AMZ *v* AXX
[2015] SGHC 283

Case Number	: Originating Summons No [P]
Decision Date	: 30 October 2015
Tribunal/Court	: High Court
Coram	: Vinodh Coomaraswamy J
Counsel Name(s)	: Koh Swee Yen and Goh Wei Wei (WongPartnership LLP) for the plaintiff; Lek Siang Pheng, Mark Seah and Patrick Wong (Rodyk & Davidson LLP) for the defendant.
Parties	: AMZ — AXX

Arbitration –Award –Recourse against award –Setting aside

30 October 2015

Vinodh Coomaraswamy J:

Introduction

1 A claimant commences arbitration seeking damages for breach of contract. Its case rests solely on the premise that the respondent has committed three breaches of contract which, taken together, amount to a repudiatory breach of contract. [note: 1] The claimant advances no alternative claim for damages for breach of contract falling short of a repudiatory breach. The respondent denies that it is in breach of contract; [note: 2] denies that the three breaches amount to a repudiatory breach of contract; [note: 3] and asserts that it is the claimant itself who has breached the contract. [note: 4]

2 In its award, the tribunal finds one alleged breach of contract to have been established but find that the other two alleged breaches are not breaches at all. The tribunal holds, however, that the claimant is unable to rely on the lone breach of contract as being a repudiatory breach of contract. In the absence of an alternative claim for damages, the tribunal dismisses the claim in its entirety. In its award, the tribunal expresses its views on a number of questions which the parties placed before it but which were not, in the light of its reasoning, necessary for its decision.

3 The claimant now applies to set aside the tribunal's award on grounds of procedural defects which it says caused it actual prejudice. I have dismissed the claimant's application with costs, largely on the ground that there were no procedural defects; alternatively that, even if there were, they caused the claimant no actual prejudice because they touched on findings which were not necessary for the tribunal's ultimate decision against the claimant on its case.

4 The claimant has appealed to the Court of Appeal against my decision. I now set out my reasons. At the respondent's request, these reasons have been anonymised.

The parties and their contract

The parties

5 The plaintiff in these proceedings was the claimant in the arbitration. It is a company incorporated in a country I shall call "Alderaan" and trades in oil products, including crude oil.

6 The defendant in these proceedings was the respondent in the arbitration. It is a company incorporated in a country I shall call "Bespin", and is a wholly-owned subsidiary of a substantial entity. The defendant's business is processing oil and manufacturing chemicals. It owns three large petrochemical development plants. One of those plants is in a province of Bespin which I shall call "Cloud City". [note: 5]

The Supply Contract

7 By a contract in writing dated 1 December 2010 [note: 6] ("the Supply Contract"), the plaintiff agreed to sell to the defendant 600,000 barrels +/- 5% of Dar Blend. Dar Blend is a type of crude oil originating in South Sudan.

8 The plaintiff relied in the arbitration on three provisions of the Supply Contract. First, it relied on clause 4 which provided for the Dar Blend to be delivered to the defendant *ex ship* during a ten-day delivery window between 10 January 2011 and 20 January 2011 in Cloud City in Bespin. Second, it relied on cl 6 which obliged the defendant to open an irrevocable letter of credit in the plaintiff's favour by 16 December 2010. Clause 6 further provided that the plaintiff had no obligation to deliver the Dar Blend before receiving a letter of credit and that the defendant would be responsible for all demurrage incurred if it opened the letter of credit late. Finally, the plaintiff relied on cl 11 of the Supply Contract which obliged the defendant, as the importer of record of the Dar Blend, to arrange for customs clearance of the Dar Blend in Cloud City. [note: 7]

9 The price for the Dar Blend under the Supply Contract was not a fixed price. Instead, the price was to be the prevailing price for Brent crude oil in the second half of January 2011, during the delivery window, subject to a discount of US$3.50 per barrel. [note: 8]

10 The Supply Contract was governed by English law and provided for disputes to be resolved by arbitration in Singapore under the rules of the Singapore International Arbitration Centre ("SIAC"). [note: 9]

11 An oil trader employed by the plaintiff, whom I shall refer to as "Owen", took the lead for the plaintiff in negotiating, documenting and performing the Supply Contract. [note: 10] Also involved for the plaintiff in performing the Supply Contract, albeit at one step removed from Owen, was the plaintiff's Finance Manager, whom I shall refer to as "Beru". [note: 11]

The lead-up to the Supply Contract

12 When the parties were negotiating the Supply Contract in September and October 2010, the defendant lacked a crude oil import licence issued by the government of Bespin. [note: 12] Without that licence, the defendant could not lawfully import crude oil, such as Dar Blend, into Bespin. Nevertheless, the defendant's representatives assured Owen during these negotiations that the defendant expected to be issued the necessary licence before the end of December 2010 [note: 13] or by 1 January 2011. [note: 14]

13 At the same time as the plaintiff and the defendant entered into the Supply Contract, they also

entered into what they call the Buy-back Contract. Under the Buy-back Contract, the plaintiff agreed to buy the Dar Blend back from the defendant on *fob* terms if the defendant was not able to take delivery of the Dar Blend during the delivery window because it lacked a crude oil import licence. [note: 15] The plaintiff's obligation under the Buy-back Contract was to buy back the Dar Blend at the prevailing price for Brent crude oil in the second half of January 2011, subject to a discount of only US$2.50 per barrel. [note: 16]

14 It is an important point that the defendant's price as the plaintiff's seller under the Buy-back Contract was *higher* than the defendant's price as the plaintiff's buyer under the Supply Contract. The combined effect of the two contracts meant that the defendant would, if it failed to secure a crude oil import licence, earn a *profit* of US$1.00 per barrel, or a profit of US$600,000 (+/- 5%) in absolute terms, on the overall transaction.

15 In November 2010, in anticipation of concluding the Supply Contract with the defendant and in order to fulfil its delivery obligation under that contract, the plaintiff took three steps. First, it contracted to purchase the necessary quantity of Dar Blend from a supplier. [note: 17] Second, it arranged financing for this purchase with its bank ("the Bank"). Finally, it chartered and nominated a vessel, which I shall call the "Tantive IV", to transport the Dar Blend from South Sudan to up to three safe ports including Alderaan and Cloud City. [note: 18]

16 Although the Supply Contract was dated 1 December 2010, the defendant returned the signed execution pages of the Supply Contract to the plaintiff only on 14 December 2010. [note: 19] On 13 December 2010, therefore, the plaintiff still did not know whether the defendant had undertaken a binding commitment to buy the Dar Blend which the plaintiff had already committed itself to purchasing from its supplier. As a result, on 13 December 2010, Owen sent a chaser to the defendant's representative inquiring about the status of the Supply Contract. The defendant responded to the plaintiff the same day with what the parties [note: 20] and the Tribunal [note: 21] have called "the Confirmation Letter". In the Confirmation Letter, the defendant confirmed that it accepted the plaintiff's offer to sell it the Dar Blend on the terms set out in the draft Supply Contract.

17 The Confirmation Letter was followed on the night of 14 December 2010, as I have said, by the duly-executed signature pages of the Supply Contract. [note: 22]

The defendant breaches the Supply Contract

18 It was the defendant's obligation under cl 6 of the Supply Contract to open by 16 December 2010 a letter of credit to pay the plaintiff for the Dar Blend. [note: 23] However, even as late as 14 December 2010, when it finally took on a contractual commitment to buy the Dar Blend under the Supply Contract, the defendant had not opened a letter of credit.

19 The plaintiff, with the knowledge and approval of the Bank, agreed with the defendant to accept the defendant's payment undertaking in place of a letter of credit. [note: 24] The plaintiff and the Bank were prepared to forgo the substantial security of a letter of credit because of the defendant's own creditworthiness and also because of the defendant's status as a wholly-owned subsidiary of a substantial and creditworthy enterprise. [note: 25]

20 The defendant failed to secure a letter of credit or to issue a payment undertaking by 16 December 2010 or indeed at all.

The cargo sets sail for Alderaan

21 Even though the plaintiff did not have either a letter of credit or a payment undertaking, Owen proceeded to load the Dar Blend onto the Tantive IV at Port Sudan on 17 and 18 December 2010. [note: 26] However, Owen did not instruct the Tantive IV to sail directly from Port Sudan to Cloud City. Instead, he instructed the vessel to sail from Port Sudan to Alderaan and to remain in Alderaan awaiting further routing orders. [note: 27] Alderaan is approximately two-thirds of the way from Port Sudan to Cloud City.

22 On or about 21 December 2010, the plaintiff's Geneva office informed Owen of market rumours that the defendant had failed to secure a crude oil import licence. [note: 28] He checked with the defendant's representative and was assured that there was nothing to worry about. It remained the case, he was told, that the defendant would be issued a crude oil import licence by 1 January 2011. [note: 29]

23 The Tantive IV arrived in Alderaan on or around 1 January 2011. Owen held the vessel there pending further routing orders. [note: 30]

The defendant fails to secure a crude oil import licence

24 On 4 January 2011, the defendant's representative confirmed to Owen that it had indeed failed to secure a crude oil import licence and would not be able to take delivery of the Dar Blend if the Tantive IV were to sail from Alderaan to Cloud City. The defendant suggested that the plaintiff try and sell the Dar Blend to a third party. [note: 31]

25 Owen told the defendant's representative that the defendant was in breach of contract by failing to secure a crude oil import licence and by failing to take delivery of the Dar Blend. He said, further, that that breach of contract had put the plaintiff in difficulties with the Bank, who had advanced credit to the plaintiff to purchase the Dar Blend for on-sale to the defendant at least partly in reliance on the defendant's creditworthiness. Because the defendant had now dropped out as the plaintiff's buyer, the Bank began to put pressure on the plaintiff to discharge by 18 January 2011 its trade-financing liability to the Bank for the cost of the Dar Blend. [note: 32]

26 Given what the plaintiff viewed as the defendant's repudiatory breach of the Supply Contract in failing to secure a crude oil import licence and to take delivery of the Dar Blend, Owen decided it was too risky to order the Tantive IV to set sail for Cloud City from Alderaan. [note: 33]

27 The last day of the delivery window was 20 January 2011. By a letter dated 20 January 2011, the plaintiff put the defendant on notice that the plaintiff considered the defendant to be in repudiatory breach of the Supply Contract and that it accepted the repudiatory breach. [note: 34] The plaintiff sent a second letter to the defendant on 25 February 2011 notifying it that it had not yet found another buyer for the Dar Blend in order to mitigate its loss and would now have to offload the Dar Blend as a distressed cargo at the best available price. [note: 35]

28 The defendant denies that the plaintiff issued any of these notices. [note: 36]

The plaintiff sells the Dar Blend to a third party

29 In March 2011, the plaintiff sold the Dar Blend to a company which I shall call "the Company". [note: 37] Because the plaintiff sold the Dar Blend as a distressed cargo, the best price which it could achieve was the price of Brent crude oil in May 2011 subject to a discount of US$18.00 a barrel. [note: 38] This discount of US$18.00 a barrel was several multiples of the discount which the plaintiff had agreed with the defendant under the Supply Contract (US$3.00). But, between December 2010 and March 2011, the price of Brent crude oil had risen dramatically. Therefore, despite the deep discount of US$18.00 a barrel, the net price per barrel on the plaintiff's sale to the Company was higher than the net price per barrel under the Supply Contract.

30 This substantial increase in the price of Brent crude oil from January 2011 to March 2011 meant that the plaintiff made a profit on the sale of the Dar Blend to the Company despite the distressed circumstances of the sale. Indeed, the plaintiff made a profit in two senses.

31 First, the plaintiff had purchased the Dar Blend from its supplier for US$51.82m. It sold the Dar Blend to the Company for US$60.59m. Its actual sale price therefore exceeded its actual cost price by US$8.77m.

32 Second, if the defendant had performed its obligation under the Supply Contract, the plaintiff would have received US$58.87m in January 2011 for the Dar Blend. Deducting its cost price of US$51.82m from the defendant's contract price would have yielded the plaintiff a hypothetical profit of US$7.05m on this counterfactual scenario. But in fact, the plaintiff achieved an actual profit of US$8.77m on its actual transaction with the Company (see [30] above). Its actual profit therefore exceeded its hypothetical profit by US$1.72m.

33 The plaintiff's position is that neither of these two calculations accurately reflect its actual financial position as a result of the defendant's breach. It argues that it incurred substantial hedging losses and other specific items of loss and expense as a result of the defendant's breach which far exceed its profits in either of these senses. These other items of loss and expense include demurrage, heating costs, financing costs and insurance costs. [note: 39] The result of all of this additional loss and expense is to leave the plaintiff substantially worse off financially than it would have been if not for the defendant's breach.

34 In March 2011, the plaintiff demanded that the defendant pay within one week the sum of US$10.17m as compensation for the defendant's breach of the Supply Contract. The defendant did not satisfy this demand, either within one week or at all.

