ADG and another *v* ADI and another matter
[2014] SGHC 73

Case Number	: Originating Summons No [K], Originating Summons No [L] (Summons No [M])
Decision Date	: 15 April 2014
Tribunal/Court	: High Court
Coram	: Vinodh Coomaraswamy J
Counsel Name(s)	: Alvin Yeo SC, Chou Sean Yu, Lionel Leo, Edmund Koh and Oh Sheng Loong (WongPartnership LLP) for the plaintiffs in OS [K] and the defendants in OS [L]; Ang Cheng Hock SC and Margaret Ling (Allen & Gledhill LLP) for the defendant in OS [K] and the plaintiff in OS [L].
Parties	: ADG and another — ADI

Arbitration – Recourse against award – Setting aside

15 April 2014

Vinodh Coomaraswamy J:

Introduction

1 By the two applications before me, the plaintiffs seek to set aside, and thereby to resist enforcement of, an arbitral award issued recently in favour of the defendant at the Singapore International Arbitration Centre.

2 The plaintiffs bring their application on two grounds:

(a) First, they argue that they were unable to present their case within the meaning of Article 34(2)(a)(ii) of the UNCITRAL Model Law on International Commercial Arbitration.

(b) Alternatively, they argue that 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 International Arbitration Act (Cap 143A, 2002 Rev Ed).

3 The plaintiffs rely for both grounds on the Tribunal's decision to declare proceedings in the arbitration closed on 4 June 2013 and its decision to dismiss the plaintiffs' application to re-open proceedings on 9 June 2013. The result of those decisions, the plaintiffs say, is that they had no opportunity to put before the Tribunal potentially relevant evidence upon which they wished to rely and which they expected to become available on or before 8 July 2013. It is undisputed that some additional evidence did in fact materialise after the Tribunal declared the proceedings closed and before 8 July 2013. It is also undisputed that the Tribunal did not have an opportunity to take into consideration this additional evidence in arriving at its determination of the parties' disputes. But the defendant maintains that no grounds for setting aside the award are thereby established. It submits that these applications are nothing more than a contrived attempt by the plaintiffs to re-litigate the disputes in the arbitration and to delay enforcement of the award.

4 Having considered the parties' written and oral submissions and the other material they put before me, I dismissed the plaintiffs' applications. The plaintiffs have now appealed to the Court of

Appeal. I therefore now set out the grounds for my decision.

Background

The parties

5 The first plaintiff is engaged in the business of exploring for, developing, producing, distributing and marketing a natural resource which I shall refer to as "Mithril". Its particular focus is on a country which I shall call "Moria". The second plaintiff is ADG's ultimate holding company. Mr Z is the Chairman, Chief Executive Officer and ultimate owner of both plaintiffs.

6 The defendant's principal activity includes exploring for and extracting natural resources in Moria.

The dispute in summary

7 The award sets out the factual background to the underlying dispute between the parties in great detail at [87] to [150]. That background can, for present purposes, be summed up in two paragraphs.

8 The first plaintiff secured rights to survey for Mithril in certain geographical regions in Moria under three contracts ("the Survey Agreements") in 2003. Arising from these three Survey Agreements, the first plaintiff entered into a separate agreement ("the Option") with the defendant in 2009. Under the Option, the defendant agreed to fund the first plaintiff's surveys under the Survey Agreements in exchange for an option to purchase a certain percentage of the first plaintiff's rights under any given Survey Agreement. In the Option, the first plaintiff made certain threshold and continuing representations and warranties to the defendant about the status of the first plaintiff's rights under the Survey Agreements. At the same time that the first plaintiff and the defendant entered into the Option, the second plaintiff executed a guarantee in favour of the defendant, guaranteeing the first plaintiff's liabilities to the defendant up to a certain maximum.

9 In 2010, the defendant asserted that it had a right to terminate the Option. The first plaintiff denied that the defendant had any such right and alleged that it was in fact the defendant who was in breach of the Option. On 30 September 2010, the first plaintiff served a notice of default on the defendant under the Option, expiring on 30 October 2010. On 29 October 2010, the defendant did three things. First, it claimed to exercise its right to terminate the Option. Second, it called on the second plaintiff under its guarantee of the first plaintiff's liabilities. Third, it commenced arbitration, seeking to validate the defendant's termination of the Option and to recover damages against the first plaintiff, and seeking payment under the second plaintiff's guarantee.

10 I now go into the underlying facts in a little more detail before dealing with the Tribunal's reasoning in its award and the grounds on which the plaintiffs seek to set that award aside.

The first plaintiff and the Corporation enter into the Survey Agreements

11 The first plaintiff entered into the three Survey Agreements on or around January 2003. Its counterparty was a Morian enterprise in the Mithril industry ("the Corporation").

12 The three Survey Agreements gave the first plaintiff the right to explore for, develop, produce and sell Mithril in three geographical regions of Moria namely: (a) Region 1, (b) Region 2; and (c) Region 3. The disputes between the first plaintiff and the defendant relate only to the Survey

Agreements for Region 1 and Region 2.

13 Each Survey Agreement had a term of 30 years comprising (a) a survey period; (b) a development period; and (c) a production period. The survey period was the first five years of the Survey Agreement's 30-year life. The survey period included a pilot phase to evaluate the commercial potential of each block. Each Survey Agreement would terminate if the first plaintiff failed to discover any commercially-exploitable Mithril within the area covered by that Survey Agreement before the five-year survey period expired. Each Survey Agreement allowed the survey period to be extended if: (a) the first plaintiff discovered Mithril shortly before the survey period expired and there was insufficient time to complete pilot development; or (b) a committee comprising representatives of both the first plaintiff and the Corporation ("the Committee") agreed to extend the pilot phase beyond the survey period. In either case, a Moria government ministry ("Ministry A") had to approve any such extension.

14 It is the first plaintiff's position that the result of these provisions is that both the Survey Agreements for Region 1 and Region 2 were valid up to and after the date the first plaintiff and the defendant entered into the Option. This is because, the first plaintiff says, it had not finished pilot development at the end of the five-year survey period in 2008. As a result, the survey period under both the Region 1 and Region 2 Survey Agreements was automatically extended when the initial five-year survey period ended in March 2008. The Survey Agreements are governed by Moria law. The first plaintiff adduced evidence from a Moria law expert that the Survey Agreements continued to be valid on this ground. The plaintiff further points out that the defendant could not shake this expert evidence in cross-examination and did not contradict this expert evidence by calling its own expert on Moria law.

The Option and the guarantee

15 In August 2009, the defendant and the first plaintiff entered into the Option. The Option consisted of two phases:

(a) In the first phase, the first plaintiff had to comply with a work programme by performing certain works under the Survey Agreements. In exchange, the defendant agreed to pay the first plaintiff a substantial sign-on bonus and to provide substantial further funding for the first plaintiff's work programme against the first plaintiff's calls for payment.

(b) The Option entered its second phase once the defendant had invested the full amount under the first phase. In this second phase, the defendant had an option to acquire a certain percentage of the first plaintiff's participating interest in each Survey Agreement. The defendant would by then be in a position to make an informed decision whether to exercise its option from the information gained in the first phase. If the defendant exercised its option, it would have to provide further substantial funding to the first plaintiff plus substantial contingency bonuses.

16 As part of the same overall transaction which led to the Option, the second plaintiff executed a guarantee on the same day that it entered into the Option by which it guaranteed the first plaintiff's liabilities to the defendant under the Option up to a certain maximum. Both the Option and the guarantee are expressly governed by English law. Both contracts have, in effect, identical arbitration clauses providing for arbitration in Singapore at the Singapore International Arbitration Centre ("SIAC").

17 By the time the defendant terminated the Option on 29 October 2010, it had paid the initial sign-on bonus plus a further substantial sum to the first plaintiff under the first phase of the Option.

The Tribunal's decision

18 In its award, the Tribunal found in favour of the defendant. It therefore held that: (a) the defendant had validly terminated the Option on 29 October 2010; (b) that by reason of the termination, the first plaintiff was liable to repay to the defendant the entire sum which the defendant had paid it plus interest; (c) that the second plaintiff was liable as the first plaintiff's guarantor to pay the defendant the maximum guaranteed sum plus interest, less any sums paid by the first plaintiff; and (d) that the first plaintiff's and the second plaintiff's counterclaims ought to be dismissed.

The first plaintiff's representations and warranties under the Option

19 The first plaintiff's representations and warranties under the Option and the Tribunal's findings about them are critical to understanding the Tribunal's reasoning and the first plaintiff's grounds for setting aside the award. The first plaintiff's principal representations and warranties to the defendant appear in Articles 7.1A to 7.1D of the Option. I discuss these in detail below. Article 7.1 of the Option provides that compliance with the representations and warranties under Article 7 be assessed against the facts as at the Effective Date. The Option defines "the Effective Date" as the date of its signing.

20 Article 7.4 of the Option obliges the first plaintiff to inform the defendant "of any material changes to the facts in the representations and warranties prior to the Approval Date". The Option defines the "the Approval Date" as the date on which the defendant exercises its option under a particular Survey Agreement. The Tribunal construed this clause as imposing a continuing obligation on the first plaintiff to inform the defendant of material changes *as and when they occurred* during the currency of the Option and not – as the first plaintiff argued – immediately before the Approval Date. This was a significant finding. The Approval Date was still in the future when the Option was terminated. Indeed, as a result of the termination, the Approval Date never arrived.

The agreed list of issues

21 Against this backdrop, the parties agreed a list of issues which the Tribunal was to determine in the arbitration. That list included the following issues:

> **I**. **<u>General Issues</u>**
>
> A. Is the validity of the [Survey Agreements] of any relevance to the parties' claims in this arbitration?
>
> B. If so, were the [Survey Agreements] valid at the time [the defendant] purported to terminate the [Option]?
>
> …
>
> II. Issues to be determined in respect of [the defendant's] claims
>
> A. Liability
>
> (1) Did [the first plaintiff] breach the [Option]?
>
> (a) Did [the first plaintiff] breach the contractual reps and warranties in the [Option]?
>
> i. Did [the first plaintiff] breach Art 7.1A?

ii. Did [the first plaintiff] breach Art 7.1B?

ii. Did [the first plaintiff] breach Art 7.1C?

iv. Did [the first plaintiff] breach Art 7.1D?

…

(b) Did [the first plaintiff] breach its undertaking at Art 7.4?

i. Can [the first plaintiff] be in breach of Article 7.4 if [the defendant] was fully apprised of … developments … through its meetings with [the Corporation]?

(c) Did [the first plaintiff] breach any other undertakings under the [Option]?

…

(d) Did [the first plaintiff] repudiate the [Option] by declaring termination of the [Option] on 30 September 2010?

(e) If [the first plaintiff] breached the [Option] on any of the foregoing grounds, do those breaches entitle [the defendant] to terminate the [Option] and/or claim damages.

22 I will call the general issues "Issue I" and the issues to be determined in respect of the defendant's claims "Issue II". The heart of the Tribunal's decision in favour of the defendant is its finding on Issue II. I therefore deal with the Tribunal's reasoning on Issue II before I consider Issue I.

