FEDERAL COURT OF AUSTRALIA

Hui v Esposito Holdings Pty Ltd [2017] FCA 648

File numbers:	VID 1192 of 2016 VID 1220 of 2016
Judge:	**BEACH J**
Date of judgment:	9 June 2017
Catchwords:	**ARBITRATION** – international commercial arbitration – application to set aside parts of partial arbitral awards – application to remove arbitrator – whether arbitrator exceeded his jurisdiction – whether arbitrator denied parties a reasonable or full opportunity to present their cases – whether applicants have suffered real unfairness and practical injustice – whether prejudgment by the arbitrator – consideration of arts 12, 18, 34(2)(a)(ii) and (iv) and 34(2)(b)(ii) of the *UNCITRAL Model Law on International Commercial Arbitration* – application granted
Legislation:	*International Arbitration Act 1974* (Cth) ss 2D, 16, 18A, 18C, 19, 39 *UNCITRAL Model Law on International Commercial Arbitration* arts 5, 12, 13, 18, 19, 34(2)(a)(ii), 34(2)(a)(iv), 34(2)(b)(ii)
Cases cited:	*AKN v ALC* [2015] SGCA 63 *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326 *Corporacion Transnacional de Inversiones SA de CV v STET International SpA* (1999) 45 OR (3d) 183 *Dalcon Constructions Pty Ltd v Chu* [2002] WASCA 290 *Indrisie v General Credits Ltd* [1985] VR 251 *Interbulk Ltd v Aiden Shipping Co Ltd; The Vimeira* [1984] 2 Lloyd's Rep 66 *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 633; [2011] SGHC 171 *Lovell Partnerships (Northern) Ltd v AW Construction plc* (1996) 81 BLR 83 *Modern Engineering (Bristol) Ltd v C Miskin & Son Ltd* [1981] 1 Lloyd's Rep 135 *R v Gough* [1993] AC 646 *Secretary of State for the Home Department v Raytheon*

	Systems Ltd [2015] EWHC 311 (TCC); [2015] 1 CLC 466 *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131 *SL Sethia Liners Ltd v Naviagro Maritime Corporation (The Kostas Melas)* [1981] 1 Lloyd's Rep 18 *TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 *Terna Bahrain Holding Company WLL v Bin Kamil Al Shamsi* [2013] 2 CLC 1 *Trustees of Rotoaira Forest Trust v Attorney General* [1999] 2 NZLR 452 *Tuta Products Pty Ltd v Hutcherson Bros Pty Ltd* (1972) 127 CLR 253
Date of hearing:	23 and 24 March 2017
Registry:	Victoria
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Sub-area:	International Commercial Arbitration
Category:	Catchwords
Number of paragraphs:	259
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Counsel for the Second and Third Respondents in VID 1192 of 2016 and First and Second Applicants in VID 1220 of 2016:	Mr MR Scott QC with Mr CP Young
Solicitors for the Second and Third Respondents in VID 1192 of 2016 and First and Second Applicants in VID 1220 of 2016:	Ashurst

Counsel for the First Respondent in VID 1192 of 2016 and VID 1220 of 2016:	Mr GP Harris QC with Mr TB Maxwell
Solicitors for the First Respondent in VID 1192 of 2016 and VID 1220 of 2016:	K&L Gates
Counsel for the Third Respondent in VID 1220 of 2016:	The third respondent in VID 1220 of 2016 did not appear

ORDERS

VID 1192 of 2016

BETWEEN:	**WILLIAM YAN SUI HUI** Applicant
AND:	**ESPOSITO HOLDINGS PTY LTD (ACN 079 763 303)** First Respondent
	UDP HOLDINGS PTY LTD (ACN 167 100 692) (RECEIVERS AND MANAGERS APPOINTED) (SUBJECT TO DEED OF COMPANY ARRANGEMENT) Second Respondent
	5 STAR FOODS PTY LTD (ACN 005 714 616) (RECEIVERS AND MANAGERS APPOINTED) (SUBJECT TO DEED OF COMPANY ARRANGEMENT) Third Respondent

JUDGE: **BEACH J**

DATE OF ORDER: **9 JUNE 2017**

THE COURT ORDERS THAT:

1. Within 7 days of the date of these orders, the applicant and second and third respondents file and serve proposed minutes of orders to give effect to these reasons with written submissions, if any, limited to 3 pages.
2. Within 14 days of the date of these orders, the first respondent file and serve proposed minutes of orders to give effect to these reasons with written submissions, if any, limited to 3 pages.
3. The precise form of orders be decided on the papers.
4. Costs reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

VID 1220 of 2016

BETWEEN:	**UDP HOLDINGS PTY LTD (ACN 167 100 692) (RECEIVERS AND MANAGERS APPOINTED) (SUBJECT TO DEED OF COMPANY ARRANGEMENT)** First Applicant
	5 STAR FOODS PTY LTD (ACN 005 714 616) (RECEIVERS AND MANAGERS APPOINTED) (SUBJECT TO DEED OF COMPANY ARRANGEMENT) Second Applicant
AND:	**ESPOSITO HOLDINGS PTY LTD (ACN 079 763 303)** First Respondent
	WILLIAM YAN SAN HUI Second Respondent
	[THE ARBITRATOR] Third Respondent
JUDGE:	**BEACH J**
DATE OF ORDER:	**9 JUNE 2017**

THE COURT ORDERS THAT:

1. Within 7 days of the date of these orders, the applicants and second respondent file and serve proposed minutes of orders to give effect to these reasons with written submissions, if any, limited to 3 pages.
2. Within 14 days of the date of these orders, the first respondent file and serve proposed minutes of orders to give effect to these reasons with written submissions, if any, limited to 3 pages.
3. The precise form of orders be decided on the papers.
4. Costs reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BEACH J:

1 The applicant in Federal Court proceedings VID 1192 of 2016, William Yan Sui Hui (Hui), and the applicants in Federal Court proceedings VID 1220 of 2016, UDP Holdings Pty Ltd (receivers and managers appointed) (subject to Deed of Company Arrangement) (UDP) and 5 Star Foods Pty Ltd (receivers and managers appointed) (subject to Deed of Company Arrangement) (5 Star Foods) are the respondents in an international commercial arbitration seated in Melbourne and constituted under a share sale agreement incorporating the provisions of the *UNCITRAL Arbitration Rules*. The first respondent in both Federal Court proceedings, Esposito Holdings Pty Ltd (Esposito) is the applicant in that arbitration. Hui, UDP and 5 Star Foods have sought pursuant to arts 12, 18 and 34 of the *UNCITRAL Model Law on International Commercial Arbitration* (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006) (the UNCITRAL Model Law) and as incorporated into domestic law by s 16 of the *International Arbitration Act 1974* (Cth) (the Act) to set aside parts of two partial awards rendered in the arbitration. They have also applied to remove the arbitrator.

2 The application to set aside part of the first partial award made on 12 September 2016 is based on the assertion that the arbitrator exceeded his jurisdiction and failed to accord procedural fairness to Hui, UDP and 5 Star Foods by his determination of issues concerning the availability of certain defences following a preliminary hearing. Hui, UDP and 5 Star Foods assert that those issues did not fall within the scope of the matters that were to be determined by the arbitrator at the preliminary hearing. By determining those issues, it is said that the arbitrator failed to give Hui, UDP and 5 Star Foods a reasonable opportunity to be heard on material issues in the arbitration. Accordingly, it is said that Hui, UDP and 5 Star Foods have suffered real unfairness and practical injustice. If necessary, they would go so far as to assert that what occurred offends the "most basic notions of morality and justice" to use the form of expression in some of the international jurisprudence discussing arts 18 and 34 of the UNCITRAL Model Law or "shocks the conscience" to use a more colloquial expression.

3 Hui, UDP and 5 Star Foods have also sought to set aside part of the second partial award made on 15 September 2016 in which the arbitrator refused to grant their applications to have

him recuse himself. They contended before the arbitrator and have contended before me that the arbitrator had already reached reasoned conclusions about some of the ultimate questions in the arbitration without giving them a reasonable opportunity to be heard and accordingly had prejudged the matter. It is said that a reasonable person would no longer have confidence in the ability of the arbitrator to arrive at a fair and balanced conclusion on those issues. Accordingly Hui, UDP and 5 Star Foods have sought to have the arbitrator removed from office.

4 Given the exceptional circumstances of the present matter, I propose to grant their applications for the reasons that follow. But the precise orders to give effect to my reasons will need to be considered further.

5 Now I accept that a supervisory court in determining whether to set aside an international commercial arbitration award or to disqualify an arbitrator ought exercise considerable caution given:

(a) the contractual and therefore consensual nature of the dispute resolution mechanism chosen;

(b) the need for expedition, commercial efficiency and finality in the application of that mechanism; and

(c) such a context within which procedural fairness questions are to be assessed, so that any consequence short of real unfairness or real practical injustice ought not justify such a remedy.

6 But even accommodating such robustness underpinned by the necessary commercial conservatism to ensure that contracting parties are bound to their choice of mechanism, I cannot overlook the significant flaws in the present arbitral process. It is necessary to elaborate on the background to a greater extent than is usual to explain the exceptional circumstances of the present case.

7 I would make one other preliminary observation at this point. The problems that have arisen in the present case have been partly caused by strategic choices made by Esposito and agreed to by the arbitrator in hiving off and determining incomplete separate questions and in doing so where the various issues between the parties had not been properly crystallised. Of course, arbitral proceedings do not have the discipline and formality of judicial proceedings and there is much greater latitude given to the choice of arbitral procedures, including the ability to

make what may appear from a supervisory court's perspective to be questionable procedural choices, provided that they do not lead to the creation of an article 34 ground. But the foreseeable risks inherent in the procedures adopted in the present arbitration have now come to fruition. No doubt Esposito perceived advantage to itself in the procedural course that was adopted by the arbitrator for which Esposito had applied. But if and to the extent that it is relevant to the exercise of my discretion to grant the relief sought, I would observe that there is no inherent unfairness in Esposito now bearing any adverse consequences flowing from the establishment of the article 34 grounds to the extent that they have their genesis in the procedure that Esposito urged on the arbitrator.

FACTUAL BACKGROUND

8 The arbitration concerns disputes arising under a share sale agreement executed on 11 December 2013. Esposito agreed to sell and UDP agreed to purchase all of the issued shares in 5 Star Foods. Hui guaranteed to Esposito the performance of UDP's obligations thereunder. The share sale agreement was subsequently amended by deeds dated 17 December 2013, 31 December 2013 and 21 January 2014; for convenience, references to "share sale agreement" in my reasons are to that agreement as amended.