The arbitration

35 On 7 April 2011, the plaintiff commenced arbitration against the defendant. [note: 40] Each party nominated one arbitrator and the SIAC nominated the presiding arbitrator. The Tribunal was duly constituted in July 2011. [note: 41]

The plaintiff's case in the arbitration

On liability

36 The plaintiff's case in the arbitration on liability was straightforward. The defendant was in breach of the Supply Contract because: (i) it had breached cl 6 by failing to open a letter of credit or, as later agreed, to issue a payment undertaking in its place by 16 December 2010; (ii) it had breached cl 11 by failing to secure a crude oil import licence; and (iii) it had breached cl 4 by failing

to take delivery of the Dar Blend during the delivery window. [note: 42] These three breaches taken together amounted to a repudiatory breach of the Supply Contract. [note: 43] The plaintiff had accepted that repudiatory breach. [note: 44] The defendant was thus obliged to pay damages to the plaintiff. [note: 45]

37 The important point about the plaintiff's claim is that it rested on – and only on – an allegation that the defendant was in *repudiatory* breach of the Supply Contract. Nowhere in its statement of claim did the plaintiff plead in the alternative that the defendant had breached the Supply Contract in a manner which fell short of being a repudiatory breach but which nevertheless left the defendant liable in damages to the plaintiff.

On quantum

38 The plaintiff's case in the arbitration on quantum was that the defendant's repudiatory breach of contract had caused it a total loss of US$13.48m. [note: 46] That sum comprised two components.

39 The first component was the sum of US$5.11m [note: 47] which the plaintiff claimed as the total of all the loss and expense it incurred as a result of the defendant's failure to take delivery of the Dar Blend. This loss and expense included demurrage, heating costs, financing costs and insurance costs. [note: 48]

40 The second component was the sum of US$8.37m [note: 49] which the plaintiff claimed as the difference between the plaintiff's financial position if the defendant had taken delivery of and paid for the Dar Blend in January 2011 under the Supply Contract and its financial position after the Company took delivery of and paid for the Dar Blend in March 2011. The plaintiff's case was that it would have made a profit of US$3.04m in the former counterfactual scenario; and that, by reason of the defendant's breach, it in fact suffered a loss of US$5.32m [note: 50] in the latter actual scenario. The difference between those two positions – one being a profit and the other a loss – is US$8.37m.

41 This US$8.37m component of the plaintiff's claim requires further explanation. Between December 2010 and March 2011, the plaintiff entered into a series of contracts to hedge its exposure under the Supply Contract. The plaintiff's evidence in the arbitration was that hedging in this way is a normal part of an oil trader's risk management. It therefore claimed its losses on these hedging contracts as losses which were within the parties' contemplation and which were therefore recoverable as damages.

42 By the delivery window in January 2011, the plaintiff had lost US$4.01m [note: 51] on its hedging positions. Thus, the plaintiff quantified the profit it would have earned if the defendant had taken delivery of the Dar Blend by charging the defendant with the hypothetical profit of $7.05m and then giving credit to the defendant for US$4.01m, [note: 52] being the plaintiff's actual hedging losses up to the delivery window. The difference between those two figures leaves a net profit of US$3.04m from the hypothetical transaction with the defendant.

43 The defendant's breach of contract meant, however, that the plaintiff's exposure to the oil market's fluctuations continued until March 2011, when it finally found a buyer for the Dar Blend, and did not end, as it should have, by the delivery window. Therefore, the plaintiff was compelled to continue to hedge its exposure under the Supply Contract up to March 2011. By that date, its hedging losses had ballooned from US$4.01m to US$14.09m. [note: 53] To compute its actual profit on

the sale to the Company, therefore, the plaintiff credited the defendant with the actual profit of US$8.77m and then charged against that figure its total hedging losses up to March 2011 of US$14.09m to arrive at a loss of US$5.32m.

44 All of that can be summarised in the following two tables: [note: 54]

Plaintiff's hypothetical position in January 2011 if the defendant had taken delivery of the Dar Blend

(a)	Anticipated profit on Supply Contract (*ie*, sum due from the defendant in January 2011 less the plaintiff's cost price)	US$7,051,139.20
(b)	Less the plaintiff's hedging losses from December 2010 to January 2011	(US$4,008,059.44)
	Profit/(loss)	**US$3,043,079.76**

Plaintiff's actual position in March 2011 because the defendant failed to take delivery of the Dar Blend in January 2011

(a)	Actual profit on sale to the Company (*ie*, sum paid by the Company in March 2011 less the plaintiff's cost price)	US$8,770,312.87
(b)	Less the plaintiff's hedging losses from December 2010 to March 2011	(US$14,094,733.44)
	Profit/(loss)	**(US$5,324,420.57)**

The defendant's defence in the arbitration

45 In the arbitration, the defendant raised four defences which are relevant for present purposes. The defendant pleaded each defence as an alternative to the preceding defences and without prejudice to its position on those preceding defences: The four defences are as follows:

(a) The defendant was not in breach of the Supply Contract. [note: 55]

(b) The defendant was not in *repudiatory* breach of the Supply Contract. [note: 56]

(c) The plaintiff had not validly communicated its acceptance of the repudiatory breach. [note: 57]

(d) The plaintiff had suffered no recoverable loss as a result of the repudiatory breach. [note: 58]

46 It is useful at this point to expand on the defendant's reasons for arguing that it was not in breach of the three obligations under the Supply Contract which the plaintiff relied upon for its claim:

[note: 59]

(a) The plaintiff had waived the defendant's performance of its obligation under cl 6 of the Supply Contract; [note: 60] alternatively, the plaintiff had continued to take steps to perform its obligations under the Supply Contract notwithstanding the defendant's breach of cl 6; and the plaintiff was therefore precluded from relying on the breach of cl 6 to justify its failure to perform its own obligations under the Supply Contract. [note: 61]

(b) It was the plaintiff who was in breach of the Supply Contract [note: 62] because it had had no intention of delivering the Dar Blend to the defendant [note: 63] and in fact failed to deliver the Dar Blend to the defendant at all; [note: 64] alternatively, the defendant had no obligation under cl 11 of the Supply Contract to secure a crude oil import licence; [note: 65] alternatively the effect of the defendant's breach in failing to secure a crude oil import licence would have been cured contractually by the operation of the Buy-back Contract; [note: 66] alternatively, the plaintiff was estopped from requiring the defendant to have a crude oil import licence because it proceeded to load the Tantive IV knowing that the defendant did not have that licence. [note: 67]

(c) The defendant was not in breach of its obligation to take delivery of the Dar Blend because it was in fact the plaintiff who had committed a repudiatory breach of the Supply Contract when it took the unilateral decision of its own volition not to deliver the Dar Blend during the delivery window without contractual justification. [note: 68]

47 By reason of this final point (at [46(c)] above), the defendant asserted a cross-claim for damages for non-delivery against the plaintiff and claimed a right to set-off those damages against any damages found to be due to the plaintiff. [note: 69]

The jurisdictional hearing

48 In addition to the substantive defences which I have outlined above, the defendant also raised a jurisdictional objection, arguing that the Supply Contract was a forgery, thereby depriving the Tribunal of any jurisdiction over it. The Tribunal directed that the defendant's jurisdictional objection be heard as a preliminary issue, with evidence. It made the usual provisions for *viva voce* evidence and for submissions on the jurisdictional objection to be exchanged in advance of the hearing.

49 The jurisdictional hearing took place on 5 and 6 December 2011. The evidence of each side's witnesses was tested by cross-examination in the presence of the Tribunal. The plaintiff adduced evidence from four witnesses of fact [note: 70] and one expert witness. [note: 71] The defendant adduced evidence from six witnesses of fact [note: 72] and one expert witness. [note: 73] Owen was one of the plaintiff's witnesses of fact. Beru was not.

50 Following the jurisdictional hearing, the Tribunal received legal submissions in writing from the parties.

51 On 30 April 2012, the Tribunal notified the parties that: (i) it was disinclined at that stage to accept the defendant's jurisdictional objection; (ii) that it would proceed to hear the parties' dispute on the merits; and (iii) that it would deal conclusively with the defendant's jurisdictional challenge in its final award. [note: 74]

The hearing on the merits

52 The hearing on the merits took place from 18 to 20 February 2013. That hearing was preceded in the usual way by an exchange of pleadings, documents, witness statements and opening statements. It was followed in the usual way by an exchange of legal submissions in writing.

53 The plaintiff called only one witness of fact at the merits hearing: Beru. In addition, it relied at the merits hearing on Owen's evidence from the jurisdictional phase. It therefore did not adduce a fresh witness statement from Owen for the merits hearing or make him available for further cross-examination.

54 The defendant also called only one witness of fact at the merits hearing.

55 The crucial issue at the merits hearing was precisely why, in January 2011, Owen had taken the decision to hold the Tantive IV and its cargo of Dar Blend in Alderaan (see [23] above) rather than instructing it to sail on to Cloud City in order to be able to deliver the Dar Blend to the defendant during the delivery window. The importance of this issue could not have been a surprise to the plaintiff. The defendant had pleaded specifically that the plaintiff had never had any intention of delivering the Dar Blend to the defendant and that its failure to do so was a unilateral decision taken of its own volition (see [46(c)] above).

56 The only evidence from Owen which was before the Tribunal at the merits hearing on this issue was the transcript of his evidence given earlier at the jurisdictional hearing. His evidence there was that he had held the Dar Blend in Alderaan in January 2011 because of the defendant's failure to secure a crude oil import licence. [note: 75] He put it in two ways. First, Owen said, he and the Bank thought that the Dar Blend – which was, after all, the Bank's only security for the trade financing it had extended to the plaintiff – would be at risk if the Tantive IV sailed into Bespin's waters when the defendant as the purchaser of the Dar Blend did not have the necessary licence from the government of Bespin to take delivery of it. [note: 76] Second, Owen said, he was afraid that it would be difficult to maintain the heating necessary to keep the Dar Blend at the required temperature in the wintry conditions off Cloud City if it proved impossible to discharge the Dar Blend there because the defendant did not have a crude oil import licence. If the Dar Blend was not properly heated, its condition would deteriorate and it could solidify entirely such that it could not be discharged. [note: 77]

57 Crucially, Owen did not, in his witness statement or in his cross-examination at the jurisdictional hearing, cite the defendant's failure to issue the payment undertaking as a reason for his decision to hold the Dar Blend in Alderaan in January 2011.

The award

58 The Tribunal issued its award on 21 January 2014. [note: 78] In the award, the Tribunal frames the issues before it in the following passage: [note: 79]

> 196. From the parties' respective positions, submissions and requests for relief, the following issues fall to be decided by the Arbitral Tribunal.
>
> (a) Does the Arbitral Tribunal have jurisdiction over this dispute?

(b) Is the Supply Contract valid and enforceable?

(c) If the Supply Contract does bind the [defendant], did the [defendant] breach the Supply Contract by:

(i) Failing to provide a letter of credit or other appropriate security;

(ii) Failing to obtain a crude import licence;

(iii) Failing to take delivery of the consignment; and/or

(iv) Were any such breaches, individually or together, repudiatory breaches of the Supply Contract, and if so, did the [plaintiff] validly accept the [defendant's] repudiatory breach.

(d) If the [defendant] did breach and/or repudiate the Supply Contract, what damages, if any, is the [plaintiff] entitled to?

(e) Is either party entitled to its costs and, if so, in what amount?

197. In the remaining sections of this award, each of these issues will be considered and determined in turn by reference to the parties' written and oral submissions and the evidence on the record of this arbitration.

198. The summaries below canvas the parties' principal arguments, as expressed in their written and oral submissions. Due to the extensive nature of these submissions, the Tribunal does not intend to provide an exhaustive account of all arguments developed by the parties in support of their respective positions. The entirety of the parties' submissions have, however, been taken into consideration by the Tribunal.

59 Issues (c) and (d) are the only issues material to the application before me. I now summarise the Tribunal's reasoning on these two issues. I need not and do not deal with the Tribunals' reasoning on the three remaining issues.

Issue (c) – repudiatory breach of contract

60 The Tribunal begins this section of its award by summarising the parties' cases. Thus, it notes that the plaintiff's case is that the defendant committed three breaches of the Supply Contract (see paragraph [196(c)(i) to (iii) of the Award cited at [58] above) amounting to a repudiatory breach; and that the plaintiff accepted the defendant's repudiation, thereby releasing the plaintiff from its obligation to deliver the Dar Blend to the defendant in Cloud City within the delivery window: [note: 80]

> The [plaintiff] contends that a series of significant breaches were committed by the [defendant] between mid-December 2010 and mid-January 2011 that were repudiatory of the Supply Contract. According to the [plaintiff], these breaches comprised: the [defendant's] failure to provide a letter of credit or other form of performance security; the [defendant's] failure to obtain a crude import licence; and the [defendant's] failure to accept delivery of the cargo. It is the [plaintiff's] position that these breaches led it to discontinue its own performance of the Supply Contract before the cargo was delivered to the point of delivery at [Cloud City] ... .