The Tribunal's reasoning on Issue II

23 The Tribunal found Issue II(A)(1)(a) in favour of the defendant on two grounds. First, it held that the first plaintiff's representations and warranties under Articles 7.1A to 7.1D of the Option were not true and correct as at the Effective Date. Second, it held that the first plaintiff breached its continuing obligation under Article 7.4 of the Option to disclose material changes to the facts underlying these representations and warranties up until the date on which the Option was terminated. These breaches gave the defendant an express right under the Option to terminate the Option and entitled the defendant to the relief which the Tribunal ultimately awarded it.

24 Understanding the Tribunal's reasoning in reaching this decision is necessary to analyse the plaintiffs' application. I therefore summarise the Tribunal's finding on each sub-issue of Issue II in turn.

Article 7.1A as at the Effective Date

25 Under Article 7.1A of the Option, the first plaintiff represented and warranted to the defendant that it held a "100% undivided Participating Interest in the [Survey Agreements], free and clear of any liens, claims, burdens or encumbrances…and no notice of default, termination of breach under the [Survey Agreements] have been received by [the first plaintiff]." The Tribunal found that this representation and warranty was untrue and inaccurate as at the Effective Date because the Survey Agreements were not then "free and clear of claims" because: (a) the first plaintiff had in fact received notice of termination of the Survey Agreements from the Corporation; and (b) the Survey Agreements were not free and clear of any claims and burdens. It is useful to explain in a little more

detail each of these points.

(A) The first plaintiff had received notice of termination

26 The Tribunal held that the first plaintiff had indeed received "notice of termination" from the Corporation on 4 December 2008 and 6 January 2009 but failed to disclose these notices to the defendant at or before the time the Option was executed.

27 First, on 4 December 2008, the Corporation sent the first plaintiff a letter titled "Notification on the Expiry of Exploration Period of Four Exploration Projects". As its title suggests, this letter notified the first plaintiff that the survey periods for the Region 1 and Region 2 Survey Agreements had expired on 1 March 2008 and that there was no commercial production in these blocks. The Corporation asked the first plaintiff to reply within 30 days and stated that it would regard the first plaintiff's failure to do so as an agreement to terminate the Survey Agreements.

28 On 19 December 2008, the first plaintiff responded to tell the Corporation that it did not agree to terminate the Survey Agreements and that it rejected the allegation that there was no commercial production in Region 1 and Region 2. The first plaintiff also claimed that the survey periods had been automatically extended pursuant to the terms of the Survey Agreements. In this letter, the first plaintiff "vigorously contested any termination by the Corporation and stated that: '[the first plaintiff] will protect its right, title and interest in each of the [Survey Agreements] which we consider to be in full force and effect'."

29 Second, on 6 January 2009, the Corporation took issue with the first plaintiff's 19 December 2008 letter and restated the contents of its 4 December 2008 letter. It then went on to propose a meeting of the Committee for the "settlement of expenses, hand-over of project data and audit at Contract termination". On 3 February 2009, the first plaintiff responded and reiterated its position that the Survey Agreements continued to be valid.

30 The Tribunal held that each letter from the Corporation was in fact a "notice of termination", even if the first plaintiff disputed their ultimate legal effect.

(B) The Survey Agreements were not free and clear of any claims and burdens

31 In light of this correspondence, the Tribunal held that the Survey Agreements were not free and clear from any claims and burdens within the meaning of Article 7.1A as at the Effective Date. As the Tribunal said, "the factual record clearly shows that the [first plaintiff's] interest in the [Survey Agreements] was under a significant storm-cloud at the time the Option was signed and that [the first plaintiff] and [the Corporation] were embroiled in serious, ongoing and unresolved disputes".

32 Mr Z's evidence on this point was that the correspondence with the Corporation between December 2008 and February 2009 was immaterial because the first plaintiff's relationship with the Corporation was one which had its ups and downs and which went hot and cold. It was normal, Mr Z, said, for Moria authorities to engage in such posturing with no formal adverse action ensuing under the Survey Agreements. The Tribunal's finding on this point is critical and I set it out in full:

> In the Tribunal's judgment, whatever [Mr Z's] subjective view of the facts may have been in June 2009, the objective state of affairs based on the evidence presented was, unambiguously, that the disputes between [the first plaintiff] and [the Corporation] regarding [the first plaintiff's] "title" under the [Survey Agreements] were very serious disputes and that these disputes continued up to and after the [Option's] signing. … Further, the evidential record shows that by

September 2009, their disputes still had not been resolved and that [the first plaintiff] and [the Corporation] remained at loggerheads when [the Corporation] terminated the [Option] on 29 October 2010.

Article 7.1B as at the Effective Date

33 Under Article 7.1B of the Option, the first plaintiff represented and warranted that it had provided to the defendant up-to-date copies of all documents in its possession that could reasonably be expected to have a material effect on the value of the Survey Agreement interests, operations under the Survey Agreements, or the validity of the Survey Agreements, which documents were complete and correct in all material respect. The Tribunal likewise found that this representation and warranty was untrue and inaccurate as at the Effective Date because the first plaintiff failed then to disclose to the defendant certain correspondence which "could reasonably be expected to have had a material effect on the use or value of the [Survey Agreement] interests, and particularly on the validity of the [Survey Agreements]".

34 First, the Tribunal relied on the 4 December 2008 and 6 January 2009 letters from the Corporation discussed above at [27] and [29].

35 Second, the Tribunal relied on a memorandum which the Corporation sent to the first plaintiff on 25 December 2008. This memorandum criticised the first plaintiff's performance as a partner and sought to discuss the first plaintiff's extension request. By the time of the arbitration, the first plaintiff could not locate this memorandum and therefore did not disclose it or adduce it in evidence before the Tribunal. It was also not in evidence before me. The Tribunal inferred the contents of this 25 December 2008 memorandum from the first plaintiff's reply to it dated 28 December 2008, which was in evidence in the arbitration. There is no suggestion that the first plaintiff was unable to locate this memorandum as at the Effective Date in order to disclose it then.

Article 7.1C as at the Effective Date

36 Under Article 7.1C, the first plaintiff represented and warranted that it did not know of any actual or threatened claims or demands in connection with the Survey Agreements. The Tribunal found that this representation and warranty was untrue and inaccurate as at the Effective Date and that the first plaintiff did know of actual or threatened claims or demands from certain correspondence.

37 First, the Tribunal again relied on the 4 December 2008 and 6 January 2009 letters from the Corporation (see above at [27] and [29]) as showing that the first plaintiff knew then that "[the Corporation] had clearly made or threatened 'claims' or 'demands' in connection with the termination of the [Survey Agreements]".

38 Second, the first plaintiff itself had threatened litigation against the Corporation in its response on 19 December 2008 (see above at [28]) to the Corporation's letter of 4 December 2008.

Article 7.1D as at the Effective Date

39 Under Article 7.1D of the Option, the first plaintiff represented and warranted that it possessed all material permits, licences, permissions, consents and authorisations necessary to conduct its business and to perform its obligations under the Survey Agreements and all such documentation was valid and in full force and effect. The Tribunal found that this representation and warranty too was untrue and inaccurate as at the Effective Date for two reasons.

40 First, the Corporation's notice dated 4 December 2008 and its letter dated 6 January 2009 put very clearly and very much in dispute "whether [the first plaintiff] 'possessed' valid extensions of the [Survey Agreements], whether 'consents and authorisations' needed for such extensions had been obtained, and whether they were 'full force in effect'".

41 Second, the Tribunal held that it was untrue and inaccurate that the first plaintiff "possessed … all licences …." as at the Effective Date. One important class of licence that it needed was a survey licence ("SL"). It is true that on 20 June 2009, before the Effective Date, one of Moria's government ministries ("Ministry B") had in fact issued SLs to the Corporation which named the first plaintiff as the survey unit under the Survey Agreements. But the Tribunal found that the Corporation had not released these SLs into the first plaintiff's *possession* and was deliberately withholding them in order to have leverage in its ongoing disputes with the first plaintiff.

Continuing obligation under Article 7.4

42 Article 7.4 of the Option provided as follows:

> All representations and warranties given under this Article 7 shall be deemed repeated and valid, true and correct as of the Approval Date, and each Party agrees to inform the other Party of any material changes to the facts in the representations and warranties prior to the Approval Date.

43 The defendant argued that Article 7.4 carried the first plaintiff's representations and warranties under Article 7.1 through to the Approval Date and imposed a continuing obligation on the first plaintiff to inform the defendant of any material changes underlying those representations and warranties as and when those changes happened, at any point during that intervening period.

44 The defendant made specific submissions on how the first plaintiff breached Article 7.4. In order to understand these submissions, it is important to bear certain key dates in the arbitration in mind. The oral hearing in the arbitration took place in two phases. The first phase was from 23 April 2012 to 27 April 2012. The second phase was from 28 January 2013 to 30 January 2013. The Tribunal made document production orders in each of the two phases. It dealt with document production in the first phase by procedural orders on 6 December 2011 and 21 February 2012. It dealt with document production in the second phase by four procedural orders between October 2012 and December 2012. The defendant took and maintained objection to the first plaintiff's failure to comply with the document production orders throughout both phases of the proceedings.

45 The defendant submitted that the first plaintiff breached Article 7.4 of the Option in the following ways:

> (a) On 19 August 2009, shortly after the defendant and the first plaintiff entered into the Option, the first plaintiff and the Corporation entered into a Memorandum of Understanding "in which [the first plaintiff] agreed, apparently as consideration for the anticipated extension of the [Region 1] survey period, to hand back rights over 50 square kilometres of [Region 1] to [the Corporation]". This memorandum was not disclosed to the defendant until 25 April 2012, during the oral hearing in the first phase of the arbitration.
>
> (b) Between September and November 2009, the first plaintiff and the Corporation were negotiating agreements to amend both the Region 1 and Region 2 Survey Agreements. The proposed amendments were "substantial changes to the terms and conditions of the [Survey Agreements]", including a right for the Corporation unilaterally to terminate the Region 1 Survey Agreement in certain circumstances. The draft amendment agreements were not disclosed to the

defendant until after the arbitration began.

(c) The first plaintiff did not inform the defendant that the Corporation was "withholding the [SLs] as 'leverage' to force [the first plaintiff] to agree to the Amendment Agreements".

(d) The first plaintiff did not inform the defendant that the Corporation took the position in January 2010 and April 2010 that the Survey Agreements were no longer valid and that the Corporation refused to revive them on their original terms but only on the amended terms it proposed.

(e) The Corporation issued a notice to the first plaintiff on 10 May 2010 informing it that the survey periods under the Survey Agreements had expired and that the Corporation declined to grant an extension of that period. The first plaintiff replied on 15 May 2010 rejecting the termination and requesting a meeting of the Committee. The first plaintiff did not disclose this correspondence to the defendant until three months later, in August 2010.

(f) The Corporation prepared a memorandum on 12 April 2010 stating that the Corporation believed that the Survey Agreements with the first plaintiff should "now be terminated" and sent it to Ministry A. The first plaintiff did not disclose this to the defendant until 28 March 2012, a month or so before the oral hearing in the first phase of this arbitration.