9 On 17 December 2013, UDP entered into an insurance policy covering warranty claims under the share sale agreement. Pursuant to cl 17 of the share sale agreement, Esposito agreed to pay for that insurance cover for the benefit of UDP with the cover responding to various consequences of breaches of warranties made by Esposito under the share sale agreement.

10 The share sale was completed on 31 January 2014, but only part of the purchase price was paid on completion. The balance, including adjustments, was to be paid over the year that followed and consisted of two payments of deferred consideration of $1 million each, an earn out payment of up to $7 million, a working capital adjustment and a refund of any tax (including GST) paid on account to the Commissioner of Taxation that was attributable to the period pre-completion; this latter aspect is referred to later in my reasons with the associated description of "Refund Amounts".

(a) The invocation of arbitration

11 On 18 September 2014, Esposito served a notice of dispute on Hui, UDP and 5 Star Foods in relation to a dispute concerning the share sale agreement pursuant to the arbitration clause in cl 21A of the share sale agreement.

12 On 30 October 2014, Esposito served on UDP, Hui, 5 Star Foods and the Institute of Arbitrators and Mediators Australia a notice of arbitration and a statement of claim in relation to disputes arising under the share sale agreement pursuant to cl 21A which incorporated the UNCITRAL Arbitration Rules. In essence, Esposito claimed that it was entitled to the balance of moneys it says were due and payable to it for the sale of its shares in 5 Star Foods.

13 On 10 November 2014, Rodney Slattery of PPB Advisory and Gregory Quinn of PPB Advisory were appointed by Coöperatiere Centrale Raiffeisen-Boerenleenbank BA, Australia Branch (Rabobank) as receivers and managers of Five Star United Food (Aust) Pty Ltd (FSUFA), the ultimate holding company of UDP and 5 Star Foods. Shortly after 10 November 2014, Marcus Derwin, the sole director of all the companies within the UDP group of companies (UDP Group), commenced a marketing and sale process in relation to the UDP Group. As part of that sale process, Derwin engaged PPB Advisory's corporate finance team to assist with the sale of the UDP Group. Further, an investigation was initiated as to what had been represented by Esposito to UDP during the sale process of its shares in 5 Star Foods.

14 Hui, UDP and 5 Star Foods were required to file and serve a response to the notice of arbitration by 30 November 2014 pursuant to art 4 of the UNCITRAL Arbitration Rules, but they did not do so. On 4 December 2014, the parties by joint letter communicated with the proposed arbitrator expressing their willingness to accept their appointment of him as arbitrator. On 8 December 2014, the arbitrator accepted that appointment.

15 On 18 December 2014, the arbitrator convened a directions hearing in which Esposito was granted leave to file and serve an amended statement of claim. The purpose of the hearing was to hear Esposito's application for UDP and 5 Star Foods to make discovery of documents relating to allegations in the proposed amended statement of claim concerning the "change of control" and "insolvency event" provisions of the share sale agreement. Esposito contended that the documents sought were "critical" documents and would allow Esposito to better articulate its claims. Further, Esposito contended that it was entitled to the documents under the share sale agreement.

16 At the directions hearing, Esposito's counsel also foreshadowed that Esposito might be amenable to having a preliminary assessment and the rendering of partial awards on some issues concerning its claims once defences had been filed.

17 On 24 December 2014, the arbitrator delivered reasons in respect of Esposito's discovery application. The arbitrator agreed that the production of the documents sought would facilitate a sharper focus on the issues in the arbitration. The arbitrator also made directions that UDP and 5 Star Foods file a statement of defence by 30 January 2015 with Hui to file a statement of defence by 6 February 2015. He also directed that UDP and 5 Star Foods make discovery by 16 January 2015. He adjourned the matter to 12 February 2015.

18 UDP and 5 Star Foods failed to file their statement of defence by 30 January 2015. Further, Hui failed to file his statement of defence by 6 February 2015.

19 On 3 February 2015, Esposito informed Hui, UDP and 5 Star Foods of the claims that it wished to be resolved at a preliminary hearing and in a partial award. Its letter stated the following:

> For reasons of costs and expedition, Seller proposes that the following claims be the subject of a preliminary hearing and a partial award in the arbitration:
>
> 1. Failure to pay $1M due and payable on 31 July 2014, paragraphs 62 - 64 and paragraphs A1 and D of the relief claimed in the Further Amended Statement of Claim;
>
> 2. Failure to pay $1M due and payable on 2 February 2015, paragraph 64A - 64C and paragraphs A1A and D of the relief claimed in the Further Amended Statement of Claim (we enclose a proposed amendment for which leave will be sought on 12 February 2015);
>
> 3. Failure to refund to Seller the Tax and GST claimed, paragraphs 49- 52 and paragraphs A2, C2 and D of the relief claimed in the Further Amended Statement of Claim; and
>
> 4 Failure to pay the $7M Earn Out Cap arising because of the Change of control due to the appointment of the Receivers and Mr Derwin, paragraphs 77A – 77O and paragraph A3 and D of the relief claimed in the Further Amended Statement of Claim.
>
> It is apparent, compared to the balance of the claims the subject of the reference and any defences raised to them, that the proof of these claims and any defences raised to them will be relatively straight forward and involve little hearing time. Further, the parties ought to be in a position to be ready for such a hearing in a matter of weeks from now as any necessary further discovery will be limited as will the evidence, which will be largely documentary and, we anticipate, largely uncontroversial. Further, it will involve few if any issues of credit by a witness called in the preliminary hearing who would also need to be called in any subsequent hearing. Lastly, discovery in respect of the balance of the issues, which is likely to be very substantial and time consuming, and the need to prepare detailed expert and further lay evidence in relation to the balance of claims could be deferred until after the partial award was delivered. In most respects, such discovery and evidence may not be required at all depending on the outcome of the partial award.
>
> While we acknowledge that we are yet to receive the respondents' defences, given

> the nature of those essentially debt/property based claims the subject of the proposal, we consider it highly unlikely that the terms of the defences would preclude such a course being undertaken in the arbitration or erode the obvious merits of such a course (particularly given the terms of clause 17 of the SSA) at all or, at least, in a way that could not be readily accommodated by appropriate directions.

20 On 9 February 2015, UDP and 5 Star Foods informed Esposito that it opposed Esposito's proposal for a preliminary hearing.

21 On 12 February 2015, a further directions hearing was held in which it was discussed whether there should be a preliminary hearing on the issues raised in Esposito's letter of 3 February 2015 and the scope of any such hearing. The arbitrator directed UDP and 5 Star Foods to file a statement of defence by 6 March 2015 and Hui to file a statement of defence by 13 March 2015. He further directed Esposito to file a formal application for a preliminary hearing by 16 February 2015.

22 On 17 February 2015, Esposito filed an application in the arbitration seeking directions in the following terms:

> 1. There be a preliminary hearing and a partial award (the **Preliminary Hearing**) of:
>
> (a) the following claims made by the further amended statement of claim dated 16 February 2015:
>
> (i) the Initial Deferred Consideration Payment of $1,000,000 plus interest calculated in accordance with clause 26.1 of the Share Sale Agreement dated 11 December 2013 (as amended) (**SSA**) (see paragraphs 62-64 and paragraph 1A of the prayer for relief);
>
> (ii) the Final Deferred Consideration of $1,000,000 plus interest calculated in accordance with clause 26.1 of the SSA (see paragraphs 64A-64C and paragraph A1A of the prayer for relief);
>
> (iii) the Refunds of Income Tax for the 2013 financial year in the amount of $1,387,110 and GST referrable to the period prior to Completion in the amount of $1,496,111 plus interest calculated in accordance with clause 26.1 of the SSA (see paragraphs 49-52 and paragraphs A2 and C2 of the prayer for relief);
>
> (iv) the Earn Out Cap of $7,000,000 due to a Change of Control or an Insolvency Event under the SSA plus interest calculated in accordance with clause 26.1 of the SSA (see paragraphs 77A-77O and paragraphs A3 of the prayer for relief);
>
> (b) such of the defences raised to the claims referred to in paragraph 1(a) above as the arbitrator considers appropriate for the Preliminary

Hearing; and

(c) the operation and effect of cl. 17 of the SSA on the defences the subject of paragraph 1(b) above.

[…]

23 On 27 February 2015, the arbitrator convened a further directions hearing. At that time, he adjourned Esposito's application for a preliminary hearing until 19 March 2015.

24 By letter dated 2 March 2015, UDP notified its insurer of a potential claim under its warranty insurance policy to cover breaches by Esposito under the share sale agreement. UDP explained that there were a number of potential claims which could arise from possible breaches of warranties given by Esposito.

25 By 6 March 2015, UDP and 5 Star Foods had not filed a statement of defence. UDP and 5 Star Foods informed the arbitrator on 6 March 2015 that they could not file a defence in time because they needed to undertake a review of certain due diligence material in respect of the sale of 5 Star Foods and whether, inter alia, Esposito had breached its warranties. Apparently, such material had been requested to be produced by Esposito but it had only been produced by it three days earlier. Further, by 13 March 2015, Hui had not filed a statement of defence.

(b) 19 March 2015 directions hearing

26 On 19 March 2015, the arbitrator held a directions hearing which was attended by the legal representatives of UDP, 5 Star Foods, Hui and Esposito. At the time of this directions hearing, neither UDP, 5 Star Foods nor Hui had filed a statement of defence. The directions hearing was held to address Esposito's preliminary hearing application.

27 Unfortunately, it is necessary to descend into the detail of the directions hearing on 19 March 2015 in order to reveal the scope of the preliminary hearing that was contemplated.

28 Initially Esposito's counsel suggested that a preliminary hearing might not be able to be set down as Hui, UDP and 5 Star Foods had not filed their statements of defence. The arbitrator nevertheless indicated that if there was insufficient cause for non-compliance with the directions for the filing of defences, he could direct that the arbitration proceed and could deal with such "claims as are appropriate".

29 UDP's and 5 Star Foods' counsel explained that his clients were not in a position to file a defence or cross-claim at that stage due to the appointment of receivers and managers and the

investigations being undertaken by them concerning claims for breaches of warranties that may be pursued against Esposito.

30 UDP's and 5 Star Foods' counsel proposed that the preliminary hearing could hear argument about the "availability of defences and set offs" under the share sale agreement, and that the arbitrator could determine those questions. But he contended that such a preliminary determination would not be in the form of an award that would be enforceable. It was said that this course would progress the resolution of the issues in the arbitration notwithstanding the extra time needed to file their defences. UDP's and 5 Star Foods' counsel stated that for the purposes of the preliminary hearing he could prepare a "statement of position or issues on [the] availability of the contractual claims in the context of a preliminary hearing". He suggested that the availability of a "defence of set off or cross claim" under the share sale agreement could be dealt with as a matter of contractual construction.