61 The Tribunal then summarises the defendant's defence, which I have set out in more detail at [45]–[47] above: [note: 81]

> In response, ... the [defendant] denies each and every one of the [plaintiff's] allegations of breach. Specifically, it notes that the [plaintiff] itself chose to proceed with the early stages of its performance of the Supply Contract notwithstanding the absence of a letter of credit or other form of security; it contends that the Supply Contract did not impose an obligation to obtain a crude import licence; and it observes that the [plaintiff] itself chose not to perform its own obligation to deliver the cargo to the contractual delivery point, thereby neutralising any claim against the [defendant] that it failed subsequently to take delivery of a cargo that never made it to the delivery point.

62 The Tribunal then analyses separately the three breaches of the Supply Contract alleged by the plaintiff before considering the three breaches all together. This section of the award commences with the following paragraph: [note: 82]

> Although these claims of breach, and the defences thereto, cannot be examined entirely in isolation, the Tribunal considers that a rigorous analysis requires that they be considered in turn, albeit without losing sight of their relationship.

First alleged breach – letter of credit or payment undertaking

63 On the first alleged breach, the Tribunal finds that the defendant's failure to issue a letter of credit or a payment undertaking by 16 December 2010 was indeed a breach of cl 6 of the Supply Contract. [note: 83] However, the Tribunal finds that the plaintiff nevertheless chose, in December 2010, to perform its obligations under the Supply Contract. For this finding, the Tribunal relies on the evidence of Beru in the merits hearing. She testified that, despite the defendant's failure to comply with cl 6 of the Supply Contract at the time the Tantive IV set sail from Port Sudan to Alderaan, the defendant's Confirmation Letter received on 13 December 2010 (see [16] above) was sufficient assurance for the plaintiff that the defendant was working on the payment undertaking and would eventually issue it to the plaintiff. The Tribunal therefore holds that, on the plaintiff's own case, it did not, in December 2010, accept the defendant's breach of cl 6 as a repudiatory breach. The Tribunal holds instead that the plaintiff did quite the opposite: that the plaintiff in December 2010, following the breach of cl 6 of the Supply Contract, affirmed it. [note: 84] On these grounds, the Tribunal concludes that it was not in December 2010 but only in early January 2011 that the plaintiff decided to divert the Dar Blend from its intended destination at Cloud City. [note: 85]

64 The Tribunal therefore holds that the plaintiff lost the chance in December 2010 to treat the defendant's breach of cl 6 as terminating the plaintiff's own delivery obligation under the Supply Contract, even if this breach were capable of constituting a repudiatory breach. This made it unnecessary for the Tribunal to decide whether the defendant's breach of cl 6 in fact constituted a repudiatory breach. [note: 86] The Tribunal does not therefore analyse this point further.

65 The Tribunal does, however, go on to consider what rights the plaintiff did in fact have arising from the defendant's breach of cl 6. It concludes that the plaintiff had the right to withhold delivery of the Dar Blend until the defendant complied with cl 6 [note: 87] and to claim damages for the defendant's breach of cl 6. [note: 88] The Tribunal then observes that the plaintiff's sole case on liability was advanced on the basis that the defendant was in repudiatory breach of the Supply Contract. The plaintiff had thereby elected to make no claim for damages caused by any of the defendant's breaches – including a breach of cl 6 – as a single and compensable breach *falling short* of a repudiatory breach. [note: 89] But, the Tribunal opines, even if the plaintiff had pursued a claim for damages for the loss caused by a breach alone of cl 6, the plaintiff would have found it difficult to

establish that it had suffered any actual loss which was causally connected to the breach, whether in terms of reliance loss [note: 90] or in terms of expectation loss. [note: 91] The Tribunal therefore concludes that the plaintiff suffered no loss by reason of the defendant's breach of cl 6 alone. [note: 92]

Second alleged breach – crude oil import licence

66 On the second alleged breach, the Tribunal holds that the defendant had no obligation under the Supply Contract to secure a crude oil import licence. The Tribunal begins its analysis by holding that, in a contract for delivery *ex ship* such as the Supply Contract, "the buyer...has sole responsibility for obtaining any import licence, and [cannot] rely on the absence of such a licence as a valid excuse for non-performance." [note: 93] That, however, does not impose a contractual obligation on the buyer to secure a required import licence or excuse the seller from its own performance if the buyer fails to secure that licence. It simply means that when the seller delivers, the buyer cannot rely on the lack of an import licence as an excuse for failing to take delivery. The Tribunal notes, however, that the defendant was not in this case relying on the absence of a crude oil import licence to explain its failure to take delivery. [note: 94]

67 Finally, the Tribunal holds that it was not, in any event, necessary for the defendant to hold a crude oil import licence in order for the defendant to perform its obligation to take delivery of the Dar Blend under the Supply Contract. The contract, being a contract for delivery *ex ship*, permitted the defendant to take delivery of the Dar Blend in several ways other than by actually taking possession of the Dar Blend and which did not require the defendant to have a crude oil import licence. [note: 95]

68 To support its holding, the Tribunal notes that the parties' overall bargain showed that they did not consider the defendant's failure to secure a crude oil import licence to be a breach of the Supply Contract. [note: 96] It relies for this holding on the effect of the Buy-back Contract (see [13] above). The Tribunal finds it difficult to believe that the parties would have agreed that the defendant should earn a profit of approximately US$600,000 under the Buy-back Contract if the parties had also intended the defendant's failure to secure a crude oil import licence to constitute a breach of the Supply Contract.

Third alleged breach – failure to take delivery

69 The Tribunal begins its analysis of the third alleged breach by noting that the defendant's performance of its obligation to take delivery of the Dar Blend is dependent upon the plaintiff's performance of its obligation to make delivery of the Dar Blend. [note: 97] Thus, the Tribunal reasons, the defendant's failure to take delivery cannot be a breach of contract unless the plaintiff's failure to make delivery was not itself a breach. That would be the case only if the plaintiff's failure to make delivery is attributable to an antecedent breach of the Supply Contract by the defendant. [note: 98]

70 The Tribunal then notes that the plaintiff has focused primarily on the defendant's failure to obtain a crude oil import licence by early January 2011 as the plaintiff's reason for not performing its obligation to deliver the Dar Blend. The Tribunal accepts as true in point of fact Owen's evidence [note: 99] in the jurisdictional phase that he held the cargo of Dar Blend in Alderaan in January 2011 (see [56] above) because of the defendant's failure to secure a crude oil import licence. [note: 100] But the Tribunal has already held that the defendant's failure to secure a crude oil import licence was not a breach of the Supply Contract and that the defendant's obligation to take delivery was not

subject contractually to its possession of a crude oil import licence. So, the Tribunal concludes, the defendant's failure to secure a crude oil import licence cannot be a contractual justification for the plaintiff's failure to deliver. [note: 101]

71 The Tribunal's analysis up to this point means that the plaintiff's failure to deliver is a breach of contract unless it resulted from the defendant's failure to issue the promised payment undertaking. That is because that is the only one of the three alleged breaches of contract which the Tribunal has found the plaintiff to have established. It is only if that breach caused the plaintiff not to deliver that it can be said that the defendant breached the Supply Contract by failing to take delivery.

72 On this point, the plaintiff relied on the evidence given at the merits hearing by Beru. [note: 102] She testified that the reason the plaintiff did not deliver the Dar Blend to the defendant was because the Bank, as the plaintiff's financing bank, would not allow the plaintiff to discharge the cargo without the security of a payment undertaking. This was inconsistent with Owen's evidence on the same point at the jurisdictional hearing. The only reason he had given for his decision to hold the Dar Blend in Alderaan in January 2011 was the defendant's failure to secure a crude oil import licence (see [56] above). He did not, at the jurisdictional hearing, testify that he had declined to deliver because of the defendant's failure to issue a payment undertaking.

73 The Tribunal prefers Owen's evidence, discounting and ultimately rejecting Beru's evidence on this critical point. It does so for three reasons. First, Beru did not give her evidence from personal knowledge. [note: 103] It was Owen who took the decision to hold the Dar Blend in Alderaan in January 2011, not Beru. On her own evidence, Beru was one step removed from Owen's decision. Second, the Tribunal notes that Beru's evidence is not corroborated by the contemporaneous documentary record. [note: 104] Third, the Tribunal does not find her evidence convincing. [note: 105] The plaintiff's payment undertaking, unlike a letter of credit, offered the plaintiff no security for its price. The Supply Contract already obliged the defendant to pay the plaintiff for the Dar Blend. An additional and separate undertaking to make payment therefore added nothing to the defendant's existing contractual obligation to make payment. The defendant's failure to give a payment undertaking could not, in and of itself, explain the plaintiff's unwillingness to perform its obligation to deliver. The Tribunal was therefore not satisfied that the defendant's breach of contract in failing to issue a payment undertaking – as compared, for example, to a failure to provide true security for payment in the form of a letter of credit – could rationally have been the plaintiff's reason for not performing its obligation to deliver.

74 The Tribunal therefore concludes that, while the defendant's failure to issue a payment undertaking was a breach of contract, that antecedent breach was factually unconnected to the plaintiff's decision not to perform its own delivery obligation and therefore did not operate to make the defendant's failure to take delivery a breach of contract. In short, the plaintiff's failure to deliver was the result of a voluntary decision by the plaintiff and not of any antecedent breach by the defendant: [note: 106]

> For these reasons, the Arbitral Tribunal concludes that the [defendant] did not breach the Supply Contract by failing to accept delivery of a cargo [of Dar Blend] that ultimately the [plaintiff] itself chose not to deliver.

Overview of all three breaches taken together

75 As foreshadowed at the beginning of this section of the award (see [60] above), the Tribunal then takes all three of the defendant's alleged breaches into account and evaluates the plaintiff's

case in the round. [note: 107] The Tribunal's view, resulting from its prior findings, remains that the plaintiff had no contractual justification for its failure to perform its obligation to deliver: [note: 108]

> The [plaintiff's] case has been marked by its decision to discontinue its own performance of the Supply Contract (in early January 2011) before it purported to accept the [defendant's] alleged repudiatory breach (in late January 2011). In so doing, the [plaintiff] effectively anticipated the [defendant's] unwillingness to accept delivery.

76 The Tribunal concludes further that the plaintiff had no reasonable factual basis in early January 2011 on which to anticipate that the defendant would breach its obligation to take delivery, given that the plaintiff made no direct inquiries of the defendant as to whether it remained prepared to accept delivery. [note: 109] As the Tribunal says: [note: 110]

> Whilst the [plaintiff] was undoubtedly entitled under the terms of the Supply Contract to elect not to proceed with its own performance of delivery in the absence of a payment undertaking, in exercising this right prior to accepting an alleged repudiation, it lost the ability to claim [damages] for the consequences of non-delivery and non-acceptance under the Supply Contract.

77 The Tribunal thus holds that the defendant was not in repudiatory breach of the Supply Contract. The plaintiff placed before the Tribunal no alternative case against the defendant founded on a breach of the Supply Contract falling short of a repudiatory breach. This holding of the Tribunal therefore suffices to reject the plaintiff's entire case on liability.

Issue (d) – consequences of the defendant's breach

78 The Tribunal's finding that the defendant did not commit a repudiatory breach of the Supply Contract made it unnecessary for the Tribunal to consider the remaining issues put before it. In particular, it was no longer necessary for the Tribunal to determine whether the plaintiff had validly accepted the defendant's repudiatory breach. [note: 111] So too, it was no longer necessary for the Tribunal to determine the issue of damages, whether as to principle or quantum. [note: 112]

79 The Tribunal nevertheless goes on to consider all of the plaintiff's claims for damages. [note: 113] The remainder of the Tribunal's analysis which I summarise below therefore rests on the assumption, unsupported by the Tribunal's actual findings and holdings, that the defendant was in repudiatory breach of the Supply Contract and that the plaintiff had validly accepted that repudiatory breach.

Damages – contract price

80 The Tribunal holds that the plaintiff suffered no recoverable loss arising from the defendant's assumed repudiatory breach. Indeed, the Tribunal gives two reasons why the plaintiff was in fact better off because the defendant did not take delivery of the Dar Blend in January 2011. First, the plaintiff sold the cargo to the Company in March 2011 at a price which was higher in absolute terms than the price the defendant would have been obliged to pay in January 2011 (see [30] above). [note: 114] Second, if the defendant had in fact taken delivery of the Dar Blend in January 2011, that would have immediately triggered the plaintiff's own obligation to repurchase the Dar Blend under the Buy-back Contract, because the defendant had in fact failed to secure a crude oil import licence. [note: 115] Therefore, if the defendant had fulfilled its obligation to take delivery of the Dar Blend in January 2011, the defendant would have been immediately entitled to impose on the plaintiff an immediate loss of US$1 per barrel for a total loss of US$600,000 +/- 5% (see [14] above).

Damages – hedging losses

81 The Tribunal holds, further, that the plaintiff's losses on the hedging contracts would not have been recoverable as damages.

