morian court dismissed the defendants' application. On the same day, the defendants commenced the arbitration.

Procedural skirmishes leading to a temporary injunction

70 The parties then engaged in two years of procedural skirmishes in the Singapore courts which culminated in the defendants securing an interim injunction which (i) restrained the secured creditors from declaring the defendants to be in default under the APA, the notes and the OMNA, (ii) restrained the secured creditors from declaring the purchase price or the unpaid principal under the notes to be due and payable and (iii) suspended the defendants' payment obligations under the notes and its obligation to provide further security by way of further SLCs. The Singapore Court of Appeal also directed that any future applications to vary or discharge the interim injunction be heard by the tribunal rather than by the courts.

71 On 7 July 2010, the tribunal upheld the interim injunction but made it clear that AKP (as the facility agent for the secured creditors) was free to contend during the substantive hearing that the tribunal did not have the jurisdiction to impose a permanent injunction to equivalent effect.

The arbitration

72 In the arbitration, the defendants' position on the substantive dispute was that the liquidator and the secured creditors' failure to pay the Pre-Closing Taxes (*ie*, the first category of taxes) rendered the Plant Assets subject to a statutory lien in favour of Erebor. As a result, the defendants claimed that the liquidator and the secured creditors had breached their obligations under the APA to deliver the Plant Assets with clean title and had also breached a number of related representations and warranties given in the APA (some of these provision have already been canvassed above).

73 The defendants also claimed that the liquidator:

(a) failed to specify to the city treasurer that the first instalment payment under the TAA was to be applied to the unpaid taxes in relation to the Plant Assets (*ie*, the assets that were transferred to the defendants) and not to the Retained Assets; and

(b) failed to comply with the TAA by failing to pay the Post-Closing Retained Assets Taxes (the third category of taxes; see [64] above), which led to the revocation of the TAA.

74 As a result, the defendants claimed that the Plant Assets remained encumbered and that the relevant authorities refused to issue the requisite tax clearances to the defendants. This in turn meant that title to the Plant Assets was not clean. The lack of clean title, according to the defendants, meant that it was unable to obtain loans from banks to finance the modernisation and rehabilitation works which the Plant Assets needed, ultimately causing the defendants to lose substantial profits.

75 Separately, the defendants also claimed that the secured creditors had, in breach of the APA, failed to settle two civil claims in respect of a plot of land which formed part of the Plant *Land* Assets (the Lost Land Claims referred to at [7] above). The defendants sought to be indemnified against the consequences of this breach.

76 As a result of all of this, the defendants claimed in the arbitration the following relief:

(a) A declaration that the liquidator, the secured creditors and shareholders were in breach of the APA in that they had failed to pay accrued taxes on the Plant Assets or failed to deliver them free of encumbrances.

(b) An order that the defendants' obligations to pay any instalments falling due under the APA, the notes, and to provide any further SLC or any SLC of increased value, be suspended, deferred and/or postponed until the liquidator and the secured creditors deliver the Plant Assets with clean title.

(c) An order that the liquidator and the secured creditors be restrained and/or enjoined from declaring the defendants in default for non-payment of "the next instalment of the Purchase Price falling due on and the provision of the New SLC on 15 October 2008".

(d) Damages.

The tribunal's decision

77 The tribunal found in favour of the defendants in its award. In summary, it held that: (i) the liquidator and the secured creditors had a joint and several obligation to transfer the Plant Assets to the defendants free from any encumbrances, which included tax liens; (ii) the tax lien which encumbered the Plant Assets meant that the liquidator was in breach of its warranty and

representation under the APA to deliver clean title to the Plant Assets on closing or soon after closing; (iii) the secured creditors were jointly and severally liable with the liquidator for this breach of the APA; (iv) the secured creditors were in breach of their obligation to settle the Lost Land Claims and accordingly were obliged to indemnify the defendants against it; and (v) the tribunal had the jurisdiction to suspend the defendants' obligations under the APA to make payment and provide further security and therefore to enjoin the secured creditors from declaring the defendants in default of those obligations (which are in fact found under the notes and the OMNA).

78 As a result, the tribunal granted the defendants relief which includes the following:

(a) It awarded the defendants US$80m in damages representing compensation for an opportunity to earn profits which it lost as a result of the liquidator's failure to transfer clean title to the Plant Assets.

(b) It awarded the defendants the equivalent of about US$23.7m by way of an indemnity in respect of the Lost Land Claims.

(c) It granted the relief sought by the defendants at [76(b)] and [76(c)] above in respect of its payment and security obligations under the notes and the OMNA.

(1) The liquidator and the secured creditors were jointly and severally obliged under the APA to sell the Plant Assets to the defendants

79 I pause at this point briefly to consider the tribunal's reasons for awarding the defendants US$80m in damages.

80 After reviewing the provisions of the APA and the mechanics of the sale which it contemplated, the tribunal concluded that the liquidator and the secured creditors were jointly and severally obliged under the APA to sell the Plant Assets to the defendants.

(2) The liquidator was in breach of the warranty and representation to deliver clean title to the Plant Assets

81 The tribunal concluded that the liquidator had an obligation to transfer clean title to the Plant Assets and that this obligation was not qualified in any way by the TAA.

82 In particular, the tribunal rejected the possibility that the TAA qualified the obligation of the liquidator and of the secured creditors under the TAA to deliver clean title to the Plant Assets because what the defendants required commercially was unencumbered title to the Plant Assets which it could use as security for future borrowing.

83 In the tribunal's view, the surest (and possibly the only) way in which the liquidator and the secured creditors could have obtained title capable of being transferred to the defendants free from encumbrances (that is, clean title) was by paying all taxes due as at 31 December 2004 using the initial down-payment. They had failed to do this because of the way in which they had agreed under the PPSA to deal with the down-payment. The tribunal held that whatever the parties to the PPSA had agreed under that agreement was none of the defendants' concern since it was not a party to it.

(3) The defendants lost the opportunity to earn increased profits

84 After finding that the liquidator had breached his obligations under the APA and that the

liquidator and the secured creditors were jointly and severally liable for this breach, the tribunal then turned to deal with the issue of damages. It took the view that although the defendants' claim was advanced as a claim for profits actually lost, the claim was "better considered as a claim for the loss of an opportunity to make increased profits". The tribunal therefore considered the defendants' damages claim on that basis. The tribunal then split on the quantum of the ultimate damage suffered by the defendants. The majority held that it was a loss of an opportunity to earn profits of US$140m. The minority concluded that it was the loss of an opportunity to earn profits of US$95.616m. The tribunal attached a probability of 55% to this opportunity. The majority therefore used its figure to assess the compensation for this lost opportunity as 55% of US$140m, or US$80m.

The plaintiffs' complaints

85 The liquidator's case in his application is as follows:

(a) The tribunal breached the rules of natural justice or the liquidator was unable to present his case on the following matters:

(i) whether the liquidator's obligation under ss 2.1 and 7.2 of the APA was qualified by the TAA;

(ii) whether the defendants were responsible for the payment of the Post-Closing Taxes in 2005 and caused the TAA to be revoked; and

(iii) whether the defendants suffered damage characterised as the loss of an opportunity to earn profits.

(b) The issue of the loss of an opportunity to earn profits was never submitted to the tribunal for determination and the tribunal had thus exceeded the scope of its jurisdiction.

As a result, the liquidator contends that the tribunal's award should be set aside in its entirety. In the alternative, the liquidator contends that the tribunal's award of damages in the sum of US$80m should be set aside.

86 The secured creditors advance a case in their application which is similar to that advanced by the liquidator at [85(a)(ii)], [85(a)(iii)] and [85(b)] above:

(a) The tribunal breached the rules of natural justice by not giving the secured creditors a fair hearing on the issue of whether the defendants were responsible for the TAA being revoked.

(b) The tribunal awarded damages for the loss of an opportunity to earn profits in circumstances where the defendants had never submitted any such claim to arbitration and where the tribunal failed to afford the secured creditors the opportunity to address the tribunal on this point.

The secured creditors argue that the award should be set aside in its entirety on these grounds.

87 In addition, the secured creditors argue the award should be set aside in its entirety on the basis that the tribunal did not give the secured creditors a fair hearing on the Lost Land Claims.

88 Further, the secured creditors advance an additional point which is unique to their position: they argue that the tribunal acted in excess of its jurisdiction by assuming jurisdiction in relation to matters under, and in granting relief under and in respect of, the OMNA and the notes. These matters

fell outside the ambit of the parties' arbitration agreement under the APA. As a result, the parts of the award which restrain the secured creditors from calling an event of default under the notes should be set aside.

89 The Funds in their application adopt these arguments of the secured creditors and of the liquidator. In addition, they argue that even though they voluntarily applied to be joined as a party to the arbitration, the defendants never sought to claim that the Funds, as assignees of rights under the notes and/or the OMNA in the secondary market, were liable under the *APA*. By determining that the Funds are jointly and severally liable along with the secured creditor to the defendants under the *APA*, the tribunal dealt with an issue or dispute that was not contemplated by the submission to arbitration and/or the tribunal breached the rules of natural justice by making its determination against the Funds without first giving them an opportunity to be heard or to present their case on why they should not be liable. Accordingly, the award should be set aside on against the Funds on the basis of an excess of jurisdiction or on natural justice grounds.

Issues to be decided

90 The argument above can be distilled into a total of seven issues for determination. The following five issues were common to all three applications:

(a) Did the tribunal fail to consider the liquidator's arguments, evidence and submissions on whether the ss 2.1 and 7.1 of the APA were qualified by the TAA ("Issue 1")?

(b) Did the tribunal fail to consider the liquidator's and the secured creditors' arguments, evidence and submissions on the issue of whether the defendants were responsible for the revocation of the TAA ("Issue 2")?

(c) Did the tribunal, in awarding damages to the defendants for their loss of an opportunity to earn profits, exceed its powers by dealing with a matter that had not been submitted to it ("Issue 3")?

(d) In the alternative to Issue 3, did the tribunal, in awarding damages to the defendants for its loss of an opportunity to earn profits fail to give the liquidator and secured creditors an opportunity to address the tribunal on that question ("Issue 4")?

(e) Did the tribunal fail to consider the secured creditors' arguments, evidence and submissions in relation to the Lost Land Claim ("Issue 5")?

91 The secured creditors' and the Funds' applications raise a separate issue which is common to them, that is, did the tribunal act in excess of its jurisdiction contrary to Art 34(2)(b)(iii) of the Model Law by granting relief under and in respect of the OMNA and the notes ("Issue 6")?

92 The Funds' application raises one further issue, unique to the Funds. That is whether the tribunal acted in excess of its jurisdiction or in breach of natural justice by holding the Funds, as assignees under the OMNA and the notes, liable alongside the rest of the secured creditors for breaches of the APA ("Issue 7").

93 I now deal with the issues in turn.

Issue 1: Did the tribunal fail to consider the liquidator's arguments, evidence and submissions on whether the ss 2.1 and 7.1 of the APA were qualified by the TAA?

The applicable legal principles

94 A party applying to set aside an award on the basis that it has been denied natural justice must identify: (a) the relevant rule of natural justice; (b) how that rule was breached; (c) how the breach was connected to the making of the award; and (d) how the breach prejudiced his rights: see *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee")* at [29] and *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*L W Infrastructure*") at [48].

95 The liquidator says that the relevant rule of natural justice is the right to be heard. Encompassed within this rule is the sub-rule that an arbitral tribunal cannot disregard submissions or arguments made by a party without considering them on their merits. The defendants do not challenge this proposition. I accept it as correct. The parties do not dispute that if this sub-rule was breached then this would have caused the liquidator and the secured creditors to have suffered prejudice. Further, the defendants do not suggest that I ought to remit this issue to the tribunal if I find that there was a breach of natural justice. Instead, both sides' submissions rest on whether this sub-rule was breached at all.

The liquidator's submissions

96 Before the tribunal, the liquidator's main defence on the issue of liability was that the TAA qualified his obligation under the APA to deliver clean title to the Plant Assets. The liquidator's evidence and submissions in support of this position before the tribunal can be summarised as follows:

(a) The APA and the documents delivered pursuant to the conditions precedent to closing must be read collectively.

(b) All the parties knew from the outset and agreed that Pre-Closing Taxes would be paid in eight annual instalments from 2004 to 2012 (except for 2005).

(c) It was a condition precedent to closing under s 5.3(b)(iii)(4) of the APA that the liquidator deliver to the defendants (in form and substance reasonably satisfactory to the defendants and their counsel) "[a] copy of the agreement duly signed by the appropriate Governmental Authority approving a deferred payment scheme for the unpaid realty taxes affecting [the Plant Assets]". It is not disputed that this condition precedent was fulfilled when the liquidator delivered the TAA to the defendants (see [52] above).

(d) It was a condition precedent to closing under s 5.3(b)(iii)(6) of the APA that the liquidator deliver to the defendants any such documents as "[the defendants] may reasonably require from [the liquidator] prior to Closing Date to give [the defendants] full, good, legal, valid and valuable title to [the Plant Assets] and to enable [the defendants] to become registered owner thereof free from and clear of all claims, Liens, and encumbrances". The only document that the defendants asked for pursuant to this condition precedent (and which the liquidator duly delivered) was a guarantee from the secured creditors that the TAA instalments would be paid on time, provided the defendants promptly paid their instalments under the notes on time (see [59] above).

(e) The defendants were represented by one of the top law firms in Moria in negotiating the APA and hence must have received legal advice on the Tax Ordinance, the TAA and the other closing documents. Mr Y (one of the defendants' witnesses) confirmed during cross-examination that it was the defendants' lawyers who advised him that the defendants should be able to

obtain registered title to the land which formed part of the Plant Assets within about two months from closing (thereby allowing them to mortgage the land to raise financing).

(f) The actions of the defendants prior to the commencement of the arbitration in 2008 were entirely consistent with the belief that the Pre-Closing Taxes (which would otherwise give rise to a tax lien) were to be dealt with exclusively in accordance with the TAA. In fact, the defendants' own Morian law expert, Justice A, expressed a similar view:

> On 15 October 2004, Closing of the transaction took place on the basis that [the liquidator and secured creditors] would meet all the payment obligations under the [TAA]. But to [the defendants'] surprise, the [the liquidator and secured creditors] did not act in accordance with the terms of the TAA. ...
>
> [The liquidator's] failure to ensure payment of the first installment [*sic*] of the accrued pre-closing taxes triggered the enforcement claims of the City of [Erebor] in relation to their lien over [the Plant Assets] ...
>
> … The parties considered that for as long as [the liquidator and secured creditors] comply with the terms of the [TAA] and meet the scheduled payment provided therein, the property would be left undisturbed. ...
>
> ...
>
> ... The provisions on warranty [*sic*] should be read together with the provision dealing with the deferred payment scheme mentioned [at Section 5.3(b)(iii)(4) of the APA]. The Parties merely stipulated that the accrued taxes on the property were for the account of [the liquidator and secured creditors] and were to be settled with the local government under a deferred payment scheme. To reiterate, the requirement of deferred payment scheme was incorporated in the contract precisely to protect [the defendants] from the possibility that should the taxes remain unpaid without any agreement as to how they are to be settled, the City of [Erebor], at any time, could sell the property in auction to satisfy its claim.

97 Counsel for the liquidator Mr Yeo points out that the award does not, on its face, address any of the six points above. From this, Mr Yeo invites me to draw the inference that the tribunal had either improperly disregarded or at the very least failed to engage with the liquidator's submissions, arguments and evidence in reaching its decision.

The defendants' submissions

98 Counsel for the defendants Mr Yeap does not deny that the award does not deal with these points expressly. However, he submits that the natural and appropriate inference is that the tribunal duly considered all the evidence, arguments and submissions and simply preferred the defendants' over the liquidator's. There is therefore no breach of natural justice. For this proposition, Mr Yeap relies on four passages from the award which I will now consider in greater detail.

Analysis of the tribunal's decision

(1) The tribunal says that it considered the liquidator's submissions

99 The first passage is paragraph 390 of the award where the tribunal expressly states that it has considered the liquidator's submissions: [note: 2]

390. The Tribunal *has already considered, and rejected, the Liquidator's submission that the APA has to be read together with the TAA (or vice-versa) and that the TAA amended or varied the APA* so that, on its true construction, the APA did not require a transfer of clean title at or within a reasonable period after Closing, but that the combined effect of those two agreements was to defer the transfer of clean title for some eight years.

[emphasis added]

100 This passage contains a general statement by the tribunal that it has considered the liquidator's submissions. That cannot in itself resolve the issue of whether the tribunal actually did so. The central inquiry is whether the award reflects that the tribunal applied its mind to the arguments put forward by the liquidator. In my view, a fundamental problem with this passage is that it shows that a misunderstanding of the liquidator's defence. This is an important point to which I shall return shortly.

(2) The tribunal assumed that the defendants would be unable to obtain secured financing so long as the TAA was in place

101 The second passage is paragraphs 348 to 351 of the award. In those paragraphs, the tribunal construes the provisions of the APA in light of its commercial context and concludes that the liquidator's case (which it understood as suggesting that the TAA had the effect of deferring the transfer of clean title to the Plant Assets for eight years) did not make "commercial sense" and "ignore[d] the other provisions of the APA that envisaged [the defendants] being able to raise finance by mortgaging the land":

348. One of the conditions precedent to the Closing [Section 5.3(b)[(iii)(4)] of the APA was that:

"(iii) [The liquidator] shall have delivered to [the defendants], in form and substance reasonably satisfactory to [the defendants] and their counsel, the following:

(4) A copy of the agreement duly signed by the appropriate Governmental Authority approving a deferred payment scheme for the unpaid realty taxes affecting [the Plant Assets];"

349. As has been seen, the TAA was an agreement between the Liquidator and [Erebor]. It is the case of both the Liquidator and the Secured Creditors that the effect of the TAA was that, to [the defendants'] knowledge, and contrary to the various provisions of the APA that referred to the obligation to deliver clean title free from and clear of all Liens, to [the defendants] (and [the defendants] identified 17 such provisions), clean title could not be delivered until the payment terms stipulated in the TAA had been complied with by the Liquidator. Thus, every provision in the APA that referred to the delivery of clean title had to be read as being qualified by reference to the TAA, and the obligation to deliver clean title was deferred until the last payment was made under the TAA.