(g) The Corporation's lawyers issued two letters to the first plaintiff on behalf of the Corporation on 21 September 2010 and 25 October 2010, both of which purported to terminate the Survey Agreements. The first plaintiff did not disclose these letters to the defendant until 26 October 2010 and 28 March 2012 respectively.

46 All of this, the defendant argued, amounted to a breach by the first plaintiff of its obligations under Articles 7.1A, 7.1B, 7.1C and 7.1D as converted into continuing obligations by Article 7.4.

47 The first plaintiff did not deal with these alleged breaches one by one. Instead, it made two overarching submissions, arguing that:

(a) The effect of Article 7.4 was to impose a one-time obligation on the first plaintiff to make disclosure at or immediately before the Approval Date. Since the defendant's termination of the Option meant that no Approval Date ever arrived, the first plaintiff's obligation under Article 7.4 was never triggered; and

(b) In any event, the defendant had its own meetings with the Corporation and was thereby aware of the material information it now alleged that the first plaintiff had failed to disclose in breach of Article 7.4.

48 The Tribunal rejected the first plaintiff's first submission, holding that Article 7.4 fell into two parts: the first part taking effect *as of* the Approval Date and the second part obliging the first plaintiff to inform the defendant of material changes *prior to* the Approval Date. The Tribunal held:

… the second part of the Article 7.4 undertaking makes it clear that [the first plaintiff] had an ongoing obligation to 'inform' [the defendant] of material changes in the facts of the Article 7.1 representations and warranties as and when they occurred throughout the period from the Effective Date to the Approval Date. To read the clause, as [the first plaintiff] does, to limit the obligation to inform [the defendant] of changes to the date immediately prior to any decision by the defendant to [exercise the option], would be illogical and absurdly non-commercial. Such a

reading would clearly rob the provision of its intended effect to protect [the defendant] from material adverse changes arising in the full intervening period between [the date the Option was entered into] and the Approval Date, whenever that might be.

49 The first plaintiff's second submission requires some additional factual background. On 13 May 2010, unknown at the time to the first plaintiff, representatives from the defendant met representatives from the Corporation. The defendant characterised this as "a courtesy visit". In this meeting, the defendant learned that the Corporation had issued letters to the first plaintiff terminating the two Survey Agreements and that the Corporation was unhappy with the first plaintiff as their business partner.

50 The Tribunal rejected the first plaintiff's attempt to rely on this meeting to support its second submission on Article 7.4, holding that: (a) certain information about material changes had come only from the first plaintiff, and had come late; and (b) that the first plaintiff's argument undermined the key purpose of contractual representations and warranties. As the Tribunal held:

> The Tribunal is not persuaded by [the first plaintiff's] contention that there could not have been any breach because [the defendant] had already been "fully apprised" of developments through its contacts with [the Corporation]. Based on the Tribunal's review of the facts, [the defendant] only first sighted evidence of [the Corporation's] 10 May 2010 termination letter on 28 August 2010 when [the first plaintiff] finally agreed to provide [the defendant] with a copy. This followed months of questions from and requests by [the defendant] which went unanswered, leaving [the defendant] with, at best, materially incomplete knowledge and limited understanding of the true and correct facts.
>
> In any case, the key purpose of warranties in a commercial contract is to relieve a promisee from the burden of determining the truthfulness of a fact, often difficult if not also impossible for it to discharge by itself. Partial knowledge or suspicion on the part of [the defendant] (hypothetical or otherwise) does not relieve [the first plaintiff] of its contractual obligation to comply with its undertaking to keep [the defendant] updated with regard to the facts of all its representations and warranties under Article 7.4 of the [Option].

51 Given that the first plaintiff's submissions went to the scope and application of Article 7.4 rather than to the specific breaches of that Article which the defendant alleged, the Tribunal did not made specific findings on those breaches. It instead made a general finding that "[the first plaintiff] failed to inform [the defendant] of a number of material changes in the facts of the representations and warranties in breach of Article 7.4 of the [Option]". In context, that must be read as the Tribunal accepting the defendant's submissions on the specific ways in which the first plaintiff's representations and warranties were untrue and inaccurate after the Effective Date, to the extent that those submissions are not inconsistent with the Tribunal's other express findings on liability under Issue II(A) or Issue I.

52 These specific breaches showed that the first plaintiff's representations and warranties under Article 7.1A to Article 7.1D continued to be untrue and inaccurate after the Effective Date in the following senses:

> (a) the first plaintiff's representation and warranty under Article 7.1A was untrue and inaccurate because events showed that even after the Effective Date:
>
> (i) the Survey Agreements continued not to be "free and clear of claims", as the parties' "serious, ongoing and unresolved disputes" continued to embroil them; and

(ii) the first plaintiff received further "notice of termination" from the Corporation, with it being irrelevant, now as before, that the first plaintiff disputed their ultimate legal effect.

(b) The first plaintiff's representation and warranty under Article 7.1B was untrue and inaccurate because there was further material correspondence after the Effective Date which "could reasonably be expected to have had a material effect on the use or value of the [Survey Agreement] interests, and particularly on the validity of the [Survey Agreements]" which the first plaintiff had in its possession and which the first plaintiff failed to disclose to the defendant in a timely manner.

(c) The first plaintiff's representation and warranty under Article 7.1C continued to be untrue and inaccurate because it knew of further actual or threatened claims or demands in connection with the Survey Agreements coming after the Effective Date but failed to inform the defendant of them in a timely manner.

(d) The first plaintiff's representation and warranty under Article 7.1D that it possessed all material permits, licences, permissions, consents and authorisations necessary to conduct its business and to perform its obligations under the Survey Agreements and that all such documentation was valid and in full force and effect continued to be untrue and inaccurate even after the Effective Date because the Corporation continued to withhold the SLs as leverage.

Other articles of the Option

53 Issue II(A) also raised for determination other representations and warranties of the first plaintiff under Article 7.1 which were said to be untrue and inaccurate as well as other undertakings of the first plaintiff under Article 6 of the Option which were said to have been breached. The Tribunal's findings on Article 7.1A to 7.1D and on Article 7.4 sufficed for it to go on to determine whether the defendant had been entitled to terminate the Option when it did. The Tribunal therefore did not therefore need to consider these other issues set out in Issue II(A).

54 With the foregoing context established, I now go on to the Tribunal's decision on Issue I.

Tribunal's decision on Issue I

55 Issue I comprised two sub-issues:

(a) Is the validity of the Survey Agreements of any relevance to the parties' claims in this arbitration?

(b) If so, were the Survey Agreements valid at the time the defendant purported to terminate the Option?

56 The *actual* validity of the Survey Agreements is at least *potentially* relevant to whether the first plaintiff's representation and warranty under Article 7.1A was true and accurate on and after the Effective Date under the combined effect of Article 7.1A and Article 7.4. Under one facet of Article 7.1A, the first plaintiff represented and warranted that it held "the rights to a 100% undivided Participating Interest in the [Survey Agreements]" and that the Survey Agreements were "in full force and effect". If the Survey Agreements were invalid on the Effective Date, or became invalid thereafter, this representation would obviously be falsified.

57 The first plaintiff's position was that the actual validity of the Survey Agreements was central

to the defendant's allegation that the first plaintiff lacked good title to the Survey Agreements. The defendant's position in the arbitration and before me was that the actual validity of the Survey Agreements was not relevant to the defendant's claim because the defendant did not need to falsify this facet of the first plaintiff's representation and warranty under Article 7.1A in order to succeed. Falsifying any one of the several *other* facets of Article 7.1A sufficed in and of itself for the defendant to succeed.

58 The Tribunal declined to determine whether the Survey Agreements were valid for several reasons:

(a) First, the Tribunal was conscious that determining that question would require the Tribunal to make a determination of the validity of a contract between the first plaintiff and an entity (the Corporation) who was not a party to the arbitration, who was not represented before the Tribunal in any way and whose contract with the first plaintiff provided for a different governing law and a different dispute resolution procedure.

(b) More importantly for present purposes, the Tribunal held that it was not necessary for it to do so in order to determine the parties' dispute. The issue of the actual validity of the Survey Agreements was potentially relevant only to the defendant's claim in respect of Article 7.1A. Even then, it was potentially relevant only to one facet of Article 7.1A. The Tribunal reached its decision on that Article by assuming in the first plaintiff's favour that the Survey Agreements were valid and considering the other facets of Article 7.1A. Having done that, the Tribunal found that the first plaintiff's representation and warranty under other facets of Article 7.1A were untrue and inaccurate. Thus, the first plaintiff's warranties and representations would still be untrue and inaccurate in the senses found by the Tribunal even if the Survey Agreements were valid. The critical issue was whether the validity of the Survey Agreements was in question, not whether they were in fact valid.

59 In essence, the Tribunal accepted the broad point which the defendant made in its post-hearing submission dated 2 July 2012 that: "[t]he mere existence of [the first plaintiff's] dispute with [the Corporation] is a material fact that the [first plaintiff] mischaracterised and concealed from [the defendant] before and during the life of the [Option]. By this act alone, [the first plaintiff] breached the [Option] and entitled [the defendant] to seek damages. The merits of [the first plaintiff's] dispute with [the Corporation] [over the validity of the Survey Agreements], therefore, has no bearing on [the first plaintiff's] liability under the [Option]."

60 The first plaintiff makes the point that this final position of the defendant was a significant evolution from its starting position in 2010, when disputes first arose between the parties. Broadly speaking, the first plaintiff's point is that the defendant's starting position was that the Survey Agreements were invalid. By the time the defendant came to terminate the Option and commence arbitration, the defendant relied not only on the contention that the Survey Agreements were invalid but also on an alternative case arising from the first plaintiff's breaches of the Option and from misrepresentations under and in connection with the Option. But, says the first plaintiff, the misrepresentations were still characterised as going to the first plaintiff's title and therefore to the validity of the Survey Agreements.

61 It appears to me that the defendant's winning point on liability was part of the defendant's case throughout the arbitration. The defendant's focus was always on both the validity and the stability of the first plaintiff's rights under the Survey Agreements. It may well be that it was not the defendant's primary point or that it was not formulated in this way until the post-closing submissions. But it is inevitable that points taken in any forensic process will evolve over time both in their content

and their formulation as evidence emerges or is challenged, as the advocate's appreciation of the case changes, in response to interaction with the Tribunal and for a whole host of other reasons. All of that is permissible so long as the opposing party has at all times reasonable notice of the case it has to meet. The first plaintiff at no time argued – whether in the arbitration or before me – that it was not open to the defendant to pursue its winning point or to shift the primary emphasis in it case on to that point. It was clearly a point which the Tribunal considered open to the defendant not only to pursue but to put at the forefront of its submissions, wherever it may have been in at other stages of the proceedings.