82 The Tribunal commences its analysis by accepting the evidence of the defendant's expert witness that hedging against price risk is a normal and prudent risk management strategy for a trader who sells crude oil under a contract, like the Supply Contract, which fixes the price by reference to a fluctuating market price. [note: 116]

83 The Tribunal then examines the case law on the recoverability, or otherwise, of hedging losses as damages. It holds that such losses are recoverable in principle within the first limb of *Hadley v Baxendale* (1854) 9 Exch 341; 156 ER 145 ("*Hadley v Baxendale*"), but that whether they were in fact recoverable under that limb depends in each case on whether the losses are reasonably foreseeable and on whether it can be said that the contract-breaker had taken responsibility for those losses. [note: 117]

84 On the facts before it, the Tribunal finds that the defendant could not reasonably have foreseen the plaintiff's hedging losses. First, the defendant could not be presumed to have knowledge of what was the normal and prudent practice of oil traders. It was not an oil trader itself, it had never dealt with the plaintiff before entering into the Supply Contract and the plaintiff had adduced no evidence that the defendant had a track record of dealing with other oil traders from which it could be taken to have the necessary knowledge that a prudent oil trader in the plaintiff's position would normally hedge. Second, the hedging losses in this case were not reasonably foreseeable because it was not the plaintiff who had entered into the hedging transactions itself, but its parent company. [note: 118]

85 The Tribunal also held that the plaintiff could not recover the hedging losses as consequential loss under the second limb of *Hadley v Baxendale*. First, the Supply Contract had an express clause excluding liability for consequential loss. [note: 119] Second, there was no evidence that the plaintiff had made the hedging transactions known to the defendant, whether before or after entering into the Supply Contract. [note: 120] Third, the hedging losses which the plaintiff incurred up to 4 January 2011 would have been incurred with or without the defendant's assumed repudiatory breach of contract. [note: 121] And finally, the plaintiff's hedging losses after 4 January 2011 were even more remote than its earlier hedging losses. [note: 122] The Tribunal holds that the plaintiff should have acted to mitigate its loss by not automatically rolling over its existing hedging positions but instead by actively considering how to balance the risk of the price of Brent crude oil rising or falling in absolute terms against the risk of Dar Blend's discount to Brent crude rising or falling. [note: 123]

86 Finally, the Tribunal finds that the hedging losses were magnified by a crisis in Libya in early 2011 which was "a significant intervening event that hugely exacerbated the extent of the [plaintiff's] losses". [note: 124] The Tribunal did not consider that it would be reasonable to throw these magnified losses onto the defendant: (i) when it was the plaintiff's parent who made the decision to continue rolling over the hedging transactions; (ii) when the defendant was not even aware that these hedging transactions were in place; and (iii) when the hedging losses exceeded the difference between the Supply Contract's price and the actual sale price by more than 500%. [note: 125]

Damages – specific items of other losses

87 The Tribunal then goes on to consider the specific items of other loss and expense which the plaintiff claimed (see [39] above). The Tribunal's view is that, if it had been necessary for the Tribunal to deal with these items of loss, it would have rejected each of them for one or more of the following reasons:

(a) the loss claimed arose from a voluntary decision taken by the plaintiff and did not follow necessarily from the defendant's alleged breach; [note: 126]

(b) the loss claimed, whether taken alone or with the other losses claimed, would not have exceeded the additional US$1.72m which the plaintiff earned on the sale of the Dar Blend to the Company by reason of the fluctuation in crude oil prices between January 2011 and March 2011; [note: 127]

(c) the plaintiff had produced insufficient evidence to establish a causal connection between the loss claimed and the defendant's alleged breach; [note: 128]

(d) the loss claimed was consequential loss which was irrecoverable either because of the exclusion clause in the Supply Contract or because the plaintiff failed to prove that the defendant had special knowledge of the likelihood of that loss; [note: 129] or

(e) the loss had been suffered by the plaintiff's parent and not by the plaintiff itself. [note: 130]

The challenge to the award

The grounds of challenge

88 The plaintiff now seeks to set aside the Tribunal's award on the following grounds:

(a) Under s 24(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the Act") on the basis that the Tribunal breached the rules of natural justice in making its award and thereby prejudiced the plaintiff's rights. In conjunction with this ground, the plaintiff also argues that it was unable to present its case in the arbitration within the meaning of Article 34(2)(*a*)(ii) of the Model Law and that the Tribunal failed to extend to the plaintiff equality of treatment within the meaning of Article 18 of the Model Law.

(b) Under Article 34(2)(*a*)(iii) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ("Model Law"), on the grounds that the award either: (i) deals with a dispute outside the submission to arbitration; or (ii) decides matters beyond the scope of the submission to arbitration.

(c) Under Article 34(2)(*a*)(iv) on the grounds that the arbitral procedure was not in accordance with the parties' agreement.

89 In particular, and in summary, the plaintiff makes the following arguments: [note: 131]

(a) The Tribunal breached the *audi alteram partem* rule [note: 132] of natural justice as a result of which the plaintiff was unable to present its case in connection with the Tribunal's decision, both on liability (summarised above at [60]–[76]) and on damages (summarised above at [77]–[87]).

(b) The Tribunal dealt with matters outside the scope of the submission to arbitration when it considered the Buy-back Contract in order to decide: (i) that the defendant was under no contractual obligation to secure a crude oil import licence (see [66]–[68] above); and (ii) that the plaintiff had suffered no recoverable loss (see [80] above).

(c) The Tribunal adopted a procedure which was not in accordance with the agreement of the parties when it failed to accord equal weight to the evidence of Owen in the jurisdictional hearing to that of Beru in the merits hearing when making its determination (see [70]–[73] above).]

(d) There is a reasonable suspicion that the arbitrator nominated by the defendant was biased against the plaintiff; and that his bias had influenced the other two members of the Tribunal against the plaintiff.

The law

90 Because the contest between the parties is on the application of the law to the facts rather than on the law itself, I can state the law briefly.

Natural justice

91 The plaintiff seeks to set aside the Tribunal's award under s 24(*b*) of the Act on the grounds that "a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of the plaintiff have been prejudiced."

92 It is well-established that a party who seeks to set aside the award of an arbitral tribunal under s 24(*b*) must establish:

(a) Which rule of natural justice was breached;

(b) How that rule was breached;

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

(d) How the breach prejudiced the party's rights.

The authorities for these propositions are *John Holland Pty Ltd (formerly known as John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 at [18]; *Soh Beng Tee & Co v Fairmont Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [29]; *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*L W Infrastructure*") at [48].

93 The two rules of natural justice are the rule against bias and the fair hearing rule.

94 The rule against bias requires a tribunal to bring to its decision-making function a mind which is impartial both in reality and in appearance. The plaintiff relies on apparent bias rather than actual bias. The rule against bias will be infringed on grounds of apparent bias if a reasonable and fair-minded person observing the proceedings and knowing all the relevant facts would have a reasonable suspicion that a fair determination of the dispute is not possible: *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 1 SLR(R) 791 at [79]–[83]; *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 at [91].

95 The fair hearing rule has two components on which the plaintiff relies in this challenge. The plaintiff relies first on the principle that a tribunal should not base its decision on a point not submitted to it or a matter not argued before it; and should allow the parties to address it on all key issues: *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 at 15 ("*Zermalt*"); *Interbulk Ltd v Aiden Shipping Co Ltd (The Vimeira)* [1984] 2 Lloyd's Rep 66 at [74]–[75]; and *Koh Brothers Building and Civil Engineering Contractor Pte Ltd v Scotts Development (Saraca) Pte Ltd* [2002] 2 SLR(R) 1063 at [47]; *Soh Beng Tee* at [65].

96 The plaintiff also relies on the principle that a tribunal cannot disregard an argument or a submission made by a party without directing its judicial mind to the merits of that argument or submission through an active process of intellectual reasoning: *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 at [31]–[39]; *Laing O'Rourke Australia Construction Pty Ltd v H&M Engineering & Construction Pty Ltd* [2010] NSWSC 818 at [38]–[39].

97 To that I would add only two points. First, a tribunal is not required to refer every issue which falls for decision to the parties for submissions. A tribunal's decision may be considered unfair only when a reasonable litigant in the position of the party challenging the award could not have foreseen the possibility of the tribunal's actual reasoning in the award: *Soh Beng Tee* at [65(d)]; *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW*") at [32]. Second, a tribunal is not confined on each disputed issue before it merely to making a binary choice between the diametrically-opposed positions taken by the parties on that issue. The tribunal may legitimately arrive at a finding which falls between the two parties' submissions so long as the finding is supported by the evidence and does not constitute a dramatic departure from the parties' positions: *Soh Beng Tee* at [65(e)].

98 The plaintiff also alleges that it was unable to present its case within the meaning of Article 34(2)(*a*)(ii) of the Model Law and that the Tribunal denied it equal treatment and a full opportunity to present its case within the meaning of Article 18 of the Model Law. Its reliance on those provisions does not add anything to its case under s 24(*b*) of the Act. I therefore need not analyse those provisions in greater detail.

Dealing with matters beyond the scope of the submission

99 The plaintiff seeks to set aside the Tribunal's award also under Article 34(2)(*a*)(iii) of the Model Law on the grounds that the award "deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration."

100 In considering whether to set aside an award under Article 34(2)(*a*)(iii) of the Model Law, the Court must consider two questions:

(a) What matters were within the scope of the submission to the tribunal; and

(b) Whether the award confined itself to such matters or whether it strayed into resolving a new difference outside the scope of the submission to arbitration and therefore irrelevant to the issues requiring determination.

The authority for this proposition is *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [44].

Procedure not in accordance with parties' agreement

Procedure not in accordance with parties' agreement

101 The plaintiff also seeks to set aside the Tribunal's award also under Article 34(2)(*a*)(iv) of the Model Law on the grounds that "the arbitral procedure was not in accordance with the agreement of the parties".

102 The plaintiff points out that the ground for setting aside an award under Article 34(2)(*a*)(iv) of the Model Law is very similar to the ground for refusing to recognise an award under Article V(I)(*d*) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). The plaintiff then relies on *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 – Commentary* (Reinmar Wolff gen ed) (C.H. Beck, Hart and Nomos, 2012) [note: 133] to submit that the elements to be satisfied to resist enforcement under Article V(I)(*d*) of the New York Convention:

(a) There must be an agreement between the parties on a particular arbitral procedure;

(b) The tribunal must have failed to adhere to that agreed procedure;

(c) The failure must be causally related to the tribunal's decision in the sense that the decision could reasonably have been different if the tribunal had adhered to the parties' agreement on procedure; and

(d) The party mounting the challenge will be barred from relying on this ground if it failed to raise an objection during the proceedings before the tribunal.

The plaintiff submits by analogy that these elements suffice also to satisfy the ground for setting aside an award under Article 34(2)(*a*)(iv) of the Model Law. I accept that submission.

Actual prejudice

103 A party who seeks to set aside an award under s 24(*b*) of the Act must show that it has suffered actual prejudice by reason of the tribunal's breach of the rules of natural justice: *Soh Beng Tee* at [65(f)]; *L W Infrastructure* at [54]. The test of actual prejudice is not whether the tribunal *would definitely* have arrived at a different result if not for the tribunal's breach of the rules of natural justice which, *ex hypothesi*, the challenging party has established. As explained by the Court of Appeal in *L W Infrastructure* at [54], the test is whether the tribunal *could reasonably* have arrived at a different result if not for that breach:

> ... [I]t is important to bear in mind that it is never in the interests of the court, must 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 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. 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 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 ... [emphasis in original]

104 The same principle applies when a party seeks to set aside an award on the ground that the award deals with a dispute outside the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission within the meaning of Article 34(2)(a)(iii) of the Model Law: *CRW* at [32]. That same principle must also apply when a party seeks to set aside an award on the grounds that the arbitral procedure was not in accordance with the parties' agreement within the meaning of Article 34(2)(*a*)(iv) of the Model Law.

105 It is therefore for the party seeking to set aside the award on each of these grounds to show not only that the award is tainted in a particular respect by a procedural defect, but that it has also suffered actual prejudice by reason of that particular procedural defect because the tribunal *could reasonably have* arrived at a different result if not for that defect.

Breach of natural justice – *audi alteram partem*

On liability

Whether the defendant breached cl 6

106 The key point which underpins the plaintiff's submission on this aspect of its challenge is that its case before the Tribunal was that: (i) the plaintiff suspended its own performance under the Supply Contract in December 2010; and (ii) it did so because the defendant had by that date had breached cl 6 of the Supply Contract by failing to issue either a letter of credit or a payment undertaking by 16 December 2010. [note: 134]

107 The plaintiff then submits that the defendant's admitted breach of cl 6 gave rise to the following three issues for the Tribunal's decision: [note: 135]

(a) Whether this breach amounted to a repudiatory breach of the Supply Contract;

(b) Whether this breach entitled the plaintiff not to perform its own delivery obligation under the Supply Contract; and

(c) Whether this breach alone caused the plaintiff any loss or damage.