350. … It does not seem to the Tribunal to make much commercial sense for a bargain for the sale and purchase of land to defer the passing of clean title for many years, and to be dependent upon the satisfactory performance by the vendor of its obligations to a third party. True it is that the Liquidator was intending to satisfy his obligations to [Erebor] from monies paid by [the defendants] to the Secured Creditors in satisfaction of [the defendants'] indebtedness to them, some of which the Secured Creditors were going to make available to the Liquidator, but that ignores the other provisions of the APA that envisaged [the defendants] being able to raise finance by mortgaging the land. The possibility of mortgaging land which was subject to a lien in

favour of [Erebor] would have been remote.

351. None of the parties to the APA would have been able to achieve its respective aims if the land had been encumbered by a lien in favour of [Erebor]. [The defendants] had to be satisfied that [they] would acquire the land with clean title and would be able to use the land to raise money.

102 The tribunal assumed that the defendants would be unable to mortgage the land so long as instalment payments under the TAA were outstanding. This assumption contradicted the tribunal's *own* factual narrative which clearly showed that the opposite was true: that it *was possible* for the defendants to obtain the necessary tax clearances (and so obtain clean title over the land and thereby mortgage the land) without waiting for the last instalment payment under the TAA to be made in 2012.

103 For example, the tribunal acknowledged at paragraph 207 of the award that Erebor issued an incomplete tax clearance certificate for the relevant parcels of land based on the tax received from the first instalment payment of the TAA:

207. On the 11th October 2005 [the city treasurer's] office issued a real property tax clearance certificate. The certificate identified [the Corporation] as having paid the realty taxes on the four properties included as part of the four parcels of land acquired by [the defendants]. ...

104 Paragraph 209 of the award showed that the tribunal was aware that even the defendants believed that it was possible to obtain the necessary tax clearances before 2012:

209. [Representatives of the defendants] informed [a representative of the secured creditors] that [the defendants] had been assessed in the amount [equivalent to about US$614,000] for the arrears due from [the Corporation] from 1999 to 2004, and that this had arisen because the payment made by the Liquidator and [AKP] of the first instalment under the TAA had not been properly allocated. They said that the correct clearances [*ie*, the tax clearance for all ten tax declarations in relation to the four parcels of land which constitute the Plant Land Assets] would only be issued when the settlement of the issue of the correct allocation of the first instalment had been sorted out and that, *immediately after receipt of such a tax clearance*, [*the defendants*] *would have four titles transferred to* [*their*] *name*[*s*]. ...

[emphasis added]

105 In fact, at paragraphs 216 and 217 of the award, the tribunal describes one of the defendants' attempts to obtain tax clearances for all ten tax declarations so that it could execute the new indenture (as well as start the process of mortgaging the land to raise its own financing):

216. On the 25th November 2005 [the representatives of the defendants] again wrote to [the city treasurer]. ...

217. ... They further pointed out [to the city treasurer] that the tax arrears for the period from 1999 to 2004 was the responsibility of the Liquidator, who would be writing to [the city treasurer] requesting that the first instalment should be applied to the parcels of land assigned to [the defendants] so that the appropriate tax clearances could be issued. Once that had been done, the Secured Creditors would be able to obtain [the new mortgage indenture] and Mortgage Participation Certificates could be issued.

106 Mr Yeap submits that it was the liquidator's own case that the TAA prevented the defendants from mortgaging its land until 2012. In support he relies on the following exchange between the liquidator and the tribunal: [note: 3]

Day 8, 24 March 2011

Arbitrator 1: As far as your understanding of what the APA required of you and the other parties, you are saying that your expectation was that you would just carry on making payment of all the back taxes by the TAA to culminate in 2012, *and that* [*the defendants*] *and the secured banks would all wait until 2012 before they presented the transfer and the mortgage for registration*; is that right?

Liquidator: Yes, sir.

Chairman: Did you share that understanding with the secured creditors?

Liquidator: I was made to understand, yes.

Chairman: You were made to understand it?

Liquidator: Because of the things that happened, from the time the MOA was signed until the APA was signed.

Chairman: No, I'm not talking about that. When you entered into the APA, *you say your understanding was that the secured creditors would have to wait until 2012 before they presented the transfer and the mortgage for registration*. Did you share that understanding with the secured creditors at the time that the APA was concluded?

Liquidator: I believe so.

Chairman: You believe so.

Liquidator: Yes, your Honour.

Chairman: Did you share it with [the defendants]?

Liquidator: I am not sure if -- because there was no discussion about transferring of title at that time with [the defendants].

Chairman: But there was with the secured creditors, and you believed that they were content to wait till 2012?

Liquidator: There was no discussion about it, but I presumed that we were of the same thinking.

Chairman: You presumed. Thank you.

[emphasis added]

107 With respect to Mr Yeap, this was not an accurate representation of the liquidator's case at all. The above exchange took place in the middle the liquidator being cross-examined about the very

separate topic of how the very first instalment paid under the TAA ought to have been applied. Further, this line of questioning was initiated not by Mr Yeap himself but by one of the arbitrators. This can be seen from the exchange below which preceded the exchange above:

> Mr Yeap: My question was not whether you had an obligation [under the APA to apply the first TAA instalment payment towards the discharge of taxes on Plant Land Assets], just in the course of normal conduct, wouldn't you have done that?
>
> Liquidator: No, sir.
>
> Arbitrator 1: Mr Yeap, this is for you to run this cross-examination as you please, of course, but I thought you were going to get to the point where you might ask the witness what, in his mind, was his anticipation of when the transfer was to be registered and the mortgage was to be registered, so that we know the basic assumptions from which --
>
> Mr Yeap: I thought it was up to 2012.
>
> Arbitrator 1: Well, you stopped just when you were getting interesting, you see.
>
> …
>
> Liquidator: Under normal circumstances, yes, the transfer would happen after all the pre-closing taxes were paid.
>
> …
>
> Arbitrator 1: But when in your mind did you think that the transfer and the mortgage were going to be registered under these arrangements which you had entered into?
>
> Liquidator: After all the pre-closing taxes had been paid.
>
> Arbitrator 1: When did you expecting all the pre-closing taxes to be paid -- 2012 or earlier?
>
> Liquidator: 2012.
>
> Arbitrator 1: So you were expecting in your mind that the transfer and the mortgage would not be registered until 2012? That was your understanding of things?
>
> Liquidator: Under normal circumstance, yes.
>
> Arbitrator 1: Were there any extra-normal circumstances or abnormal circumstances in this case?
>
> Liquidator: An exception. The City [of Erebor] might give an exception. The City might give a clearance, although the pre–reclosing taxes --
>
> Arbitrator 1: That's up to the City.
>
> Liquidator: Yes, up to the City.
>
> …

108 It was also clear from the liquidator's cross-examination the next day that the liquidator did not think that there was a problem in securing the necessary tax clearances (thereby allowing the defendants to mortgage the land) even though the TAA was still in effect:

> **Day 9, 25 March 2011**
>
> Mr Yeap: In the second sentence here:
>
> "As to the four … parcels of land we are likewise granted tax amnesty on the [*sic*] and penalties and the balance on the principal has been allowed to be paid in eight … annual instalments …"
>
> -- as reflected in the TAA which you've attached. Then you go on to say:
>
> "On the basis of the above two items, we believe [the defendants] can secure from the City of [Erebor] the necessary tax clearance for the transfer of titles for the said four parcels of land."
>
> I'm trying to understand this. If, as you have said … [the defendants] may have to wait eight years … how do you reconcile that with your last statement that you believe that [the defendants] can secure from the City the necessary tax clearance?
>
> Liquidator: That was a personal belief. *If the pre-closing taxes have already been addressed by the tax amnesty agreement, and the payments due under tax amnesty agreement are all current, then payment of the current tax liabilities might move the City to allow the issuance of the tax clearance*.
>
> [emphasis added]

109 The tribunal's misunderstanding of the liquidator's case seems to have been reinforced by the defendants' written submissions to the tribunal. The defendants summarised those submissions as follows before me (I have taken the liberty of numbering the sentences for ease of reference): [note: 4]

> (1) [T]he deferred payment scheme in Section 5.3(b)(iii)(4) of the APA, presumably the TAA, did not have any effect of postponing the transfer of titles to [the defendants] to 2012 upon the payment of the last TAA instalment.
>
> (2) The reference to the deferred payment scheme under the APA was only to assure [the defendants] that the unpaid pre-Closing taxes on [the Plant Assets] were settled, thereby paving the way for the Liquidator, the Secured Creditors and the Shareholders of [the Corporation] to transfer clean title of [the Plant Assets] to [the defendants].
>
> (3) If the parties' intention under the APA was that the deferred payment scheme had the effect of postponing the transfer of title to a much later date after Closing, parties would and should have provided in writing the qualifications to the obligations of the Liquidator, the Secured Creditors and the Shareholders of [the Corporation] under Sections 2.1, 7.2 and/or 7.3 and in other relevant sections of the APA at the time of drafting of the APA. This was simply not done ...
>
> [emphasis in original omitted]

These submissions are confusing and confused. Sentence (1) was not in dispute. Sentence (2) was

entirely consistent with the liquidator's case. In fact, sentence (2) directly contradicts the defendants' own position (as I understand it) that the liquidator's obligations under the APA to deliver clean title to the Plant Assets was unqualified. Sentence (3) was (and is) a mischaracterisation of the liquidator's case.

110 I accept that if the tribunal had considered both parties' submissions and preferred the defendants' submissions over those of the liquidator then that must be the end of the matter. I accept also that there would be no breach of natural justice if the tribunal had considered but simply misunderstood the liquidator's submissions.

111 What is troubling here is that the line of reasoning adopted by the tribunal does not suggest that it had even considered the liquidator's submissions. In fact, it is puzzling that the tribunal at paragraph 296 of the award states that there was "not a shred of contemporaneous evidence" in favour of the liquidator's position (despite the material already described above):

> 296. [The secured creditors and the liquidator] submitted that the APA had to be construed in light of the TAA. As has been noted previously, the parties to and the objectives of the two agreements, namely, the APA and the TAA were completely different. The APA was an agreement for the sale and purchase ... whereas the TAA was an agreement made to compromise historic indebtedness and to enable the APA to be concluded to which only the Liquidator and [Erebor] were parties. It is, in the Tribunal's opinion, improbable that any of the parties thought that the TAA discharged or amended an agreement as comprehensive as the APA. *Indeed, it is to be noted there is not a shred of contemporaneous evidence that anyone thought that the TAA had that effect*. The Tribunal has no hesitation in rejecting such a submission.
>
> [emphasis added]

(3) The tribunal's discussion of the background to the TAA

112 The third passage which Mr Yeap relies on is paragraphs 352 to 357 of the award. Here, the tribunal pointed out that the historical background to s 5.3(b)(iii)(4) of the APA was important because it was instructive to remember how the TAA became a condition precedent in the APA. The tribunal first recalled that under s 5.3(c) of the MOA entered into in January 2004, the liquidator's obligation in relation to the Corporation's outstanding tax liabilities was to:

> *apply* for the waiver by all appropriate Governmental Authority of all tax liabilities of [the Corporation] affecting any or all of [the Plant Assets], including but not limited to the liability for income and/or real estate taxes ...
>
> **[emphasis added]**

113 The tribunal next recalled that, and I have already mentioned at [31] above, a few days after signing the MOA, the defendants asked the liquidator to apply to Erebor for a waiver of unpaid taxes affecting the Plant Assets or to settle those unpaid taxes if a waiver could not be obtained.

114 The tribunal then recalls at paragraphs 355 and 356 of the award the events which I have described at [33] to [35] above. The SP did not adopt the draft resolution prepared by the liquidator and the defendants to waive the unpaid taxes but instead passed on 3 August 2004 a resolution requiring the city treasurer to levy execution on all of the Corporation's properties. However, by 7 September 2004, the SP changed its mind and passed the Tax Ordinance.

115 Having described the historical background, the tribunal then concludes at paragraph 357 of the award:

> 357. In the light of that factual background, it does not seem to the Tribunal that it is possible to construe the TAA as being intended to or designed to derogate from the Liquidator's obligation to deliver clean title to [the defendants]. Clearly, what [the defendants] required was unencumbered land, which was available to use as security for future borrowing. That is why, from the outset, [the defendants were] insistent on either the outstanding taxes being paid or a waiver of those taxes.

116 The tribunal's analysis is odd, to say the least. It does not seem to appreciate that the very background it described at length militated against its own conclusion. The tribunal construed s 5.3(c) of the MOA as being consistent with the unqualified obligation of the liquidator to deliver unencumbered land to the defendants. In doing so, it conflated the obligation of the liquidator to *apply* for a waiver of the unpaid taxes with the requirement to *obtain* the waiver. (Incidentally, the liquidator did in fact apply for the waiver so this condition precedent would have been fulfilled had it been imported into the APA).

117 Having conflated the obligations, the tribunal assumed that regardless of the eventual terms which the parties were to negotiate and agree in the APA, it must remain a requirement under the APA that a waiver be obtained in respect of the unpaid taxes or that these unpaid taxes should be settled. Again the tribunal appeared to have reached this conclusion without engaging with the submissions of the liquidator on this point.

118 The APA was entered into on 10 September 2004, that is, three days *after* the SP enacted the Tax Ordinance. By this time, the defendants *knew* that the Pre-Closing Taxes were not waived and could not be waived. If the defendants wanted the liquidator to pay all unpaid realty taxes prior to closing, the defendants could have attempted to negotiate a condition precedent in the APA to that effect. If the liquidator balked, the defendants had the option of terminating the MOA [note: 5] and walking away from the transaction at the expiry of the exclusivity period (which incidentally was also on 10 September 2004) on the basis that the venture had become no longer commercially viable. [note: 6]

119 The defendants did not do so. Instead, they signed the APA on the last day of the exclusivity period under the MOA (*ie*, 10 September 2004) without importing s 5.3(c) of the MOA into the APA. In other words, the defendants decided that it was in their commercial interest to compromise by requiring the liquidator to do no more than deliver the TAA under s 5.3(b)(iii)(4) of the APA.

120 However, as I have mentioned above, showing that the tribunal erred in its reasoning does not establish a breach of natural justice. I am, however, satisfied that the liquidator has established that the tribunal disregarded his evidence and submissions on this point. In the circumstances, it was simply inexplicable that the tribunal did not even engage with the liquidator's argument that the Tax Ordinance and the TAA must have been in the contemplation of all parties when they entered into the TAA.

(4) The tribunal's discussion of the secured creditors' witnesses' evidence

121 The fourth passage which Mr Yeap relies on is paragraph 358 (which has to be read together with paragraph 359) of the award:

> 358. It was suggested by [the representatives of the secured creditors] that [the defendants]

knew from the outset that it would not get clean title until 2012 when the TAA came to an end. There was no documentary evidence to support that suggestion, and [the defendants'] witnesses all denied that they had any such knowledge. Significantly, neither [the liquidator] nor the Secured Creditors made such a suggestion in the contemporaneous correspondence, and [the liquidator's] attempt to advance the argument in his oral evidence was clearly an afterthought and unpersuasive.

359. In the result, the Tribunal is unable to accept the evidence of [the representatives of the secured creditors], and has no doubt that [the defendants] believed, quite understandably, that clean title was going to be delivered to it at or soon after Closing. It seems to the Tribunal highly improbable that [the defendants] would have been prepared to invest in [the Corporation's Mithril plant] if [they were] not immediately going to get clean title.

122 Mr Yeap points to this passage as proof that the tribunal simply preferred the defendants' case. I disagree. As I have mentioned above, it was never the liquidator's case that the TAA *varied* his obligations under the APA to acknowledge contractually that the defendants could not mortgage the land to raise additional financing until the last instalment of the TAA was paid in 2012. [note: 7] If anything, this passage shows that the tribunal had reached its conclusion by rejecting an argument that was never made to it, and thereby ignoring the arguments that were made to it.

Conclusion on Issue 1

123 In light of the above, I am satisfied that the liquidator was denied natural justice and that the award should be set aside in its entirety for this reason alone.

Issue 2: Did the tribunal fail to consider the liquidator's and the secured creditors' arguments, evidence and submissions on the issue of whether the defendants were responsible for the revocation of the TAA?

The liquidator's and the secured creditors' submissions

124 The liquidator's case was that the revocation of the TAA was caused (or primarily caused) by the defendants. As a result, the defendants had only themselves to blame for any loss suffered as a result of being unable to obtain clean title to the Plant Assets. In other words, the defendants' actions broke the chain of causation between any breach of the APA and any loss which the defendants suffered. The liquidator's evidence and submissions in support of this position before the tribunal can be summarised as follows:

(a) By purchasing the Plant Assets, the defendants had purchased not only the Plant *Land* Assets but also the Plant *Non-Land* Assets.

(b) The defendants accepted that it was responsible for the payment of Post-Closing Plant Asset Taxes (the second category of taxes which were due on both Plant Land Assets and Plant Non-Land Assets; see [63] above). This was confirmed by a key concession during the cross-examination of one of the defendants' witnesses, Mr X:

> Mr Yeo: [Mr X], by this time, when you got this letter of 22 March 2005, you were aware of this requirement under the tax amnesty agreement, that current taxes had to be kept current -- that current taxes had to be paid, otherwise one of the consequences would be that the tax amnesty agreement is revoked. You were aware of that point by then, right?

Mr X: Yeah, from this letter, yes, definitely, yes.

Mr Yeo: You were also aware that as between [the defendants] and [the secured creditors and the liquidator], [the defendants] had undertaken to pay the post-closing taxes in relation to the properties -- land and non-land -- transferred to them, sold to them; correct?