The Tribunal's decision to declare proceedings closed

On 29 May 2013, the Tribunal proposes to close proceedings

62 Rule 28.1 of the Arbitration Rules of the SIAC, 4th edition, 1 July 2010 ("the SIAC Rules") states:

> The Tribunal shall, after consulting with the parties, declare the proceedings closed if it is satisfied that the parties have no further relevant and material evidence to produce or submission to make. The Tribunal may, on its own motion or upon application of a party but before any award is made, reopen the proceedings.

63 By the middle of March 2013, the oral hearings in both phases of the arbitration had concluded. The Tribunal had received all the very substantial written and oral evidence which all the parties had sought to place before it on the matters in dispute on both phases of the arbitration. The Tribunal had also received in July 2012 and February 2013 the parties' very substantial closing briefs on the facts and the law in both phases of the arbitration.

64 On 29 May 2013, the Chairman of the Tribunal notified the parties that the Tribunal proposed to declare the proceedings closed in accordance with Rule 28.1 of the SIAC Rules, "subject to any comments the parties may wish to make…by the close of business on 31 May 2013." On 30 May 2013 at 4:06 pm, the defendant's lawyers confirmed to the Tribunal that the defendant had no comment on the Tribunal's proposal. At the close of businesses on 31 May 2013, the Tribunal had not received any comment from the plaintiffs' lawyers on its proposal. Nevertheless, the Chairman did not take the formal step of declaring the proceedings closed on that day.

65 The next working day was Monday 3 June 2013, 31 May 2013 being a Friday. At 11:47 am on 3 June 2013, the plaintiffs' lawyers responded to the Chairman's 29 May 2013 email and informed the Chairman that they were still taking instructions from their clients. They sought the Chairman's "indulgence in responding … by tomorrow", *ie* 4 June 2013.

On 4 June 2013, the Tribunal declares proceedings closed

66 By 6.00 pm on 4 June 2013, the plaintiffs' lawyers had not responded to the Tribunal. At 6.21 pm, after business had closed that day, the Chairman sent an email to the parties. He noted that the business day had ended and no comments had been received from the plaintiffs as at 6.15 pm on the Tribunal's proposal on 29 May 2013 to close the proceedings. He accordingly declared the proceedings closed.

67 The plaintiffs' lawyers responded 12 minutes later, at 6.33 pm on 4 June 2013. I set out this email in full:

> First of all, our apologies for the late issuance of this email, but I was in the process of obtaining information about certain potential developments in [Moria], from my co-counsel […]
>
> These potential developments are in respect of the position of the […] authorities relating to the status of the [SLs] and the [Survey Agreements], which are expected *on or shortly after 8 July 2013*. These *may be material* to the issues that had arisen in this arbitration and I have been instructed by [the plaintiffs] to draw this to the attention of the Tribunal.
>
> We had been seeking to obtain more details about this matter which was why we had asked for more time to respond. Again, I apologise for not reverting earlier to the Tribunal.
>
> [emphasis added]

68 The defendant's lawyers responded, objecting to the "reopening of the proceedings and to any further attempt by the first plaintiff to delay the proceedings".

69 I pause to make two observations on the plaintiffs' lawyers' email dated 4 June 2013. First, the email begins and ends with an apology. It does not object to the Tribunal's decision to declare proceedings closed, or the procedure which the Tribunal adopted in doing so. It does not allege that any of the plaintiffs' procedural rights have been infringed. It equally contains no reservations of any of the plaintiffs' procedural rights which may have been infringed. All of that, taken together with the preceding email dated 3 June 2013 where the word "indulgence" was expressly used, indicates to me an acknowledgment by the plaintiffs that they were now in the realm of procedural indulgences rather than procedural rights.

70 Second, this email does not ask the Tribunal for a fuller or further opportunity to present evidence as part the plaintiffs' case. It is notable that this email does not say that the plaintiffs have evidence in hand which they wish to present to the Tribunal. Nor does the email ask for time to gather in hand and present to the Tribunal evidence which is in existence. Instead, the email speaks only of "potential developments" which are "expected on or shortly after 8 July 2013". The plaintiffs were asking the Tribunal to wait until 8 July 2013 or "shortly after" that date to see what develops. On 4 June 2013, the most that could be said was that if those developments actually did take place, evidence *could* come into existence which the plaintiffs *may* wish to present to the Tribunal as part of its case.

On 5 June 2013, the plaintiffs apply to reopen proceedings

71 The Chairman's view, not surprisingly, was that proceedings closed at 6.21 pm on 4 June 2013 pursuant to his declaration under Article 28.1 of the SIAC Rules. He therefore viewed the plaintiffs' lawyers' email as a request to reopen the proceedings under Rule 28.1 of the SIAC Rules rather than a request to postpone closing the proceedings in belated response to his email of 29 May 2013. On 5 June 2013 at 8.20 am, he therefore invited the plaintiffs' lawyers to clarify by close of business on the same day:

> (1) whether they are making a formal application to reopen the proceedings under SIAC Rule 28.1; and
>
> (2) if so, what is the nature of the "potential developments" and precisely how they would impact on any of the issues that have been argued before [the Tribunal]?

72 At 4.11 pm on that day, the plaintiffs' lawyers confirmed that they were indeed applying to re-

open the proceedings. They explained that the nature of the "potential developments" was that one of Moria's government departments ("Department C") was in discussions about issuing SLs directly to the first plaintiff. They explained further that this development would be relevant because the defendant had made the point in their submissions that the first plaintiff did not have valid SLs. I set out the body of this email in full:

> The potential developments mentioned in our email dated 4 June 2013, as we understand from [the plaintiffs'] co-arbitral counsel […] relate to…[Department C] being currently in discussions with other Country agencies (including [Ministry A, Ministry B and the Corporation]) on the issuance directly to [the first plaintiff] of the [SLs] for the [Region 1 and Region 2 Survey Agreements]. [The plaintiffs' Moria counsel] has been informed that [Department C] is expected to make its decision on or about 8 July 2013.
>
> One of the central issues raised in this arbitration is the validity of the [Region 1 and Region 2 Survey Agreements]. Although [the plaintiffs'] position is that there is sufficient evidence before the Tribunal that these [Survey Agreements] are valid (including… uncontradicted Moria law evidence […]), the issuance to [the first plaintiff] of the [SLs] for the [Region 1 and Region 2 Survey Agreements] would put this issue to rest. Further, in support of its case that the [Region 1 and Region 2 Survey Agreements] have been terminated by [the Corporation], [the defendant] has argued that [the first plaintiff] does not have "a currently valid copy of an [SL] for either [Region 2] or [Region 1]" (see [the defendant's] Post Hearing Brief dated 2 July 2012 at [63]) and that "there is no evidence in the record that since sending its May 10, 2010 notice to [the first plaintiff]... [the Corporation] has applied for any new [Ministry B] licenses in [the first plaintiff's] name" (see [the defendant's] Post Hearing Brief dated 2 July 2012 at [66]). It is plain that the potential developments mentioned in our email dated 4 June 2013 would have a material impact on these arguments.
>
> For the foregoing reasons, the potential developments mentioned in our email dated 4 June 2013 are clearly relevant to the issues in this arbitration and would have an impact on any award that the Tribunal may make. [The plaintiffs] are not, as [the defendant] alleges, attempting to "delay the conclusion of these arbitrations". [The plaintiffs] simply wish for the Tribunal to have regard to all further relevant and material evidence in coming to its decision."
>
> [emphasis in original omitted]

73 I make four points on this email. First, the focus in this email remains on waiting and seeing what develops "on or about 8 July 2013" rather than on receiving further evidence (whether previously available or not). The email makes clear that even as at 5 June 2013, the plaintiffs do not have in hand any relevant and material evidence which they seek a further or fuller opportunity to produce.

74 Second, the only point to which the new development is said to be relevant is "the validity of the [Region 1 and Region 2 Survey Agreements]" in order to rebut the defendant's assertion in submissions that even at the close of the arbitration, the first plaintiff did not have "a currently valid copy of an [SL] for either [Region 2] or [Region 1]." Before me, the relevance of the evidence was put in a different way (see [128] below).

75 Third, nowhere in this email is the point made that the Tribunal's failure to wait and see what happened would amount to a denial of natural justice or would deprive the plaintiffs of a reasonable opportunity of presenting their case. Quite the contrary: the plaintiffs' own express position in this email is that as at 5 June 2013, "there is sufficient evidence before the [T]ribunal that these [Survey

Agreements] are valid". If that is true, any further evidence can hardly be said to be so crucial that a failure to receive it would amount to denying the first plaintiff natural justice or depriving the first plaintiff of a reasonable opportunity to be heard. If there was sufficient evidence on this point before the Tribunal on 5 June 2013, the first plaintiff had already had that reasonable opportunity.

76 Finally, nowhere in this email do the plaintiffs take any objection to the procedure which the Tribunal adopted to consider and determine the plaintiffs' application to re-open the proceedings. In particular, there is no complaint that the Tribunal's deadline for the plaintiffs' response by the close of the same business day was unreasonably short or in some other way deprived the first plaintiff of procedural justice. In fact, that deadline gave the plaintiffs' lawyers a full business day to respond, given that the Chairman sent his email before the beginning of the business day. And the plaintiffs' lawyers were able to respond well before the end of the business day.

77 At 10:04 pm on the same day, the defendant's lawyers objected to the plaintiffs' attempt to re-open proceedings. They raised three broad grounds.

78 First, they said that under Rule 28.1 of the SIAC Rules, the Tribunal is empowered to declare proceedings closed when it is "satisfied that the parties have no further relevant and material evidence to produce or submissions to make". They submitted that the test to re-open proceedings which had already been closed must require a more exacting showing by the plaintiffs than simply having some "relevant and material evidence to produce or submissions to make". Otherwise, declaring the proceedings closed would be deprived of any significance.

79 Second, they pointed out that the first plaintiff's assertions of "potential developments" were vague and unworthy of credit. There was no evidence to show that any "potential developments" would actually happen. The plaintiffs' only basis for anticipating them was a vague "understanding" about unspecified "discussions" between Moria's authorities.

80 Third, even if the "potential developments" became actual developments, the developments and any evidence that that may give rise to was irrelevant and immaterial. The defendant pointed out that its claims related to the first plaintiff's culpable non-disclosures in 2009 and 2010 and those non-disclosures remained culpable whatever Moria's authorities may decide in 2013.

On 9 June 2013, the Tribunal declines to reopen proceedings

81 On Sunday 9 June 2013 at 9:01 am, the Tribunal by email dismissed the first plaintiff's application to reopen the proceedings. It did so because it found that: (a) there was no basis to wait and see what "potential developments" happen; and (b) the expected "potential development" is not relevant or material to the Tribunal's determination:

> During the course of these already protracted proceedings the Parties have had ample opportunity to argue and adduce evidence in support of their respective cases. In the Tribunal's view, the "potential developments" cited by [the plaintiffs] lack sufficient certainty and specificity to justify re-opening these proceedings. The developments may or may not occur "on or about 8 July", or at all. Clearly, it would be wrong for the Tribunal to allow the proceedings to be prolonged indefinitely based solely on the expectations of a party of new developments in the evidence.
>
> In any case, the Tribunal does not consider that the development anticipated by [the plaintiffs] and specified in their application – namely, the issuance of [SLs] directly to [the first plaintiff] – is either relevant or material to the Tribunal's determination of the claims before it. The Claimant's

claims are premised principally on facts from 2009 to 2010. Therefore, whatever Moria authorities may decide in 2013 about the status of the [SLs] in relation to the [Region 1 and Region 2 Survey Agreements] today is neither relevant nor material to the outcome of [the defendant's] claims.