31 Hui's counsel agreed with the proposal put by UDP's and 5 Star Foods' counsel for a preliminary hearing that could deal, inter alia, with the question of the availability of any set off defence.

32 Esposito's counsel said that if the arbitration respondents wished to rely on a cross-claim by way of set off to any of the claims in paragraph 1(a) of Esposito's application dated 17 February 2015 (the paragraph 1(a) claims), Esposito would have to investigate it to determine whether it was an appropriate matter to be dealt with as part of the preliminary hearing.

33 The arbitrator then proceeded to identify the possibilities as to how the preliminary hearing could proceed. First, he suggested that the preliminary hearing could deal with the paragraph 1(a) claims only. Second, he suggested that the preliminary hearing could proceed with the paragraph 1(a) claims together with "such limited defence[s] concerning the construction of clause 17". Third, he suggested that the matter could proceed with the paragraph 1(a) claims heard with a full hearing of any cross-claim.

34 The arbitrator stated that the first option could deal with a determination of the paragraph 1(a) claims but could lead to questions about whether a partial award should be made and, if so, whether the partial award should be stayed. UDP's and 5 Star Foods' counsel submitted that the first option could not produce a partial award.

35 The arbitrator queried whether it was open to him to deal with the paragraph 1(a) claims and make a partial award in relation to them whilst reserving the right of the arbitration

respondents to pursue cross-claims and to apply for a stay of the partial award. UDP and 5 Star Foods resisted the suggestion that a partial award could be made after the arbitrator had preliminarily determined the paragraph 1(a) claims.

36 Esposito's counsel stated that Esposito supported the arbitrator's first option of proceeding with the paragraph 1(a) claims only. He further stated that the paragraph 1(a) claims could be determined without the benefit of any defence from the arbitration respondents and that if the arbitration respondents had a cross-claim, such a claim could be heard as "phase two". Esposito's counsel stated that there was no reason why the arbitrator could not make a binding partial award in relation to the paragraph 1(a) claims because what was being brought against Esposito was a counterclaim. It is worthwhile reproducing what was said, which was the following:

> MR HARRIS: We oppose that. Our view is the suggestion that came from you is the appropriate one - we should proceed with paragraph (a) claims. They should be dealt with without the benefit of any defence from my learned friend. If he has a cross-claim, that cross-claim can be heard as Phase 2. There is no reason why you can't make a partial award which is binding in relation to the paragraph (a) claims because, by definition, what is being brought against us is a cross-claim.
>
> THE ARBITRATOR: Mr Scott has submitted I would not, on a return of that, be able to make a partial award. Do we have to have that argument today?
>
> MR HARRIS: No, that can be - it is a matter for you, at the end of the hearing, about whether you feel, having conducted the hearing, that you're in a position to properly make a partial award, but we see no impediment to that and as, with respect, you observed, it becomes a question of enforcement.
>
> In the ordinary course of things, claims are heard concurrently with counterclaims, a judgment is determined in relation to the claims made and the counterclaims that have been made and then the two are set off against each other to get a net figure. It is perfectly acceptable that claims can be determined ahead of counterclaims, a final award can be made, that award can be enforced. If, in Phase 2, counterclaims are established and an award is made, then that award can be enforced.

37 Esposito's counsel stated that there was no reason why the arbitrator could not set a timetable for the hearing of the paragraph 1(a) claims and "leave open the opportunity" for UDP and 5 Star Foods to subsequently expand the scope of the preliminary hearing as long as it did not affect the timetable. He said that if additional matters could be "bolted on" to the determination of the paragraph 1(a) matters, then "presumably we'll be notified about that".

38 The arbitrator then stated that what he proposed to do was to schedule a preliminary hearing of the paragraph 1(a) claims, and that he would adjourn the matter for a short time to allow the parties to draft programming orders for a preliminary hearing in May 2015.

39 After lunch, Esposito's counsel handed up a draft minute. There was then a discussion about whether paragraph 3 of the draft minute should include the words "and (if considered by the arbitrator to be appropriate) a partial award". Esposito's counsel submitted that those words were included in the draft minute because Esposito would seek a partial award at the end of the hearing. UDP's and 5 Star Foods' counsel stated that he understood that the arbitrator would make directions to fix a date for the hearing of the paragraph 1(a) claims and that that was all that the direction needed to say. The arbitrator agreed to take out the words, "and (if considered by the arbitrator to be appropriate) a partial award", but stated that it was a "live question" as to whether as a result of the preliminary hearing, the outcome would be a partial award and that he had removed those words on that understanding.

40 The arbitrator directed that there be a preliminary hearing in respect of the paragraph 1(a) claims only. The arbitrator also directed UDP and 5 Star Foods to file a statement of defence by 2 April 2015 and Hui to file a statement of defence by 10 April 2015. It may be observed at this point that necessarily questions of set off and the like were not contemplated by the parties or the arbitrator as being within the scope of the preliminary hearing; indeed no relevant pleadings had been filed at that time on that aspect.

41 The precise directions made by the arbitrator on 19 March 2015 in respect of the preliminary hearing were as follows:

> **Preliminary Hearing**
>
> 4. There be a preliminary hearing in respect of the claims the subject of paragraph 1(a) of the claimant's application dated 17 February 2015 (**Preliminary Hearing**) namely –
>
> (i) the Initial Deferred Consideration Payment of $1,000,000 plus interest calculated in accordance with clause 26.1 of the Share Sale Agreement dated 11 December 2013 (as amended) (**SSA**) (see paragraphs 62-64 and paragraph 1A of the prayer for relief);
>
> (ii) the Final Deferred Consideration of $1,000,000 plus interest calculated in accordance with clause 26.1 of the SSA (see paragraphs 64A-64C and paragraph A1A of the prayer for relief);
>
> (iii) the Refunds of Income Tax for the 2013 financial year in the amount of $1,387,110 and GST referrable to the period prior to Completion in the amount of $1,496,111 plus interest calculated in accordance with clause 26.1 of the SSA (see paragraphs 49-52 and paragraphs A2 and C2 of the prayer for relief); and
>
> (iv) the Earn Out Cap of $7,000,000 due to a Change of Control or an Insolvency Event under the SSA plus interest calculated in accordance with clause 26.1 of the SSA (see paragraphs 77A-77O and paragraphs A3 of the prayer for relief).

5. The date of the Preliminary Hearing is 25 May 2015 (Hearing Date) on an estimate of three to five days.

(c) Other directions hearings and steps

42 After the 19 March 2015 directions hearing, the solicitors for UDP and 5 Star Foods informed the receivers of FSUFA that the preliminary hearing was listed for 25 May 2015. I would note at this point that Slattery of PPB Advisory, the receivers of FSUFA, deposed that he understood that the preliminary hearing would deal only with certain claims made by Esposito and would not deal with any possible claims under investigation by UDP and 5 Star Foods for breaches of warranty or related defences. Slattery also deposed that if he had been told that the alleged breaches of warranty or the availability of related defences would arise for determination at the preliminary hearing, he would have sought advice to protect UDP's and 5 Star Foods' position.

43 On 27 March 2015, the arbitrator held a further directions hearing, the detail of which is not presently relevant. The hearing had been sought by UDP and 5 Star Foods who sought to vacate the arbitrator's direction to make discovery concerning correspondence between UDP, the receivers at PPB Advisory and Rabobank. The arbitrator refused to vacate that direction.

44 On 30 March 2015, Esposito filed with the arbitrator an application for permission to issue subpoenas in the Supreme Court of Victoria. Again, the background to this is not directly relevant for present purposes.

45 On 2 April 2015, UDP and 5 Star Foods served a statement of defence. On 10 April 2015, Hui served a statement of defence and counterclaim.

46 On 15 April 2015, the arbitrator convened a further directions hearing in which UDP and 5 Star Foods applied to dismiss Esposito's application to issue subpoenas. I would note that the arbitrator ultimately directed that Esposito be granted permission to seek to issue subpoenas and that UDP and 5 Star Foods make discovery.

47 On 22 April 2015, Slattery and Quinn were appointed joint and several receivers of UDP and 5 Star Foods. Also on that day, Peter Marsden, Richard Stone and Andrew Beck of RSM Bird Cameron were appointed joint and several administrators of UDP and 5 Star Foods.

48 On 23 April 2015, the receivers of UDP and 5 Star Foods instructed Campbell Jaski of PPB Advisory to investigate whether Esposito had engaged in any breaches of warranty under the share sale agreement.

49 Michael Sloan, a partner of Ashurst, deposed on behalf of UDP and 5 Star Foods that he understood in late April / early May 2015 that notwithstanding the appointment of administrators, investigation into the conduct of 5 Star Foods' business was ongoing and that an objective of those investigations was to identify potential claims available to UDP and 5 Star Foods against Esposito in the arbitration. It was perceived that such claims might constitute or provide valuable assets to the receivers.

50 On 24 April 2015, the receivers of FSUFA, UDP and 5 Star Foods wrote to Esposito's solicitors (K&L Gates), confirming the above appointments and noting that they were in the process of seeking instructions in relation to the arbitration.

51 Sloan deposed that at around 5 May 2015, he understood, based on the arbitrator's directions made on 19 March 2015, that any positive defences foreshadowed in UDP's and 5 Star Foods' defence were not for hearing and determination in the preliminary hearing.

52 Sloan also deposed that if he had known that the arbitrator intended to determine any set off defences available to UDP and 5 Star Foods, he would have sought instructions from the receivers to intervene in the arbitration to update the arbitrator on investigations and in the arbitration to prevent related issues being heard or determined in the absence of UDP and 5 Star Foods. He said that whilst Esposito's claim in the arbitration had little economic value (given that that claim was made against two companies in voluntary administration and receivership), his clients' counterclaim had potentially significant value, particularly having regard to the position in relation to the relevant insurance policy. He deposed that these reasons and in his view the limited scope of the preliminary hearing informed the decision not to participate in the preliminary hearing.

53 On 5 May 2015, the solicitors for UDP and 5 Star Foods (Ashurst) sent a letter to K&L Gates, explaining that Ashurst no longer held instructions to act for UDP and 5 Star Foods in the arbitration. The letter requested that all future correspondence be directed to the administrators at RSM Bird Cameron. Ashurst then forwarded that letter to the arbitrator and the arbitration parties.