Mr X: Yes, post-closing taxes was our responsibility.

(c) At the relevant time, the defendants were liaising with Erebor to obtain a tax exemption for Post-Closing Plant Assets Taxes in relation to the Plant Assets but were ultimately unsuccessful.

(d) The defendants failed to pay any of the Post-Closing Plant Asset Taxes in relation to the Plant *Non-Land* Assets in 2005. The defendants also did not pay the sum of about US$51,500 which it said represented the 2005 Post-Closing Plant Asset Taxes in relation to the Plant *Land* Assets [note: 8] ;

(e) In the circumstances, the revocation of the TAA was caused (or primarily caused) by the defendants' own breaches and so they could not rely on their own breach(es) or blame the liquidator for the revocation of the TAA.

125 Mr Yeo argues that the tribunal ignored the undisputed facts and the defendants' concessions and did not actively consider the liquidator's submissions and arguments. In doing so, Mr Yeo submits that the tribunal decided this issue for reasons of its own and thereby breached the rules of natural justice.

126 The secured creditors' case before the tribunal in summary was that the defendants were under a contractual obligation under s 6.01(e) of the OMNA to pay the Post-Closing Plant Assets Taxes (see [55(b)] above). It was therefore the defendants' failure to pay the Post-Closing Plant Asset Taxes that had caused the TAA to be revoked. Alternatively, the secured creditors argued that they should not be held liable jointly with the liquidator for any of his breaches of the TAA.

127 Before me, counsel for the secured creditors Mr Singh argues that the tribunal's reasoning in the award shows that when it dealt with s 6.01(e) of the OMNA, it failed to appreciate that the liquidator and the secured creditors stood in a different position as against the defendants. On that basis, he argues that the tribunal did not expressly or implicitly deal with the secured creditor's separate arguments in this regard and thereby breached the rules of natural justice.

The defendants' submissions

128 Mr Yeap points to four separate passages in the award to show that the tribunal more than adequately dealt with the issue of revocation and that there was therefore no breach of the rules of natural justice. I shall deal with each of them in turn.

Analysis of the tribunal's decision

(1) The tribunal's remarks that revocation of the TAA was a "hotly contested" issue

129 Mr Yeap first points to paragraph 148 of the award where the tribunal referred to the reasons for the revocation of the TAA as a "hotly contested" issue:

> 148. The revocation of the TAA, and the reasons for that revocation, were amongst the most hotly contested issues in the arbitration. [The defendants] contended that the reason for the revocation was the failure of the Liquidator to comply with the terms of the TAA. For his part, the Liquidator, who was joined by the Secured Creditors in this submission, contended that the reason for the revocation was that [the defendants] failed to pay the taxes due on the parcels of land transferred to [them] during 2005.

Mr Yeap argues that this showed that the tribunal was fully aware of the revocation issue and the submissions advanced by both parties.

130 As I have already said, the mere fact that the tribunal acknowledges that an issue is live does not necessarily mean that the tribunal has engaged with the submissions and arguments of both sides on that issue.

131 It is pertinent that the tribunal in this passage says that "the Liquidator, who was joined by the Secured Creditors in this submission, contended that the reason for the revocation was that [the defendants] failed to pay the taxes due on the *parcels of land* transferred to it during 2005" [emphasis added]. With respect, this misstates the liquidator's (and the secured creditors') position. It is not disputed that the liquidator's position in the arbitration was that the defendants had failed to pay taxes to settle the Post-Closing Plant Taxes in 2005. But this failure includes not only the taxes due on the parcels of land (*ie*, Plant *Land* Assets) but also the taxes due on the Plant *Non-Land* Assets. It is also undisputed that the liquidator repeatedly stated his position in the arbitration. The tribunal's error in this regard is consistent with Mr Yeo's submission that it had no actual regard for the submissions made by the liquidator. It was also consistent with Mr Singh's submission that the tribunal had simply dealt with the liquidator and the secured creditors as if they were a single entity, thereby depriving the secured creditors of their right to have their separate submissions considered in light of their separate position.

132 Further, this passage (as well as the tribunal's main analysis of this issue) appears in the part of the award where the tribunal is discussing the chronology of events. I found this rather curious. It was not at all clear whether the tribunal truly appreciated how the issue of revocation was relevant in light of its own finding that the secured creditors and the liquidator were in breach of the APA from the very outset because the TAA did not have the effect of removing the statutory liens over the Plant Assets.

133 When I pressed Mr Yeap on this point in oral submissions, he took the position that the tribunal's analysis of this issue was completely irrelevant to the issue of the US$80m in damages it awarded to the defendants, but was relevant only to the issue of who was responsible for paying the penalties and interest on the unpaid back taxes, when those penalties and interest became payable upon the revocation of the TAA. In my view, this made the location of the tribunal's analysis of this issue within the context of its entire award even more curious.

134 In any event, as we shall see below, even though the tribunal ostensibly recognised the importance of the issue to the parties, the award does not actually analyse (i) the liquidator's submissions and the evidence put forward or (ii) the secured creditors' submissions on this point at all.

(2) The tribunal accepted the liquidator's purported concession that he was liable for the current taxes in 2005

135 Mr Yeap next relies on paragraphs 227 to 248 of the award where he says the tribunal

determined that it was the liquidator who was responsible for the TAA being revoked and shows that the tribunal simply preferred the defendants' evidence, arguments and submissions over the liquidator's.

136 In paragraphs 227, 228 and 236 of the award, the tribunal holds that the secured creditors' payment on behalf of the liquidator of about US$108,000 on 27 December 2005 to Erebor for the Post-Closing Retained Assets Taxes (the third category of taxes; see [64] above) was not sufficient to discharge all of the outstanding taxes, leaving a shortfall of around about US$11,000. The liquidator himself acknowledged this in a letter to Erebor dated 28 March 2006. The liquidator therefore owed outstanding taxes to Erebor as at 31 December 2005.

137 At paragraphs 244 and 246 to 248 of the award, the tribunal finds that as a result, the TAA was automatically revoked on 1 January 2006:

> 244. Accordingly, the Tribunal holds that on the 31st December 2005, or at the latest, the 1st January 2006, the TAA was automatically revoked.
>
> …
>
> 246. There was also considerable debate about whether, if the TAA was automatically revoked by reason of the failure to pay current taxes after Closing, the fault was that of the Liquidator or of [the defendants].
>
> 247. *In the Liquidator's Written Reply Closing Submissions, he accepts that he was ultimately liable for payment of current taxes* vis-à-vis [*Erebor*]*: see Paragraph 64.1. The Tribunal agrees with that concession.* The Liquidator goes on to assert that [the defendants] had a contractual responsibility to the Liquidator for paying the current taxes. The Tribunal finds no justification for that assertion in the APA, and the provision upon which the Liquidator relies (Section 6.01(e) of the [OMNA]) contains a covenant to the Secured Creditors and the Facility Agent but not to the Liquidator.
>
> 248. The Tribunal finds that the TAA was automatically revoked by reason of the failure of the Liquidator to pay the current taxes during 2005. The latest date upon which the automatic revocation took place was the 1st January 2006.
>
> [emphasis added]

138 In summary, the tribunal's decision that it was the liquidator who caused the revocation of the TAA at the latest on 1 January 2006 by failing to pay the full amount of (all) current taxes by 31 December 2005 turned on the liquidator's concession that he was liable for the payment of (all) current taxes (that means to say both the Post-Closing Plant Assets Taxes and the Post-Closing Retained Assets Taxes). The tribunal found that the liquidator was unable to rely on s 6.01(e) of the OMNA since the defendants' covenant to pay Post-Closing Plant Asset Taxes was given only to the secured creditors and not to the liquidator.

139 In my judgment, the mere fact that the tribunal dealt with an issue and gave its reasons for doing so does not mean that it has considered both sides' submissions. In fact, it is possible to infer from the tribunal's reasoning that it failed to address its mind or to engage with one party's submissions at all. I make the following observations.

140 First, the tribunal fails even to mention the express admission of the defendants' witness Mr X

that the defendants were obliged to make payment of the Post-Closing Plant Assets Taxes (which related to both Plant Land Assets and Plant Non-Land Assets) even though the tax declarations remained in the name of the Corporation (see [124(b)] above). Neither does the tribunal refer to the liquidator's point that the defendants refused to make payment of the Post-Closing Plant Asset taxes in relation to the Plant Non-Land Assets for which they unsuccessfully sought tax exemptions. Instead, the tribunal focuses only on the question of payment of taxes for the Plant Land Assets.

141 Second, and related to the first point, the chronology set out by the tribunal in the award does not include the correspondence between the defendants and Erebor in which the defendants sought exemptions for the payment of taxes on the Plant Non-Land Assets. An example of this is the tribunal's summary of a letter dated 15 April 2005 which the tribunal refers to at paragraph 184 of the award:

> 184. On the 15th April 2005, [the defendants' in-house counsel] wrote a lengthy letter to [the city treasurer]. She disputed the computation contained in [the city treasurer's] letter dated the 4th February 2005. She told [the city treasurer] that the reason for the dispute was that the computation was "based on the assessed value of all properties belonging to [the Corporation]", but reminded him that only four parcels of land had been assigned to [the defendants]. [The defendants' in-house counsel] said that there was a need for a reconciliation of the city treasurer's records and documents with [the defendants'] authorised representatives …
>
> [emphasis in original omitted]

The tribunal in its summary of the 15 April 2005 letter above curiously refers only to the second and fifth paragraph of the letter but omits the third and fourth paragraph which make it clear that the defendants were aware that they were responsible for paying the 2005 Post-Closing Plant Assets Taxes in respect of the Plant Non-Land Assets:

> With respect to the buildings and machineries and other immovable properties which were assigned to [the first defendant] under a Deed of Assignment of [Plant Non-Land Assets] …, the valuation thereof made by the Asian Appraisal is only [about US$151.4m]. Please be reminded that these machineries, buildings and other immovables have already depreciated and the same have not been operational since 1999 when [the Corporation] ceased operations. …
>
> It is very important that your Office should also be informed that our company has a pending request with the Honourable city mayor and the [SP] wherein we are availing of the tax exemptions under the [Investment Incentives Code] of [Erebor]. These tax exemptions are available to new investors and even to existing enterprises which are being revived and whose facilities are being rehabilitated by the new owners who are investing a considering sum of investments. Please be further advised that our request is still pending study by a Committee headed by [one of the Erebor City Councillors] which Committee was specifically created for such purpose. …

142 Third, the tribunal's reliance on the liquidator's concession that he was legally liable for the payment of all the current taxes in 2005 was taken completely out of context. It is undisputed that the liquidator remained legally liable to Erebor for all taxes so long as he remained the nominal owner of the property on the title registry. However, it was also undisputed that the defendants were responsible for the payment of the Post-Closing Plant Asset Taxes. In order to arrive at its conclusion, it was necessary for the tribunal to deal with and give reasons for dismissing the concession of Mr X. But it did not.

143 In coming to its conclusion, it also appears that the tribunal departed in a significant respect from the submissions of both parties, and in particular, from the submissions of the defendants. From the written submissions before the tribunal, it was clear that the defendants' position was that the liquidator was delinquent in paying the Post-Closing *Retained Assets* Taxes (not the Post-Closing *Plant Assets* Taxes) in 2004 (not 2005), [note: 9] such that the TAA was automatically revoked by as early as January 2005 (not January 2006). [note: 10] As for the defendants' non-payment of the Post-Closing Plant Asset Taxes in respect of the Plant *Non-Land* Assets, the defendants' case (on which extensive submissions were made) was that it could not be faulted for failing to pay these taxes because of the actions of Erebor and the liquidator. In other words, the defendants *accepted* that it was responsible for paying Post-Closing Plant Assets Taxes but offered a defence for its failure to do so.

144 This much was conceded by Mr Yeap during oral submissions before me: [note: 11]

> Mr Yeap: Let me pause here. We never said we had no responsibility in general to pay the post closing taxes, so this issue is really a red herring. We always said we were trying to pay, we were trying to pay the post closing taxes. And I have shown your Honour we are trying to, we needed to get it discharged. *So we never took the basis you, the liquidator, had to pay the post closing taxes. That was never our case*. So the statement that somehow the tribunal got it wrong, your Honour, is -- and I will demonstrate to your Honour further on this. That is a total mischaracterisation of how the issues were dealt with below. We accepted we were supposed to be paying, we were trying to pay.
>
> Court: Which statement do you mean?
>
> Mr Yeap: That [the defendants] had -- there was some allegation by the applicants that the tribunal did not consider or was under a misapprehension as to whether [the defendants] had an obligation to pay post closing taxes. I will come back to that when I get to that point further. I'll just leave it for the time being, your Honour.
>
> Court: Very well.
>
> …
>
> Mr Yeap: So in paragraph 247, your Honour, your Honour will see that the tribunal has made the point that the liquidator is ultimately liable for payment of the current taxes …
>
> [reads out paragraph 247 of the award]
>
> I'll show your Honour the tribunal's -- how they pick up the issue later.
>
> Suffice to say, I also went through the APA again and as I recall there is no specific provision in the APA saying that [the defendants were] to bear the post closing [tax].
>
> Court: I know. But [Mr X, the key witness of the defendants] admitted it in cross-examination.
>
> Mr Yeap: He accepted that. *We proceeded on the basis that we were responsible, that's why we were trying to pay.* So for us to say we had no real responsibility had clean title been given to us -- our case was that if -- you were supposed to give us clean title, we would have … paid all the post closing [taxes], we were trying it pay the post closing [taxes] but it became a being problem because of the back taxes.

[emphasis added]

I was thus satisfied from the above that the tribunal had determined the issue on its own basis without regard to evidence and submissions before it.

(3) The tribunal "agreed" with the defendants that it was excused from its obligation to pay current taxes

145 The third passage Mr Yeap relies on is paragraphs 409 to 411 of the award where the tribunal agreed with the defendants that they did not have to pay current taxes because of the liquidator's and secured creditor's breach of their obligations under the APA to deliver clean title:

> 409. [The defendants contend] that [a specific principle of Morian law] is irrelevant because the reason why [the defendants] did not pay the current realty taxes, *if it was* [*their*] *responsibility to do so*, was because [they were] entitled to withhold performance of [their] obligations so long as the Liquidator and the Secured Creditors failed to perform their obligations. [The defendants submit] that the relevant limitation period is not the one year provided for [under this principle], but the 10 years provided for [under another principle] in respect of claims under a written contract where there is a claim for specific performance.
>
> 410. Thus, [say the defendants], as the Liquidator and the Secured Creditors are in breach of their obligations under the APA, [the defendants are] excused from performance of [their] obligations, and time does not being to run against [them].
>
> 411. The Tribunal has concluded that [the defendants'] submissions are correct. …
>
> [emphasis added]

146 Mr Yeap says that the tribunal's phrase "if it was its responsibility to do so" in the passage above shows implicitly that the tribunal took into account Mr X's admission and any submissions on it that the defendants was responsible for paying Post-Closing Plant Asset Taxes. I do not agree. If this passage was indeed meant to acknowledge Mr X's admission and deal with it, then the tribunal would have dealt with it in paragraph 247 where the tribunal was *specifically* addressing its mind to that question in the context of the revocation of the TAA. Having considered the submissions of both sides, I am satisfied that this passage supports, rather than undermines the liquidator's and the secured creditors' case that there has been a breach of natural justice.

147 The first point to make is that the tribunal's discussion in this passage is in relation to the issue of whether a limitation defence was available to the liquidator and the secured creditors under a certain principle of Morian law. It is therefore unclear, in light of the tribunal's own logic, how the issue of revocation was at all related to the question of limitation.

148 It was also inexplicable why the tribunal ascribed to the defendants an argument which the defendants did not make at all. The defendants' case in the arbitration on the limitation defence had nothing to do with the revocation issue. Instead, it was framed as follows: [note: 12]

> [The defendants] say that [the liquidator and the secured creditors] have cited the wrong [principle of Morian law] in relation to [the defendants'] claim. [The defendants'] claim is based on the reciprocal obligations under the APA (*the duties to pay the Purchase Price and to deliver clean title to* [*the Plant Assets*]). According to [another principle of Morian law], upon a breach of

such reciprocal obligations, [the defendants], being the injured [parties], may choose between fulfilment and rescission of the obligation of the Liquidator, [the secured creditors] and/or the [the shareholders of the Corporation] to deliver clean title of [the Plant Assets] to [the defendants], with payment of damages in either case. ...

[emphasis added]

149 The defendants' case therefore was that it was entitled to withhold its payments under the notes so long as it had not received clean title to the Plant Assets. Also, as conceded by Mr Yeap above, it *was* the defendants' case that they were responsible for paying Post-Closing Plant Asset Taxes. There was therefore no uncertainty about the position which would have warranted the tribunal using the conditional form "if it was its responsibility to do so" when describing the defendants' position in respect of the Post-Closing Plant Asset Taxes. In the circumstances, I am of the view that the tribunal's adoption of this argument for a completely unrelated point to my mind is not a "middle path" between both parties' submissions (*cf Soh Beng Tee* at [65(e)]). I agree with Mr Yeo that the tribunal's conclusion at paragraphs 409 to 411 of the award appears to have been reached on its own basis with no reference to either parties' submissions.

150 In any event, Mr Yeap's reliance on this passage was in truth an afterthought by the defendants as it did not appear in the defendants' written submissions in the applications and was advanced for the first time only in oral submissions before me. [note: 13]

(4) The tribunal found that the defendants had mitigated their losses and acted reasonably in refusing to pay the outstanding "back-taxes" in 2005

151 The fourth passage which Mr Yeap relies on [note: 14] is found at paragraphs 459 to 465 of the award. Again, this was a submission that was raised only in oral submissions before me and which did not appear in any of the defendants' written submissions prior to that. In summary, the tribunal here was dealing with the liquidator and secured creditor's contention that the defendants had failed to mitigate its loss. In particular, the tribunal was considering the liquidator's and the secured creditors' submission that the defendants should have come forward to pay the outstanding amount of back taxes (that is, Pre-Closing Taxes) which the secured creditors and the liquidators were contractually liable to pay under the APA.