108 The plaintiff submits that the Tribunal breached natural justice in arriving at the following findings on these three issues; further or alternatively, that the plaintiff was unable to present its case in respect of the following findings:

(a) That the plaintiff did not suspend its performance under the Supply Contract in December 2010 but only in January 2011;

(b) That the defendant's breach of cl 6 was not a repudiatory breach of the Supply Contract; and

(c) That the defendant's breach of cl 6 did not cause the plaintiff any recoverable loss.

109 It is useful now to set out the Tribunal's reasoning on these issues: [note: 136]

371. ...[I]t is not in dispute that the [defendant] did not provide a payment undertaking or other

form of security by 16 December 2010. As such, the [defendant] was in breach of an express obligation under the Supply Contract.

372. This notwithstanding, the [plaintiff] chose not to send the [defendant] a notice of breach under the Supply Contract. Moreover, it chose nevertheless to proceed with its performance of the early stage of the delivery of the contractual cargo until at least the beginning of January 2011. It was only then that the [plaintiff] decided to divert the cargo from its intended destination at the delivery point at [Cloud City] ... and this diversion was due primarily to its discovery that the [defendant] had not obtained a crude import licence by the end of 2010.

373. In explaining why it elected to proceed with its own performance notwithstanding the absence of an alternatively agreed form of security by 16 December 2010, the [plaintiff] has relied during the merits phase of this arbitration in particular on the evidence of [Beru]. As the Finance Manager of the [plaintiff], [Beru] explained during her cross-examination that the receipt of the Confirmation Letter on 13 December 2010 was a form of assurance that the [defendant] would be issuing the payment undertaking to the [plaintiff] at some point in time.

374. In so submitting, the [plaintiff] effectively acknowledged that, whilst it did not waive entirely the obligation imposed on the [defendant] to provide a payment undertaking, it did not accept the failure to make provision of a security by 16 December 2010 as a repudiation of the Supply Contract, thereby bringing it to an end. Instead, on its own case, the [plaintiff] can be taken to have affirmed the contract, even if the non-provision of security would have qualified as a repudiatory breach (on which question the Tribunal need not opine).

110 The plaintiff's submission on these paragraphs of the Award appear at [105]–[110] of its written submissions. I set out these paragraphs in full below, striking through the words in those paragraphs which counsel for the plaintiff withdrew in the course of her oral submissions and double-underlining the words which she added. The single underlining in the extract below appears in the original submissions.

105. The Tribunal's finding at [372] of the award completely contradicted the evidence, submissions and arguments made by the [plaintiff] which shows that the opposite was true..., and patently demonstrated the Tribunal's complete misunderstanding of the [plaintiff's] case. Notwithstanding the unchallenged and undisputed evidence adduced by the [plaintiff] that it suspended performance of the Supply Contract from December 2010 upon the [defendant's] failure to provide a letter of credit / payment undertaking by the contractually stipulated deadline of 16 December 2010 ... the Tribunal surprisingly found ~~without referring to , let alone addressing any of the [plaintiff's] evidence, submissions and arguments~~ that the [plaintiff]..."chose nevertheless to proceed with its performance of the early stage of delivery of the contractual cargo until at least the beginning of January 2011." Such a finding flies in the face of the [plaintiff's] evidence, submissions and arguments ... which were ~~entirely~~ omitted from any ~~mention~~ *analysis* in the award. The only reasonable inference which can be drawn from this must be that the Tribunal somehow chose to reach this finding at [372] of the Award on its own basis, and that the Tribunal failed to properly understand and consider the evidence, submissions and arguments put forward by the [plaintiff].

106. Indeed, the award gave no hint whatsoever that the Tribunal considered the [plaintiff's] evidence, submissions and arguments .... [with] "an active process of intellectual engagement". ... The award is also oddly silent on the reasoning process that led the Tribunal to its finding at [372] of the award. The Tribunal did not ~~cite~~ *analyse* any evidence, submissions and arguments in support of its finding, not to mention any reasoning or discussion on the basis for such a finding.

This leads inevitably to the inference that the Tribunal had either improperly disregarded or at the very least failed to engage with the [plaintiff's] evidence, submissions and arguments in reaching the finding which runs contrary to undisputed and unchallenged evidence and departed in a significant respect from the [plaintiff's] evidence, submissions and arguments.

...

108. The fact that the Tribunal had failed to understand and consider the [plaintiff's] evidence, submissions and arguments and/or improperly regarded them is further apparent from [373] of the Award, where the Tribunal found that the [plaintiff's] explanation as to "*why it elected to proceed with its own performance notwithstanding the absence of [the letter of credit / payment undertaking] by 16 December 2010*", was based on [Beru's] evidence that the [plaintiff] had assurance from the [defendant's] confirmation letter that the [defendant] would be issuing the payment undertaking to the [plaintiff] at some point in time.

109. However, a perusal of [Beru's] evidence in its context would make it apparent that [Beru's] evidence was not given as the [plaintiff's] explanation as to "why it elected to proceed with its own performance *notwithstanding the absence of the [letter of credit / payment undertaking] by 16 December 2010*", but in response to the question as to why the [plaintiff] did not provide any formal notice or demand to the [defendant] to provide the payment undertaking ... .

110. In fact, it has always been the [plaintiff's] case that it had never elected to proceed with its own performance under the Supply Contract when it did not receive the [defendant's] letter of credit / payment undertaking by the contractually stipulated date ... . The [plaintiff's] case has always been that because the [defendant] did not provide the letter of credit / payment undertaking by 16 December 2010 (or at any time thereafter), the [plaintiff] was not obliged to deliver the Dar Blend, and hence did not give instructions to the [Tantive IV] to sail to [Bespin] since 17 December 2010 and took no steps towards delivering the Dar Blend to [the defendant]. The Tribunal's finding at [372] of the award in itself, shows a fundamental misunderstanding by the Tribunal of [the plaintiff's] evidence, submissions and arguments, which led to the Tribunal's disregard of the [plaintiff's] case without first understanding and considering the merits of the [plaintiff's] case, and constitutes a clear breach of natural justice.

[Emphasis in original in italics and underline, footnotes omitted]

111 The plaintiff's submissions continue in the same vein at [110]: [note: 137]

... [I]t is difficult to see how the Tribunal, if it had truly understood and considered the [plaintiff's] evidence, submissions and arguments, could possibly have come to the (wrong) conclusion at [372] to [374] of the Award that the [plaintiff] had elected to proceed with performance of delivery of the Dar Blend after 16 December 2010, when it is clear from the [plaintiff's] evidence, submissions and arguments...that the contrary happened. It is obvious that the Tribunal did not turn their minds to, and thus did not consider, the evidence, submissions and arguments adduced by the [plaintiff] on this.

112 I deal with each of the alleged breaches of natural justice in turn.

When did the plaintiff suspend performance?

113 On the Tribunal's first finding (see [108] above), the plaintiff's submission are as follows. The plaintiff's evidence, submissions and arguments were that it suspended its performance under the

Supply Contract as early as 16 December 2010 by not taking steps to deliver the Dar Blend to the defendant, as a response to its breach of cl 6. [note: 138] Yet the Tribunal found instead that the plaintiff exercised its right not to deliver the Dar Blend only in early January 2011. [note: 139] This shows that the Tribunal did not turn its mind to the plaintiff's evidence, submissions and arguments; [note: 140] that it completely misunderstood the plaintiff's case; [note: 141] that it arrived at this finding on its own basis; [note: 142] that it relied on the defendant's mischaracterisation of the plaintiff's case; [note: 143] and that it deprived the plaintiff of its opportunity to be heard. [note: 144]

114 This submission is misconceived.

115 The plaintiff's case on this finding is not that the Tribunal denied it natural justice by depriving it of the opportunity to put evidence, submissions and arguments on the issue before the Tribunal. The plaintiff's case, instead, is that the Tribunal denied it natural justice by not applying its mind to the plaintiff's evidence, submissions and arguments.

116 The passage which I have set out at [109] above shows that this is simply not true.

117 The Tribunal had before it two conflicting cases as to whether the defendant's breach of cl 6 meant that the plaintiff ceased to be obliged to deliver the Dar Blend under the Supply Contract. The plaintiff's case in its Statement of Claim was that, in and from December 2010, it ceased to be under any such obligation by reason of the defendant's breach of cl 6 of the Supply Contract. [note: 145] The defendant's case in its Statement of Defence was that the plaintiff was precluded from relying on the defendant's breach of cl 6 as a ground for not delivering the Dar Blend to the defendant under the Supply Contract: [note: 146]

> 44. In the premises, the [plaintiff] would be estopped and/or precluded from requiring the [defendant] under the [Supply Contract] to furnish a letter of credit/payment undertaking by 16 December 2010 and in any event, before the [plaintiff] would have been obligated to deliver oil sold under the [Supply Contract] to the [defendant].
>
> 45. In any event, the [plaintiff] continued to take steps towards performance of its obligations under the [Supply Contract] notwithstanding any alleged non-compliance of Clause 6 by the [defendant] and should not be allowed to now retrospectively rely on Clause 6 to avoid obligations that it may have under the [Supply Contract].

118 The passage I have quoted from the award at [109] above makes clear that the Tribunal did apply its mind to the evidence, submissions and arguments of both parties. Thus, the Tribunal held that the defendant's breach of cl 6 did entitle the plaintiff, on and from 17 December 2010, to suspend performance of its delivery obligation. But it held also that the plaintiff's decision on 18 December 2010 to instruct the Tantive IV to leave Port Sudan and sail to Alderaan – which, it must be remembered, instructed the vessel to sail two-thirds of the way *towards* Cloud City, even if not *to* Cloud City – amounted to the plaintiff's election to proceed with performance of its delivery obligation and thereby to affirm the Supply Contract, notwithstanding the breach of cl 6. This finding amounts simply to the Tribunal preferring the defendant's case over the plaintiff's.

119 The Tribunal's finding that the plaintiff did not suspend performance of its delivery obligation under the Supply contract in December 2010 is not affected by any breach of natural justice; nor was the plaintiff unable to present its case on this issue.

Was the breach of cl 6 a repudiatory breach?

120 On the Tribunal's second finding (see [108] above), the plaintiff's case before me is as follows. The defendant's failure to issue a letter of credit or a payment undertaking by 16 December 2010 was a repudiatory breach of the Supply Contract. [note: 147] Yet the Tribunal found that the plaintiff did not accept the defendant's failure to furnish security by 16 December 2010 as a repudiation of the Supply Contract. The Tribunal therefore expressly declined to decide the critical threshold issue whether the defendant's breach was in fact a repudiatory breach. [note: 148]

121 This submission too is misconceived.

122 The Tribunal's reasoning at [374] in the passage I have quoted at [109] above is that, *even if* the defendant's breach of cl 6 were a repudiatory breach of the Supply Contract, the plaintiff continued its performance and therefore did not accept the defendant's breach as bringing its own delivery obligation to an end. For the reasons I have set out at [113]–[119] above, the Tribunal's finding that the plaintiff continued its performance after the defendant's breach of cl 6 was not a finding reached in breach of natural justice nor was the plaintiff unable to present its case on it.

123 In light of this finding, it became unnecessary for the Tribunal to decide whether the defendant's breach of cl 6 was in fact a repudiatory breach of contract. Although that issue was one of a handful of fundamental issues before the Tribunal, a decision on that ultimate issue fell away because of the Tribunal's finding that, even assuming the defendant's breach of cl 6 to have been a repudiatory breach, the plaintiff did not accept that breach as putting its delivery obligation at an end. It is not a breach of natural justice in itself for a tribunal to decline to express a view on an issue which its chain of reasoning renders unnecessary.

124 The Tribunal's decision not to decide whether the defendant's breach of cl 6 of the Supply Contract was a repudiatory breach of that contract does not constitute a breach of natural justice; nor was the plaintiff unable to present its case on this issue.

Did the breach cause the plaintiff any recoverable loss?