54 Later on 5 May 2015, K&L Gates sent a letter to the administrators at RSM Bird Cameron which relevantly stated:

> In respect of the Arbitration, we note that a preliminary hearing is listed for 25 May 2015 to deal with a number of disputed issues in the Arbitration, including whether an Insolvency Event and Change of Control occurred for the purposes of the SSA.

> Esposito is seeking to obtain documents and materials from non-parties to the arbitration, PPB Advisory (PPB) and Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. (RaboBank) in connection with those issues.

55 On 7 May 2015, the administrators of UDP and 5 Star Foods wrote to K&L Gates stating that because of the appointment of administrators, under s 440D of the *Corporations Act 2001* (Cth) the arbitration should be stayed, given that they would not consent to the continuation of the arbitration.

56 On 14 May 2015, Jaski of PPB Advisory issued a draft report into the alleged breaches of warranties by Esposito. Apparently, after being given that draft report, the receivers decided to instruct Ashurst to actively participate in the arbitration and to bring a cross-claim against Esposito in respect of the breaches of warranty that the report had identified. But Slattery deposed that he was not concerned for UDP and 5 Star Foods to participate in the preliminary hearing because, as he understood it, that hearing would not involve the issues to be raised by UDP and 5 Star Foods in relation to the alleged breaches of warranty.

57 On 20 May 2015, the administrators of UDP and 5 Star Foods sent an email to the arbitrator and the parties stating that they did not intend to take part in the arbitration and accordingly would not attend the directions hearing scheduled on 21 May 2015. In context, it would seem that this was to be understood at least in respect of their participation in the preliminary hearing.

58 On 21 May 2015, the arbitrator held a directions hearing in which he appeared to state that the preliminary hearing would not concern the availability of defences, including set off defences. Only representatives of Hui and Esposito were in attendance. Relevantly, the following exchange occurred between the arbitrator and counsel for Hui:

> THE ARBITRATOR: You know the claims that are made. They have pleaded it.
>
> MR MASTERS: I do. But it's in circumstances where there are set-off defences and counterclaims - - -
>
> THE ARBITRATOR: **But we won't be entering into those, will we**.
>
> MR MASTERS: I know, no. But the argument that we will be having will have regard to the fact that there are counterclaims and set-off defences that are made in relation to these very points.
>
> THE ARBITRATOR: But how will they go to the proof of these claims?
>
> MR MASTERS: It will all depend on what Mr Harris says in his outline.
>
> THE ARBITRATOR: **This is a preliminary hearing. It is simply the claims. I understand you are putting them to proof and you have flagged these other**

> **defences. We are not dealing with the other defences.** But you will have to meet an application that's been foreshadowed that there be a partial award or interim relief of some kind. That's what's been foreshadowed. You will have to meet that.
>
> MR MASTERS: Indeed.
>
> THE ARBITRATOR: **That's the scope of what will happen at this preliminary hearing, as I'm understanding it.**
>
> (emphasis added)

59 Now although the arbitrator stated that the arbitration respondents would need to meet a foreshadowed application at the preliminary hearing that there be a partial award or interim relief, he appeared to make it clear that the preliminary hearing would only concern the paragraph 1(a) claims and would not concern defences to those claims.

60 Also on 21 May 2015, the arbitrator made directions postponing the preliminary hearing date from 25 May 2015 to 3 June 2015.

61 On 27 May 2015, Esposito filed an outline of submissions for the preliminary hearing. On 1 June 2015, Hui filed an outline of submissions for the preliminary hearing. He set out reasons why a partial award should not be made in respect of the paragraph 1(a) claims. I will return to this later.

(d) The preliminary hearing – 3 and 4 June 2015

62 On 3 and 4 June 2015, the preliminary hearing was held. Esposito and Hui appeared and were represented. There was no appearance for UDP and 5 Star Foods. This was unsurprising given that the administrators of UDP and 5 Star Foods had previously informed the arbitrator that they did not intend to participate. Further, UDP and 5 Star Foods, consistently with that position, had not filed an outline of submissions in advance of the preliminary hearing.

63 In summary, at the preliminary hearing, Esposito's counsel addressed the availability of the set off defences despite what the arbitrator had determined would be the scope of the preliminary hearing. But Hui's counsel did not engage with the availability of set off defences at the hearing. He stated throughout that the arbitrator had made it clear that the availability of Hui's set off defences was not within the scope of the preliminary hearing. Further, the arbitrator accepted throughout the preliminary hearing that he would not adjudicate on the merits of the set off claims and would, for the purposes of the preliminary hearing, accept that there were claims for a set off but would make no judgment about their

merit. I will return to the detail of the preliminary hearing in a later section of my reasons, save to mention one matter at this point.

64 In terms of dealing with a claim by the arbitration respondents against Esposito, a distinction needs to be made between the existence and quantification of such a claim and the issue of whether, if such a claim existed, it was available as a contractual set off under the share sale agreement or as an equitable set off. And if it was available as such a set off, whether it could provide a defence to Esposito's paragraph 1(a) claims. The further dimension was whether Hui could indirectly avail himself of such claims by arguing that his liability under the guarantee could rise no higher than that of UDP (the principal debtor).

65 I am satisfied on the evidence as to the sequence of events that such matters were not within the scope of the preliminary hearing or the paragraph 1(a) claims. Neither were issues concerning the enforceability of the guarantee against Hui. They were for later determination.

(e) Later events

66 On 12 June 2015, Hui filed an amended statement of defence and counterclaim.

67 On 18 June 2015, the administrators and receivers of UDP executed a deed of company arrangement.

68 On 1 July 2015, UDP and 5 Star Foods sought to file an amended statement of defence and counterclaim which pleaded set off defences that were based on breach of warranty claims alleged against Esposito. Apparently, the amendments were made as a result of findings and recommendations in the PPB Advisory draft report of 14 May 2015.

69 On 14 July 2015, Hui filed a further amended statement of defence and counterclaim, which pleaded set off defences.

(f) The arbitrator's three sets of reasons and two partial awards

70 On 25 September 2015, the arbitrator delivered his reasons in respect of the preliminary hearing. At [1] of his reasons, the arbitrator said:

> On 19 March 2015, on the application of the claimant and after hearing from the parties, the arbitral tribunal directed that there be a preliminary hearing in respect of the claims the subject of paragraph 1(a) of the claimant's application dated 17 February 2015 (Preliminary Hearing), namely –
>
> (i) the Initial Deferred Consideration Payment of $1,000,000 plus

interest calculated in accordance with clause 26.1 of the Share Sale Agreement dated 11 December 2013 (as amended) (SSA) (see paragraphs 62-64 and paragraph 1A of the prayer for relief);

(ii) the Final Deferred Consideration of $1,000,000 plus interest calculated in accordance with clause 26.1 of the SSA (see paragraphs 64A-64C and paragraph A1A of the prayer for relief);

(iii) the Refunds of Income Tax for the 2013 financial year in the amount of $1,387,110 and GST referrable to the period prior to Completion in the amount of $1,496,111 plus interest calculated in accordance with clause 26.1 of the SSA (see paragraphs 49-52 and paragraphs A2 and C2 of the prayer for relief); and

(iv) the Earn Out Cap of $7,000,000 due to a Change of Control or an Insolvency Event under the SSA plus interest calculated in accordance with clause 26.1 of the SSA (see paragraphs 77A-77O and paragraphs A3 of the prayer for relief).

71 In his reasons, the arbitrator determined the paragraph 1(a) claims, but also determined issues concerning the availability of set off defences and Hui's guarantee. Most if not all of such issues were not within the ambit of the preliminary hearing. Indeed, little, if any submissions were made thereon even by Esposito. The arbitrator said the following at [7(i)] to [7(q)] of his reasons:

The general set-off clause – clause 31.21

(l) The Buyer is entitled under clause 10 of the SSA to set-off reasonable costs of preparing tax returns against any Refund Amounts due. Subject to that one exception which is not relevant to the present case, as a matter of construction of the provisions of the SSA, the respondents have no contractual right of set-off in respect of the Refund Amounts. The exception to the general set-off in clause 31.21 applies, the SSA expressly providing otherwise in the case of the Refund Amounts. The Buyer is not relevantly entitled under clauses 12.4 or 16 or otherwise under the SSA, to a reduction or extinguishment of the Refund Amounts by way of adjustment of the obligation.

(m) The Buyer is however entitled to set-off against the Refund Amounts its claim for the Working Capital Adjustment Amount of $5,042,801 as a debt claim giving rise to a defence of set-off at law. It is a money claim for a liquidated amount. That claim did not accrue to either the Company or the second respondent and accordingly they cannot avail themselves of this set-off.

(n) In my view neither the Company nor the Guarantor show an entitlement under the SSA or in equity or otherwise to set off against the Refund Amounts the cross claims for Working Capital Adjustment or for damages for Warranty Claims.

The Guarantee

(o) Pursuant to the guarantee in the SSA, the second respondent guaranteed to the Seller the punctual performance by the Buyer of the Buyer's obligations

> under the SSA including its obligations to pay money. The second respondent did not guarantee the Buyer's obligation to pay either the Deferred Consideration amounts or the Earn Out Cap, independently of any adjustment by way of set-off for the Working Capital Adjustment amount or for damages for Warranty Claims. Put another way, the second respondent is entitled to invoke the set-off claims under clause 12.4 and clause 16 by way of defence to those claims. The Buyer's obligation to pay the Deferred Consideration amounts or the Earn Out Cap is to be assessed, taking into account any such adjustments, if they are made out.
>
> (p) The second respondent stands therefore in a similar position to the Buyer in relation to the claims for the Deferred Consideration amounts and the Earn Out Cap. It is open to the Guarantor to claim that the claimed set-offs under clause 12.4 and clause 16 apply to reduce or extinguish the liability of the Buyer under the SSA to the Seller for the Deferred Consideration amounts and the Earn Out Cap and as a result, to reduce or extinguish the amount for which the second respondent is liable under the guarantee.
>
> (q) I consider however that the claim for the Refund Amounts stands in a different position. As a matter of construction of the SSA, there is no provision for amounts payable by the Seller under clause 12.4 or 16 to operate as an adjustment or decrease in any Refund Amounts that may be payable. There is no other relevant provision which would operate to extinguish or diminish the Buyer's obligation to pay the Refund Amounts, the punctual performance of which the second respondent guaranteed.