152 The tribunal went through the conduct of the parties throughout 2005, including the attempt by both the liquidator and the defendants to persuade Erebor to apply the first TAA instalment towards the Pre-Closing Taxes related to the Plant Land Assets, and concluded that the defendants had behaved reasonably in the circumstances. Mr Yeap submits that when read together with the other three passages above, the tribunal has made it clear that it is the liquidator, and not the defendants, who was responsible for the revocation of the TAA.

153 This submission was a complete non-starter. The tribunal here was dealing with the Pre-Closing Taxes. It was not dealing with the post-closing tax obligations at all. Thus, if this passage was really intended to resolve the issue of revocation (which it was not), again it supports the liquidator's and the secured creditors' argument that the tribunal ignored their arguments which centred around the responsibility for paying Post-Closing Plant Assets Taxes.

Conclusion on Issue 2

154 Reading the award as a whole and having regard to the documents which were placed before me, I am satisfied that the liquidator was denied natural justice and that, even if I am wrong on Issue

1, the award should be set aside in its entirety on the basis of my finding on Issue 2. Given that I have found in favour of the liquidator, I do not find it necessary to discuss the secured creditors' submissions on this issue in any more detail.

Issue 3: Did the tribunal, in awarding damages to the defendants for their loss of an opportunity to earn profits, exceed its powers by dealing with a matter that had not been submitted to it?

The applicable legal principles on Art 34(2)(a)(iii) of the Model Law

155 The relevant legal principles are not in dispute. Art 34(2)(a)(iii) of the Model Law provides that an arbitral award may be set aside by the court if 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 the arbitration.

156 The Court of Appeal discussed the law on setting aside an award on the ground of excess of jurisdiction under Art 34(2)(a)(iii) of the Model Law in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [31] to [33] ("*CRW v PGN*"). As the Court of Appeal said at [31]:

> 31 It is useful, at this juncture, to set out some of the legal principles underlying the application of Art 34(2)(a)(iii) of the Model Law. 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 [were not] submitted to it or failed to decide matters that [were] 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 ...

157 The Court of Appeal made it clear in *CRW v PGN* at [32] that in order to set aside an award under Art 34(2)(a)(iii), in addition to satisfying the court that the case comes within that provision, applicant must also satisfy the court that it suffered actual or real prejudice.

158 The question of what matters are within the scope of a submission to arbitration was recently considered by the Court of Appeal in *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*Kempinski*"). In *Kempinski*, the Court of Appeal emphasised (at [33] and [36]) the importance that pleadings and the memorandum of issues play in delineating the issues which are before an arbitral tribunal:

> 33 The role of pleadings in arbitral proceedings is to provide a convenient way for the parties to define the jurisdiction of the arbitrator by setting out the precise nature and scope of the disputes in respect of which they seek the arbitrator's adjudication. ...
>
> …
>
> 36 … In arbitration, the parties can determine the scope of the arbitration … *vis-à-vis* the issues to be tried. As Dyson LJ observed in *Al-Medenni v Mars UK Limited* [2005] EWCA Civ 1041 at [21]:
>
> > ... It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. *The function of the judge is to adjudicate on those issues*

alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. Bu[t] if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness.

[emphasis added]

159 Recognising that arbitration is a dynamic and flexible process, the Court of Appeal also recognised at [37] that it was possible to introduce new issues so long as the adjudicatory process ensures procedural fairness:

> 37 … Even where a new issue is raised by the court on its own motion as a result of the evidence adduced during the trial, the defence should, for the sake of good order, be amended so that the plaintiff may file an amended reply and, if necessary, call rebuttal evidence on the new issue. This is an established process to ensure fairness to the party affected by the new issue. From the court's perspective, any issue of fact and/or law that is relevant to the dispute before it will normally be allowed to be raised by way of an amendment to the pleadings so that all the issues relevant to the dispute can be disposed of at the same time in the same trial (subject only to the principle that a proposed amendment to a party's pleadings, if allowed, must not result in prejudice to the other party which cannot be compensated by way of costs).

160 Thus, if a tribunal is of the view that a party has not addressed the real issue on which the dispute before it turns, it ought to invite that party to amend its pleadings so as to place that issue squarely before the tribunal and to give unambiguous notice to the opposing party that that issue is to be presented to and considered by the tribunal. Having said that, the Court of Appeal also held that the failure of one party to amend its pleadings cannot be determinative of whether the issue has been submitted to the tribunal. Rather, the key question is one of substance over form. The question is whether the opposing side was given sufficient notice of and opportunity to meet the new case: *Kempinski* at [47].

161 This is, of course, subject to two qualifications. First, a party cannot unilaterally enlarge the tribunal's jurisdiction beyond that permitted by the parties' arbitration agreement simply by the manner in which it frames its pleadings. Second, while each party is entitled to an opportunity to present its case, it is entitled only to a *reasonable* opportunity to do so. So a tribunal before whom a party seeks to reframe its case, with or without consequential amendments to its pleadings will have to consider whether acceding to that request will cause unreasonable prejudice to the opposing party.

My decision on Issue 3

(1) The defendants' own case on damages was that it had suffered a loss of actual profits and not a loss of an opportunity to earn profits

162 Mr Yeap accepts that the defendants' pleadings characterised their loss as a loss of profits and sought compensation equivalent to those profits lost. He accepts also, as he must, that the tribunal approached the defendants' loss as a lost opportunity to earn profits and not as a loss of actual profits. His argument was that the issue of whether the defendants had lost an opportunity to earn profits was always a live issue before the tribunal. In support, he relies on the defendants' notice of

arbitration. The defendants concluded their list of relief claimed with a generic claim for damages:

> **RELIEF SOUGHT**
>
> 61. [The defendants] seek the following orders and reliefs:
>
> …
>
> (5) An order that the Secured Creditors do indemnify [the defendants] for any and all costs, expenses, obligations, liabilities and/or damages that [the defendants] may incur in respect of the issue of the unpaid taxes and all interests and penalties in respect thereof pursuant to Article 7.3(g) of the APA;
>
> (6) Further or alternatively, *damages* …
>
> ...
>
> [emphasis added]

163 According to Mr Yeap, the prayer for generic "damages" was broad enough to include damages for loss characterised as a lost opportunity to earn profits. I do not agree. Damages is the default remedy for a cause of action in contract and is simply a claim compensation for the loss suffered. The real question is, having regard to the pleadings, evidence and submissions, what did the defendants assert they had lost as a result of the breaches of contract alleged?

164 Having considered the material put before me, [note: 15] I agree with the secured creditors and the liquidator that the defendants characterised their loss as the actual profits that they would have earned but which they failed to earn because of the breaches of contract. For virtually the entire arbitration, their claim was framed as follows:

> (a) the defendants intended to mortgage the Plant Assets in order to obtain additional financing amounting to US$86m (later increased to US$106m);
>
> (b) the purpose of the additional loans was to finance the works needed to modernise and rehabilitate the Plant Assets;
>
> (c) because the Plant Assets did not come with clean title, the defendants were unable to obtain the additional loans from banks; and
>
> (d) because the defendants were unable to obtain the additional loans, they would have earned actual profits for which they ought to be compensated.

165 None of the documents which the defendants presented to the tribunal and placed before me on these applications characterised their loss as the loss of an opportunity to earn profits. In the memorandum of issues jointly prepared by the parties to the arbitration, the parties together framed the issue as one relating to a loss of profits. Thus, for example:

> 3. In the event the Tribunal finds that the Liquidator, [the secured creditors] and/or the [shareholders of the Corporation] breached the above mentioned obligations/warranties/representations, what losses, damages and/or *losses of profits* (if any) [the defendants] are entitled to. In this respect, the following related or sub-issues arise,

namely, whether the Liquidator, the [the secured creditors] and/or the [shareholders of the Corporation] are liable to:-

…

(b) compensate [the defendants] for any *loss of profits* suffered by [the defendants] arising from their inability to obtain the Additional Loans from other third party financial institutions, and if so, the amount thereof. In relation to this, the following sub-issues also arise:

(i) whether the alleged breach(es) caused *the loss of profits* claimed by [the defendants];

(ii) if so, whether [the defendants'] right to claim for such *loss of profit* is affected by the alleged failure on the part of [the defendants] to pay post Closing taxes, which allegedly led to the revocation of the TAA ...

...

[emphasis added]

166 In some arbitrations, the memorandum of issues includes a catch-all provision which gives the arbitral tribunal some latitude to add issues which are not expressly listed (see for example *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [52]). There was no such provision here. Instead, the concluding provision in paragraph 8 of the agreed memorandum of issues merely recorded that: "The Parties reserve their rights to modify, vary and/or supplement the contents of this Memorandum." This is entirely consistent with the secured creditors' and the liquidator's position that the tribunal was not given the unilateral power to add to the issues which were expressly listed in the memorandum of issues. While the parties did agree in paragraph 8 of the memorandum of issues that they remained free to modify, vary or supplement the issues, party could not do so unilaterally, with no notice formal or informal to the other party.

167 The defendants continued to characterise their loss in this way up to and including the defendants' written closing submissions dated 23 May 2011. Those submissions stated the following at paragraph 293:

293. [t]he *quantification of loss of profits* suffered by [the defendants] as a result of [the secured creditors and the liquidators'] breaches of their obligations/ warranties/ representations under the APA is set out in the Witness Statement of [one of the defendants' experts] signed on 3 November 2010. The *loss of profits* as at 31 December 2009 was quantified at US$368.578 million.

[emphasis added]

168 It is to my mind clear beyond doubt that the sole basis of the defendants' case on loss before the tribunal was that by reason of the breaches of contract which they alleged, the defendants would actually have earned profits and ought therefore to be compensated for those actual lost profits. It quantified those lost profits at US$368.578m.

(2) The tribunal understood the defendants' original claim in the award as one of loss of profits

169 The tribunal also understood the defendants' case on loss as one concerning the loss of actual profits and not the loss of an opportunity to earn profits. During the defendants' oral closing

submissions on 21 October 2011, Mr Yeap addressed the tribunal on the alleged lack of evidence that the defendants had tried but failed to obtain additional funding to modernise the steel plant. The chairman of the tribunal then suggested that the defendants ought to be seeking compensation for the loss of an opportunity to earn profits as opposed to seeking compensation for the loss of actual profits: [note: 16]

Mr Yeap: Yes, but if you are expecting us to get specific bankers to come and say "I was running this bank at that time, [the defendants] had approached me and I had said no only because of this reason", firstly, I don't think that would be realistic, if I may say so, because of the nature of the litigation.

Chairman: But what you are really then talking about, Mr Yeap, is not actually the inability to raise the funds, it's the loss of the opportunity.

Mr Yeap: I know. I was going to say that also. At the end of the day, I was going to say that if the Tribunal felt that there was a loss of an opportunity, *certainly it would be open to the Tribunal to analyse it as a loss of a chance, or alternatively what we call temperate damages*, which incidentally has already been referred to in [the defendant's Morian Law expert, Justice A's] first statement.

Like the common law principles, if the Tribunal is of the view that we have suffered loss and it's a question of difficulty in proving that loss, the quantum, then it is open to the Tribunal to give damages which it believes to be fair and reasonable. So they've got the same principle as we do in the common law system. It's not a new point, it has been flagged from day one.

Chairman: *But neither courts nor tribunals just pluck figures out of the air.*

Mr Yeap: Yes. I was going to say that *in considering what is fair and reasonable, it would be open to the Tribunal to analyse this from a chance perspective. But it may not be seen as a loss of a chance* per se*, but it dovetails with the concept of temperate damages.*

Arbitrator 1: Yes so are you saying that temperate damages is the [Morian law] equivalent of the concept of a loss of a chance?

Mr Yeap: *I would say that they may not be entirely equivalent, but the loss of a chance may well come within the temperate damages doctrine.*

Chairman: [Justice A] refers to temperate damages, but I don't think so [the secured creditors' and the liquidator's Morian Law expert Justice B] specifically deals with this question.

Mr Yeap: No one asked [Justice A] about temperate damages.

Chairman: No, but I think he did deal with temperate damages in his --

Mr Yeap: Yes, it's in his statement. That's right we dealt with exemplary, we dealt with temperate, we dealt with all kinds of damages.

Chairman: All I said was I don't think that [Justice B] actually dealt with temperate damages.

Mr Yeap: He had every opportunity to do so.

Chairman: Well.

Mr Yeap: You are correct.

Chairman: But equally, *I don't think that Justice A gave us much of an as* [*sic*] *to how the [Morian] court might assess temperate damages, other than to stick one finger in a mouth and stick it in the air and see which the way wind was blowing.*

[emphasis added]

170 I make four observations about the exchange above. First, this was the first time the defendants ever put its case on loss on the basis that what it had lost was an opportunity to earn profits, or indeed an opportunity to raise additional finances whether as a step towards earning actual profits or towards a further, subsidiary opportunity to earn profits. Second, rightly or wrongly, it was the defendants' *own* case that any award for a loss of opportunity had to be dealt with not under the concept in Morian law of "actual or compensatory" damages but under the alternative concept in Morian law of "temperate" damages. Third, it is obvious from the above exchange that there was no evidence before the tribunal from Justice B, the Morian law expert for the secured creditors and for the liquidator, on the concept of "temperate" damages under Morian law. Fourth, as the Chairman pointed out, the problem with this new alternative case characterising the defendants' loss as the loss of an opportunity to earn profits was that there was insufficient evidence for the tribunal to quantify the defendants' opportunity of earning that profit and thereby to quantify the compensation to be awarded for the loss. As the chairman of the tribunal put it, "neither the courts nor the tribunals pluck figures from the air".

171 The following exchange then took place: [note: 17]

Chairman: So you say that because of the liquidator's failure to transfer title to you, you *lost the opportunity to raise the additional loans*?

Mr Yeap: That's right.

Chairman: *That's the way it is now put, is it*?

Mr Yeap: I think that's the way we have always put it, it's just that we took it further to say that if we have had the loans we would have basically -- I mean, the intention was to get on with the enhancements but certainly because we couldn't get on with it, as it turned out, we suffered operating losses. I mean, we could have -- if those loans were permitted to be used for operating purposes, we may well have done it, but the fact is that what is clear is without the land, we couldn't get the additional loans. And that has always been our case.

Arbitrator 2: It still leaves the problem, as I understand it, Mr Yeap. The difference between loss of opportunity and actual loss would be in one case you say "If I had the money, I would have done this". And in the second, you say "If I had the money, I could have done this". In either event you would need some kind of factual basis to say what is it that you would or could have done with the money. In one case it becomes loss of opportunity, in the other case it becomes an actual loss. That's really where at least I think this Tribunal will need a little help on facts.

[emphasis added]

172 To my mind, the above exchange shows clearly that the tribunal recognised, once all the evidence was in, that the defendants ought to have characterised their loss as the loss of an opportunity to earn profits. This exchange also shows clearly that the tribunal recognised that the legal and factual underpinnings of an inquiry into a lost opportunity to earn profits were quite different from those of an inquiry into a loss of actual profits which had been presented to them.

(3) The tribunal expressly re-characterised the defendants' claim in the award as one of loss of an opportunity to earn profits

173 All of this is confirmed in the award itself, where the tribunal explicitly recharacterises the defendants' case on loss from a claim to recover loss of actual profits to a "claim for the loss of an opportunity to make increased profits" (at paragraphs 432 to 433 of the award):

> 432. [The defendants claim] that, as a result of the failure to transfer clean title, [they were] unable to obtain the Additional Loans (as defined in the APA) in order to rehabilitate, modernise and upgrade the [Mithril Plant] so that [they had] lost profits which are estimated to be [US]$368.6 million for the period between 2005 and 2009.
>
> 433. [The defendants assert] that the failure of the Liquidator and the Secured Creditors to transfer clean title hindered [their] efforts to raise money to refurbish and modernise the [Mithril Plant], and that, in consequence, [they were] unable to earn the profits that [they] would have been able to earn during a period when the worldwide demand for [Mithril] was flourishing. Although this claim was put as a loss of profits claim, *it is, in the Tribunal's view, better considered as a claim for the loss of an opportunity to make increased profits, and the Tribunal will consider it on that basis.*
>
> [emphasis added]

174 At paragraph 445 of the award, the tribunal again recharacterises the defendants' loss as a lost opportunity to earn profits:

> 445. The Tribunal next considers the damages to which [the defendants are] entitled as a result of the breach of the APA by the Liquidator and the Secured Creditors. ***It is clear that*** [***the defendants***] ***cannot prove any actual loss*** . However, [*the defendants'*] *case is that* [*they*] *lost the opportunity to earn profits*. [They] did not carry out the intended work of rehabilitation and modernisation, as [they] did not have the funds to do so. The failure of the Liquidator and the Secured Creditors to transfer clean title meant that [the defendants were] unable to raise the additional loans against the security of the new [indenture], and, in consequence, [were] unable to carry out the work of rehabilitation and modernisation that it [*sic*] was necessary to do in order to make the plant more productive. As a result of the breach, therefore, [the defendants] lost the opportunity to earn substantial profits[.]
>
> [emphasis added in bold and bold italics]

175 Mr Singh argues that this recharacterisation of the defendants' case is significant because the tribunal themselves recognise that "[*i*]*t is clear that* [*the defendants*] *cannot prove any actual loss*" [emphasis added]. Mr Singh took this to mean that the tribunal found as a fact that the defendants' claim for loss of actual profits failed. I was initially hesitant to accept this interpretation. I am keenly aware that an award has to be construed generously and any passage in an award needs to be construed in the context of the entire award and not read like a statute. On one reading, it is at least *plausible* that the tribunal here is using "actual loss" simply to refer to quantifiable out of pocket

losses (in other words, reliance loss) as opposed to the loss of expected future profits (or expectation loss).