125 On the Tribunal's third finding (see [108] above), the plaintiff's case before me proceeds as follows. The Tribunal expressly acknowledged that the plaintiff had not been afforded an opportunity to show what loss it had suffered by reason of the defendant's failure to open a letter of credit or to issue a payment undertaking by 16 December 2010. [note: 149] Yet, the Tribunal found that this breach had, in itself, caused the plaintiff no recoverable loss. [note: 150] The Tribunal reached this finding as a result of a frolic of its own, [note: 151] in breach of natural justice, [note: 152] depriving the plaintiff of any opportunity to present its case [note: 153] or to address the Tribunal on a key issue which was operating on the Tribunal's mind, [note: 154] and did so knowing that that is what it was doing. [note: 155]

126 This submission too is misconceived.

127 The plaintiff chose to premise its case to the Tribunal on the sole foundation that the defendant's three breaches of contract put it in repudiatory breach of the Supply Contract, which discharged the plaintiff from its own obligation to deliver the Dar Blend under the Supply Contract and entitled the plaintiff to damages for the defendant's failure to take delivery of the Dar Blend. The plaintiff concedes this in its written submissions: [note: 156]

> … The [plaintiff's] case on its loss and damage was advanced on the basis of the [defendant's] *repudiation* of the Supply Contract, considering that payment and delivery obligations are generally regarded as conditions in sales [sic] contracts, the breach of which gives the innocent party (in this case, the [plaintiff]) the right to terminate the contract and to claim for [sic] damages. Thus, the [plaintiff] did not adduce any evidence or make any arguments or submissions on the specific loss and damage caused by each singular breach [by the defendant] of the various provisions of the Supply Contract.
>
> [Emphasis original, footnotes omitted]

The defendant's case in response was simply, for the reasons set out at [45]–[46] above, to deny that it was in breach of contract, let alone repudiatory breach of contract; and that it was in fact the plaintiff who was in repudiatory breach of contract by choosing unilaterally and of its own volition not to deliver the Dar Blend. [note: 157]

128 The plaintiff's case on liability – in its pleadings, its evidence and its submissions – was therefore an all-or-nothing case. It staked its entire case on liability on being able to persuade the Tribunal to find that the defendant was in repudiatory breach of the Supply Contract. The plaintiff had to take this position because nothing less than a finding that the defendant was in repudiatory breach would have operated to excuse the plaintiff from its own delivery obligation under the Supply Contract. Without a contractual excuse for its own failure to deliver, the plaintiff would have found itself in breach of contract, unable to recover any damages at all and potentially liable to the defendant in damages (see [47] above).

129 The plaintiff's tactical choice in how it framed its case left the position before the Tribunal as follows. If the plaintiff satisfied the Tribunal that the defendant was in repudiatory breach of the Supply Contract, the plaintiff would have established a contractual justification for not delivering the Dar Blend and would succeed on liability. If the plaintiff failed to satisfy the Tribunal that the defendant was in repudiatory breach of contract, it would have no contractual justification for not delivering the Dar Blend and would lose on liability. So the plaintiff could lose on liability either if the Tribunal found that the defendant was not in breach of the Supply Contract at all (as the Tribunal did in connection with the defendant's failure to secure a crude oil import licence), or if the Tribunal found that the defendant was in breach of the Supply Contract but that the breach did not amount to a repudiatory breach (as the Tribunal did with the defendant's failure to issue the payment undertaking).

130 Crucially, the plaintiff could not put forward an alternative case that, if the Tribunal were to find the defendant in breach of the Supply Contract in any of the three respects which the plaintiff advanced, but were to hold that the breach did not amount to repudiatory breach, the defendant would nevertheless be liable to the plaintiff to pay damages for the specific individual breaches of contract found. That would have exposed the plaintiff to liability to the defendant for non-delivery.

131 In any event, for whatever reason, whether the plaintiff had suffered any recoverable loss by reason of the defendant's breach of cl 6 of the Supply Contract was not an issue which was before the Tribunal in any form, whether as the plaintiff's primary case or as its alternative case. It was therefore wholly unnecessary for the Tribunal to have considered this issue, let alone to have determined it.

132 Further, the plaintiff suffered no actual prejudice by reason of the Tribunal's decision to consider and express a view on this issue. Whatever the Tribunal said on this issue had no effect whatsoever on its ultimate decision that the defendant was not liable to the plaintiff on the case

advanced by the plaintiff. Even if the Tribunal had heard from the plaintiff on this issue, therefore, the Tribunal's ultimate decision would remain unchanged.

133 Indeed, if the Tribunal had concluded on this issue that the plaintiff had in fact suffered loss as a result of the defendant's breach of cl 6 of the Supply Contract and had awarded the plaintiff damages for that breach alone, the Tribunal would have gone beyond the case which the plaintiff had presented to the Tribunal and the defendant would have had very strong grounds to set aside the award under s 24(*b*) of the Act and under several limbs of Article 34(2)(*a*) of the Model Law.

134 The fact is that the plaintiff presented to the Tribunal, for whatever reason, an all-or-nothing case on liability. It cannot complain simply because the Tribunal has given it nothing.

135 The Tribunal's finding that the plaintiff suffered no recoverable loss arising from the breach of cl 6 does not constitute a breach of natural justice; nor was the plaintiff unable to present its case on this issue.

Whether the defendant was in anticipatory breach

136 The plaintiff submits that the Tribunal breached natural justice in arriving at its finding that the defendant was not in anticipatory breach of the Supply Contract; further or alternatively, that the plaintiff was unable to present its case on this finding in the following respects:

(a) The plaintiff's case was that the defendant's three breaches taken together constituted an actual, repudiatory breach of the Supply Contract; [note: 158] it was never the plaintiff's case that the defendant was in anticipatory breach of the Supply Contract. [note: 159]

(b) The Tribunal, "on its own basis and without notice to the plaintiff and without giving the plaintiff an opportunity to present its case on this issue, adopted the defendant's ... submissions [note: 160] in finding that the plaintiff's claim was better considered as a claim for anticipatory breach and proceeded to approach the plaintiff's claim as an anticipatory breach claim, although this was not the way that the plaintiff had framed its case". [note: 161]

137 This submission too is misconceived.

138 The relevant passage of the award which the plaintiff attacks with this submission reads as follows:

> 434. Having considered the [plaintiff's] three claims of breach individually, the Arbitral Tribunal ends by providing a brief overall evaluation of the [plaintiff's] case on breach.
>
> 435. The [plaintiff's] case has been marked by its decision to discontinue its own performance of the Supply Contract (in early January 2011) before it purported to accept the [defendant's] alleged repudiatory breach (in late January 2011). In so doing, the [plaintiff] effectively anticipated the [defendant's] unwillingness to accept delivery.
>
> 436. The evidence on which it based this anticipation was, however, limited. The absence of a payment undertaking, and unconfirmed third-party information to the effect that a crude [oil] import licence has not been obtained might – in the normal course – have led to direct written communications from the [plaintiff] to the [defendant]. The Tribunal would have expected such written communications from the [plaintiff] before any decision to discontinue performance.

> Specifically, the Tribunal would have expected the [plaintiff] to call in writing for the payment undertaking, to seek confirmation from the [defendant] directly as to whether it had obtained a crude [oil] import licence and to demand verification that the [defendant] intended to fulfil its obligation to accept delivery. In the event, no such written communications were sent. Not only is this surprising, but it indicates that the [plaintiff] had an inadequate basis on which to anticipate the [defendant's] unwillingness to accept delivery.
>
> 437. Whilst the [plaintiff] was undoubtedly entitled under the terms of the Supply Contract to elect not to proceed with its own performance of delivery in the absence of a payment undertaking, in exercising this right prior to accepting an alleged repudiation, it lost the ability to claim for the consequences of non-delivery and non-acceptance under the Supply Contract.

139 The plaintiff's submission on this passage is as follows: [note: 162]

> 147. It is plain that the Tribunal attached great weight to this question of anticipatory breach raised by the [defendant] for the first time in its Post-Hearing Submissions and which formed no part of the [plaintiff's] case. It cannot be disputed that the [plaintiff] had not been given notice of and an opportunity to deal with the [defendant's] submissions in this regard.
>
> 148. If the Tribunal thought that the [plaintiff's] claim was better considered as a claim for anticipatory breach and the [plaintiff] had not dealt with it (as is apparent from the [plaintiff's] framing of its case and its Post-Hearing Submissions), the Tribunal was obliged to give the [plaintiff] the opportunity to deal with this new issue. Critically, the Tribunal did not give the [plaintiff] such an opportunity. At no time before the Award was issued, did the Tribunal indicate that it intended to treat or re-classify the [plaintiff's] case as a claim for anticipatory breach and did not ask the [plaintiff] to submit on this issue at all. This question of anticipatory breach only became apparent when the Award was issued.
>
> 149. The Tribunal, by making findings on this issue which the [plaintiff] did not have an opportunity to address in its evidence, submission and arguments, had neither acted fairly nor given the [plaintiff] any opportunity of putting forward its case. ...
>
> [emphasis added in underline]

140 The core of the plaintiff's submission on this aspect of its case is the proposition advanced by the plaintiff at [148] of its written submissions and which I have underlined in the passage quoted at [139] above. If that proposition is correct, it means that a tribunal breaches natural justice – or denies a party a full opportunity to present its case – if the tribunal fails to advise a party on how it should better frame its own case and then fails to hear that party's submissions on the new case which the tribunal has advised it to advance. That is a startling proposition and one which I should have thought was unsupported by authority.

141 As authority for this proposition, however, the plaintiff cites the decision of Bingham J (as he then was) in *Zermalt*. In that case, an arbitrator was appointed under a rent review clause to determine the new rent for certain shop premises and made two critical findings in his award. First, he found that part of the premises were of very basic finish. Second, he found that rents achieved by smaller comparable premises on a per square foot basis could not be extrapolated arithmetically to larger premises, like the one under consideration, *ie*, without adjustment. On one reading of the award, it appeared that the arbitrator relied on these two findings to hold that the rent of the premises concerned should be lower than it would otherwise be. The landlord complained that these two points were not part of the tenant's case, were not opined upon in the parties' experts' report,

were not put by the arbitrator to the parties' experts and appeared for the first time in the arbitrator's award.

142 Bingham J said this:

> ... the rules of natural justice do require ... that matters which are likely to form the subject of decision, insofar as they are specific matters, should be exposed for comments and submissions of the parties. If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission, then again it is his duty to give the parties a chance to comment. ... It is not right that a decision should be based on specific matters which the parties have never had a chance to deal with, nor is it right that a party should first learn of adverse points in the decision against him. That is contrary both to the substance of justice and to its appearance, and on the facts of this case, I think that the landlords' case is made out.

Having found that the award gave at least the appearance of a breach of natural justice, Bingham J accordingly set aside the award under s 23(1) of the English Arbitration Act 1950.

1 4 3 *Zermalt* is quite different from the present case. In *Zermalt*, the award gave at least the appearance that the arbitrator's findings had a direct effect on his ultimate decision on the quantum of the revised rent. That is not the position in the present case.

144 By the time the Tribunal comes to this part of the award, the Tribunal has already found that: (i) the defendant breached cl 6 of the Supply Contract; (ii) notwithstanding this breach, the plaintiff had affirmed the Supply Contract in December 2010 by electing to continue with its obligation to deliver; (iii) because the plaintiff chose not to treat the breach of cl 6 as putting the plaintiff's obligation to deliver at an end, it was unnecessary for the Tribunal to decide whether this breach was capable of constituting a repudiatory breach of the Supply Contract; (iv) the defendant's failure to secure a crude oil import licence was not a breach of any of its obligations under the Supply Contract; (v) this failure was therefore incapable of constituting a repudiatory breach, not being a breach at all; (vi) the plaintiff therefore had no contractual justification for choosing not to deliver the Dar Blend to the defendant within the delivery window; and (vii) therefore, the defendant's failure to take delivery of the Dar Blend was not a breach of the Supply Contract.

145 That set of findings was sufficient in itself to reject the only case on liability which the plaintiff chose to pursue in the arbitration. That case, as the plaintiff's submissions concede, was based on the defendant's actual breach and never included an alternative case as resting on anticipatory breach.

146 It was therefore not necessary for the Tribunal even to consider the issue of anticipatory breach in the section of the award which the plaintiff attacks under this submission, *ie*, the passage commencing at [434] (see [138] above), let alone to come to a decision on it. This is quite different from the position in *Zermalt*, where the challenged findings gave at least the appearance of having led to the actual determination of the ultimate issue before the arbitrator.

147 There is no analogy to be drawn between the facts of the present case and the facts of *Zermalt*. The true analogy to be drawn to that case would have been if the Tribunal had considered the doctrine of anticipatory breach and had held that, even though the defendant was not in *actual* breach of the Supply Contract, it was in *anticipatory* breach of the Supply Contract and therefore was liable in damages to the plaintiff. In that situation, the defendant would have had a compelling

argument that it had been found liable in breach of natural justice on an unpleaded point. But that is not the situation here. The defendant has been found not liable to the plaintiff on all pleaded points. The fact that it has been found not liable to the plaintiff on an unpleaded point cannot be a cause for the plaintiff to complain.

148 The plaintiff's true complaint is not that the Tribunal breached natural justice or denied it a full opportunity to present the case which the plaintiff chose to present. The Tribunal discharged that duty. Its true complaint is that the Tribunal failed to invite the plaintiff to present an improved case, being one on which the Tribunal expressed a view after determining the case which the plaintiff had actually presented and which was unnecessary for that determination. The plaintiff put its submission this way: [note: 163]

> 148. If the Tribunal had thought that the [plaintiff's] claim was better considered as a claim for anticipatory breach and the [plaintiff] had not dealt with it (as is apparent from the [plaintiff's] framing of its case and its Post-Hearing Submissions), the Tribunal was obliged to give the [plaintiff] the opportunity to deal with this new issue. Critically, the Tribunal did not give the [plaintiff] such an opportunity. At no time before the Award was issued, did the Tribunal indicate that it intended to treat or re-classify the [plaintiff's] case as a claim for anticipatory breach and did not ask the [plaintiff] to submit on this issue at all. This question of anticipatory breach only became apparent when the Award was issued.