72 The arbitrator at [166] said:

> I accept that the Seller has not received the Refund Amounts. I have determined that, subject to its claimed set-off for the Working Capital Adjustment Amount of $5,042,801, the Buyer is liable under the provisions of the SSA for the payment to the Seller of an amount equal to those Refunds totalling $2,883,225 and $780,622, making a total of $3,663,847 together with interest in accordance with the provisions of the SSA from the dates when the respective amounts became due. I have also determined that the Company is liable under the provisions of the SSA, with no right of set-off, for the payment to the Seller of an amount equal to those Refund Amounts. I will hear argument about the question of interest in relation to the Company.

73 At [174] and [175], the arbitrator said:

> In my view, by these provisions the Seller has chosen to accept a contractual promise from the Buyer and the Company to procure that the Company (or the relevant Group Member) or the Buyer pay an amount equal to the Refund Amounts. These provisions do not in my view constitute a promise by the Buyer or indeed the Company or other Group member to hold any refunds received for the Seller, in the sense of requiring any of them to set apart in a separate fund for the Seller the refunds received. They do not constitute any direction, irrevocable or otherwise, to pay the amounts in question direct to the Seller out of the refunds as they come to hand. In my view therefore the claim for the declaration in relation to the Refund Amounts fails.
>
> What is clear however from the context of the SSA and these provisions concerning the Refund Amounts is that the Seller was assured of the benefit of the Refund Amounts as a payment from either the Company or the other Group member. The Buyer and the Company agreed to this in the SSA. It was not intended as between

> the Seller and the Buyer that the Refund Amounts would be subject to adjustment in the same way that the components of the Purchase Price were subject to adjustment for the Working Capital Adjustment Amount or for damages for Warranty Claims. The Refund Amounts were intended primarily to come from a party other than the Buyer. I attach significance to this aspect in considering the claims of the respondents to set off against the Refund amounts the amounts for which they claim a set-off against the Purchase Price otherwise payable.

74 At [183] to [198] and also [219] et seq there was a discussion of set off.

75 The arbitrator then went on at [236] to say:

> I have also determined that the Company and the second respondent are each liable to the Seller for the Refund Amounts without right of set-off. I will make a partial award in that respect against them. I will hear the parties on the question of both interest and costs in relation to that issue. I will hear submissions as to whether in that partial award I should also formally dismiss the claimant's application for a declaration in paragraph C2 of the prayer for relief that the Company holds the Refund Amounts for the Seller.

76 Relevantly, earlier in the arbitrator's reasons at [6], he set out a summary of the principal issues in the application:

> The claimant has applied for a partial award for each of the amounts determined to be due and owing in respect of the claims the subject of the Preliminary Hearing. In defence, the respondents relied on certain specified set offs to deny liability to the claimant. By its July amended statement, the first respondent now also counterclaims. The second respondent also counterclaimed. At the hearing he contended that if the arbitral tribunal finds in favour of the claimant on any of those claims, the tribunal should do no more than make a determination to that effect, falling short of making any partial award. The effect of the set offs claimed is one of the principal issues the subject of the Preliminary Hearing.

77 On 26 November 2015, Hui filed an outline of submissions challenging the arbitrator's 25 September 2015 reasons. He contended that the arbitrator had exceeded his jurisdiction and had denied Hui procedural fairness by entering into and deciding issues as to the availability of the set off and Hui's guarantee. He contended that these matters formed no part of the issues that the arbitrator was authorised to decide at the preliminary hearing. It was said that the scope of the preliminary hearing was limited to the paragraph 1(a) claims only and that there was not to be any consideration of the set off defences and Hui's guarantee. Hui contended that the arbitrator should make a limited partial award but only in terms that Hui contended for and that the arbitrator should then withdraw from office. The terms of the partial award sought by Hui were set out at [20] of his submissions:

> Accordingly, the second respondent asks the arbitrator to make an award as follows:
>
> (a) subject to any defences (including set offs), the Initial Deferred Consideration of $1,000,000 became due and payable by the Buyer under the

SSA on 31 July 2014 and interest commenced to accrue on that amount from that date in accordance with the SSA;

(b) subject to any defences (including set offs), the Final Deferred Consideration of $1,000,000 became due and payable by the Buyer under the SSA on 2 February 2015 and interest commenced to accrue on that amount from that date in accordance with the SSA;

(c) subject to any defences (including set offs), the Earn Out Cap of $7 million became due and payable by the Buyer as an instalment of the Purchase Price under the SSA on 10 November 2014 and interest commenced to accrue on that amount from that date in accordance with the SSA;

(d) subject to any defences (including set offs), the Buyer and the Company are liable to the Seller for the Refund Amounts of $3,663,847 together with interest in accordance with the provisions of the SSA from the dates the respective amounts became due;

(e) the Refund Amounts were not, and are not, held for the Seller by way of an equitable assignment or express trust.

78 By email to the parties on 18 December 2015, the arbitrator noted that he was yet to make an award in the matter and was open to hearing argument as to whether his reasons were "substantively wrong". He explained that he remained "open to argument" as to whether he had "misapplied the legal authorities and principles referred to in relation to the present matter and whether for that reason the tribunal should not make any partial award for a money amount against [Hui]". The arbitrator also invited the parties to make submissions to address the question as to "whether and on what basis the arbitral tribunal should have come to a different conclusion and if so what conclusion, notwithstanding the reasons for determination given". This was a curious invitation given that the arbitrator appears to have already made up his mind on such matters and had ruled thereon.

79 On 22 December 2015, the arbitrator made directions fixing a hearing on 16 March 2016 in respect of Hui's application made by way of his submissions dated 26 November 2015. The arbitrator also made directions for the filing of submissions in response to Hui's application. I note for completeness that there was an issue raised by Esposito against Hui's application which was to the effect that Hui was out of time in making his application and that an extension should not be granted. The hearing on 16 March 2016 was to also deal with this issue raised by Esposito. This timing issue was not raised in the proceedings before me and I will not comment further on it.

80 On 18 January 2016, UDP and 5 Star Foods filed an outline of submissions which supported Hui's challenge to the arbitrator's reasons and supported the form of award proposed in Hui's

26 November 2015 submissions. Further, they supported Hui's application for the arbitrator to withdraw from office. At [2] to [4] of their submissions, UDP and 5 Star Foods stated:

> *First*, although the administrators of the first and third respondents told the arbitrator on 20 May 2015 that "*the administrators do not intend to take part in the arbitration and accordingly will not be attending the directions hearing scheduled to take place tomorrow*", on 1 July 2015 Ashurst sent a proposed amended defence and counterclaim supported by a detailed draft report of PPB Advisory to the arbitrator and requested a directions hearing be held.
>
> This correspondence was only consistent with the first and third respondents continuing to participate in the arbitration and bringing to the arbitrator's attention the basis (not just the form) of their proposed amended defence and counterclaim
>
> For that reason, the second respondent's criticism of the arbitrator's pre-judgment of questions in issue applies equally to the first and third respondents, if not more so, because at no time were they notified that there was any possibility of any defences of set off raised by them being ruled in or out as a result of the preliminary hearing. Their 1 July 2015 application was only consistent with the opposite expectation and understanding. At no time prior to the arbitrator's reasons published 25 September 2015 were the first and third respondents informed of any change in the scope of the preliminary hearing or given any opportunity to be heard on the issues of greatest importance.

81 On 2 February 2016, Esposito filed an outline of submissions in response to the challenge against the arbitrator's 25 September 2015 reasons. On 17 February 2016, Hui, UDP and 5 Star Foods filed submissions in reply to Esposito's submissions. Further submissions were filed by Esposito on 26 February 2016.

82 On 16 March 2016, the arbitrator held a hearing of Hui's, UDP's and 5 Star Foods' application for a partial award in the terms set out in their outlines of submissions and a determination that the arbitrator withdraw from his office and that the arbitration continue before a new arbitrator.

83 On 15 April 2016, the arbitrator delivered a detailed second set of reasons addressing the proposed partial award and Hui's, UDP's and 5 Star Foods' application.

84 First, the arbitrator expressed the application in the following terms at [62] and [64]:

> In his written submissions dated 26 November 2015, [Hui] contends that the question of what was - and what was not - to be the subject of the Preliminary Hearing was expressly determined by the arbitrator when directions for the Preliminary Hearing were made on 19 March 2015. He refers both to the claimant's application dated 17 February 2015 and to the actual directions made on 19 March 2015 in connection with the Preliminary Hearing. The corollary of these submissions is that it was not open to the claimant at the Preliminary Hearing to seek a partial award that the respondents or any of them pay money to the claimant.
>
> […]

> [Hui] contends that the arbitrator was authorised by the parties to decide, and clearly himself understood that he was permitted only to decide, those claims, which he set out in full at [1] of the Reasons, that is to say, the specified claims made by the claimant but not any defences, either as referred to in the application or otherwise; that there was no agreement between the arbitrator and the parties that questions other than those claims should be determined. …
>
> It follows from this primary contention, the second respondent contends, that the determinations as to set offs were made in circumstances where the second respondent was given no opportunity to be heard on the question and that if an award strays beyond the claims set out in full at paragraph [1] of the Reasons, it would be liable to be set aside on its face without more.

85 Second, the arbitrator considered the scope of the preliminary hearing. He rejected the arbitration respondents' contentions as to that scope. He said at [81]:

> I reject the respondents' contentions as to the scope of the Preliminary Hearing directed to be held. In my view, for the reasons here discussed and, by the directions setting down the subject claims, the arbitral tribunal set down for preliminary hearing the subject claims, reserving as one possible outcome of the Preliminary Hearing that the tribunal might make a partial award in favour of the claimant for a dollar amount in respect of all or any of the claims against the respondents. This meant that the tribunal was at liberty to decide not only whether the claimant made out the claims at [1] of the Reasons but also whether there should be a partial award in favour of the claimant for the payment of any specified amount. The respondents had at that stage filed no claims to set-off or other defences, despite directions to do so.

86 In summary, the arbitrator took the view that at the preliminary hearing, the arbitral tribunal was at liberty to decide not only whether Esposito made out the paragraph 1(a) claims but also whether there should be a partial award in favour of Esposito for the payment of any specified amount. The arbitrator then stated at [90] in his reasons:

> There was no direction or determination that the arbitral tribunal would adjudicate the specified claims on the basis that any defence that was pleaded was not to be taken into account. To the contrary, any such defence or the availability of it needed to be taken into account in deciding whether there would be a partial award for a specified amount or amounts. If one outcome open was the making such a partial award, the other was the converse that, if the claims were not made out on the evidence, the arbitral tribunal could dismiss them. There was no agreement by the parties as to the directions made for the Preliminary Hearing.

87 I must say that I found the characterisation of the arbitrator's description at [81] to be in some respects curious and his propositions at [90] to be in some respects vague. Generally, the arbitrator's position and assessment after the event cannot dictate my objective assessment of the events of 19 March 2015, 3 and 4 June 2015 and the arbitrator's reasons published on 25 September 2015.