82 The first plaintiff's application having been rejected, proceedings in the arbitration remained closed.

The Tribunal issues its award

83 The Tribunal issued its award in mid July 2013. The plaintiffs take the point that the Tribunal's award was so close to its decision not to reopen proceedings that it appears that the Tribunal had already made up its mind on the merits on the date it declined to reopen proceedings. I deal with this submission at [152] - [157] below.

The plaintiffs apply to set aside the award

84 On 30 July 2013, the plaintiffs applied to set aside the award. On 23 August 2013, the defendant commenced separate proceedings seeking leave to enforce the award. On 28 August 2013, the assistant registrar granted the defendant leave to enforce the award subject to the plaintiffs' right to set that order aside. On 9 September 2013 the plaintiffs applied to set aside the enforcement order on the same grounds as they raised on the application to set aside the award. I heard both applications together.

Potential developments develop

85 Before me, the plaintiffs rely on two items of evidence which came into existence after the Tribunal declined to reopen the proceedings and which they say they were prevented from placing before the Tribunal before it issued its award.

86 First, on 27 June 2013, the Corporation withdrew a notice which it posted on its website on 9 March 2011 and which was titled "Statement of Termination and non-extension of Four [Survey Agreements] with [the first plaintiff]". That notice stated that the Region 1 and Region 2 Survey Agreements had expired and that the cooperation between the first plaintiff and the Corporation under the Survey Agreements had accordingly come to an end. The 9 March 2011 notice reads as follows:

> [The Corporation] signed four [Survey Agreements] with [the first plaintiff], they are … [Region 1 and Region 2 Survey Agreements] … In these contracts, … [Region 1 and Region 2 Survey Agreements] … were all signed January 2003 and the survey period of these contracts … expired on March 1st, 2008.
>
> Whereas the survey period of these four [Survey Agreements] … expired, according to the related laws and regulations and provisions in these Contracts, all above-mentioned … [Survey Agreements] would not be extended between [the Corporation] and [the first plaintiff], and the cooperation relation between two parties [under] [Survey Agreements] is ended.
>
> […]
>
> [The Corporation]

March 9, 2011

The Corporation posted this notice on its website after the arbitration had commenced but before the oral hearing in the first phase. As a consequence of the decision reflected in this notice, Ministry B changed the designated survey unit in the SLs under the Region 1 and Region 2 Survey Agreements from the first plaintiff to the Corporation.

87 Second, on 4 July 2013, Ministry B issued a notice dated 4 July 2013 to the first plaintiff stating: "On 4 July 2013, upon the application by the Corporation, [Ministry B] had changed the survey unit [in the SLs for Region 1 and Region 2] from [the Corporation] to [the first plaintiff]." That notice bore a notation indicating that it had been copied to the Corporation. It was accompanied by SLs for the Region 1 and Region 2 Survey Agreements which now named the first plaintiff, rather than the Corporation, as the survey unit for Region 1 and Region 2 and which were, apparently, released into the first plaintiff's possession. Ministry B backdated these SLs to 2011 and 2012 even though they were issued in 2013.

These proceedings

88 The plaintiffs submit that because the Tribunal's refusal to reopen proceedings on 9 June 2013 prevented them from putting these two items of evidence before it:

(a) The plaintiffs were "unable to present [their] case" within the meaning of Article 34(2)(a)(ii) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law");

(b) Alternatively, the plaintiffs' 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 International Arbitration Act ("IAA").

The plaintiffs' submissions summarised

89 The plaintiffs' submission in summary is as follows. The events which they expected to happen after the close of the arbitral proceedings did in fact happen and happened (as the plaintiffs foreshadowed) before the Tribunal issued its award. Those events gave rise to new evidence. The plaintiffs were prevented by the Tribunal from presenting that evidence to the Tribunal. The plaintiffs therefore submit: (a) the Tribunal's unilateral decision to close proceedings and its subsequent refusal to reopen proceedings was unfair and unreasonable and breached the plaintiffs' right to be heard and (b) the new evidence was relevant to the issues in the arbitration and to the Tribunal's findings in the award, and would (or could) have had a material impact on those findings. The plaintiffs therefore suffered real and actual prejudice as a result of the Tribunal's refusal to wait for this evidence.

90 In short, the plaintiffs submit that "[t]hese were the significant developments that [the first plaintiff] expected would occur on or about 8 July 2013 (that did occur before 8 July 2013). Had the Tribunal not closed proceedings, the first plaintiff could and would have submitted this to the Tribunal as evidence."

Threshold difficulties with the plaintiffs' submissions

91 It seems to me that there are three threshold difficulties with the plaintiffs' case.

92 First, insofar as the plaintiffs now allege that the Tribunal denied them natural justice in the procedure it adopted to declare the proceedings closed and to deal with the plaintiffs' application to

reopen proceedings, the plaintiffs took no objection to that procedure at the time or indeed at any time before these applications. It could be said that the effect of Rule 36.1 of the SIAC Rules is that the plaintiffs have waived their right to take this objection now by not having promptly objection to the Tribunal then. But that is not a ground which the defendant advanced and so I say no more of it.

93 Second, the notice from Ministry B and the associated SLs were issued on or about 4 July 2013. The 9 March 2011 notice was removed from the Corporation's website even earlier, on 27 June 2013. When both events occurred, the Tribunal had not yet delivered its award. The plaintiffs therefore still had an opportunity to place this material before the Tribunal. Yet, the plaintiffs made no attempt to do so. They say that this was because their application to re-open the proceedings had already been rejected. But on 4 July 2013, the plaintiffs would have had a stronger case to reopen proceedings. On that date, the plaintiffs would not be asking the Tribunal and the defendant to wait and see what developed. Instead, they would have in hand new evidence which could not possibly have been placed before the Tribunal earlier because it did not then exist.

94 Third, it seems to me that the only explanation for this failure is the point made in the plaintiffs' lawyers' email of 5 June 2013: that the plaintiffs' view on 4 July 2013 continued to be that they had already placed sufficient evidence before the Tribunal on this issue (see [72] above). If so, the plaintiffs' attempt to rely on this additional evidence now to set aside the Tribunal's award – after it has been handed down and after it has gone against them – appears to me to lack *bona fides*.

95 Notwithstanding these threshold points, I will consider the plaintiffs' submissions on their merits.

The defendant's submissions summarised

96 The defendant's submissions on the application before me are, in summary, that there was no breach of the plaintiffs' right to be heard and, in any event, there was no prejudice to the plaintiffs because the new evidence would have had no impact on the Tribunal's decision.

The applicable legal principles

Minimal curial intervention

97 A court has power to set aside an award only on the limited grounds expressly prescribed in Article 34 of the Model Law and s 24 of the IAA: see *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [65(c)] and *PT Asuransi Jasa Indonesia (Persero) v DexiaBank SA* [2007] 1 SLR(R) 597 at [57]. When exercising that power, the court must bear in mind the overarching judicial policy of minimal curial intervention in arbitration. Indeed, this policy is all the more important when the purpose of the application is to challenge the ultimate product of an arbitration: a final, binding and enforceable award. As VK Rajah JA said in *Soh Beng Tee* (at [62]):

> Aggressive judicial intervention can only result in prolonging the arbitral process and encourage myriad unmeritorious challenges to arbitral award[s] by dissatisfied parties. Left unchecked, an interventionist approach can lead to *indeterminate* challenges, cause *indeterminate* costs to be incurred and lead to *indeterminate* delays.
>
> [emphasis original]

98 A court which construes and applies its power to set aside arbitral awards too widely, therefore, fails to support arbitration as a useful and efficient alternative dispute resolution process

and fails to uphold the parties' exercise of their autonomy in agreeing to submit their disputes to a final resolution by arbitration with limited rights of recourse: *Soh Beng Tee* at [62], [63], [65(c)] and [65(d)]. The courts do not exercise an appellate function over the decisions of arbitral tribunals (*Soh Beng Tee* at [65(c)]) and it would be wrong to permit a system of *de facto* appeals by applying the existing grounds for setting aside loosely.

99 The conception of fairness embodied in the rules of natural justice does not just take into consideration the interests of the unsuccessful party. Refusing to set aside an award on arid and technical challenges so as to deprive a successful party of the fruits of its labour is equally an aspect of fairness: *Soh Beng Tee* at [65(b)].

Four-limbed test in John Holland

100 The Court of Appeal in *John Holland Construction & Engineering Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 ("*John Holland*") held at [18] that a party applying to set aside an award on the basis that a rule of natural justice has been breached 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 the applicant's rights.

First limb: the relevant rule of natural justice

101 The plaintiffs say that the rule of natural justice which the Tribunal breached is the applicant's right to be heard. That right, together with the right to an impartial tribunal, are the two fundamental rules of natural justice. The right to be heard is expressly embodied in Article 18 of the Model Law which states:

> Article 18. Equal treatment of parties
>
> 18. The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

102 The plaintiffs submit further that the right to be heard encompasses not only the right to make submissions on the issues, but also the right to submit relevant and material evidence to the Tribunal. The defendant does not challenge this proposition. I accept it as correct.

103 This right, however, is not an unqualified right to present any and all submissions and evidence at any time of a party's choosing no matter what the consequences. It is true that Article 18 gives each party to an international arbitration a right to have "a *full* opportunity of presenting its case". Article 18 does not, on its face, qualify this right. By contrast, the typical formulation of the right to be heard as a rule of natural justice is that each party has a *reasonable* right to be heard. This is embodied, for example, in s 22 of the Arbitration Act (Cap 10, 2002 Rev Ed) which provides as follows: "The arbitral tribunal shall act fairly and impartially and shall give each party a reasonable opportunity of presenting its case."

104 Despite first impressions, "a full opportunity" to present one's case under Article 18 of the Model Law is not wider than a "reasonable opportunity" to present one's case. In *Soh Beng Tee*, the

Court of Appeal treated the different formulations of the principle in s 22 of the Arbitration Act and in Article 18 of the Model Law as being identical in substance (at [42]). Further, the Court of Appeal in the same case at [55] approved in the highest terms Fisher J's conspectus in *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 ("*Rotoaira Forest*") in which he drew no distinction between a "full opportunity" and a "reasonable opportunity" to present one's case:

> …
>
> (c) As a minimum each party must be given a full opportunity to present its case.
>
> (d) In the absence of express or implied provisions to the contrary, it will also be necessary that each party be given an opportunity to understand, test and rebut its opponent's case; that there be a hearing of which there is reasonable notice; that the parties and their advisers have the opportunity to be present throughout the hearing; and that *each party be given reasonable opportunity to present evidence and argument in support of its own case*, test its opponent's case in cross-examination, and rebut adverse evidence and argument.
>
> [emphasis added]

105 *Rotoaira Forest* is a case on which both parties rely. I take it as common ground, therefore, that although Article 18 mandates a "full opportunity" to be heard, that is no different from a *reasonable* opportunity to be heard.