The plaintiff makes the same point with respect to the Tribunal's failure to hear it on the issue of whether the defendant's breach of cl 6 of the Supply Contract alone had caused the plaintiff any specific loss. [note: 164]

149 There was absolutely no obligation on the Tribunal to give the plaintiff an opportunity to deal with the issue of anticipatory breach when that issue was no part of the plaintiff's case before the Tribunal. *Zermalt* is not authority for any such obligation. The Tribunal's failure to give the plaintiff an opportunity to deal with the issue of anticipatory breach cannot conceivably amount to a breach of natural justice or to denying the plaintiff a full opportunity to present *the plaintiff's* case.

Whether the plaintiff was entitled to withhold performance

150 The plaintiff submits that the Tribunal breached natural justice in arriving at its finding that the plaintiff had no contractual entitlement under the Supply Contract not to deliver the Dar Blend to the defendant when it decided in early January 2011 to instruct the Tantive IV not to set sail from Alderaan to Cloud City; further or in the alternative, that the plaintiff was unable to present its case on this issue in the following respects:

> (a) The Tribunal fundamentally misunderstood the plaintiff's case when it held that the plaintiff's explanation for non-delivery "focused primarily on the defendant's failure to obtain a crude import licence". [note: 165] In fact, the plaintiff had decided to suspend delivery [note: 166] and discontinue performance [note: 167] as early as 17 December 2010 when it instructed the Tantive IV to sail to Alderaan instead of Cloud City, and the plaintiff did so because the defendant had failed to procure a letter of credit or to issue a payment undertaking by 16 December 2010. [note: 168]
>
> (b) The Tribunal went on a frolic of its own when it held that a payment undertaking from the defendant added nothing to its existing obligation to make payment as the buyer under the Supply Contract and, on that ground, rejected the plaintiff's evidence that it had decided to

discontinue performance of the Supply Contract in early January 2011 because the defendant had failed to issue a payment undertaking. [note: 169]

(c) The Tribunal deviated from the agreed arbitral procedure by failing to accord equal weight at the merits hearing to the evidence which Owen had given in the jurisdictional hearing [note: 170] and in finding that the evidence of Beru was insufficient to establish the plaintiff's reason for discontinuing performance in January 2011 in the absence of corroborating documentary evidence. [note: 171]

151 This submission too is misconceived.

152 By the time the Tribunal comes to consider in its award the plaintiff's reasons for not delivering the Dar Blend to the defendant, the Tribunal has already made its findings on the first two breaches which the plaintiff alleged against the defendant. First, the Tribunal has found that the defendant breached cl 6 of the Supply Contract but that the plaintiff is unable to rely on that breach as putting the plaintiff's obligation to deliver at an end. Second, the Tribunal has found that the defendant's failure to secure a crude oil import licence was not a breach of any of its obligations under the Supply Contract and was therefore incapable of constituting a repudiatory breach of that contract.

153 It is in that context that the Tribunal then turns to consider the third of the breaches alleged by the plaintiff: that the defendant breached the Supply Contract by failing to take delivery of the Dar Blend.

154 At this point of the Tribunal's reasoning, the plaintiff's entire case on liability turns on a single question of fact: why did the plaintiff decide in January 2011 not to deliver the Dar Blend to the defendant? The evidence before the Tribunal on this question was conflicting. Owen in the jurisdictional hearing had attributed the plaintiff's decision to the fact that the defendant had not secured a crude oil import licence. Beru in the merits hearing attributed the plaintiff's decision to the fact that the defendant had failed to issue a payment undertaking. Resolving this critical question of fact therefore required the Tribunal to consider, analyse and make a finding as to whose evidence, Beru's or Owen's, was more credible.

155 That is precisely what the Tribunal did. I have already summarised at [72]–[73] above the careful way in which the Tribunal approached the evidence of both Owen and Beru on this issue. It considered both witnesses' evidence, weighed the two competing and conflicting accounts and came to a reasoned decision to prefer the evidence of Owen over the evidence of Beru. The Tribunal neither fundamentally misunderstood the plaintiff's argument nor did it go on a frolic of its own.

156 As for the Tribunal's finding that the payment undertaking added nothing to the defendant's existing payment obligation under the Supply Contract, that finding came after the Tribunal had made its finding against the plaintiff on its true reason for deciding in January 2011 not to deliver the Dar Blend to the defendant. It did so because it preferred Owen's evidence over Beru's, principally because Owen was speaking from personal knowledge whereas Beru was not. The Tribunal's finding that the payment undertaking added nothing to the defendant's existing payment obligation was not the basis on which the Tribunal made its finding. Its finding on this issue caused the plaintiff no actual prejudice.

157 Further, the Tribunal's reliance on the absence of corroborating documentary evidence as a further factor for preferring Owen's evidence over Beru's evidence is not a deviation from the parties' agreed arbitral procedure. That reliance is a part of the ordinary procedure by which a finder of fact

makes findings of fact: by testing the oral evidence of a witness against the inherent probabilities and the documentary record. There is simply no basis for any suggestion that the Tribunal did not accord the same weight to the evidence led at the jurisdictional hearing as it did to evidence led at the merits hearing.

158 It is true that the Tribunal expresses the wish that it could have heard further from Owen at the merits hearing. [note: 172] It is difficult, however, to see how that wish can be connected to any breach of natural justice. It is for each party to the arbitration to decide for itself which witnesses it wishes to put forward at each phase of an arbitration, bearing in mind the questions which will be in issue in that phase. In its decision on the merits, the Tribunal gave full weight to Owen's evidence at the jurisdictional hearing. Indeed, the Tribunal gave Owen's earlier evidence in the jurisdictional hearing greater weight than it did Beru's later evidence at the merits hearing. If the plaintiff's decision not to adduce evidence from Owen at the merits hearing left an evidential gap which led to an adverse finding against it, that consequence is not one for which the plaintiff can or ought to attempt to blame the Tribunal. It is not the Tribunal's function to settle the parties' witness list. Much less is it a breach of natural justice if the Tribunal does not do so.

159 In the circumstances, the Tribunal's finding that the plaintiff had no contractual justification for its failure to deliver the Dar Bland to the defendant was not arrived at in breach of natural justice, either as a result of denying the plaintiff a full opportunity to present its case on that issue or otherwise.

On damages

Whether the plaintiff's hedging losses were recoverable

160 The plaintiff submits that the Tribunal breached natural justice in arriving at its decision that the plaintiff's hedging losses were irrecoverable; further or in the alternative, that the plaintiff was unable to present its case on this issue in the following respects:

(a) The unchallenged expert evidence adduced by the plaintiff was that: (i) hedging is a standard practice adopted by most oil companies; (ii) there is no need for the plaintiff specifically to inform the defendant that the plaintiff was hedging its exposure; (iii) the defendant is itself an established player in the oil industry and would be familiar with the practice of hedging; (iv) a trader can hedge against oil prices but not against a contractual differential as that differential varies from transaction to transaction; and (v) the plaintiff took a mechanical and standard approach towards its hedging strategy at all times, in accordance with best practices. [note: 173]

(b) The Tribunal arrived at a finding unsupported by evidence when it found that it had no basis to assume that the defendant, being a substantial oil company, was familiar with the hedging practices of oil traders like the plaintiff. [note: 174]

161 I do not accept the plaintiff's submissions that this part of the award was tainted by any of the procedural defects complained of. But, for the reasons which follow, it is not necessary for me to consider that part of the plaintiff's case for setting aside the award in any greater detail.

162 Given that the Tribunal found that the defendant was not liable to the plaintiff at all and given that that finding is not liable to be set aside on any of the grounds advanced by the plaintiff, this ground of challenge directed at the Tribunal's findings on damages cannot succeed. Whatever the Tribunal may have found on damages, and whatever procedural defects there may have been in the

procedure which the Tribunal adopted in making those findings, its findings on damages were wholly unnecessary. They made no difference whatsoever to its decision that the defendant was not liable to the plaintiff at all. They cannot conceivably have caused the plaintiff any actual prejudice.

Whether the plaintiff's other losses were recoverable

163 The plaintiff submits that the Tribunal breached natural justice in arriving at its decision that the plaintiff's other losses were irrecoverable; alternatively that the plaintiff was unable to present its case on this issue in the following respects:

(a) The Tribunal rejected the plaintiff's claims for these other losses because they fell below the immediate profit of US$1.72m which the plaintiff had made on re-selling the Dar blend to the Company at the higher market price prevailing in March 2011. [note: 175]

(b) In arriving at this conclusion, the Tribunal left out of account:

(i) the hedging losses that the plaintiff had suffered and which went hand-in-hand with the profit of US$1.72m which the Tribunal attributed to the plaintiff; [note: 176]

(ii) the plaintiff's claim for the US$1.36m in demurrage it incurred while the Tantive IV was in Alderaan from 4 January 2011 until the plaintiff sold the Dar Blend to the Company in March 2011;

(iii) the additional losses which the plaintiff incurred because the Euro, the currency in which all transactions for Dar Blend are settled because of sanctions imposed on its trade by the United States, depreciated against the US dollar; [note: 177]

(iv) the additional losses which the plaintiff suffered in order to facilitate the sale to the Company in March 2011. [note: 178]

164 For the reasons set out at [161]–[162] above, this challenge too must fail. These findings on damages too were wholly unnecessary. They made no difference whatsoever to the Tribunal's decision that the defendant was not liable to the plaintiff at all. They cannot conceivably have caused the plaintiff any actual prejudice.

Matters beyond the scope of the submission

165 The plaintiff submits that the award contains decisions on matters beyond the scope of the submission to arbitration in that the Tribunal considered and determined the following two issues arising in respect of the Buy-back Contract: (i) whether the defendant had an obligation to obtain a crude oil import licence, and if so whether the defendant breached that obligation; (ii) whether the plaintiff suffered loss and damage. [note: 179]

166 This submission too is misconceived.

167 It will be remembered that the Buy-back Contract conferred a *benefit* on the defendant [note: 180] if it failed to secure a crude oil import licence. In wrapping up its finding on whether the parties could have intended the defendant's failure to secure a crude oil import licence to be a breach of the Supply Contract, the Tribunal therefore says this: [note: 181]

409 Indeed, the parties' conclusion of a Buy-back contract is the strongest possible evidence that the parties did not consider ... an absence of a crude oil import licence to be a breach of the Supply Contract. By this Buy-back contract, the [defendant] would sell the cargo back to the [plaintiff] in circumstances in which an importation into [Bespin] was not possible because of the absence of an import licence. Whilst the [plaintiff's] [Owen] stated in his witness statement that the [plaintiff] was assured ... that the Buy-back contract was just "for show", there is nothing on the face of the Buy-back contract to suggest that its validity and enforceability should be treated differently from the Supply Contract itself. In the words of counsel for the [plaintiff]: "In a sense, you could view the buyback arrangement as a contingency plan in the event that the [defendant] was unable to obtain the crude import licence...."

410 To argue nevertheless that the [defendant's] inability to obtain a crude import licence amounted to a breach would be to suggest that the parties agreed that the [defendant] would benefit from a contractual right to re-sell to the [plaintiff] (at a higher price) under the Buy-back contract that arose as a result of its own earlier breach of the Supply Contract. Such a proposition (i.e. that a right accrues to the [defendant] as a result of its own breach) is obviously unsustainable. In entering into the Buy-back contract as a "contingency plan" in the event of an inability to obtain a crude oil import licence, the parties thereby confirmed that such an inability did not involve a breach of contract".

[original emphasis omitted]

168 To this last paragraph, the Tribunal presciently added the following footnote: [note: 182]

To be clear, the Arbitral Tribunal does not consider that it is its role or its right to decide claims under the Buy-back contract, which has its own arbitration clause. But the parties have made no claims under that contract, and that is not what the Arbitral Tribunal has done. Rather the Tribunal has considered the impact of the existence of the Buy-back contract on the better interpretation of the Supply Contract over which it does have jurisdiction.

169 The Tribunal's footnote is an absolutely correct summary of the wholly permissible use to which the Tribunal put the Buy-back Contract in the award. The Tribunal determined no issues arising in respect of the Buy-back Contract. The Tribunal merely relied on the existence and effect of the Buy-back Contract as support for its findings on the two issues listed at [165] above.