88 Third, the arbitrator considered that the arbitral tribunal did not exceed its jurisdiction in respect of the preliminary hearing in determining the set off issues. The arbitrator took the

view that Hui, UDP and 5 Star Foods as reasonable litigants would have foreseen the possibility of the arbitral tribunal determining the set off issues. Accordingly, so the arbitrator found, there was no breach of procedural fairness. The arbitrator provided the following reasons at [137] and [138] in respect of the set off issues:

> As reasonable litigants, the respondents would in my view have foreseen the possibility of the arbitral tribunal determining the set-off issues for the following reasons –
>
> > (a) The scope of the Preliminary Hearing as directed to be held was not confined as contended by the respondents. They were reasonably put on notice that the tribunal was at liberty to decide not only whether the claimant made out the claims at [1] of the Reasons but also whether there should be a partial award in favour of the claimant for the payment of any specified amount. That necessarily involved consideration of such defences that may thereafter be taken by the respondents. I refer to the discussion above at paragraphs [80] to [90];
> >
> > (b) The broader scope of the Preliminary Hearing was confirmed in discussions at the directions hearing on 21 May 2015. While the substantive merits of the claims to a set-off of the Working Capital Adjustment Amount and for warranty claims were not to be agitated at the Preliminary Hearing, the claimant was seeking a partial award that the respondents pay moneys to the claimant. I refer to the discussion above at paragraphs [96] to [99];
> >
> > (c) The submissions filed by the claimant dated 27 May 2015 prior to the Preliminary Hearing foreshadowed the set-off issues. I refer to the discussion above at paragraphs [100] to [102]. The second respondent advanced contentions in response that the alleged entitlement of the Buyer to set off was not within the scope of the Preliminary Hearing. This in my view did not foreclose the possibility that the tribunal would address the set-off issues and, depending on the view taken, make a partial award against the second respondent. I do not accept that the claimant did not demur from those contentions of the second respondent.
> >
> > (d) During the Preliminary Hearing itself, the second respondent was put on notice that the tribunal would be addressing the set-off issues. I refer to the discussion above at paragraphs [103] to [123]; and
> >
> > (e) The second respondent was given the opportunity to file further material. I refer to paragraph [123].
>
> The discussion at the directions hearing on 19 March 2015 and the subsequent statement of defence filed by the first and third respondents dated 10 April 2015 suggested that those respondents defended the claims made by the claimant by alleging a set-off of claims for the Working Capital Adjustment amount and for damages for breach of warranties. These were raised by way of defence but were discrete in the sense that they could have been but were not framed as independent claims by the first respondent. The second respondent also raised those set-offs by way of defence although he could not have raised those set-offs as independent claims by him. The tribunal in its reasons took the approach of treating the set-offs as valid on their face but enquiring whether as a matter of law or equity they could be raised by way of a defence of set-off to the various claims made. That approach was signalled to the claimant and the second respondent during the Preliminary Hearing.

> As discussed below, it was an approach identified by Robert Goff J in *The Kostas Melas* as open to the tribunal.

89 I will discuss *SL Sethia Liners Ltd v Naviagro Maritime Corporation (The Kostas Melas)* [1981] 1 Lloyd's Rep 18 later in my reasons in some detail. In my view, Esposito's and the arbitrator's reliance thereon to provide a justification for what occurred before the arbitrator and what he decided was misconceived. Moreover, what the arbitrator said at [138] was, with due respect, a post-rationalisation of what in fact occurred on 4 June 2015.

90 Fourth, the arbitrator accepted that he had erred by determining that Hui was liable to pay amounts under the guarantee to Esposito. The arbitrator accepted that Hui had not been given the opportunity to adduce evidence going to the unenforceability of the guarantee. The arbitrator found that Hui would not have foreseen the possibility of the arbitral tribunal determining the guarantee issues and had been denied procedural fairness. In this regard, the arbitrator in his reasons at [163] and [164] made the following observations:

> I now turn to the guarantee issue. In my view, having considered the submissions of the parties and examined the transcript of proceedings, the second respondent as a reasonable litigant would not in my view have foreseen the possibility of the arbitral tribunal determining whether, there being no evidence going to the unenforceability or discharge of the guarantee, the claimant had made out its claims under the guarantee to the Refund. Amounts and is entitled to a partial award that the second respondent pay the Refund Amounts to the claimant (the **guarantee issue**).
>
> As noted, the tribunal determined at [182] of the Reasons that –
>
> > 'there being no evidence going to the unenforceability or discharge of the guarantee, I have determined that the claimant has made out its claims under the guarantee, subject in the case of the claims for the Deferred Consideration amounts and the Earn Out Cap, to the question of the claimed set-offs.'
>
> This determination in relation to the second respondent was made without any forensic enquiry into the matters raised by the second respondent in paragraphs 80 to 90 of his amended statement of defence and counterclaim. It was based on the incorrect premise that the second respondent had had an opportunity to adduce that evidence. It denied the second respondent the opportunity to present his defence going to the unenforceability of the guarantee. The conclusion can readily follow that with adequate notice, and on evidence being adduced, the second respondent might have been able to persuade the tribunal to a different result.

91 I must say that this concession by the arbitrator did not instill in me confidence in what had occurred concerning the scope of and issues to be determined at the preliminary hearing and what the arbitrator thought he was doing in that regard. Moreover, in my view his prejudgment of the guarantee issues alone, notwithstanding the attempts to remedy what occurred, provides reason enough as to why he should not continue as arbitrator.

92 Finally, the arbitrator determined that he would not withdraw from office as arbitrator but would allow the parties to make further submissions on this aspect before he made a final decision. He made the following observations at [180] to [181] of his reasons:

> In the case of the set-off issues, as arbitrator, I did express conclusions on those particular issues and in that sense 'made up my mind' on those questions. As I am of the view that it was proper to determine those issues and that there has not been a breach of the 'hearing' rule, subject to any contrary view of the court, I would not be reconsidering those set-off issues again in the arbitration. If on the other hand, I am incorrect in the conclusions I have expressed above on those set-off issues and have in fact determined those issues when there was no proper basis for doing so, as arbitrator I would have to revisit and determine those issues again. I would in those circumstances and subject to the views of the Court be more sympathetic to the application that I withdraw from office.
>
> On the guarantee issue, as discussed above, I undertook no forensic enquiry of the matters pleaded in paragraphs 80 – 90 of the second respondent's statement of defence. I made the determination in paragraph 236 of the Reasons, expressly on the basis of their being no evidence in support of those allegations. I have not deliberated on the allegations going to the unenforceability of the guarantee or come to any conclusion on the issues raised by that pleading. In those circumstances I have not 'made up my mind' on them and any future consideration of them would not involve any reconsideration of conclusions previously arrived at. As Mr Scott QC submitted in relation to the Reasons on the set-off issues, they are reasonably extensive. The same does not apply to the issue whether the guarantee is enforceable and the associated issues raised in the defence and counterclaim.

93 The arbitrator concluded that he would not make a partial award in the terms proposed in Hui's submissions of 26 November 2015. Instead, he proposed making a partial award in the terms set out in the annexure to his reasons and invited the parties to make any submissions as to the form and content thereof.

94 I must say that I am struck by the stark contrast between the legal and factual propositions dealing with the set offs that are discussed in great detail in the arbitrator's reasons of 25 September 2015 and 15 April 2016, yet are singularly absent from Esposito's written submissions filed before the preliminary hearing, with only *some* of them raised for the first time in closing address by Esposito at the preliminary hearing. That contrast alone is a powerful demonstration that the arbitrator travelled well beyond what was contemplated as the scope of the preliminary hearing.

95 On 13 May 2016, Hui filed an outline of submissions which contended that the arbitrator should nevertheless still withdraw from office given that the arbitrator had decided in his 15 April 2016 reasons that he had erred in deciding adversely to Hui on the guarantee question without affording him an opportunity to be heard. Hui submitted that a reasonable person would no longer have confidence that the arbitrator could come to a fair and balanced

conclusion on the issues if he were to reconsider them. Hui persisted with the submission that the arbitrator should make a partial award in the terms proposed in Hui's submissions of 26 November 2015. Also on 13 May 2016, UDP and 5 Star Foods filed an outline of submissions which adopted Hui's submissions on the withdrawal and the form of partial award. On 29 June 2016, Esposito filed an outline of submissions which supported the arbitrator's form of partial award annexed to his 15 April 2016 reasons. Submissions in reply were filed by Hui on 11 July 2016 and by UDP and 5 Star Foods on 13 July 2016. Esposito filed rejoinder submissions on 23 August 2016.

96 On 12 September 2016, the arbitrator delivered a third set of reasons addressing the form of the partial award and the withdrawal application. As to the form of the partial award, the arbitrator stated at [10] that he stood by the grounds expressed in his 15 April 2016 reasons in relation to the determination of the set off issue. He reiterated at [2(c)] that the arbitration respondents "as reasonable litigants, would have foreseen the possibility of the tribunal determining the set-off issues". But not only was that not reasonably foreseeable in my view, but the arbitrator's conduct at and before the preliminary hearing reasonably induced the opposite belief. The arbitrator decided that he would render a partial award substantially in the form of the proposed partial award annexed to his 15 April 2016 reasons. As to the withdrawal application, the arbitrator stated that he was not persuaded that he should withdraw from office.