176 On balance, however, it is my view that the interpretation which Mr Singh puts on this passage is more consistent with the tenor of the entire award. First, it was never the defendants' case that it suffered out of pocket losses. Rather, as the tribunal itself recognised in paragraph 432, it was the defendants' case that "as a result of the failure to transfer clean title, it was unable to obtain the additional Loans (as defined in the APA) in order to rehabilitate, modernise and upgrade the [Mithril Plant] so that it has lost profits which are estimated to be [US$368.6m] for the period between 2005 and 2009". Second, in the exchanges between the tribunal and counsel quoted above, the tribunal showed itself acutely aware of the evidential difficulties that the defendants had in establishing on the balance of probabilities that it had suffered actual losses of US$386.6m.

177 For completeness I should add that I found the following passage at paragraph 458 of the award particularly difficult:

> 458. The Tribunal notes that under [a principle of Morian law], there is a head of damages called "temperate or moderate" damages. This category covers cases where it is not possible readily to quantify the actual loss suffered, and the [Morian Courts] thus award "temperate or moderate" damages. However, in the present case, the Tribunal has received satisfactory evidence that [the defendants] *did suffer actual loss and has also received expert evidence of the likely quantum of such loss*. Accordingly, the Tribunal does not find [this principle] to be applicable.
>
> [emphasis added]

This paragraph is consistent with the rest of the award insofar as it suggests that the tribunal was satisfied that the defendants had suffered some form of loss, though not loss of the kind it had chosen to advance in its claim: lost actual profits. Nevertheless, even though Mr Yeap had earlier pointed out that on the defendants' own case, the gateway under Morian law for a claim equivalent to the common law concept of a loss of opportunity came under the Morian law concept of temperate damages, the tribunal inexplicably decided that this concept was not applicable as it held it had "received expert evidence of the likely quantum of such loss". With respect, the expert evidence that the tribunal had received was on lost actual profits, and not on the loss of an opportunity to earn profits. In reaching its conclusion: (i) to eschew the concept of temperate or moderate damages under Morian law; and (ii) to take expert evidence adduced to assist the tribunal to assess lost actual profits and use that evidence to assess damages for the loss of an opportunity to earn profits, it appears to me that the tribunal decided the matter on a basis which was not submitted to it.

Kempinski is distinguishable on the facts

178 Mr Yeap relies on *Kempinski* to argue in the alternative that even if the issue of a lost opportunity to earn profits was not expressly submitted to the tribunal, the defendants' claim for damages reframed in this way was "part of, or directly related to, the dispute which the parties submitted for arbitration" and therefore need not have been specifically pleaded. [note: 18]

179 In my view, the facts of *Kempinski* can be distinguished from the present case. In *Kempinski*, K commenced arbitration against P, alleging the wrongful termination of a management contract. After the arbitrator had issued a first interim award but before he had issued a second interim award, P discovered that K had entered into a similar arrangement with a third party, allegedly in breach of the management contract. The arbitrator issued a third interim award which held that the new arrangement was inconsistent with the management contract and that K was not entitled to damages

after the date of the new arrangement. K applied to set aside the third interim award on the basis that the issue was not within the scope of the parties' submission to arbitration since the new arrangement had not been specifically pleaded. The High Court agreed with K and set aside the third interim award. The Court of Appeal in *Kempinski*, reversing the High Court, dismissed the application and restored that award.

180 The Court of Appeal found that the pleaded issues submitted for arbitration included K's claim (i) for damages for "the remainder of the term of the [management contract]" and (ii) specific performance. This meant that the issue of the legal effect of the new arrangement on the continuing viability of these two claims after the date of the new arrangement fell within the scope of the parties' submission to arbitration. It then held at [47]:

> 47 ... In our view, any ***new fact*** or change in the law arising after a submission to arbitration which is ancillary to the dispute submitted for arbitration and which is known to all the parties to the arbitration is part of that dispute and need not be specifically pleaded. It may be raised in the arbitration, as [P] did when it raised the New Management Contract as part of its *force majeure* defence to [K's] claim. We should also point out that [K] was given sufficient notice of and opportunity to meet [P's] *force majeure* defence.
>
> [emphasis added in bold italics]

181 The Court of Appeal was also satisfied that K had suffered no prejudice as a result of the failure of P to amend its pleadings. It emphasised (at [51]) that there had been "*extensive correspondence, written submissions and expert evidence*" [emphasis added] on the legal effect of this new arrangement. It was also clear that the arbitrator had on several instances informed the parties that he wanted to be addressed on the legal effect of the new arrangement. Seen in that light, P's failure to amend its pleadings was in substance immaterial in light of the ample notice that K had on this issue.

182 *Kempinski* was a case where a *new fact* emerged in the course of the arbitration which had a bearing on the quantum of damages or the viability of the remedy of specific performance which was properly before the tribunal. In the present case, there were no new facts which emerged in the course of the arbitration. All that happened is that it occurred to the tribunal, almost at the very end of the arbitration, that the defendants ought to have characterised their loss in a different way in light of the evidence. Unlike *Kempinski*, the tribunal did not ask the parties to address it on a claim for a lost opportunity to earn profits before quantifying and awarding damages on that basis in its award.

(4) "Loss of an opportunity to earn profits" is different from "loss of profit"

183 However, can it be argued that the loss of an opportunity to earn profits and a loss of actual profits are *in substance* the same thing? If that is the case, it is irrelevant what label the tribunal puts on the defendants' loss. At a high level of conception, there is force in the argument that in both cases a party is seeking to recover compensation for profits which he expected to earn from activities which were in the future at the time of breach and which will now never take place because of the breach. Seen in that light, loss characterised as a loss of actual profits is necessarily the same a loss of an opportunity to earn profits in the sense that earning the profits in both cases depends on the future occurrence of uncertain events.

184 Nevertheless, there is to my mind a substantive distinction between the two ways of looking at loss. In a claim for the loss of actual profits, the plaintiff asserts that but for the breach of contract, he *would* (not *could*) have earned profits. In other words, the plaintiff is asserting a direct link

between the breach and the loss. If the plaintiff *succeeds* in proving that link, he is entitled to full compensation for his loss. If, on the other hand, the plaintiff *fails* to prove that direct link, he recovers nothing.

185 Damages assessed on the basis of actual lost profits is thus an all or nothing exercise. This is an important point. Even if the finder of fact is of the view that there is only a 51% chance that the plaintiff would have gone on to earn the profits claimed if the breach had not occurred, the plaintiff recovers full compensation. He does not recover 51% of his loss. By the same token, even if the finder of fact is satisfied that the plaintiff's chance of going on to earn the profits claimed is as high as 49%, the plaintiff recovers nothing. He does not recover 49% of his loss.

186 The position is completely different when a plaintiff presents his loss as a lost opportunity to earn profits. On that analysis, the plaintiff asserts that but for the breach of contract, he *could* (not *would*) have earned profits. On this analysis, the plaintiff concedes that his ability to earn profits is subject to events beyond his control (for example, because of the actions of a third party). A plaintiff who proves this assertion on a balance of probabilities is not entitled to full compensation and cannot move directly to the assessment stage. He is entitled only to proceed to the intermediate stage of proving the likelihood of those events occurring. That likelihood is then ascertained by the finder of fact and applied at the quantum stage to modulate the plaintiff's damages proportionately. A party who advances a case on the basis of a lost opportunity to earn profits concedes that he might recover less in damages if he succeeds but mitigates his risk of recovering nothing at all.

187 This view is consistent with the way in which the distinction is treated, at least under Singapore law (I will return to this point later below at [191]). In the Singapore High Court case of *Super Continental Pte Ltd v Essential Engineering & Construction Pte Ltd* [2010] SGHC 365 ("*Super Continental*"), S contracted to purchase machines from E. S planned to use these machines to manufacture certain products which it would then sell for a profit. E's machines were defective and as a result, S specifically claimed both damages for actual loss of profits and, in the alternative, damages for the loss of a chance to earn profits. Having found E liable to S, Judith Prakash J turned to consider S's claim for damages. S's case on actual lost profits was that it would have derived profits from sales to certain businesses such as Singapore Airlines even though it did not have a contract to supply Singapore Airlines with the product at the time of the breach (*Super Continental* at [136]). Although its evidence on the ability to earn a profit from Singapore Airlines was weak, S argued that it merely had to show a real or substantial chance to earn that profit in order for the court to award damages for actual loss of profits. Prakash J disagreed and held at [142]:

> 142 ... In this connection, I think the plaintiff has mixed up two different bases of claim. A plaintiff can make a claim for actual loss of profits if he can show that on a balance of probabilities, he would, apart from the defendant's breach, have earned such profits. Alternatively, he can make a claim for the loss of a chance to make a profit.

Prakash J then held that S failed to show that it would have earned the projected profits and that his claim for actual loss of profit failed on that basis. On the alternative claim, Prakash J was satisfied that S had lost a real and substantial *chance* to earn profits and not a speculative one. On that basis, she awarded S a percentage of the profit S could have earned.

188 In light of my discussion at [162] to [187] above, I am satisfied that the tribunal exceeded its jurisdiction by inquiring into the defendants' loss of an opportunity to earn profits even though it was not an issue that was placed before it. I now move on to consider whether the secured creditors and the liquidator suffered prejudice as a result.

(5) The secured creditors and the liquidator suffered prejudice

(3) The secured creditors and the liquidator suffered prejudice

189 Mr Yeap makes two arguments in relation to prejudice. First, he argues that even if the issue of a lost opportunity to earn profits was not submitted to the tribunal, the secured creditors and the liquidator suffered no prejudice since all the relevant evidence was before the tribunal for it to determine the lost opportunity claim. Second, he argues that there was in any event no prejudice because the tribunal concluded at paragraph 454 of the award that the defendants would have had a slightly better than even chance of making substantially enhanced profits (and then put the figure at 55%). This, so the argument went, meant that if the tribunal had determined the case based on the defendants' original claim for actual lost profits, the defendants would have satisfied the tribunal on the balance of probabilities that it would have earned the profit claimed (because the tribunal ascribed a probability of more than 50% to the chance) and therefore obtained 100% of the actual lost profits claimed. Therefore, the secured creditors and the liquidators should, if anything, be grateful that the tribunal re-characterised the defendants' claim and thereby limited the damages awarded against them to only 55% of the projected profits.

190 Turning to his first argument, in my view, the re-characterisation of the damages issue deprived the secured creditors and the liquidators of an opportunity to adduce evidence and make submissions on:

(a) the relevant legal principles under Morian Law relating to damages for the loss of an opportunity; as well as

(b) gaps in the evidence available to establish a claim for damages for loss of an opportunity to earn profits (as opposed to a claim for actual loss of profits).

191 Whatever the position might be under Singapore law with respect of damages for the loss of an opportunity, the APA was governed by Morian law. A key issue which the tribunal would have had to consider, therefore, was whether a claim for the loss of an opportunity to earn profits was recoverable under Morian law and if so, what were the relevant principles for quantifying damages awarded on that basis.

192 Both sides in this application tendered expert evidence on Morian law from most eminent experts. The defendants adduced expert evidence from Justice A. He contends that there is no distinction between loss of profits and loss of an opportunity under Morian law. It is worth pointing out that this directly contradicts the position taken by the defendants before the tribunal that loss of opportunity cases "dovetails with the concept of temperate damages" as opposed to "actual and compensatory damages" (see transcript reproduced at [171] above). On the other hand, the secured creditors' Morian Law expert Justice B contends that Morian law does not allow a claim on the basis of actual or compensatory damages for the loss of an opportunity. His evidence is that, at best, temperate or moderate damages should have been awarded and this would have led to a significantly lower quantum of damages.

193 It is not this court's role to determine whether the loss of a chance doctrine as it is understood at common law is available under Morian law or how it should be characterised and treated under Morian law. In my view, prejudice has been suffered by the secured creditors and the liquidator because this evidence could have made a reasonable difference to the tribunal: see *L W Infrastructure* at [54].

194 It is also clear from the arbitral documents that the liquidator and the secured creditors took the defendants' claim for actual lost profits at face value. Given that the defendants were running an all or nothing claim on damages, the plaintiffs ran an "all or nothing" defence directed solely towards

attacking causation on the balance of probabilities. In other words, the plaintiffs' argument on damages was that the defendants had failed to prove on the balance of probabilities that the plaintiffs' alleged breach had *caused* the defendants to suffer a loss of profits at all. Evidence and submissions directed towards moving the balance of probabilities on an actual lost profits claim is in substance and effect quite different from evidence and submissions directed towards ascertaining the quantum of the chance lost on the lost opportunity analysis. For one thing, the balance of probabilities approach is binary whereas the lost opportunity approach is infinitely shaded from 0% to 100%.

195 I therefore accept that the difference between the defendants' pleaded case on its loss and the approach on loss which the defendants urged upon the tribunal and which the tribunal adopted is a difference of substance and not form, and one which caused prejudice to the liquidator and the secured creditors. Had the defendants' claim in damages been put from the outset, either primarily or in the alternative, as one arising from a lost opportunity to earn profits, the tribunal would have had to inquire explicitly at an intermediate stage, between liability and assessment, into the proper percentage to be ascribed to the lost opportunity to earn profits. The liquidator and secured creditors were entitled to adduce expert evidence and made submissions on that issue.

196 To this end, the tribunal observed in the award at paragraph 451 that the liquidator's expert accountant was instructed only to provide a critique of the report prepared by the defendants' expert accountant and "provided no independent assessment of the damages claim". Mr Yeap argued that having made that choice, the secured creditors and liquidator cannot now complain that it had no opportunity to adduce further evidence at the hearing. But this is precisely the point I make. Given the manner in which the defendants advanced its claim on damages, it was perfectly legitimate for the liquidator and the secured creditors to confine their defence to attacking the defendants' assertion that it could prove on the balance of probabilities that it had suffered loss caused directly by the breach and that it could prove to the same standard the quantum of that loss. That is a different exercise from ascribing a likelihood to intermediate events between the breach and the lost profits. On the case on damages which the defendants put forward, the likelihood of those intermediate events was never in issue during the evidential phase and throughout virtually all of the submissions phase.

197 The biggest difficulty with the award which Mr Yeap had to grapple with was the lack of any analysis by the tribunal to show how it determined that the defendants had a 55% chance of making substantially enhanced profits. As the chairman of the tribunal himself recognised, "neither courts nor tribunals just pluck figures out of the air" (see [169] above). This observation is as true of lost actual profits as it is of a *likelihood* of lost profits. Yet, the chairman of the tribunal himself recognised during oral submissions that the defendants' submissions and evidence on the probability of the lost opportunity were unhelpful: [note: 19]

> Chairman: … But if you now say, well, we lost the chance to raise that sort of money, and we should get temperate damages to represent that loss of a chance, what do we say? Do we say it's 1 per cent or 10 per cent or 5 per cent of that? How do we begin? That's where we need help.

198 Once the tribunal moved away from the defendants' pleaded all or nothing case on damages and the binary nature of a lost actual profits claim, the secured creditors and the liquidators were entitled to an opportunity to address the tribunal on where between 0% and 100% the justifiable level of damages should rest in light of Morian law on damages, expert evidence on the issue, the likelihood of the opportunity materialising and the parties' submissions.

199 Mr Yeap's second argument – that the tribunal's approach in fact left the liquidators and the secured creditors better off – is also without merit. First, as I have mentioned above, the tribunal found that the defendants were unable to prove their case on actual loss. On my reading, that is a finding by the tribunal that the defendants failed to prove on the balance of probabilities that it had suffered a loss of actual profits. That finding in itself ought to have resulted in the dismissal of the defendants' claim on this head. The liquidator and the secured creditors have clearly been prejudiced. In any event, the issue is not whether the liquidator and the secured creditors are less worse off. Rather, the issue is whether the liquidator and secured creditor were prejudiced because they were unable to object to the inclusion of this new issue at such a late stage or because they were unable to address the tribunal on this issue with relevant evidence which could have led to a lower award of damages. I have found that they were.

Conclusion on Issue 3

200 To summarise the discussion from [155] to [198], I am satisfied that the tribunal acted in excess of its jurisdiction in making an award for damages for the loss of an opportunity to earn profits and that the award should be set aside in its entirety on this basis alone.

Issue 4: Did the tribunal, in awarding damages to the defendants for its loss of an opportunity to earn profits fail to give the liquidator and secured creditors an opportunity to address the tribunal on that question?

201 My decision on Issue 3 renders Issue 4 largely academic. I have found that characterising loss as profits actually lost is different in substance (and not merely form) from characterising loss as the loss of an opportunity to earn profits. I have also found that the recharacterisation of the defendants' claim in this manner caused the liquidator and the secured creditors prejudice because they did not have proper notice of it and were not allowed an opportunity to address it with evidence and submissions. The conclusion must be that the liquidators and the secured creditors did not receive a fair hearing on this issue. However, for the sake of completeness, since the parties made extensive submissions on this point I shall deal with this point in slightly greater detail.

202 The secured creditors' and the liquidator's arguments on this point are twofold:

(a) First, they argue that by deciding the issue of damages on the basis of a lost opportunity, they were denied the opportunity to make submissions and/or introduce evidence on the likelihood of the defendants' opportunity to earn increased profits.

(b) Second, they argue that the decision was one which was wholly at odds with the evidence tendered.

203 Mr Yeap, on the other hand, relies on *Soh Beng Tee* for the proposition that the court must determine that the tribunal's decision to award damages for loss of opportunity to earn profits was "unexpected" before it the award was liable to be set aside.

204 In *Soh Beng Tee*, F employed S to build a condominium. Despite numerous requests for an extension of time, F gave S only a five day extension. When S was unable to complete the building works in time, F terminated S's employment. S commenced arbitration against F. The arbitrator found in favour of S, holding that S should have a reasonable amount of time to complete the project.