170 The existence and effect of the Buy-back contract was not in dispute in the arbitration. The plaintiff accepted before the Tribunal that the Buy-back Contract was a valid contract, albeit one whose obligations the plaintiff did not expect to materialise and which were not, in any event, triggered on the facts. [note: 183] The plaintiff also accepted in the oral closing submissions that: "In a sense, you could view the buyback arrangement as a contingency plan in the event that the defendant was unable to obtain the crude [oil] import licence, and there was no way the defendant could import the Dar Blend." [note: 184] This position was consistent with the plaintiff's position in its pleadings, [note: 185] in the evidence of Owen, [note: 186] in its written closing submissions after the jurisdictional hearing [note: 187] and in its written closing submission after the merits hearing. [note: 188]

171 The fact that the Tribunal relied on the Buy-back Contract for the purposes of making these two findings is not something that could have taken the plaintiff by surprise. The Tribunal foreshadowed to the parties that it considered the existence and effect of the Buy-back Contract to

be relevant to these two issues. The Tribunal therefore expressly invited the parties to address the Tribunal in their written closing submissions and in their oral closing submissions on the relevance of the existence and effect of the Buy-back Contract to these two issues. [note: 189] The plaintiff made submission on both issues, without objection. [note: 190]

172 Finally, the Tribunal's reliance on the existence and effect of the Buy-back Contract to arrive at these two findings caused no actual prejudice to the plaintiff. The finding that the defendant had no obligation to secure a crude oil import licence was one which the Tribunal arrived at on the construction of the Supply Contract as a whole in light of the obligations of a buyer under a contract for delivery *ex ship*. The Tribunal had concluded that the defendant had no obligation to secure a crude oil import licence even before it considered the inference to be drawn on this issue from the existence and effect of the Buy-back Contract. Further, it was wholly unnecessary for the Tribunal to consider whether the plaintiff had suffered any recoverable loss arising from the defendant's breach of its obligation to take delivery of the Dar Blend, given that the Tribunal had already found that the defendant was not in breach of contract for failing to take delivery of the Dar Blend.

173 There is no merit in the plaintiff's submission that the Tribunal's reliance on the Buy-back Contract to arrive at these two findings involved the Tribunal in straying into matters going beyond the submission to arbitration.

Reasonable suspicion of bias

174 Finally, the plaintiff complains that the conduct of the arbitrator nominated by the defendant gave rise to a reasonable suspicion of bias on his part, which justifiably raises the doubt that the other two arbitrators constituting the Tribunal may have been influenced by his bias. [note: 191]

175 The plaintiff complains about the following conduct by the defendant's nominee:

(a) He appears to have prejudged the plaintiff's claims which led him to enter into the fray with an inquisitorial cross-examination of Beru [note: 192] on a number of issues including: (i) whether the defendant had an obligation to take delivery of the Dar Blend; (ii) on the plaintiff's claim for hedging and other losses; and (iii) the buy-back arrangement.

(b) He appears not to have considered the plaintiff's claim with a detached mind because he dissented on the preliminary issue on jurisdiction and, as a result, refused to sign the award on the merits even though he agreed with the conclusions of the majority on liability and quantum. [note: 193]

176 There is absolutely no basis for an allegation even of apparent bias against the defendant's nominee. There is even less basis for an allegation that the apparent bias alleged against him somehow influenced the remaining two arbitrators. Both allegations should never have been made.

Conclusion

177 In the circumstances, I have rejected each of the plaintiff's grounds of challenge. I have therefore dismissed the plaintiff's application, with costs.

[note: 1] 2 PCB 571 at [33].

[note: 2] 2 PCB 593 at [39].

[note: 3] 2 PCB 593 at [60].

[note: 4] 2 PCB 593 at [65].

[note: 5] Witness statement of [Y] filed on 25 April 2014 at [9]; 2 PCB 1258.

[note: 6] 1 PCB 187 at [3].

[note: 7] 1 PCB 568 at [23]

[note: 8] 1 PCB 198 at [45].

[note: 9] 1 PCB 8 at [12].

[note: 10] 1 PCB 187 to 209.

[note: 11] 2 PCB 598 at [1].

[note: 12] 1 PCB 188 at [6]; 1 PCB 189 at [13]; 1 PCB 194 at [31].

[note: 13] 1 PCB 196 at [35]–[38], 1 PCB 197 at [42]–[45].

[note: 14] 1 PCB 194 at [31].

[note: 15] 1 PCB 195 at [35].

[note: 16] 1 PCB 198 at [45]–[46].

[note: 17] 1 PCB 190 at [16]; 192 at [22].

[note: 18] 1 PCB 194 at [32].

[note: 19] 1 PCB 199 at [46].

[note: 20] 1 PCB 197 at [40].

[note: 21] 1 PCB 105 at [373].

[note: 22] 1 PCB 199 at [46].

[note: 23] 1 CSK at [20].

[note: 24] 1 PCB 199 at [47]; 1 PCB 201 at [53].

[note: 25] 1 PCB 192 at [24]; 2 PCB 599 at [8].

[note: 26] 1 PCB 199 at [49].

[note: 27] 1 PCB 200 at [49].

[note: 28] 1 PCB 200 at [50].

[note: 29] 1 PCB 200 at [50].

[note: 30] 1 PCB 200 at [51].

[note: 31] 1 PCB 200 at [52].

[note: 32] 1 PCB 201 at [52].

[note: 33] 1 PCB 201 at [54].

[note: 34] 1 PCB 202 at [56].

[note: 35] 1 PCB 202 at [60].

[note: 36] 2 PCB 593 at [63].

[note: 37] 1 PCB 203 at [62].

[note: 38] 1 PCB 203 at [62].

[note: 39] 1 PCB 203 at [63].

[note: 40] 1 PCB 8 at [12].

[note: 41] 1 PCB 10 at [22].

[note: 42] 2 PCB 567–571, [23]–[33]; 2 PCB 1048–1060, [111]–[138].

[note: 43] 2 PCB 571 at [33].

[note: 44] 2 PCB 572 at [34].

[note: 45] 2 PCB 572 at [38].

[note: 46] 2 PCB 537 at [39(e)].

[note: 47] 2 PCB 616.

[note: 48] 1 PCB 203 at [63].

[note: 49] 2 PCB 616.

[note: 50] 2 PCB 616.

[note: 51] 2 PCB 616.

[note: 52] 2 PCB 616.

[note: 53] 2 PCB 616.

[note: 54] 2 PCB 616.

[note: 55] 2 PCB 588 at [39].

[note: 56] 2 PCB 593 at [60]–[61].

[note: 57] 2 PCB 588 at [62].

[note: 58] 2 PCB 588 at [68].

[note: 59] 2 PCB 588 at [39].

[note: 60] 2 PCB 588 at [39].

[note: 61] 2 PCB 590 at [45].

[note: 62] 2 PCB 591 at [48].

[note: 63] 2 PCB 591 at [49].

[note: 64] 2 PCB 591 at [48]–[49].

[note: 65] 2 PCB 591 at [50].

[note: 66] 2 PCB 588 at [54].

[note: 67] 2 PCB 591 at [59].

[note: 68] 2 PCB 591 at [48]; 595 at [66].

[note: 69] 2 PCB 593 at [66]–[67].

[note: 70] 1 PCB 16 at [46].

[note: 71] 1 PCB 24 at [81].

[note: 72] 1 PCB 15 at [44].

[note: 73] 1 PCB 16 at [45].

[note: 74] 1 PCB 29 at [105].

[note: 75] 1 PCB 118 at [424].

[note: 76] 1 PCB 200 at [50].

[note: 77] 1 PCB 200 at [51].

[note: 78] 1 PCB 1.

[note: 79] 1 PCB 51 at [196].

[note: 80] 1 PCB 101 at [358].

[note: 81] 1 PCB 101 at [359].

[note: 82] 1 PCB 101 at [360].

[note: 83] 1 PCB 104 at [371].

[note: 84] 1 PCB 104 at [373].

[note: 85] 1 PCB 104 at [372].

[note: 86] 1 PCB 105 at [374].

[note: 87] 1 PCB 105 at [376].

[note: 88] 1 PCB 105 at [377].

[note: 89] 1 PCB 105 at [378].

[note: 90] 1 PCB 106 at [380].

[note: 91] 1 PCB 106 at [381].

[note: 92] 1 PCB 107 at [383].

[note: 93] 1 PCB 112 at [406].

[note: 94] 1 PCB 112 at [407].

[note: 95] 1 PCB 112 at [408].

[note: 96] 1 PCB 112 at [409].

[note: 97] 1 PCB 116 at [421].

[note: 98] 1 PCB 117 at [422].

[note: 99] 1 PCB 118 at [424].

[note: 100] 1 PCB 118 at [425].

[note: 101] 1 PCB 118 at [425].

[note: 102] 1 PCB 104 at [373].

[note: 103] 1 PCB 119 at [429].

[note: 104] 1 PCB 119 at [430].

[note: 105] 1 PCB 119 at [431].

[note: 106] 1 PCB 120 at [433].

[note: 107] 1 PCB 120–121 at [434]–[437].

[note: 108] 1 PCB 120 at [435].

[note: 109] 1 PCB 121 at [436].

[note: 110] 1 PCB 121 at [437].

[note: 111] 1 PCB 121 at [438].

[note: 112] 1 PCB 122 at [441].

[note: 113] 1 PCB 122 at [441].

[note: 114] 1 PCB 126 at [457].

[note: 115] 1 PCB 126 at [458].

[note: 116] 1 PCB 126–128 at [463]–[465]

[note: 117] 1 PCB 130 at [474].

[note: 118] 1 PCB 130 at [475].

[note: 119] 1 PCB 125 at [454]; 1 PCB 131 [476].

[note: 120] 1 PCB 131 at [477].

[note: 121] 1 PCB 131 at [478].

[note: 122] 1 PCB 131 at [479].

[note: 123] 1 PCB 131 at [479].

[note: 124] 1 PCB 132 at [480].

[note: 125] 1 PCB 132 at [480]–[481].

[note: 126] 1 PCB 134 at [491], 1 PCB 135 [494].

[note: 127] 1 PCB 135 [496], 1 PCB 136 at [501], 1 PCB 137 at [505], 1 PCB 139 at [510].

[note: 128] 1 PCB 136 at [501], 1 PCB 139 at [510].

[note: 129] 1 PCB 137 at [505].

[note: 130] 1 PCB 137 at [505].

[note: 131] PWS page 26 at [50].

[note: 132] PWS page 28 at [55].

[note: 133] Plaintiff's Bundle of Authorities, Tab 38.

[note: 134] PWS 61 at [100].

[note: 135] PWS 53 before [93]; and 69 before [103].

[note: 136] 1 PCB 104 at [371]–[374].

[note: 137] PWS 76 at [118].

[note: 138] PWS 61 at [100].

[note: 139] PWS 78 at [123].

[note: 140] PWS 77 at [118].

[note: 141] PWS 70 at [105]; 73 at [110].

[note: 142] PWS 70 at [105]; 73 at [110].

[note: 143] PWS 79 at [124].

[note: 144] PWS 79 at [124].

[note: 145] 2 PCB 569 at [26].

[note: 146] 2 PCB 590 at [45].

[note: 147] PWS 75 at [116].

[note: 148] PWS 75 at [115].

[note: 149] PWS 80 at [126].

[note: 150] PWS 81 at [127]; 81 at [128].

[note: 151] PWS 83 at [132].

[note: 152] PWS 84 at [135]; 85 at [139].

[note: 153] PWS 84 at [134].

[note: 154] PWS 80 at [127]; 82 at [129].

[note: 155] PWS 82 at [130].

[note: 156] PWS 53 at [94].

[note: 157] 2 PCB 580581.

[note: 158] PWS 86 at [140].

[note: 159] PWS 87 at [143].

[note: 160] 2 PCB 1144 at [72][74].

[note: 161] PWS 87 at [144].

[note: 162] PWS 89 at [147]–[148].

[note: 163] PWS 89 at [148].

[note: 164] PWS 83 at [133].

[note: 165] PWS 99 at [170].

[note: 166] PWS 99 at [170].

[note: 167] PWS 104 at [172].

[note: 168] PWS 99 at [170].

[note: 169] PWS 105 at [175].

[note: 170] PWS 105 at [178]; 107 at [182].

[note: 171] PWS 107 at [182].

[note: 172] 1 PCB 118 at [426].

[note: 173] PWS 109 at [186].

[note: 174] PWS 110 at [189].

[note: 175] PWS 113 at [196].

[note: 176] PWS 113 at [197].

[note: 177] PWS 121 to 127 at [201]–[203].

[note: 178] PWS 127130 at [204]–[208].

[note: 179] PWS 9499 at [158][169].

[note: 180] 1 PCB 46 at [183].

[note: 181] 1 PCB 113 at [409][410].

[note: 182] 1 PCB 114, footnote 162.

[note: 183] 2 PCB 943 at lines 4 to 9; 2 PCB 944 line 7 to 945 line 23.

[note: 184] 2 PCB 941 at lines 13 to 16; 2 PCB 1091 at [213].

[note: 185] 2 PCB 567 at footnote 31 to [22].

[note: 186] 1 PCB 195 at [34]–[36].

[note: 187] 1 PCB 498 at [101]–[104].

[note: 188] 2 PCB 1091 at [213].

[note: 189] 2 PCB 917 at line 24 to 2 PCB 918 at line 9.

[note: 190] 2 PCB 940 at line 25 to 2 PCB 945 at line 23; 2 PCB 949 at line 17 to 2 PCB 950 at line 18.

[note: 191] PWS 130 to 131 at [209]–[210].

[note: 192] 2 PCB 1302 at [101]–[105].

[note: 193] 2 PCB 1314 at [101(ii)].