97 The arbitrator's 12 September 2016 reasons were delivered with a partial award (the first partial award) which declared that Hui, UDP and 5 Star Foods were obliged to pay certain sums under the share sale agreement subject to some (but not all) of the defences. The first partial award was expressed in the following terms:

> 1. Declare that subject to paragraph 2 –
>
> (a) the Initial Deferred Consideration of $1,000,000, became due and payable by the first respondent (the Buyer) and the second respondent (the Guarantor) to the claimant (the Seller) under the SSA on 31 July 2014;
>
> (b) the Final Deferred Consideration of $1,000,000, became due and payable by the first respondent and the second respondent to the claimant under the SSA on 2 February 2015;
>
> (c) the Earn Out Cap of $7 million became due and payable by the first respondent and the second respondent to the claimant as an instalment of the Purchase Price under the SSA on 10 November 2014

with the question of interest in each case reserved for later determination;

2. Declare that –

   (a) the first respondent and the second respondent (the Guarantor) are each entitled to set off in reduction of each of the amounts referred to in paragraph 1 such amount if any as may be found due by the claimant to the first respondent for the Working Capital Adjustment Amount under clause 12.4 of the SSA or for damages for the Warranty Claims under clause 16;

   (b) the question whether by reason of the matters referred to in paragraphs 84-86 of the second respondent's further amended statement of defence and counterclaim –

      (i) the Seller is in breach of the SSA;

      (ii) the SSA is discharged as against the second respondent;

      (iii) the Seller is precluded in equity from enforcing the guarantee provided for in clause 29 of the SSA as against the second respondent; and

      (iv) the guarantee the subject of clause 29 in the SSA is discharged as against the second respondent

   is reserved to a further hearing, whether the final hearing or otherwise;

   (c) the question of the first and third respondents' entitlement to set off against the amounts referred to in paragraph 1 the loss and damage alleged in paragraph 77S of the first and third respondents' amended statement of defence dated 1 July 2015 is reserved to a further hearing, whether the final hearing or otherwise;

3. Declare that, subject to paragraph 4, under the terms of the SSA, the Refund Amounts set out below became due and payable by the first respondent, the second respondent and the third respondent to the claimant:

(a)	income tax refund received in July 2014	
	due on 7 August 2014	$1,387,110
(b)	income tax refund received in August 2014	
	due on 7 September 2014	$1,496,115
(c)	GST refund received in April 2014	
	due on 7 May 2014	$780,622
	TOTAL	$3,663,847

with the question of interest in each case reserved for later determination;

4. Declare that–

   (a) the first respondent is entitled to set off in reduction of the Refund Amounts referred to in paragraph 3 such amount if any as may be found due by the claimant to the first respondent for the Working

Capital Adjustment Amount under clause 12.4 of the SSA;

(b) neither the first respondent nor the third respondent is entitled to set off in reduction of the Refund Amounts referred to in paragraph 3 such amount if any as may be found due by the claimant to the first respondent for damages for the Warranty Claims under clause 16;

(c) the second respondent is not entitled under the SSA or in equity or otherwise to set off against such of the Refund Amounts, if any, as may hereafter be found due by the second respondent to the claimant such amount if any as may be found due by the claimant to the Buyer for the Working Capital Adjustment Amount under clause 12.4 of the SSA or for damages for the Warranty Claims under clause 16;

(d) the question referred to above in paragraph 2(b) in relation to the second respondent is reserved to a further hearing, whether the final hearing or otherwise;

(e) the question of the first and third respondents' entitlement to set off against the Refund Amounts the loss and damage alleged in paragraph 77S of the first respondent's amended statement of defence dated 1 July 2015 is reserved to a further hearing, whether the final hearing or otherwise.

5. The claim that the Refund Amounts were or are held for the claimant is dismissed.

6. The costs of and incidental to the Preliminary Hearing including the second respondent's application for a partial award are reserved for future determination.

98 On 15 September 2016 the arbitrator made a further partial award (the second partial award) dismissing Hui's application that he withdraw.

(g) Federal Court proceedings

99 Relevantly to the proceedings before me, on 7 October 2016, Hui filed an originating application (VID 1192 of 2016) seeking to set aside parts of both the first partial award and the second partial award, and an order for the removal of the arbitrator. On 12 October 2016, UDP and 5 Star Foods filed an originating application (VID 1220 of 2016) seeking similar relief.

100 On 11 and 12 October 2016, Hui and Esposito indicated by email to the arbitrator that the proceedings in the Federal Court should operate as a stay of the arbitration until the hearing and determination of those proceedings. Contrastingly, by email dated 20 October 2016, UDP and 5 Star Foods made an application to the arbitrator for further programming directions in the arbitration. UDP and 5 Star Foods took the view that the Federal Court proceedings did not operate as a stay of the arbitration. By email dated 24 October 2016, Esposito made an application to the arbitrator to stay the arbitration until the hearing and

determination of the Federal Court proceedings. On 27 October 2016, the arbitrator delivered reasons in respect of the stay application. He determined not to formally stay the arbitration until the hearing and determination of the Federal Court proceedings but to defer making directions generally in the arbitration until after directions had been made in the Federal Court proceedings. In the arbitrator's view, there was no good reason why pending the hearing and determination of the Federal Court proceedings, the parties could not take steps in the arbitration that could reasonably expedite the final hearing, whoever might constitute the arbitral tribunal at that time.

101 On 2 December 2016, a directions hearing was held in this Court before the docket judge, who set down both proceedings for trial on 23 and 24 March 2017, being dates acceptable to the parties' convenience.

102 On 16 February 2017, the arbitrator made directions on the papers for the production of further documents and the filing of lay and expert evidence in the arbitration.

RELEVANT LEGISLATIVE FRAMEWORK AND OTHER INSTRUMENTS

103 It is appropriate to set out relevant provisions of the Act and the UNCITRAL Model Law. I will also at this point make some general observations concerning art 34 of the UNCITRAL Model Law.

(a) The Act

104 Section 2D provides:

> **Objects of this Act**
>
> The objects of this Act are:
>
> (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and
>
> (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and
>
> (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and
>
> (d) to give effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting; and
>
> (e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission

on International Trade Law on 7 July 2006; and

(f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 March 1975.

105 Section 16 provides:

Model Law to have force of law

(1) Subject to this Part, the Model Law has the force of law in Australia.

(2) In the Model Law:

arbitration agreement has the meaning given in Option 1 of Article 7 of the Model Law.

State means Australia (including the external Territories) and any foreign country.

this State means Australia (including the external Territories).

106 Section 18A provides:

Article 12 – justifiable doubts as to the impartiality or independence of an arbitrator

(1) For the purposes of Article 12(1) of the Model Law, there are justifiable doubts as to the impartiality or independence of a person approached in connection with a possible appointment as arbitrator only if there is a real danger of bias on the part of that person in conducting the arbitration.

(2) For the purposes of Article 12(2) of the Model Law, there are justifiable doubts as to the impartiality or independence of an arbitrator only if there is a real danger of bias on the part of the arbitrator in conducting the arbitration.

107 Section 18C provides:

Article 18 – reasonable opportunity to present case

For the purposes of Article 18 of the Model Law, a party to arbitral proceedings is taken to have been given a full opportunity to present the party's case if the party is given a reasonable opportunity to present the party's case.

108 Section 19 provides:

Articles 17I, 34 and 36 of Model Law – public policy

Without limiting the generality of Articles 17I(1)(b)(ii), 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, it is declared, for the avoidance of any doubt, that, for the purposes of those Articles, an interim measure or award is in conflict with, or is contrary to, the public policy of Australia if:

(a) the making of the interim measure or award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the interim measure or award.

109 Section 39 provides:

Matters to which court must have regard

(1) This section applies where:

(a) a court is considering:

(i) exercising a power under section 8 to enforce a foreign award; or

(ii) exercising the power under section 8 to refuse to enforce a foreign award, including a refusal because the enforcement of the award would be contrary to public policy; or

(iii) exercising a power under Article 35 of the Model Law, as in force under subsection 16(1) of this Act, to recognise or enforce an arbitral award; or

(iv) exercising a power under Article 36 of the Model Law, as in force under subsection 16(1) of this Act, to refuse to recognise or enforce an arbitral award, including a refusal under Article 36(1)(b)(ii) because the recognition or enforcement of the arbitral award would be contrary to the public policy of Australia; or

(v) if, under section 18, the court is taken to have been specified in Article 6 of the Model Law as a court competent to perform the functions referred to in that article – performing one or more of those functions; or

(vi) performing any other functions or exercising any other powers under this Act, or the Model Law as in force under subsection 16(1) of this Act; or

(vii) performing any function or exercising any power under an agreement or award to which this Act applies; or

(b) a court is interpreting this Act, or the Model Law as in force under subsection 16(1) of this Act; or

(c) a court is interpreting an agreement or award to which this Act applies; or

(d) if, under section 18, an authority is taken to have been specified in Article 6 of the Model Law as an authority competent to perform the functions referred to in Articles 11(3) or 11(4) of the Model Law – the authority is considering performing one or more of those functions.

(2) The court or authority must, in doing so, have regard to:

(a) the objects of the Act; and

(b) the fact that:

(i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and

(ii) awards are intended to provide certainty and finality.

(3) In this section:

arbitral award has the same meaning as in the Model Law.

foreign award has the same meaning as in Part II.

Model Law has the same meaning as in Part III.

(b) The UNCITRAL Model Law

110 Article 5 provides:

Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

111 Articles 12 and 13 provide:

Article 12. Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13. Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

112 Articles 18 and 19 provide:

> *Article 18. Equal treatment of parties*
>
> The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.
>
> *Article 19. Determination of rules of procedure*
>
> (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

113 Article 34 provides:

> *Article 34. Application for setting aside as exclusive recourse against arbitral award*
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
>
> (2) An arbitral award may be set aside by the court specified in article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
>
> (b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

(c) Article 34 - Scope

114 It is convenient at this point to make reference to some general observations from *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131 at [70] to [74] and [175] to [178].

115 First, it is apparent that the text of art 34 significantly limits the circumstances under which an award may be set aside. So much is apparent from the text of art 34(1), the prefatory words "only if" to art 34(2) and the limited categories in art 34(2).

116 Second, such a limitation is reinforced by considering art 34 in the context of art 5. Indeed, ss 2D and 39 of the Act entail as much. Not to significantly limit such circumstances would be antithetical to the objects prescribed in ss 2D(a) to (c) and (e). Not to significantly limit such circumstances would be to pay insufficient regard to the fact that "arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes" (s 39(2)(b)(i)). And not to significantly limit such circumstances would be to pay insufficient regard to the fact that "awards are intended to provide certainty and finality" (s 39(2)(b)(ii)).

117 Third, the corollary of the foregoing is that significant judicial restraint must be exercised in considering and determining an art 34 challenge. It is not an occasion for a merits review. It is not an occasion for delving into the evidence before the arbitral tribunal to assess legal or factual error. Indeed, there is no free-standing challenge for error of law (whether generally or on the face of the award), although the same may not be entirely irrelevant to other grounds of challenge specified in art 34. Further, it is not an occasion for delving into the adequacy of evidence to support particular findings through the confected mechanism of a procedural fairness type challenge.

118 Fourth, if a procedural fairness type challenge has been made, the context and practical circumstances and consequences are all important. One starts with the context that one is dealing with a significant international commercial dispute between well-represented and well-heeled commercial operators. One adds to that context that the parties have chosen arbitration as the relevant dispute mechanism, which necessarily entails some compromise in the choice of procedures dictated by efficiency and expedition. The normative evaluation involved in deciding whether a party has been given a reasonable opportunity to put its case must necessarily be undertaken in that context. Further, taking into account the context I have described, any consequence short of "real unfairness" or "real practical injustice" should be put to one side (*TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 at [55] per Allsop CJ, Middleton and Foster JJ).