Tribunal's power to determine its own procedure

106 The plaintiffs allege that they did not have a reasonable opportunity to be heard on the merits of the arbitration because the Tribunal breached the rules of natural justice in arriving at two decisions: its decision on 4 June 2013 to declare proceedings closed and its decision on 9 June 2013 not to reopen proceedings. The result of those decisions, the plaintiffs say, was that the Tribunal failed to receive the two items of evidence (see [85] above) which *could* have had an effect on the Tribunal's ultimate decision on the merits of the parties' disputes.

107 Both of the decisions which the plaintiffs challenge are procedural decisions. A tribunal is given a wide and flexible power to make procedural decisions by Article 19(2) of the Model Law:

> **Article 19. Determination of rules of procedure**
>
> (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

108 Quite apart from the Model Law, the parties in this case agreed to give the Tribunal wide and flexible procedural powers. Rule 16.1 of the SIAC Rules mirrors the first limb of Article 19(2) of the Model Law and provides as follows:

> 16.1 The Tribunal shall conduct the arbitration in such manner as it considers appropriate after consulting with the parties, to ensure the fair expeditious, economical and final determination of

the dispute.

109 The parties also agreed to give the Tribunal a wide and flexible power to deal with evidence. Article 19(2) of the Model Law (see [107] above) is mirrored in Rule 16.2 of the SIAC Rules which reads as follows:

> 16.2 The Tribunal shall determine the relevance, materiality and admissibility of all evidence. Evidence need not be admissible in law.

110 The parties also agreed to give the Tribunal a wide and flexible residual power to deal with any procedural gaps in the SIAC Rules. That power is governed by Rule 36.2 of the SIAC Rules:

> 36.2 In all matters not expressly provided for in these Rules, the Chairman, the Registrar and the Tribunal shall act in the spirit of these Rules and shall make every reasonable effort to ensure the fair, expeditious and economical conclusion of the arbitration and the enforceability of the award.

111 Parties who choose to arbitrate in Singapore or under the SIAC Rules therefore and thereby agree to give the Tribunal a wide and flexible discretion to determine its own procedures and processes and to receive and evaluate competing evidence and arguments in order to arrive at its determination: *Soh Beng Tee* at [60]; *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM Division*") at [115]. Indeed, this party-mandated flexibility to adapt the procedure to the dispute is one of the hallmarks and main attractions of arbitration. It represents one of its key advantages over traditional litigation. It is significant that the plaintiffs do not seek to set this award aside on the ground that the Tribunal followed an arbitral procedure which was not in accordance with the parties' agreement, even though that constitutes an independent ground for doing so under Article 34(2)(a)(iv) of the Model Law.

112 The wide and flexible procedural power of the Tribunal is, of course, not unqualified: it is subject to the standards set by the rules of natural justice and in particular the right to be heard. But the right to be heard too is not unqualified: it is subject to the standard of reasonableness. By the parties' agreement, therefore, the Tribunal is entitled to make procedural decisions which give each party a *reasonable* right to present its case, after weighing the competing considerations. This includes the need to ensure the fair expeditious, economical and final determination of the dispute (see *TMM Division* at [103]). That is not just an ideal which the Tribunal is to pursue; it is an obligation which the Tribunal is to achieve, in consultation with the parties under Rules 16.1 and 36.2 of the SIAC Rules (see [107] and [110] above). Another example of a valid competing consideration is preserving a third-party's right of confidentiality in documents presented to the Tribunal: see *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871 at [141].

113 The courts should be slow to harden the concept of a parties' right to be heard in arbitration by importing wholesale into the law of arbitration all aspects of the right to be heard as it has developed in administrative law. The core concept of natural justice as it has developed in administrative law no doubt applies to a tribunal. But one must remember that an arbitral tribunal's powers over the parties spring from their consent and not from the coercive powers of the state or of a public body. The right to be heard as it is applied in arbitration is much less concerned with protecting the vulnerable against arbitrary governmental or quasi-governmental action and much more concerned with achieving practical results which fulfil the parties' expectations of arbitration as a dispute resolution process. A further reason in international commercial arbitration is that one of its goals is for businesses to achieve precisely the expeditious, economical and final determination that the SIAC Rules mandate. It is for that reason that the parties consciously agree to the Tribunal's procedural flexibility and consciously accept the limited rights of recourse under the IAA.

114 Thus, where a tribunal is alleged to have breached a party's right to be heard, the guiding principle for the court remains the principle of limited curial intervention. This is all the more so where the breach is said to have arisen from a procedural or case-management decision of the tribunal. This principle is illustrated by *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1*) [2012] 4 HKLRD 1 ("*Grand Pacific*"), a decision of the Hong Kong Court of Appeal.

115 In *Grand Pacific*, the applicant sought to set aside an award under Article 34(2)(a)(ii) of the Model Law on the grounds that it had been unable to present its case in the arbitration. The judge at first instance set aside the award. He found that the applicant had been unable to present its case because: (a) the tribunal deviated from an earlier agreed procedural order with the result that the applicant had an unreasonably short time to prepare to cross-examine the opposing party's expert witness; (b) the tribunal rejected the applicant's request to rely on new authorities presented after a deadline without considering the content or the subject matter of the new authorities; and (c) the applicant made a submission to the tribunal on an issue of Hong Kong law and the tribunal refused to afford the applicant its right to have the last word on that issue even though the respondent in its submissions in response introduced two authorities not previously cited.

116 The Hong Kong Court of Appeal reversed the first instance decision and upheld the award. It found that none of these grounds justified a finding that the applicant had been unable to present its case. It held at [95] that before a court finds that a party was unable to present its case within the meaning of Article 34(2)(a)(ii) of the Model Law, "the conduct complained of must be sufficiently serious or egregious so that one could say a party has been denied due process". Although the term "due process" originates in English law (see the Liberty of Subject Act 1354, still in force in England today), it is not a term of art in English, Singapore or indeed Hong Kong law. Read in context, the concept of "due process" referred to by the Hong Kong Court of Appeal directs the focus to the elemental or fundamental aspects of the right to be heard rather than to its technical or incidental aspects. The violation of that right which is necessary to amount to a party being "unable to be heard" must be a radical breach of that right which is "serious or egregious", though not so radical that the public policy grounds under Article 34(2)(b)(ii) are engaged.

117 The Hong Kong Court of Appeal also endorsed at [95] the proposition from a commentary on the Model Law that the right of each party to be heard does not mean that the tribunal must "sacrifice all efficiency in order to accommodate unreasonable procedural demands by a party.": see Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, at p 551. Instead, it emphasised the wide discretion of an arbitral tribunal to make case management decisions (at [68]):

> The learned Judge concluded… that the refusal to receive and consider the additional authorities prevented [the applicant] from presenting its case and therefore a violation of art.34(2)(a)(ii) has been established. With respect, I cannot agree with Saunders J. *I do not believe he was entitled to interfere with a case management decision, which was fully within the discretion of the [t]ribunal to make.*
>
> **[emphasis added]**

Second limb: was there a breach of natural justice?

Grounds on which the plaintiffs rely

118 The plaintiffs rely on their right to be heard to support their submission that there was a breach of the rules of natural justice within the meaning of s 24(b) of the IAA and also to support

their argument that they were unable to present their case within the meaning of Article 34(2)(a)(ii) of the Model Law. In their submissions, they treat the two provisions as co-extensive in scope and result. In my view, that is the correct approach. The rules of fairness or natural justice are not rigid but depend on their context. Thus, in considering whether a particular decision has been arrived at in breach of the rules of natural justice, the court will take into account the structure of the decision-making body and the nature and purpose of the decision itself: *R v Avon County Council ex parte Crabtree* [1996] 1 FLR 502. On an application under s 24(b) of the IAA, therefore, a court must have regard to the special character of arbitration as a consensual dispute resolution process and the resulting policy of minimal curial intervention. I therefore see no distinction between the right to be heard as an aspect of the rules of natural justice under s 24 (b) of the IAA and as an aspect of being able to be heard within the meaning of Article 34(2)(a)(ii). I shall therefore deal with both limbs of the plaintiffs' submissions together as the plaintiffs have.

119 The plaintiffs submit that the Tribunal acted unfairly and unreasonably on 4 June 2013 and on 9 June 2013 for three reasons:

(a) The Tribunal "unilaterally" declared proceedings closed even though the plaintiffs' lawyers had informed the Tribunal that the plaintiffs wished to respond to the Tribunal's proposal to do so. This was unfair and unreasonable for three reasons. First, there was no urgency for the Tribunal to hear from the plaintiffs by the close of business on 4 June 2013. Second, the Tribunal did not respond to the plaintiffs' lawyers' email dated 3 June 2013 at all and, in particular, it imposed no deadline for the plaintiffs' comments on the Tribunal's proposal to close proceedings. Third, the Tribunal did not foreshadow to the plaintiffs' lawyers that it would declare the proceedings closed if the plaintiffs failed to comment by the close of business on 4 June 2013.

(b) The Tribunal "compounded its error" by refusing to reopen proceedings on 9 June 2013. First, the Tribunal wrongly took the view that the plaintiffs had had ample opportunity to adduce evidence in support of its case. This, it is said, ignored the fact that the evidence the plaintiffs wished to rely on had not yet come into existence. Second, the Tribunal took the view that the plaintiffs were asking for the proceedings to be reopened indefinitely when all they were asking was for the proceedings to be re-opened for just over four weeks, from 5 June 2013 to 8 July 2013.

(c) The Tribunal wrongly took the view that the plaintiffs' reference to potential developments lacked sufficient certainty and specificity to justify reopening the proceedings. First, the plaintiffs' lawyers told the Tribunal what the plaintiffs expected to happen. Second, the plaintiffs' lawyers told the Tribunal when the plaintiffs expected it to happen. And the plaintiffs' expectations were borne out on both counts.

120 I do not, of course, sit as a court of appeal from the Tribunal's actual decisions on 4 June 2013 and 9 June 2013. But insofar as the plaintiffs suggest that the *procedure* which the Tribunal adopted to arrive at these decisions breached their right to be heard, I am wholly unable to agree. These decisions are quintessential case management decisions. These decisions, as well as the procedure the Tribunal followed in arriving at these decisions, were well within its wide and flexible procedural powers.

Tribunal did not unilaterally declare proceedings closed

121 In my view, the Tribunal did not act unilaterally, unfairly or unreasonably in declaring proceedings closed. It properly and sufficiently consulted the parties within the meaning of Rule 28.1 of the SIAC Rules by informing them early on 29 May 2013 of its proposed course of action and giving

them what was effectively three business days to comment. That was a perfectly reasonable deadline. If a deadline is reasonable in all the circumstances, it is not nullified and does not become unreasonable simply because those who are subject to it fail to perceive any need for urgency. A deadline is imposed to be observed and carries consequences if it is not. In that sense, there is no distinction between a deadline and a strict deadline. The defendant's lawyers had no difficulty in observing the deadline. Indeed, the plaintiffs do not go so far as to suggest that this first deadline was unreasonable. No doubt, if they had felt that it was unreasonably short either in absolute terms or in the circumstances, they would have, immediately and in any event before it expired, sent a short email informing the Tribunal that they needed more time to take instructions and respond. They did not. The Tribunal, in any event, did not declare the proceedings closed immediately upon the close of business on 31 May 2013 as it initially proposed.