205 F sought to set aside the award on the basis that the arbitrator had found that S was entitled to a reasonable amount of time to complete the project and had thereby set "time at large" without

fixing what that reasonable extension of time ought to have been. Further, the issue of whether time was at large as a result of F's acts of prevention had not been submitted on or canvassed before the arbitrator and F had been unfairly deprived of the opportunity to present countervailing arguments to the arbitrator. The trial judge found for F and set aside the award. The Court of Appeal restored the award.

206 The Court of Appeal pointed out that the pleadings filed by the parties expressly referred to the issue of whether time was at large; and noted that at the end of the hearing, the arbitrator specifically called for and gave the parties the opportunity to tender written submissions on the issue of whether time was at large.

207 The Court of Appeal held at [41] that even where the issue was not truly alive during the arbitration, that would not, in itself, amount to a breach of natural justice:

> 41 In addition, even if we were to determine that the issue of whether time was at large was not truly alive during the arbitration, that *per se* would not be sufficient to inexorably lead to the conclusion that the Arbitrator had necessarily failed to adhere to the rules of natural justice in denying [F] an occasion to present its contentions on the issue. ***It is frequently a matter of degree as to how unexpected the impugned decision is, such that it can persuasively be said that the parties were truly deprived of an opportunity to argue it.*** As helpfully summarised in Sir Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) ("*Commercial Arbitration*") at p 312:
>
> > If the arbitrator decides the case on a point which he has invented for himself, he creates surprise and deprives the parties of their right to address full arguments on the base which they have to answer. Similarly, if he receives evidence outside the course of the oral hearing, he breaks the rule that a party is entitled to know about and test the evidence led against him.
>
> [emphasis in original omitted; emphasis added in bold italics]

208 As I have already mentioned above, it was clear to me that the pleadings, evidence and submissions tendered by the defendants were made purely to advance a claim for profits actually lost. In the face of that, the liquidator and the secured creditors were entitled to position their evidence and submissions to meet the defendants' case as it was presented.

209 Mr Yeap argues that since the defendants' loss of an opportunity to earn profits was expressly mentioned during the exchange on 21 October 2011, the liquidator and the secured creditor were not prevented from making submissions on this issue. In other words, following this exchange, they could or should have taken the initiative to ask the tribunal to hear them on the issue or to receive further written submissions addressed to this issue; but they instead elected not to do so.

210 It is important to understand in context how the loss of an opportunity issue arose. The exchange between Mr Yeap and the tribunal occurred well after the close of the evidential phase and after the parties had filed two rounds of written closing submissions on 23 May 2011 and 4 July 2011 respectively. Mr Yeo, who was also counsel for the liquidator in the arbitration, addressed the tribunal on damages on 20 October 2011. The secured creditor adopted the liquidator's submissions on the issue of damages. During Mr Alvin Yeo's submissions, he was repeatedly assured by the tribunal that if he had not fully addressed the defendants' submissions on damages and if the tribunal needed further assistance, he would be given a chance to address the tribunal once more.

211 The issue of loss of an opportunity arose the following day, 21 October 2011, after both the liquidator and secured creditor had completed their oral submissions on all issues. The tribunal then gave directions for the parties to file submissions on the limited issue of the relief sought by the defendants. The tribunal did not give the parties free rein to make additional submissions on whatever they chose. Further, in light of the exchange with the chairman of the tribunal in which he pointed out the difficulties in the defendants advancing a loss of an opportunity case on damages on the state of the evidence before the tribunal and in light of the gap in the submissions (see [169] and [196]), it appeared to me entirely reasonable for all counsel to assume that the tribunal proposed to deal with the defendants' claim for relief as it had been pleaded and advanced up to that point.

212 In my view, for the reasons already stated in Issue 3, if the tribunal thought that the defendants' claim was better considered as a claim for the loss of an opportunity to earn profits the tribunal was obliged to give the parties the opportunity to deal with this new point. Also for the reasons which I have already stated in Issue 3, I find that the liquidator and the secured creditor suffered prejudice as a result. The award should therefore be set aside in its entirety on this basis alone.

Issue 5: Did the tribunal fail to consider the secured creditors' arguments, evidence and submissions in relation to the Lost Land Claims?

213 The fifth issue concerns whether the tribunal breached the rules of natural justice by not having regard to the defences that the secured creditors ran in relation to the Lost Land Claims. In particular, the question is whether the tribunal wrongly assumed that the secured creditors had made a concession as to whether the parcel of land which was the subject of the Lost Land Claims was truly "lost".

The background to the Lost Land Claims

214 In the arbitration, the defendants sought damages from the secured creditors and the liquidator, alternatively an indemnity, in relation to two claims that were subsisting over land which formed part of the Plant Assets.

215 The defendants rely on the indemnity found in s 6.8 of the APA which reads:

> **6.8 Claims for Settlement by [the secured creditors]**
>
> *In the event* [*the secured creditors*] *fail to settle and discharge the* ***Claims for Settlement*** *by* [*the secured creditors*], ***more particularly described in Part A of Schedule VI hereof, in the manner set forth therein*** , on or before the Closing Date, [the secured creditors] shall fully settle and discharge the same claims prior to the expiration of this APA. One (1) year prior to the expiration of this APA, [the secured creditors] and [the defendants] shall agree on the manner of the settlement and discharge of the Claims for Settlement by [the secured creditors]. It is expressly understood that [the secured creditors] shall, at all times, indemnify and hold [the defendants] completely free from and clear of any and all liabilities, obligations, damages, costs and expenses of whatever kind and nature, arising from the *Claims for Settlement* by [the secured creditors].
>
> [emphasis added in italics and bold italics]

216 The expiration date referred to above was 15 October 2012 (*ie*, eight years after the date of closing (see [53] above)). The "Claims for Settlement" which were the subject of the indemnity were

set out at Part A of Schedule VI of the APA, which reads:

> **CLAIMS FOR SETTLEMENT BY [the secured creditors]**
>
> **PART A**
>
> **1. Petition for Reconstitution of Two**
>
> **Original Certificates of Title by [Celeborn].**
>
> This is a Petition filed in 1985 by [Celeborn] for the reconstitution of supposed titles of his mother over parcels of land with a total area of 38.2 hectares in [Erebor] (which included … the 3.4071 hectares on which [a shop which forms part of the Plant Assets] is situated). This was opposed by the Government, [the Corporation]… and the City of [Erebor].
>
> Manner of Settlement: Note that none of [the Plant Assets] subject of this Asset Purchase Agreement are included in the above-mentioned cases, except the property over which [a shop which forms part of the Plant Assets] is situated. Accordingly, the undertaking of [the secured creditors] with respect to the settlement of the cases above-mentioned shall be limited to the property over which [a shop which forms part of the Plant Assets] is situated, and the liability of [the secured creditors] shall be limited to the value of such property at the time of expropriation.
>
> …
>
> **2. [Lorien] vs. [the Corporation]**
>
> Nature/Amount Involved:
>
> This is an action for ejectment brought by [Lorien] against [the Corporation]. [Lorien] claims to have bought the subject property from [Celeborn] (item 1 above). The total money judgment in favor of [Lorien] is [about US$864,000] representing yearly rental of [about US$34,000] from June 1978 to June 2003 plus rental payments in arrears, attorney's fees and cost of suit.
>
> Manner of Settlement: as provided in the [Celeborn] case above, the undertaking of [the secured creditors] with respect to the settlement of this [Lorien] case shall likewise be limited to the property over which [a shop which forms part of the Plant Assets] is situated, and the liability of [the secured creditors] shall be limited to the value of such property.

217 The secured creditor's obligations under s 6.8 of the APA read with Part A of Schedule VI of the APA were thus to settle the claims in respect of the Celeborn Claim and the Lorien Claim (which I referred to at the start as the Lost Land Claims) or before 15 October 2012. If the Lost Land Claims were still not settled by 15 October 2011, the secured creditors were to agree with the defendants on the manner of settling the Lost Land Claims.

218 In addition to the indemnity in s 6.8 of the APA, the secured creditors also gave the following warranty and representation under s 7.3(g) of the APA in relation to the Lost Land Claims which was supported by a similar indemnity:

> (g) Aside from the Designated Liabilities and the claims, Liens and encumbrances listed in the list attached hereto and made an integral part hereof as Schedules VI and VII which affect the Mortgaged Assets and which claims have been or will be settled by the relevant Party on or before the Closing Date, it is not aware and has no knowledge of any other such claims, liens

and/or encumbrances of whatever kind and nature that may affect the Mortgaged Assets (the "Other Claims, Liens and Encumbrances"). In the event that it is shown that it is aware or has knowledge of any of such Other Claims, Liens and Encumbrances, it shall indemnify [the defendants] for any and all costs, expenses, obligations, liabilities, and/or damages that [the defendants] may incur in respect of any or all such Other Claims, Liens and Encumbrances.

219 The defendants' claim appears to have come about this way. In addition to the Lost Land Claims, one Mdm Vaire had separately filed a petition in the Morian courts in 1998 claiming that she was the true owner of the land in respect of the Celeborn Claim (which is the same land as that of the Lorien Claim). Separately, the government of Moria commenced an action in October 2004 for the cancellation of title in respect of the same piece of land. Both Mdm Vaire's claim and the government of Moria's claim made their way to the Morian Supreme Court. On 7 July 2010, the Morian Supreme Court issued a decision that (i) upheld the grant of Mdm Vaire's petition and (ii) reinstated the government of Moria's Claim.

220 In the arbitration, the defendants contended that the liquidator and/or the secured creditors had breached ss 2.1 and/or 7.2 and/or 7.3 of the APA "in respect of the loss or absence of ownership of the lands under or in respect of [the Celeborn Claim] and [the Lorien Claim], and/or in failing to fully discharge such Claims for Settlement".

221 The defendants argued that because of the Celeborn Claim and/or the Lorien Claim and/or the decision of the Morian Supreme Court, they had lost approximately 9.5 hectares of land (which they later reduced to 6.05 hectares instead) that should have been transferred to it under the APA. On the defendants' case, that land was lost because the Celeborn Claim and/or the Lorien Claim and/or the Morian Supreme Court's decision meant that that land could not be transferred to it.

222 The defendants further asserted that it was entitled to be indemnified by the secured creditors, pursuant to s 6.8 of the APA in the sum of about US$23.7m for the loss of the 6.05 hectares of land.

Summary of the tribunal's decision on the Lost Land Claims

223 The tribunal found in favour of the defendants and ordered that the secured creditors pay to the defendants the sum of about US$23.7m in respect of the Lost Land Claims by way of an indemnity.

224 The tribunal's decision on this issue can be summarised as follows:

(a) the relevant provisions of the APA in relation to the Lost Land Claims are s 6.8 and Schedule VI (paragraphs 469 to 473 of the award);

(b) Under s 6.8 and Schedule VI of the APA, the secured creditors undertook to "sort out the position" in relation to the Lost Land Claims or indemnify the defendants in respect of it. As a result of the Morian Supreme Court's decision, the secured creditors are not in a position to sort out the position and must therefore indemnify the defendants (paragraph 476 of the award);

(c) The secured creditors' submission that the Lost Land Claims is premature must fail because "[t]he fact that the APA gives the Secured Creditors until October 2012 to transfer the [Celeborn] Land is of no consequence in the *light of the acceptance by both* [*the defendants*] *and the Secured Creditors, that there is no prospect of the Secured Creditors being able to make the transfer*" [emphasis added] (paragraph 477 of the award);

(d) The secured creditors' submission that the Lost Land Claims is premature must also fail because "[i]t is not open to the Secured Creditors to contend, on the one hand, that the claim for indemnity is "*dead*", and, on the other hand, that it is premature" (paragraph 477 of the award); and

(f) The tribunal accepted the defendants' valuation expert's evidence that the "full value of the freehold interest in the [Celeborn] Land" was about US$23.7m and used that as the measure of the defendants' loss (paragraph 483 of the award).

The secured creditors' submissions

225 Mr Singh contends that the tribunal erred in the manner in which it construed s 6.8 and Schedule VI of the APA because the clear language of the provisions (i) limited the scope of the indemnity obligations to the settlement of the Celeborn Claim and the Lorien Claim and these claims no longer existed by virtue of the Morian Supreme Court's decision and (ii) s 6.8 requires the secured creditors to indemnify the defendants only to the extent that the defendants incurred any obligations, liabilities, damages or costs or expenses as a result of the Celeborn Claim and Lorien Claim. It does not require the secured creditors to "sort out the position" in relation to these two claims. Mr Singh however rightly concedes that this court does not exercise an appellate function over the merits of the tribunal's decision. Thus the parties will have to live with the decision of the tribunal even if it erred in law in its construction of s 6.8 and Schedule VI. [note: 20]

226 Mr Singh asserts that the tribunal's award on the Lost Land Claims should be set aside because the tribunal failed to consider the secured creditors' evidence and arguments on three sub-issues:

(a) What exactly comprised the land "lost" by the defendants that formed the subject of their Lost Land Claims?

(b) Whether the land that was the subject of the Lost Land Claims were indeed "lost"?

(c) Whether the Lost Land Claims were premature?

227 In doing so, Mr Singh focused most of his submissions (rightly in my view) on the fact that the tribunal proceeded on the basis that the secured creditors had "accepted" that there was no prospect of them being able to transfer the relevant land to the defendants prior to 15 October 2012. He argues that there is no support for this acceptance in anything in the record. This was an acceptance which cut across the secured creditors' contention that the Celeborn land was not lost (because there was still a chance that the land could be conveyed) and that any claim was premature (because the secured creditors had until 15 October 2012 to make good on their promise to settle the claims over the land).

228 Mr Singh argued that as was the case in *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row*") where the arbitrator there mistakenly thought that one party had abandoned one part of its claim because of a concession which did not in fact take place, the tribunal here had mistakenly assumed that the secured creditors had conceded the point when it in fact had not.

Did the secured creditors accept that it would be impossible to transfer the land to the defendants following the Morian Supreme Court decision?

229 Mr Yeap makes several arguments to show why the tribunal was justified in stating that the

secured creditors accepted that it would be impossible to transfer the land to the defendants following the Morian Supreme Court's decision.

230 First, he argues that the secured creditors in their submissions in the arbitration never took the position that there was any prospect of transferring title to the Celeborn land to the defendants. [note: 21] He says it was not disputed by the liquidator and the secured creditors that the results of (i) the Celeborn Claim, (ii) the Lorien Claim, (iii) Mdm Vaire's claim and/or (iv) the Morian Supreme Court's decision were that the relevant land (which formed part of the Plant Land Assets which were to be conveyed to the defendants) had effectively been lost. He also maintains that the tribunal on several occasions put forward the proposition that the secured creditors were not in a position to transfer title in respect of the Celeborn land and that secured creditors' lead counsel in the arbitration (not Mr Singh) did not challenge that proposition on any of those occasions.

231 I cannot agree. In their initial closing submissions filed in the arbitration on 23 May 2011, the secured creditors contended expressly that there remained a chance that the Celeborn land could be transferred to the defendants:

> 283. Moreover, whilst the issue of ownership may have been settled between [Mdm Vaire] … on the one hand, and [Celeborn] and [Lorien] on the other hand, there are nevertheless *two sets of proceedings* brought by the Government of [Moria], namely, the Expropriation Proceedings, as well as the Reversionary Proceedings, which have been reinstated by reason of the Appeal Judgment.
>
> 284. The Expropriation Proceedings was originally filed on 15 August 1983, by Government of [Moria], through [the predecessor of the Corporation]. The original aim was to obtain part of the [Celeborn] Land, measuring 30.25 hectares, for the use by [the Corporation] to operate the [the Corporation's Mithril plant]. Logically, there is a possibility that, should the Expropriation Proceedings brought by the Government of [Moria] be successful, then the title to [the Plant Land Assets], insofar as they are the subject of the Expropriation Proceedings, would vest in [the defendants] (as successors in title of [the Corporation]) …
>
> 285. As for the Reversionary Proceedings, these were filed on 13 October 2004, for a reversion of parcels of land … which form part of the [Celeborn] Land.
>
> 286. Given that the Expropriation Proceedings and the Reversionary Proceedings remain pending, the net effect on [the defendants] is uncertain. Therefore, it remains clear that their claim is wholly premature.

232 Mr Yeap says that these arguments were speculative and that the tribunal agreed with that view. However, he was unable to point to anywhere in the award where the tribunal agreed that it was speculative.

233 It appears that it was in fact the defendants who (incorrectly) suggested at paragraphs 327 to 331 of their initial written submissions on liability dated 23 May 2011 that the secured creditors did not challenge that the defendants had lost the Celeborn land:

> 327. *The* [secured creditors and liquidator] *do not challenge that* [the defendants] *have indeed lost the Lost Land* but simply assert that the Lost Land claim is rendered moot by the [Morian Supreme Court Decision], as [Celeborn] was found not to be an heir of … the original owner of [the relevant parcel of land]. [The Morian Supreme Court] instead affirmed the 17 July 2004 decision of the [Morian] Regional Trial Court that a [Mdm Vaire] was the rightful heir. …

328. It bears highlighting that the result of the aforesaid proceedings is that [the defendants] have most certainly lost such part of [the Plant Assets] whether by reason of the [Morian Supreme Court Decision] or otherwise …

329. In their cross-examination of [Mr Y, one of the defendants' witnesses], [the secured creditors'] solicitors did not challenge [Mr Y's] evidence on the issue of Lost Land …

330. The Liquidator's counsel also did not cross-examine [Mr Y] on the issue.

331. In view of the fact that the [secured creditors' and liquidator's] counsel both did not challenge [Mr Y's] evidence on this issue, [the defendants] humbly submit that [the defendant's] claim in this regard should be admitted in full.

234 In their further written submissions on liability filed on 4 July 2011, the secured creditors took issue with the defendants' "gross mischaracterisations of the Secured Creditors' position". Referring to the extracts from the defendants' initial written submissions above, the secured creditors submitted at paragraphs 174 to 180:

174. Contrary to [the defendants'] misstatements … [t]he Secured Creditors have never waived their right to insist that [the defendants] do so to establish their claim. …

175. Indeed, the Secured Creditors had expressly sought to cross-examine [Mr Y] on the issue of actual loss, by reference to the fact that [the defendants] have been successfully leasing out [a shop situated on the land subject to the Lost Land Claims] to a third party without any disturbance, and in fact continue to do so. ...