122 It was neither unreasonable nor unfair for the Tribunal not to respond to the plaintiffs' lawyers' belated email on 3 June 2013 by: (a) setting an explicit deadline for the plaintiffs' lawyers to respond; and (b) by telling the plaintiffs' lawyers that that deadline was a strict deadline with consequences. It was the plaintiffs' lawyers who, on 3 June 2013, sought the Tribunal's indulgence to respond a day later. The Tribunal's initial deadline expired at the close of business on 31 May 2013. In that context, it was for the plaintiffs' lawyers to make clear to the Tribunal if they intended to respond at a time on 4 June 2013 which was other than the close of business on that day. They did not. It does not lie in the plaintiffs' mouth now, as a supplicant who sought and obtained an indulgence, to accuse the Tribunal of having acted unilaterally, unreasonably and unfairly in expecting the plaintiffs to respond by the close of business on 4 June 2013 or by declaring the proceedings closed when no response or request for extension was forthcoming by that time.

Tribunal's refusal to re-open proceedings

123 It is also my view that the Tribunal did not act unilaterally, unfairly or unreasonably in refusing to reopen proceedings on 9 June 2013. First, on 5 June 2013, the Tribunal invited the plaintiffs to make a formal application to re-open proceedings by close of business the same day. Well before the deadline, at 4.12 pm, the plaintiffs' lawyers sent a comprehensive email setting out their position. The plaintiffs did not then object that the Tribunal's deadline was unreasonable or that they were prejudiced by being required to respond within the same business day. It does not lie in the plaintiffs' mouth now to complain that the procedure was unfair.

124 Second, having been made aware of the nature of the anticipated development, the Tribunal was entitled to take the view that it remained satisfied that the plaintiffs had no further and material evidence to produce. At that stage, the plaintiffs were not seeking to adduce evidence at all for the reasons I have given above: they were asking the Tribunal (and the defendant) to wait and see what developed by 8 July 2013 or possibly shortly beyond that date. Further, the plaintiffs asserted in their email of 5 June 2013 that they had already placed sufficient evidence before the Tribunal on the issue of the validity of the Survey Agreements. In that sense, the plaintiffs themselves accepted that they had had a reasonable opportunity to present their case on this issue.

125 Third, having overseen the entire proceedings from beginning to end, the Tribunal was well placed to make the case management decision that the anticipated development lacked sufficient certainty and specificity to justify re-opening these proceedings and that the prejudice to the defendant in further delaying the proceedings outweighed any prejudice that the plaintiffs might suffer. In fact, the plaintiffs conceded in oral arguments before me that the specificity of the expectation and length of the time extension sought were factors which the Tribunal could legitimately take into account.

126 Contrary to the plaintiffs' submissions, the Tribunal's overall conduct both in declaring the proceedings closed and in considering the plaintiffs' application to re-open proceedings showed regard for the rules natural justice and its obligation to be fair to both parties. The plaintiffs have failed to establish that there was a breach of their right to be heard. In case I am wrong on that, I proceed to consider the next limb on the assumption that the Tribunal did breach the plaintiffs' right to be heard by shutting out the new evidence.

Third limb: was the breach connected to the award?

127 Establishing a breach of natural justice is not in itself sufficient to succeed in a challenge under s 24(b) of the IAA. The party seeking to set aside the award has the burden of establishing a "causal nexus" between the breach and the award: *Soh Beng Tee* at [73].

128 The plaintiffs submit that if the Tribunal had held proceedings open on 4 June 2013 or reopened proceedings on 9 June 2013 in order to receive the evidence which emerged on 27 June 2013 and on 4 July 2013, that evidence would have shown that:

(a) The Region 1 and Region 2 Survey Agreements were always valid, and thus the first plaintiff had good title under the Survey Agreements;

(b) That the first plaintiff was always entitled to the SLs for Region 1 and Region 2;

(c) That any disputes between the first plaintiff and the Corporation were not as grave and serious as the defendant portrayed them to be;

(d) That Mr Z had told the truth in the arbitration when he said that:

(i) the Corporation knew it had no power to terminate the Survey Agreements or to influence their validity; and

(ii) the Corporation's conduct in 2009 and 2010 was mere posturing as part of the "hot and cold" relationship between the first plaintiff and the Corporation since the day the Survey Agreements were signed in 2003; and

(e) That the first plaintiff's representations and warranties in Article 7 of the Option were true and accurate.

129 In considering the plaintiffs' submissions on the causal nexus, I bear in mind that they challenge the award on procedural grounds only, arising from an alleged breach of natural justice. They do not rely on a substantive ground, for example that the Tribunal dealt with a dispute not falling within the terms of the submission to arbitration within the meaning of Article 34(2)(a)(iii) of the Model Law. Given that, it is not my role in testing this causal nexus to review the content of the reasoning by which the Tribunal reached its determination as expressed in the award. I therefore take that reasoning as I find it and consider how, if at all, the absence of this new evidence could have a causal connection with that award on that reasoning.

Validity of the Survey Agreements

130 Insofar as the new evidence is said to be relevant to the validity of the Survey Agreements, that issue found no place in the Tribunal's reasoning. In determining Issue I, the Tribunal held that that question was of only marginal and incidental relevance to the central issues at hand and

therefore unnecessary for its decision. It therefore expressly did not decide whether the Survey Agreements were actually valid. That is clear from [162] – [164] and [166] of the award.

> 162. [The defendant] contends that the issue of the validity of the [Survey Agreements] is not relevant to the claims advanced by it. Therefore, it contends that the Tribunal does not need to determine the validity of the [Survey Agreements] in order to find [the first plaintiff] liable. In any event, [the defendant] contends that the [Survey Agreements] automatically terminated pursuant to their terms upon the expiry of the survey periods on 1 March 2008.
>
> 163. [The plaintiffs] assert that the question of the validity of the [Survey Agreements] is "central" to [the defendant's] allegation that [the plaintiffs] "lacked good title" to the [Survey Agreements] and to its pleaded case on alleged breaches of contract. Therefore, [the plaintiffs] assert that the issue of [Survey Agreement] validity is "clearly relevant" and should be determined by the Tribunal. [The plaintiffs'] case is that the [Survey Agreements] have never been terminated and remain in full force and effect.
>
> 164. Having considered the submissions of both Parties, the Tribunal declines to make any decision here as to the validity of the [Survey Agreements], for several reasons.
>
> …
>
> 166. More importantly for present purposes, the Tribunal does not find it necessary to make any determination as to the validity of the [Survey Agreements] in order to decide the Parties' dispute. While the issue could be relevant, in a marginal and general sense, to the disputes between the Parties, for the reasons set out in the following sections of this [a]ward the Tribunal is persuaded that there is no requirement to determine the validity of the [Survey Agreements] in order to decide the Parties' respective cases in this arbitration.

131 Thus, the Tribunal held that the first plaintiff's representation and warranty under Article 7.1A was falsified not because the Survey Agreements were invalid but because it was untrue and inaccurate for the first plaintiff to say that its "rights under the [Survey Agreements] (whatever they were) were 'free and clear of any liens, claims, burdens or encumbrances', short of actual invalidity".

The first plaintiff's entitlement to valid SLs

132 This point arose because Mr Z admitted during the first oral hearing that as at the time of that hearing in April 2012, the first plaintiff did not have a valid SL for either Region 1 or Region 2. The defendant then relied on this as part of its argument that the first plaintiff's representations and warranties under the Option were untrue and inaccurate.

133 The Tribunal's reasoning required it to consider whether the first plaintiff had SLs in its possession in 2009 (when the Option was signed) and 2010 (when the defendant terminated the Option). That was the crucial point on which the Tribunal held that the representation in Article 7.1D of the Option was untrue and inaccurate. SLs issued in 2013 have no relevance to that issue. This is so even though the 2013 SLs were backdated to 2011 and 2012. That backdating merely shows that Ministry B took the position in *2013* that the first plaintiff was entitled to SLs which named it as the survey unit in 2011 and 2012. It says nothing about whether the first plaintiff was entitled to SLs as a matter of historical fact in 2011 and 2012 itself, when Mr Z gave evidence. Much less does it say anything about whether the first plaintiff had SLs in its *possession* in 2009 and 2010.

The first plaintiff's and the Corporation's disputes not serious

134 Even if the 2013 SLs were relevant to show that the disputes between the first plaintiff and the Corporation were not serious, they were relevant to show the position between the parties in *2013*. The fact that these SLs had been issued in 2013 said nothing at all about the state of the disputes between the first plaintiff and the Corporation in 2009 and 2010. That was the crucial period in the Tribunal's reasoning. The Tribunal drew certain inferences and made certain findings from the contemporaneous evidence about the seriousness of the disputes at that time. It is not for me to say whether those findings are right or wrong as a matter of law or fact. But it clear that on the Tribunal's approach, these SLs issued in 2013 were not relevant to the issue it identified for itself.

Mr Z's evidence

135 The first plaintiff submits that the SLs and the removal of the termination notice dated 9 March 2011 from the Corporation's website on 27 June 2013 shows that the Corporation knew it had no power to terminate the Survey Agreements or to influence their validity.

136 First, the removal of the notice from the Corporation's website was not one of the matters which the plaintiffs asked the Tribunal on 5 June 2013 to reopen proceedings to await. Nor was this evidence brought to the Tribunal's attention before it issued its award. In those circumstances, it appears to me that the plaintiffs cannot rely on the Tribunal's failure to reopen the proceedings to receive this evidence as a breach of their right to be heard.

137 Second, whether the Corporation knew it had no power to terminate the Survey Agreements or to influence their validity is not an issue which formed part of the Tribunal's reasoning process. That process, as I have shown, bypassed entirely any consideration of the validity of the Survey Agreements at all.

138 The plaintiffs also submit that the new evidence shows that the Corporation's conduct in 2009 and 2010 was mere posturing as part of the "hot and cold" relationship between the first plaintiff and the Corporation since the day the Survey Agreements were signed in 2003.

139 This too finds no place in the Tribunal's reasoning. It concluded that the first plaintiff had an obligation at the outset of the Option and during its continuation to ensure that its representations and warranties under Article 7.1 of the Option were and remained true and accurate. In essence, the Tribunal found that these obligations required the first plaintiff to inform the defendant as and when its relationship with the Corporation turned hot and cold. On that reasoning, evidence that this relationship was hot in 2013 does not negate the first plaintiff's obligation in 2009 and 2010 to inform the defendant that the relationship was at that time cold.