176. It is therefore patently inaccurate for [the defendants] to assert that the Secured Creditors have never disputed or challenged that the land alleged to be lost was indeed lost.

177. It is also patently inaccurate for [the defendants] to assert that [Mr Y] was never cross-examined by the Secured Creditors ...

...

180. [The defendants'] flawed submissions, viz. "In view of the fat that [the secured creditors' and liquidator's] counsel both did not challenge [Mr Y's] evidence on this issue, [the defendants] humbly submit that [the defendants'] claim in this regard should be admitted in full", should therefore be firmly rejected.

[emphasis in original omitted]

235 The position taken by the secured creditors in both their written submissions was entirely consistent with the position taken by the secured creditors' lead counsel during the arbitration where he maintained that there was still a possibility that the defendants could receive title to the land. [note: 22]

236 I am therefore satisfied from the objective record that the secured creditors never conceded that there was no prospect of transferring the land to the defendants. By failing to consider the arguments which the secured creditors made in this respect, I am satisfied that the tribunal breached the rules of natural justice.

237 In the circumstances, if the tribunal had not assumed that the secured creditors accepted that there was no prospect of transferring the land subject to the Lost Land Claims to the defendants, this could *reasonably* have made a difference to the outcome of the case since it was possible and plausible for the tribunal to conclude otherwise: that the Lost Land Claims were indeed premature or that the land was indeed not "lost". The breach of natural justice here was therefore not of a trivial and technical nature. The tribunal's failure to consider the secured creditors' clearly-stated position caused prejudice to them. In any event, the defendants did not dispute that the secured creditors had suffered prejudice if I found that there was a breach of natural justice in relation to Issue 5.

238 In light of my decision, I do not have to go on to decide if Mr Singh is correct in contending that the tribunal failed to consider the secured creditors' submissions on what exactly comprised the land "lost" by the defendants that formed the subject of the Lost Land Claims.

239 I do, however, make one observation. The tribunal noted that there was a dispute between the defendants and the secured creditors on how to value the land subject to the Lost Land Claims should liability for the indemnity be established and that "[t]he difference between the two valuations was very substantial. [The defendants'] valuation was [about US$23.7m] whereas [the secured creditors'] valuation was that the ownership interest in the [relevant parcel of land] as at [31] December 2010 was [about US$16,300]" (see paragraphs 479 and 482 of the award).

240 From the objective record it is clear that one of the key areas of disagreement was whether the "loss" should be calculated on the basis of 6.05 hectares of land (which was what the defendants contended) or based on 3.4071 hectares of land (which was what the secured creditors contended in light of the provisions in Schedule VI of the APA (reproduced at [216] above)).

241 In spite of this, the tribunal simply stated its conclusion that it preferred the defendants' evidence over the secured creditors' evidence and that "[t]he indemnity must be the full value of the freehold interest in the [Celeborn] Land, that is, [about US$23.7m]" (see paragraph 483 of the award). The tribunal gave no reasons for its conclusion. In those circumstances, even though I do not have to decide the point, I had much sympathy for the secured creditors' contention that it was not given a fair hearing on the matter because the tribunal gave no indication that it had even applied its mind to the language of Schedule VI of the APA and how it ought to be construed when it came to quantifying the loss.

Conclusion on Issue 5

242 To summarise the discussion from [213] to [241] above, I am satisfied that the tribunal breached the rules of natural justice and failed to give the secured creditors a fair hearing on the issue of the defendants' Lost Land Claims and that the parties who were jointly and severally liable under the indemnity in s 6.8 of the APA had suffered prejudice as a result.

Issue 6: did the tribunal act in excess of its jurisdiction contrary to Art 34(2)(b)(iii) of the Model Law by granting relief under and in respect of the OMNA and the notes?

243 My holdings thus far mean that it is strictly unnecessary to consider Issue 6. I go on to consider it nonetheless in light of the extensive submissions of the parties on this point.

244 The secured creditors and the Funds accept that the defendants' claim for damages against the liquidator and the secured creditors for failing to deliver clean title to the Plant Assets fell within the scope of the arbitration agreement in the APA. Their complaint here is that the *relief* sought by the defendants in relation to its payment obligations under the notes amounted *in substance* to a

pre-emptive declaration that the defendants were not liable under the OMNA and the notes. They submit further that if that is the relief that the defendants wanted, they should have sought that relief in accordance with the separate dispute resolution provision in the OMNA and not that in the APA. Therefore, in granting the relief sought by the defendants at [76(b)] and [76(c)] above, the complaint is that the tribunal exceeded its jurisdiction under the arbitration agreement *in the APA*.

245 Issue 6 concerns the situation where the dispute referred to the arbitrators is one that is not within the parties' arbitration agreement or that goes beyond the scope of that agreement. In this situation, the arbitral tribunal's decision as to its own jurisdiction can be challenged afresh by the court in exercise of its original jurisdiction (*cf* the court's limited role in a challenge on the basis of natural justice): *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 1 SLR(R) 23 at [21] and [22].

246 The starting point of the analysis must be the express wording of the dispute resolution provisions in the APA and in the OMNA. Before I turn to those provisions, I should also mention as a preliminary point that it is undisputed that these provisions, like the contracts in which they are found, are governed by Morian law. Having said that, I have considered both experts' evidence on Morian law I am satisfied that the applicable principles are not materially different from those under Singapore law.

The relevant provisions of the APA and the OMNA

247 The APA's dispute resolution provision is found in s 10, which states:

> **DISPUTE RESOLUTION**
>
> 10.1 Amicable Settlement
>
> Any dispute or controversy of any kind whatsoever arising between or among the Parties (such dispute or controversy being referred to herein as a "Dispute") in respect of all matters relating to or in connection with this APA and also in all matters concerning the provisions of this APA and the performance of the obligations provided herein, shall be settled amicably by mutual consultations between or among the Parties as far as practicable.
>
> 10.2 Arbitration
>
> If the Dispute cannot be settled amicably within thirty (30) days by amicable settlement, the same shall be resolved through arbitration in accordance with the arbitration rules of the Singapore International Arbitration Centre (the "Centre") for the time being in force.
>
> …
>
> 10.3 Other Defaults
>
> Notwithstanding anything herein, the provisions of Sections 10.1 and 10.2 of this APA shall not apply to any default under the [OMNA], the Tranche A Note, the Tranche B Note, any of the [SLCs], the [new mortgage indenture], or any contract, agreement or document supplemental or accessory thereto.
>
> For the avoidance of doubt, a default under the [OMNA], the Tranche A Note, the Tranche B Note, any of the [SLCs], the [new mortgage indenture], or any contract, agreement or document

supplemental or accessory thereto shall be subject to, and governed by, the respective terms thereof and [the secured creditors] shall have the right to immediately enforce any and all remedies available to them under such agreements.

248 The dispute resolution provision of the OMNA is found in s 9.08(b), which states:

> 9.08 Governing Law; Submission to Jurisdiction
>
> …
>
> (b) Any suit, action or proceeding against [the defendants] with respect to the *Relevant Documents* or on any judgment entered by any court in respect thereof may be brought in any competent court in [the capital of Moria], and the parties hereby submit to the non-exclusive jurisdiction of such courts for the purpose of any such suit, action, proceeding or judgment. The foregoing, however, shall not limit or be construed to limit the rights of [the Corporation's Creditors] to commence proceeding or to obtain execution of judgment against [the defendants] in any venue or jurisdiction where assets of [the defendants] may be found.
>
> …
>
> [emphasis added]

The phrase in italics "Relevant Documents" as defined in s 1.01 of the OMNA includes, *inter alia*, the OMNA itself, the notes, the new mortgage indenture, the SLCs and all other documents required to be delivered pursuant to these documents. [note: 23] It does not, however, include the APA.

The tribunal's findings

249 The tribunal concluded that it had the jurisdiction to grant the relief sought by the defendants for the following reasons. It first decided at paragraph 85 of the award that the APA was the principal agreement governing the relationship between the parties. Thus, the tribunal held, the legal basis of the defendants' payment obligations under the notes arose under the *APA*, as the parties' principal agreement, and *not* under the OMNA:

> 85. There is, in the Tribunal's view, no doubt that the APA was the principal agreement. Nor, as will be illustrated, is there any doubt that [the defendants'] payment obligation arose under the APA and not under the [OMNA].
>
> 86. Section 3.1 of the APA provides that "… for and in consideration of the transaction [the defendants] shall pay the Purchase Price within a period of eight (8) years from the Closing Date (the "Payment Period",) as follows: ...". It can, therefore, readily be seen that the obligations of [the defendants] (on the one hand) and the Liquidator and the Secured Creditors (on the other hand) were reciprocal. In exchange for the payment of the Purchase Price in the stipulated manner the Liquidator and the Secured Creditors were to transfer and deliver [the Plant Assets] free of encumbrances and [the Corporation's Liabilities] were to be discharged.

This is also evident from paragraph 88 of the award where the tribunal held:

> 88. ... a dispute which arises from an alleged breach by the Secured Creditors of their obligations under Section 2 of the APA requires [the tribunal] to consider whether [the defendants were] obliged to perform its reciprocal obligation and make payment of the Purchase Price. ...

250 At paragraph 99 of the award, the tribunal then held that s 10.3 of the APA properly construed meant that the dispute resolution provisions of the APA take precedence over any other dispute resolution mechanism so long as any obligation of the secured creditors' under the APA is involved:

> 99. … if any dispute arises between [the defendants] and the Secured Creditors relating to the alleged breach of an obligation by [the defendants] under the … Notes, the SLCs or the [OMNA] itself, *which does not relate to the rights and obligations of the parties under the APA*, such a matter would be excluded from the arbitration agreement in the APA notwithstanding the fact that the … Notes and the SLCs had been issued pursuant to the APA. ...
>
> [emphasis added]

My decision on Issue 6

251 With respect, I am unable to agree with the tribunal's construction of the dispute resolution provisions.

(1) "Notwithstanding anything herein" and "For the avoidance of doubt"

252 In my view, the phrase "notwithstanding anything herein" in the first paragraph of s 10.3 of the APA makes it clear that the parties contemplated a potential overlap between matters which would constitute a "Dispute" in s 10.1 and s 10.2 of the APA and a "default" in s 10.3. If this were not the case, s 10.3 would be completely otiose. The second paragraph of s 10.3, which begins with "[f]or the avoidance of doubt", reinforces this construction of s 10.3.

253 Further, s 10.1 and s 10.2 of the APA appeared in the parties' transaction as early as the MOA. Section 10.3, however, was introduced later, only when the dispute resolution mechanism in the MOA was migrated into the APA. To my mind, this suggests that s 10.3 of the APA was inserted only *when* the terms and conditions of the notes were finalised and embodied in the OMNA and only *because* it became apparent to the parties that there might be a situation in which obligations under the APA and the OMNA might overlap. In that way, s 10.3 of the APA served to break a deadlock by directing parties to the OMNA.

254 That being the case, the question which the tribunal asked itself – that is, whether the dispute falls within the scope of the APA – is in my respectful view the wrong question. The express wording of s 10.3 of the APA requires the tribunal instead to ask itself whether this "dispute" is also a "default" within the scope of the OMNA. If it is, then under s 10.3 of the APA, this dispute ought to be decided in accordance with the dispute resolution provisions in the OMNA.

255 For the reason above, I cannot accept Mr Yeap's submission that the tribunal was correct in finding that the APA was the principal and overarching document because it provided for the creation of the OMNA and the notes. I also cannot accept the submission that because the defendants' payment and security obligations arose under the APA, the disputes in respect of those obligations were rightly referred to arbitration under the APA. For the same reasons, I also reject his related argument that the tribunal had the jurisdiction to deal with a matter which constitutes a breach both under the APA and the OMNA under s 10.2 of the APA. To my mind, that ignores the clear meaning and intent of s 10.3 of the APA.

(2) "a default under the Omnibus Agreement"

256 But what is a default under the OMNA? A "Default" is defined in s 1.01 of the OMNA as an

"Event of Default" or an event which following the lapse of a notice period would become an Event of Default. The Events of Default are set out at s 8.01 of the OMNA. They include, *inter alia*, (i) the failure to pay sums due under the OMNA (which would be sums due under the notes) (s 8.01(a) of the OMNA) and (ii) the failure to comply with the terms of the OMNA, the notes, the new mortgage indenture and the SLCs (s 8.01(c) of the OMNA). Therefore, by seeking the relief that it did in relation to its payment obligations under the notes, I agree with Mr Singh that the defendants were effectively and in substance seeking a prospective determination that it would not be liable for an "Event of Default" (or that it would not be in default) if it did not pay the next instalment on the notes because of the breaches of the APA by the liquidator and the secured creditor. In my view, this was a matter which fell squarely within the express carve-out in s 10.3 of the APA.

257 Mr Yeap argues (in the alternative) that the carve-out in s 10.3 of the APA, properly construed, applies only to what he calls a "pure default". He submits that a "pure default" is different from a "dispute" under s 10.1 and s 10.2 of the APA. According to Mr Yeap, a "pure default" occurs if the defendants simply refuse to meet their obligations under the notes, the new indenture or SLCs. On the other hand, it is a "dispute" and not a "pure default" if the defendants' refusal to make payment under the notes is in some way linked to the secured creditors' obligations under the APA. Seen in that light, Mr Yeap submits that s 10.3 of the APA is intended to break a deadlock by diverting parties to the OMNA only in the very limited situation of a "pure default". I do not agree. I fail to see why "default" under the OMNA includes only uncontentious defaults but not defaults that were "contentious".

258 In fact, Mr Yeap's interpretation would lead to absurd commercial results. The defendants assumed almost all of the obligations under the OMNA. His interpretation would mean that it would have the unilateral power to dictate whether a disagreement regarding its payment obligation under the notes was to be resolved by the dispute resolution mechanism under the APA or the OMNA. Upon a default, all it would have to do is simply allege that it was relieved of its obligation to pay under the notes by a breach of the secured creditors' obligations under the APA (however spurious). That would automatically render the matter a "dispute" and remove it from the dispute resolution mechanism in the OMNA. In my view, that could not have been the intention of the parties. That interpretation would denude s 10.3 of the APA of all practical significance.

(3) Commercial considerations

259 Further, in my view, it made perfect commercial sense for the parties to have structured their dispute resolution mechanism in the manner described above. The purpose of the APA was to ensure that the Plant Assets were transferred to the defendants in exchange for the issuance of the notes. As part of the commercial transaction, these notes were meant to be (and indeed were) traded and on-sold to third parties (such as the Funds and the parties who held the notes before them) who would have absolutely no interest or involvement in the actual sale process of the Plant Assets. In fact, this was expressly contemplated by s 9.04 of the OMNA which permits a noteholder to assign all or any portion of its rights and obligations under the OMNA, the notes, the SLCs and the new mortgage indenture (but not under the APA) to anyone save for direct competitors of the defendants.

260 Indeed, this was the manner in which (at least some of) the original secured creditors of the Corporation managed to exit as creditors of the Corporation. The payments were thus structured to ensure that a noteholder was entitled to transfer its rights and obligations under the notes without any reference to the underlying transaction documented by the APA. I should add here that Mr Yeap's argument that the notes were technically non-negotiable instruments does not address the real point here: that the commercial intention of the parties was plainly for the notes to be on-sold to third parties. Such third parties should not have to be, and would not want to be, concerned with any

dispute arising out of the APA. [note: 24]

261 I am thus satisfied that the contractual intention of the original parties to the transaction was for the notes to be detached entirely from the APA and to take on a legal life of their own following closing. Put another way, the dispute resolution mechanism in the OMNA was the mechanism chosen by the parties to resolve all matters concerning the payment and security obligations under the notes following closing. In my respectful view, the tribunal's construction of s 10.3 of the APA would turn the commercial rationale of the entire transaction on its head. It makes the notes a highly unattractive proposition for anyone to acquire in the secondary market. That would in turn defeat the entire purpose of structuring the transaction in the manner that the parties did. At least part of that purpose was to allow secured creditors who did not wish to be tied to the defendants for the long term to exit as creditors through the secondary market rather than through some sort of accelerated repayment, in order not to disrupt the defendants' business or cash flow.

(4) The "non-exclusive jurisdiction" of the Morian courts

262 Mr Yeap argues in the alternative that s 9.08(b) of the OMNA is a permissive and not a mandatory provision. In other words, the secured creditors may choose to but, are not obliged to, go to the Morian courts to enforce their rights under the OMNA. If s 10.3 of the APA is seen in that light, Mr Yeap argues, it is not attempting to break any deadlock between the two dispute resolution provisions whenever there was an overlap.

263 This argument is, with respect, a complete non-starter.

264 The "non-exclusiveness" of s 9.08(b) of the OMNA concerns the non-exclusiveness of the Morian courts *as a forum* as opposed to the non-exclusiveness of court proceedings *as the only dispute resolution mechanism*. In fact, the non-exclusive nature of s 9.08(b) undermines Mr Yeap's argument rather than supporting it. Section 9.08(b) gives the Corporation's creditors (in this context, the noteholders) the ability to commence proceedings against the defendants in any other forum (*ie*, any other court) outside Moria where the defendants have assets. To my mind, this only goes to show that the dispute resolution mechanism was drafted to facilitate noteholders' rights of recovery in the event of default. This, in my view, is entirely consistent with the construction of s 10.3 of the APA described above.

Conclusion on Issue 6

265 To conclude on Issue 6, I find that the tribunal exceeded its jurisdiction by granting the relief set out at [76(b)] and [76(c)] above. Therefore, even if I am wrong on Issues 1 to 5, I would have set aside those heads of relief which the tribunal granted and which pertain to the defendants' payment and security obligations under the OMNA and the APA.