Representations and warranties were true and accurate

140 This submission is a *non sequitur*. The Tribunal's entire decision turned on the first plaintiff's initial representations and warranties under the Option being true and accurate on the Effective Date and its continuing obligation to disclose changes to the facts underlying those representations and warranties after the Effective Date. Further, the Tribunal's reasoning took into consideration the *actual* state of the relationship between the Corporation and the first plaintiff in 2009 and 2010 and the *potential* effect of that actual relationship on the subject-matter of the Survey Agreements. The Tribunal was not concerned with their *potential* relationship and the *actual* effect on the subject-matter of the Survey Agreements. So, for example, a refusal to receive evidence which shows that the Corporation in fact had a *warm* relationship with the first plaintiff *in 2009 and 2010* could possibly be said to have a causal nexus with the making of the award. But a refusal to receive evidence which shows only that the Corporation has a warm relationship with the first plaintiff in *2013* and, at the

most, that the Corporation is prepared *in 2013* to draw a line under the past and move forward, is not. Documents and events in 2013 cannot retrospectively change the *actual* state of the parties' relationship in 2009 and 2010 and the *potential* effect of that relationship on the subject-matter of the Survey Agreements.

141 For the foregoing reasons, it is clear to me that the Tribunal's refusal to hold proceedings open or to reopen proceedings to permit it to receive the new evidence was not causally connected to the Tribunal's reasoning and decision on the central issue of whether the plaintiffs' warranties and representations under Article 7.1 and Article 7.4 were in fact true and correct from the outset of the Option until it was terminated.

Fourth limb: were the plaintiffs prejudiced by the breach?

142 The lack of a causal nexus is sufficient in itself to dispose of the plaintiffs' application. However, in the event that I am wrong, I now assume a causal connection between the Tribunal's decision and the making of the award and consider whether the plaintiffs have suffered prejudice.

143 In *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*LW Infrastructure*"), Sundaresh Menon JA (as the Chief Justice then was) considered the test of prejudice in determining whether an arbitral award should be set aside. He held at [54]:

> … it is important to bear in mind that it is never in the interest of the court, much less its role, to assume the function of the arbitral tribunal. To say that the court must be satisfied that a different result would definitely ensue before prejudice can be said to have been demonstrated would be incorrect in principle because it would require the court to put itself in the position of the arbitrator and to consider the merits of the issue with the benefit of materials that had not in the event been placed before the arbitrator. Seen in this light, it becomes evident that the real inquiry is whether the breach of natural justice was merely technical and inconsequential or whether as a result of the breach, the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations. Put another way, the issue is whether the material could reasonably have made a difference to the arbitrator; rather than whether it would necessarily have done so. Where it is evident that there is no prospect whatsoever that the material if presented would have made any difference because it wholly lacked any legal or factual weight, then it could not seriously be said that the complainant has suffered actual or real prejudice in not having had the opportunity to present this to the arbitrator (cf *Soh Beng Tee* at [86]).

144 The plaintiffs submit that all they have to do to establish prejudice is to show that a reasonable tribunal *could* have had its view influenced or affected by the new evidence, and hence the plaintiffs have suffered prejudice from having had that evidence excluded. For this proposition, the plaintiffs place heavy reliance on the following statement of Menon JA in *LW Infrastructure* at [54]:

> the issue is whether the material *could reasonably have made a difference* to the arbitrator; rather than whether it would necessarily have done so.

145 In my view, it is not that sentence which captures the true intent of Menon JA in *LW Infrastructure*. The main concern in *LW Infrastructure* was to address a difficulty arising from at least one formulation of the test of prejudice set out in *Soh Beng Tee* at [91]:

> 91 ... [i]t appears to us that in Singapore, an applicant will have to persuade the court that

there has been some actual or real prejudice caused by the alleged breach. … There must be more than technical unfairness. It is neither desirable nor possible to predict the infinite range of factual permutations or imponderables that may confront the courts in the future. What we can say is that to attract curial intervention *it must be established that the breach of the rules of natural justice must, at the very least, have actually altered the final outcome of the arbitral proceedings in some meaningful way*. If, on the other hand, the same result could or would ultimately have been attained, or if it can be shown that the complainant could not have presented any ground-breaking evidence and/or submissions regardless, the bare fact that the arbitrator might have inadvertently denied one or both parties some technical aspect of a fair hearing would almost invariably be insufficient to set aside the award.

[emphasis added]

146 The passage from *Soh Beng Tee* quoted above could be interpreted to mean that a court needs to find that the breach of natural justice *actually* altered the final outcome of the arbitration in some meaningful way before prejudice is established. There are two difficulties with that interpretation. First, it is virtually impossible to satisfy and could be said to set the bar too high for a party who has, *ex hypothesi*, suffered a denial of natural justice causally connected to the award. Second, it appears to require the court to step into the shoes of the tribunal and to decide afresh and on a hypothetical basis, the merits of the parties' dispute but for the breach of natural justice. The intent of *LW Infrastructure* is to address these concerns rather than to go to the opposite extreme of setting a test that it too easy to satisfy.

147 The real import of that case is to be found in the sentence preceding the one on which the plaintiffs rely. As Menon JA said in that sentence, "... *the real inquiry* is whether the breach of natural justice was *merely technical or inconsequential* or whether as a result of the breach, the arbitrator was denied the benefit of arguments or evidence that had a *real as opposed to a fanciful chance* of making a difference to his deliberations" [emphasis added].

148 Reading *Soh Beng Tee* in light of *LW Infrastructure*, what I have to determine on this limb is whether the breach of the rules of natural justice (which I have assumed took place in this case and which I have assumed was causally connected to the award) was merely technical or inconsequential or whether as a result of the breach, the Tribunal was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to the final outcome of the arbitral proceedings in some meaningful way.

149 In this case, the Tribunal found that a number of the first plaintiff's warranties and representations under Article 7.1 of the Option were untrue and inaccurate and were also the subject of inadequate ongoing disclosure under Article 7.4 of the Option. This included the first plaintiff's representation and warranty that its interest under the Survey Agreements were "free and clear of any…claims [or] burdens", that "no notice of default, termination of breach under the [Survey Agreements] has been received", that it had provided to the defendant "up-to-date copies of all documents in its possession that could reasonably be expected to have a material effect on the value of the [Survey Agreement] interests", that there were "no claims [or] demands…in connection with the [Survey Agreements]…pending or threatened" and that it "possesses all material …licences…." on the Effective Date.

150 None of these grounds depends on the actual validity of the Survey Agreements or the SLs issued under them, whether the validity is tested in 2009 and 2010 or is tested in 2013. The Tribunal reasoned to its determination by making and relying on findings on the evidence before it comprising contemporaneous communications between the first plaintiff, the Corporation and Moria authorities in

2009 and 2010 and the undisputed events in those years. The Tribunal as a result found the first plaintiff in breach of the Option and rejected the first plaintiff's argument that the breaches were technical. On the Tribunal's reasoning, any one of these falsified representations or warranties would have sufficed to entitle the defendant to terminate the Option and to recover substantial damages. The path by which the Tribunal reasoned to this result is entirely unaffected by the new evidence.

151 In light of the foregoing, I find that the new evidence, even if the Tribunal had received it, carried no real chance of making a difference to the final outcome of the arbitral proceedings in any meaningful way. It is significant that the first plaintiff itself did not prospectively characterise the evidence which it expected would emerge as crucial evidence which would make a difference to the entire outcome of the arbitration. Instead, it characterised the evidence simply as additional material to put a single issue in the arbitration to rest on which it had already adduced sufficient evidence (see [75] and [94] above).

Did the Tribunal predetermine the issues?

152 The plaintiffs also draw to my attention the fact that the Tribunal closed the proceedings on 9 June 2013 and issued its award just over a month later. The plaintiffs suggest that the Tribunal may well have already made up its mind by 9 June 2013 to find the first plaintiff liable, and to do so on the reasoning which is set out in the award. The plaintiffs further submit that if the Tribunal had instead kept an open mind, it would have given the first plaintiff an opportunity to make oral submissions on its application to reopen proceedings at a physical hearing or by telephone call.

153 I cannot accept this submission for four reasons. First, unfairly predetermining a dispute is one of the most serious charges that can be levied against a tribunal, short of fraud or corruption. On the plaintiffs' reasoning, the more efficient a tribunal is, the stronger the inference of predetermination. That cannot be correct. It is surely significant that under Rule 28.2 of the SIAC Rules, the Tribunal was obliged to issue its award within 45 days from the date on which it declared proceedings closed, *ie* on or before 19 July 2013. That the Tribunal issued its award slightly earlier than 19 July 2013 ought to be welcomed rather than seized upon as evidence of such a serious dereliction of duty.

154 Second, the brief reasons which the Tribunal gave when dismissing the plaintiffs' attempt to reopen proceedings show that its mind remained open, even on Issue I and even as late as 9 June 2013. The Tribunal gave two grounds for dismissing the application. Only the second of those grounds could be said to touch on the overall merits of the parties' dispute. That second ground was that the defendant's "claims are premised principally on facts from 2009 and 2010. Therefore, whatever the [Moria] authorities may decide in 2013 about the status of [SLs] in relation to the [Region 1 and Region 2 Survey Agreements] today is neither relevant nor material to the outcome of [the defendant's] claims." That ground and the way in which it is put shows that the Tribunal had not yet determined that the validity of the SLs, and by inference of the Survey Agreements, in *2009 and 2010* was unnecessary for its decision.

155 Third, even taking the plaintiffs' case at its highest, it is well-established that the right to be heard does not require a tribunal to keep the parties informed of its reasoning process in real time until the very moment that its decision falls, complete and fully-formed, into the parties' waiting hands. As Lord Diplock said in a judicial review case challenging a decision by the English Monopolies Commission in *F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 369, cited in *Soh Beng Tee* at [52]:

> The commission for reasons that are set out in its report rejected the appellants' arguments. Even in judicial proceedings in a court of law, once a fair hearing has been given to the rival

> cases presented by the parties the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If this were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would have to be abolished.

156 Thus, even if there were some evidence to suggest that the Tribunal had arrived at any tentative views on the facts or the law by 9 June 2013, that conduct would not in itself be a breach of the plaintiffs' right to be heard. And it could not be converted into a breach of that right simply because the plaintiffs at that late stage – after the Tribunal had received all the evidence and all the submissions on fact and law that either party had until then wanted to put before it – called upon the Tribunal to consider reopening proceedings to await potential developments.

157 Fourth, insofar as the plaintiffs suggest that the Tribunal breached natural justice in not allowing them an oral hearing on the application to reopen proceedings, the plaintiffs did not ask the Tribunal for an oral hearing and did not take objection to the procedure which the Tribunal did adopt. That point cannot be advanced now.

Conclusion

158 For the foregoing reasons, I dismissed the plaintiffs' application to set aside the Tribunal's award. The plaintiffs did not raise any other grounds to support their application to set aside the order of court giving the defendant leave to enforce the award as a judgment of the High Court. I therefore also dismissed the plaintiffs' application to set aside that order of court. Finally, I ordered the plaintiffs to pay a single set of costs of and incidental to both applications to the defendant, such costs to be taxed if not agreed.