Issue 7: Did the tribunal act in excess of its jurisdiction or in breach of natural justice by holding the Funds, as assignees under the OMNA and the notes, liable alongside the rest of the secured creditors for breaches of the APA?

266 My findings thus far are sufficient for the Funds' application to be allowed in its entirety. It is therefore not strictly necessary for me to determine Issue 7. I nevertheless consider Issue 7 in light of the importance of this issue and the parties' extensive submissions on this point. The issue here is whether the Funds, who purchased the right to receive payments under the notes in the secondary market and who applied voluntarily to join the arbitration as parties, can now complain that the tribunal acted in excess of its jurisdiction in finding them liable under the APA when they were: (i) not

parties to the APA; and (ii) the defendants advanced no positive case against them throughout the arbitration.

The background to the Funds' involvement in the arbitration

267 As mentioned above, s 9.04 of the OMNA gave the original secured creditors of the Corporation the right to assign their rights and obligations under the Relevant Documents (which included the OMNA and the notes but crucially not the APA (see [248] above)).

268 In a series of trades between 2005 and 2008, the Funds purchased the right to receive payments under the notes on the secondary market as distressed debt. The Funds' counterparties in these trades were not the original holders of the notes but were parties who were themselves purchasers of rights from the original noteholders.

269 The operative documents in each of these trades includes (i) a transfer agreement (which in two instances are called "assignment agreements" and in one instance is called a "sale agreement") as well as (ii) a notice of assignment which is addressed to the facility agent for the notes (*ie*, AKP) and the defendants. It also appears that all the transfer agreements are governed by English law.

270 Mr Jeyaretnam maintains that these trades did not have the effect of constituting the Funds parties to the APA. Thus, he argues, the Funds were not subject to any of the obligations under the APA, including the obligation to transfer clean title to the defendants, nor were they party to the arbitration agreement contained in s 10 of the APA. According to Mr Jeyaretnam (and related to his argument on Issue 6 above which I have accepted), the entire commercial purpose of structuring notes in the way the parties did was to ensure that they could be traded on the secondary market independently of the underlying transaction comprised in the APA.

271 Although Mr Yeap contends otherwise, his contention lacks any conviction and appears to be an afterthought. The defendants did not name the Funds in their notice of arbitration in 2008. Instead, the defendants named only the original noteholders (together with the rest of the secured creditors of the Corporation). The defendants did so even though they had by then already been served notice that the relevant notes had been acquired by the Funds.

272 The Funds were formally joined as a party to the arbitration only some two and a half years later on 22 March 2011 when they volunteered to be so joined. If the defendants believed that this joinder meant that non-parties to the APA were volunteering to be liable under the APA, one would have expected them to welcome the joinder. Instead, the defendants asked for evidence that the Funds were in fact transferees or assignees before informing the tribunal that they would not object to the joinder. As I will explain, the circumstances leading up to the Funds' joinder application are of central importance to the determination of this issue.

273 The tribunal's award was issued in May 2012. To the Funds' dismay, the tribunal permitted the defendants to suspend without consequence their payment and security obligations under the OMNA and notes. To the Funds' surprise, the tribunal also found the "Secured Creditors" (which the tribunal listed in Annex A to the award) to be jointly and severally liable with the liquidator to the defendants for US$80m in damages for breaches of the APA. To the Funds' horror, they found themselves named in Annex A alongside the rest of the secured creditors (including the original noteholders) as parties liable to the defendants. In other words, the defendants achieved a thorough windfall: although they had commenced arbitration against all of the original 23 secured creditors of the Corporation, they had been given far more than they asked for. They were now able to look to the Funds in addition to these 23 secured creditors to recover under the award.

274 On 3 July 2012, the Funds applied separately from the rest of the secured creditors to set aside the award.

The Funds' submissions

275 Mr Jeyaretnam first contends that the transfers could not and did not constitute the Funds a party to the APA. Since the Funds were not a party to the APA, they could not have incurred any obligations under the APA and ought never to have been held liable for damages arising from breaches of obligations under the APA. This argument is superficially attractive. But in my judgment, it conceals the real issue at stake on the Funds' application which, after all, is an application to set aside the award. If the Funds became a party to the arbitration by virtue of a joinder application and if the terms of reference of the tribunal include the issue of whether the Funds are liable under the APA, Mr Jeyaretnam's argument serves merely to attack the tribunal's decision on the merits. It does not undermine the tribunal's jurisdiction to hold the Funds liable under the APA.

276 On the merits, I have much sympathy for the Funds' position. It is indeed odd that a mere assignee of rights under the notes who joins an arbitration voluntarily can end up being held to have incurred obligations to the defendants under an agreement to which it was never a party, and therefore to be jointly and severally liable to pay the defendants US$80m. Instinctively it appears to me that the tribunal's award is wrong, at the very least because it cannot be that the original noteholders *and* the Funds are both liable at the same time. But all of this is beyond the remit of the court in a setting aside application. The Funds have to live with the tribunal's decision, however surprising or erroneous, unless a ground for setting aside is made out.

277 The outcome of this issue therefore hinges on Mr Jeyaretnam's alternative contention, which is that the Funds joined themselves to the arbitration only for a limited purpose, which was because they were affected by the relief sought by the defendants under the OMNA:

(a) The defendants had (wrongly) commenced the arbitration to seek to avoid its payment obligations under the notes and to prevent all noteholders from declaring an event of default. The Funds joined the arbitration only as a party affected by the relief sought by the defendants; and

(b) In its notice of arbitration, the defendants' allegations of breaches of the APA were limited to the original secured creditors (including the original noteholders) and not to assignees of entitlements under the OMNA or the notes.

278 While Mr Jeyaretnam agrees that the Funds are bound by the decision of the tribunal, he maintains that they are bound only to the extent that the decision falls within the tribunal's terms of reference in relation to the Funds. After the Funds joined the arbitration, the defendants did not amend their notice of arbitration to assert a claim that the original noteholders *and* their assignees and successors-in-interest were *all* to be held *simultaneously* liable for breaches of the APA. In light of this, Mr Jeyaretnam contends that the defendants' case for liability under the APA was asserted against only the original secured creditors (including the original noteholders). So, he submits, the question of whether the Funds (as an assignee of the notes) ought to be liable for obligations under the APA falls entirely outside the tribunal's terms of reference.

279 Mr Jeyaretnam relies on this submission to assert that the tribunal breached the rules of natural justice by not giving the Funds an opportunity to present their case on why assignees in their position should not be held liable under the APA before holding that they were so liable.

The defendants' submissions

280 Mr Yeap submits that the Funds voluntarily subjected themselves to the tribunal's jurisdiction without qualification and conducted themselves throughout as if though they were content to be treated in the same way as the original secured creditors and noteholders. As such, the Funds placed themselves squarely within the four corners of the defendants' case and the tribunal's terms of reference. The Funds are therefore bound by the award regardless of whether the tribunal's decision was correct on the merits.

My decision on Issue 7

281 In my judgment, the resolution of this issue requires careful consideration of the manner in which the parties conducted themselves, starting with the events leading up to the Funds' joinder application all the way until the award was issued.

(1) The notice of arbitration

282 I turn first to the foundational document: the defendants' notice of arbitration. The Funds rely on paragraph 9 of the notice of arbitration to support their argument that the defendants' presented their case as being against only the original secured creditors:

> 9. The Liquidator, the Secured Creditors, and/or [the shareholders of the Corporation] stand in material breach of their obligations under the APA. ... Furthermore, one or more of the Secured Creditors may have assigned or transferred their entitlements under the Tranche A Note, the Tranche B Note and/or the [OMNA] (all of which are referred to and elaborated upon hereinafter) *but such assignment and/or transfer ought not derogate from the obligations and liabilities undertaken by the Secured Creditors under the APA for which there is no right of assignment on the part of the Secured Creditors.*
>
> [emphasis added]

283 Mr Yeap argues that this paragraph does not mean that the defendants took the position that assignees like the Funds could never be liable under the APA. Instead, he contends that paragraph 9 is simply the defendants' explanation as to why it believes that the original secured creditors who may have assigned or transferred their entitlements (*ie*, the original noteholders) nevertheless remain liable under the APA and are properly named as parties to the arbitration. In my judgment, such an interpretation of paragraph 9 is completely untenable in its context. The defendants must have believed that either the original secured creditors or the assignees (but not both) were liable. Given that the defendants would have received the notices of assignment from the Funds by the time the notice of arbitration was issued, I am satisfied that the defendants presented its case on the basis that only the original secured creditors – and not the Funds – were liable under the APA.

(2) A&G's letter 3 November 2010 and the parties' memorials

284 The next significant event occurred on 3 November 2010 when Allen & Gledhill LLP ("A&G") (then counsel for the secured creditors in the arbitration) wrote to the tribunal as follows:

> Whereas we previously acted exclusively for [AKP], we wish to inform that we have been appointed to act *on the collective behalf of the Secured Creditors*. *A list of specific parties for whom we act is enclosed* for your reference.
>
> The 1st Memorial that we will shortly circulate is submitted *on their behalf*.

[emphasis added]

285 The "list of Secured Creditors" which A&G enclosed included the Funds. Whatever the Funds might have intended, the letter did suggest that the Funds saw their legal position as indistinguishable from the rest of the secured creditors' and that they adopted all the arguments in the secured creditors' 1st Memorial which were of common application.

286 The secured creditors' 1st Memorial contained both the secured creditors' case in relation to the tribunal's lack of jurisdiction to halt payment under the notes as well as its case in relation to clean title. The clean title argument, however, would not have been available to an assignee in the position of the Funds unless it was made in the alternative (*ie*, in the event that an assignee could also be potentially be liable under the APA). But this is not how it was presented to the tribunal. When the secured creditors' 2nd Memorial was presented to the tribunal, the Funds' case was once again presented without drawing any distinction between the Funds' liability and the secured creditors' liability.

287 Despite this, and consistent with their notice of arbitration, the defendants' two memorials continued to present their case on the basis that only the secured creditors who were party to the APA could be held liable under the APA (to the exclusion of parties to whom the original noteholders had assigned or transferred their entitlements under the OMNA and notes).

(3) A&G letters on 22 February 2011 and 11 March 2011

288 On 22 February 2011, A&G wrote to the defendants' solicitors to inform them that it would be applying formally for the Funds to be joined as parties to the arbitration. In this letter, A&G describes the Funds as a "Secured Creditor, who was not previously named in the Notice of Arbitration" and as "[s]uccessor-in-interest" to the original noteholders.

289 While I agree with Mr Jeyaretnam that it is possible to read the phrase "successor-in-interest" as suggesting that the Funds held by way of assignment only the right to be paid and did not incur any obligations, I agree with Mr Yeap that the phrase in its context suggested that the Funds were holding themselves out to be in the same position in all respects as the original noteholders.

(4) The exchange with the tribunal on 22 March 2011

290 About a week into the substantive hearing on liability issues, the tribunal asked for an update on the joinder application. The defendants' counsel informed the tribunal that the defendants wished to clarify if the Funds would be bound by the decision of the tribunal: [note: 25]

> Chairman: ... So far as outstanding housekeeping matters are concerned, there's the issue of joinder.
>
> Mr Yeap: Yes. We've looked at the documents and in principle we have no objections, but I just wanted to clarify two things. Number one is that presumably, they would agree to be bound by the decision.
>
> Chairman: If they have become parties to the arbitration then they have very little choice, having applied.
>
> Mr Yeap: I would have thought so, yes.

> Presumably in the context of the application that is being made, Allen & Gledhill would be considered as representing them in the proceedings? I just wanted clarity on that point, that's all.
>
> A&G: Yes, we are representing the applicants to be joined.
>
> Mr Yeap: Very well then. Yes.

291 Mr Jeyaretnam does not deny that the Funds agreed to be bound by the tribunal's decision. He contends instead that "agreeing to be bound" means agreeing to be bound by the tribunal's findings made "for the purpose of other proceedings … and having to take account of those and not reopen those [findings]" [note: 26]. However, while accepting that the Funds were willing to "take the rough with the smooth and would be bound by the findings of the arbitrators", Mr Jeyaretnam maintains that this does not imply that the Funds had, by joining themselves as parties to the arbitration, signed up to being held liable for damages on a claim that was made against only the original secured creditors under an agreement to which the Funds were never a party.

292 While I have no doubt that this may have been what the Funds thought at the time (why would they otherwise volunteer to join an arbitration they need not be part of?), in my judgment, this did not appear to be the objective message that they were sending to either the tribunal or to the defendants. In the exchange above, when Mr Yeap used the phrase "bound by the decision" it was obvious that he was referring to the entire decision on the merits. The chairman's response that "[i]f they have become parties to the arbitration then they have very little choice, having applied" showed that his underlying assumption too was that having voluntarily applied to join the arbitration in the capacity of "successor-in-interest" of a secured creditor, the Funds' joinder application was unqualified and they agreed to be treated just like the rest of the secured creditors. At no point in this exchange did counsel then representing the funds suggest that their application to be joined as a party was qualified in any way or that their position was distinct from the secured creditors' position.

293 As a follow up to the exchange above, A&G on 24 March 2011 handed to the tribunal a document which the tribunal described as "a list of secured creditors, both under the notice of arbitration, and those represented by Allen & Gledhill and joined as parties". This again suggested that the Funds were content with being treated as if they were in the same legal position as the rest of the secured creditors.

(5) The agreed memorandum of issues

294 On 18 May 2011, after the Funds had been formally joined to the arbitration, the parties submitted an agreed memorandum of issues. Mr Jeyaretnam argues that the liability issues here were framed as being solely between the defendants and "the [Corporation's] secured creditors" and that this made it clear that the defendants' claim was against the original secured creditors as opposed to assignees such as the Funds.

295 The problem with this construction of the memorandum of issues is that it completely undermines the Funds' position in respect of the secured creditors' arguments which they now say were the only arguments they aligned themselves with. For example, the following issue was stated at paragraph 6:

> 6. Whether [the Corporation's] Secured Creditors are entitled to an order that [the defendants] pay [the Corporation's] Secured Creditors:

(a) the balance of the outstanding Purchase Price (in the event that the Tribunal finds that it has jurisdiction over the issue); and/or

(b) damages for losses caused by the interim injunction ordered by the Singapore High Court and continued by the Tribunal by Procedural Order No. 5 dated 7 July 2010 (in the event the Tribunal has jurisdiction over this issue).

It was thus clear from an objective reading of the agreed memorandum of issues that the Funds had aligned themselves completely and without distinction with position of the secured creditors.

Conclusion on Issue 7

296 In light of the above, I am satisfied from the conduct of the Funds that they joined the arbitration on the basis that they were content to be treated just like the other secured creditors, without distinction and for all purposes. Whatever may be the merits of the tribunal's decision, I am satisfied that the tribunal acted within the scope of its jurisdiction in finding the Funds liable under the APA. Further, having aligned themselves with the position of the secured creditors, the Funds are not entitled to complain on a setting aside application that:

(a) the position of the Funds as assignees was not put squarely in issue;

(b) the tribunal dealt with the identity of the parties in only one paragraph (*ie*, paragraph 4 of the award) without any consideration of whether the Funds ought to be treated differently from the rest of the secured creditors;

(c) that the agreed memorandum of issues did not contain the issue of the unique position of the Funds; and

(d) as a result of (a) to (c) above, it was denied natural justice because the Funds had no opportunity to present any arguments as to why their position was different from the rest of the secured creditors.

Despite this, as I have already mentioned above, my decision on Issue 7 is strictly moot in light of my decision in relation to the rest of the issues.

Conclusion

297 To conclude, for the reasons given above, I allow all three applications in their entirety.

298 I shall hear the parties on costs and on any consequential orders which may need to be made.

[note: 1] DBOD 1331-1337.

[note: 2] Defendants' Written Submissions in OS [L] dated 15 February 2013 at [272].

[note: 3] Para 18.2 of the Defendants' Skeletal Note on Qualification of the APA to the extent of the TAA.

[note: 4] [270(3)] of the Defendants' Submissions in OS [L].

[note: 5] Under the long-stop provision at Section 6.1(a) of the MOA.

[note: 6] Transcript 28 February 2013 Mr Alvin Yeo Page 93 Line 1.

[note: 7] Transcript 1 March 2013 Mr Alvin Yeo's Oral Submissions Page 11 Line 25.

[note: 8] See also Mr Yeap's confirmation of this sum at NE 8 March 2013 Page 53 Line 22 to Page 54 Line 9.

[note: 9] Liquidator's 1st Written Submissions in Arbitration at [164] (DBOD 5656).

[note: 10] Liquidator's 1st Written Submissions in Arbitration at [179] (DBOD 5665).

[note: 11] NE 8 March 2013 Page 26 Line 16 to Page 27 Line 11.

[note: 12] The Defendants' 1st Written Submissions on Liability at [51]. DBOD 5592-5593.

[note: 13] NE 6 March 2013 Page 162.

[note: 14] NE 8 March 2013 Page 49 to 67.

[note: 15] Notice of Arbitration dated 10 October 2008 at [56]-[57]; the Defendants' 1st Memorial dated 3 November 2010 at [117]-[128].

[note: 16] Transcript, 21 October 2011, pp 52-54.

[note: 17] Transcript, 21 October 2011, p 65.

[note: 18] Para 383 of the Defendants' Submissions (Secured Creditors) dated 15 February 2013.

[note: 19] Transcript 21 October 2011 Page 55.

[note: 20] NE 28 February 2013 Page 15 Line 1-7.

[note: 21] The Defendants' Written Submissions (Secured Creditors) dated 15 February 2013 at para 312 and 313.

[note: 22] Transcript for 21 October 2011 p 1-2; 148-150 in DBOD.

[note: 23] DBOD 1390.

[note: 24] Secured Creditors' Written Submissions at para 114.

[note: 25] Transcript dated 22 March 2011 Page 1 Line 11 to 24 (DBOD 4427).

[note: 26] NE 16 April 2013 Page 32 Line 19-21.