119 Further, as the Full Federal Court in *TCL Air Conditioner* at [154] noted:

> Thirdly, the notion of prejudice or unfairness does not involve re-running the arbitration and quantifying the causal effect of the breach of some rule. The task of the Court in assessing prejudice or unfairness or practical injustice is not to require proof of a different result: see generally the discussion in *LW Infrastructure* at [50]-[54]. *If a party has been denied a hearing on an issue, for instance, it is relevant to enquire whether, in a real and not fanciful way, that could reasonably have made a difference.* It should be recalled that the proper framework of analysis for the [International Arbitration Act] is the setting aside or non-recognition or enforcement of an international commercial arbitration. In that context, it is essential to demonstrate *real unfairness* or *real practical injustice*. (my emphasis)

120 And relatedly at [169] it said:

> The appellant argued that even so-called minor or technical breaches of the rules of natural justice would suffice for the setting aside or non-recognition or non-enforcement of an international commercial arbitration award, unless the Court could exclude any possibility of a different result being reached. This was said to flow from the lack of any reference to prejudice in the [International Arbitration Act] and the unqualified statement of Parliament in effect that any breach of the rules of natural justice was contrary to Australian public policy. This should be rejected for the reasons that we have given. It confuses and misstates the relevant conception of natural justice as one divorced from unfairness or practical injustice, it disembodies the words of Parliament from their statutory context, and it would impute to Parliament an intention to interfere with arbitral awards in a manner that would undermine fatally the facilitation and encouragement of international commercial arbitration in Australia.

121 Fifth, the art 34(2)(a)(ii) question and the art 34(2)(b)(ii) limb overlap for reasons analogous to those explained by Croft J in *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326 at [26] where his Honour said:

> The "unable to present its case" and "public policy" grounds were argued together

> and as alternatives to one another in these proceedings. In my view, and for the reasons that follow, there is no practical difference between these two grounds in the way in which they relate to natural justice and procedural fairness in the circumstances of this case. Nevertheless, it is important to note that these grounds are conceptually different. The "public policy" ground is directed towards contraventions of "fundamental principles of justice and morality" of Victoria. By contrast, the "unable to present its case" ground focuses on whether the party seeking to set aside the award has been accorded procedural fairness. As the following reasons show, this point may be a distinction without a difference in the present context because the requirement that parties in arbitrations be accorded procedural fairness or natural justice within the meaning of those terms in the relevant legislative context is part of the public policy of Victoria, and for that matter, Australia. In accordance with the approach adopted by the parties then, I will consider the "unable to present its case" ground and the "public policy" ground together.
>
> (footnotes omitted)

122 Finally, art 18 and the review powers under art 34 of the UNCITRAL Model Law are not intended to apply to unfairness caused by a party's own conduct including forensic or strategic decisions (*Corporacion Transnacional de Inversiones SA de CV v STET International SpA* (1999) 45 OR (3d) 183 at 204 per Lax J, applied by Croft J in *Amasya Enterprises* at [29]).

(d) UNCITRAL Arbitration Rules

123 As I have indicated, the dispute resolution mechanism in the share sale agreement (cl 21A) incorporated the terms of the UNICTRAL Arbitration Rules then in force. I have considered inter alia the terms of arts 11 to 14, 17 and 21 (the provision which *procedurally* allows for a set off). I note that art 17, cl 1 provides for each party to be given "a reasonable opportunity of presenting its case". Given s 18C of the Act which modifies art 18 of the UNICTRAL Model Law, no separate dimension arises from any consideration of art 17 of the UNCITRAL Arbitration Rules. Certainly, no party suggested otherwise.

124 Nothing further need be said in the present context concerning the UNCITRAL Arbitration Rules.

ANALYSIS

125 It is convenient at this point to address the following matters:

(a) First, the scope of the preliminary hearing.

(b) Second, what the arbitrator decided.

(c) Third, the value of the lost opportunity.

(d) Fourth, *The Kostas Melas*.

(e) Fifth, the scope of arts 18, 34(2)(a)(ii) and 34(2)(b)(ii) of the UNCITRAL Model Law.

(f) Sixth, the arbitrator's prejudgment.

(g) Seventh, the consequences and form of relief.

(a) The scope of the preliminary hearing

126 In my view, it was well understood by the parties and acceded to by the arbitrator that the preliminary hearing would not concern the availability of set off defences or their merits. Let me draw out some themes from the detailed chronology set out earlier.

127 At the directions hearing on 19 March 2015, the arbitrator determined and directed that there would only be a preliminary hearing of Esposito's paragraph 1(a) claims. The arbitrator declined to direct that there be a preliminary hearing of positive defences to those claims or of the operation and effect of cl 17 of the share sale agreement.

128 In relation to the 19 March 2015 hearing the following may be noted. First, at that time, neither UDP, 5 Star Foods nor Hui had filed a statement of defence. Second, it was UDP's and 5 Star Foods' counsel that put a proposal which he said would progress the resolution of the issues in the arbitration notwithstanding the extra time that UDP and 5 Star Foods (and Hui) needed to file their defence. The proposal was that at the preliminary hearing the arbitrator could hear argument about the availability of defences, including set off defences, under the share sale agreement, and then determine those questions. UDP's and 5 Star Foods' counsel stated that, for the purposes of the preliminary hearing, he could prepare a statement of position or statement of issues on the availability of defences under the share sale agreement. But *contrastingly*, Esposito's counsel said that if the arbitration respondents wished to rely on a cross-claim by way of set off to any of the claims, Esposito would have to investigate that once it saw it and worked out whether it was an appropriate matter to be dealt with as part of the preliminary hearing or whether it should be deferred. Third, and

ultimately, the arbitrator directed that there be a preliminary hearing in respect of the claims the subject of paragraph 1(a) of Esposito's application dated 17 February 2015.

129 In summary, it was well understood by the parties and the arbitrator, that the arbitrator would only hear Esposito's claims (described at the hearing as the "paragraph (a) claims") at the preliminary hearing and would not hear any positive defences or set offs.

130 At a directions hearing on 21 May 2015, the arbitrator reiterated that the preliminary hearing would not concern the availability of defences, including set off defences. It is appropriate to set out some passages of the transcript:

(a) At an early point, the following exchange occurred:

> THE ARBITRATOR: Can I hear from you, Mr Harris, about the hearing next week. We are dealing with three claims.
>
> MR HARRIS: Yes.
>
> THE ARBITRATOR: Just remind me.
>
> MR HARRIS: Yes…

(b) Esposito's counsel elaborated on the claims and then the following exchange occurred:

> THE ARBITRATOR: And you are being put to proof of those matters.
>
> MR HARRIS: Yes.
>
> THE ARBITRATOR: **There are defences pleaded by all respondents, but the second respondent's pleaded defences, they are not the subject of the hearing next week. Am I right about that?**
>
> MR HARRIS: **We would contend that's the effect of your direction, yes…**
>
> (emphasis added)

(c) Later, the following exchange occurred between the arbitrator and Hui's counsel:

> MR MASTERS: I might just frankly admit I don't understand why the preliminary hearing is going ahead in light of the defences. I need to see the outline. I'm being given one business day once I have seen the outline to formulate a response. I'm not in a position right now to formulate a response to something I haven't seen and don't understand.
>
> THE ARBITRATOR: You know the claims that are made. They have pleaded it.

> MR MASTERS: **I do. But it's in circumstances where there are set-off defences and counterclaims - - -**
>
> THE ARBITRATOR: **But we won't be entering into those, will we.**
>
> MR MASTERS: I know, no. But the argument that we will be having will have regard to the fact that there are counterclaims and set-off defences that are made in relation to these very points.
>
> THE ARBITRATOR: But how will they go to the proof of these claims?
>
> MR MASTERS: It will all depend on what Mr Harris says in his outline.
>
> THE ARBITRATOR: **This is a preliminary hearing. It is simply the claims. I understand you are putting them to proof and you have flagged these other defences. We are not dealing with the other defences.** But you will have to meet an application that's been foreshadowed that there be a partial award or interim relief of some kind. That's what's been foreshadowed. You will have to meet that.
>
> MR MASTERS: Indeed.
>
> THE ARBITRATOR: That's the scope of what will happen at this preliminary hearing, as I'm understanding it.
>
> (emphasis added)

131 In summary, by the time of that directions hearing, the respondents to the arbitration had filed statements of defence. Generally, although the arbitrator stated that the arbitration respondents would need to meet a foreshadowed application at the preliminary hearing that there be a partial award or interim relief, he also reaffirmed that the preliminary hearing would only concern Esposito's claims and would not concern positive defences to those claims including set offs.

132 Esposito and Hui subsequently filed outlines of submissions in respect of the preliminary hearing which was consistent with that understanding.

133 The outline of submissions filed by Esposito did not address the legal or factual merits of the set off defences at all. Indeed, the outline stated at [122]:

> … no doubt having regard to the respondents' conduct in the arbitration and consistent with his duty imposed by Article 17 of the Rules (to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' disputes), the arbitrator properly set down the claims the subject of [the] Preliminary Hearing so as to exclude consideration of such [set off] claims when pleaded.

134 It is appropriate to set out in more detail what Esposito's written submissions contained.

135 At [73], the following was said:

[73] The issues for Determination at the Preliminary Hearing are:

a. Did United Dairy Power Pty Ltd receive a Refund of GST in respect of the month of January 2014 of $204,130, and, if so:

   i. on what date; and

   ii. has that Refund been paid to Seller by either Buyer or United Dairy Power Pty Ltd in accordance with clause 10.1(h) of the SSA?

b. Did United Dairy Products Pty Limited receive a Refund of GST in respect of the month of January 2014 of $576,492, and, if so:

   i. on what date; and

   ii. has that Refund been paid to Seller by either Buyer or United Dairy Products Pty Limited in accordance with clause 10.1(h) of the SSA?

c. Did Company receive a Refund of $1,363,434 in respect of income tax for the financial year ending 30 June 2013 and, if so:

   i. on what date; and

   ii. has that Refund been paid to Seller by either Buyer or Company in accordance with clause 10.1(h) of the SSA?

d. Did Company receive a Refund of $1,496,115 in respect of income tax for that part of financial year from 1 July 2013 to 31 January 2014, if so:

   i. on what date; and

   ii. has that Refund been paid to Seller by either Buyer or Company in accordance with clause 10.1(h) of the SSA?

e. Were the Refunds received by a member of the Group held for Seller?

f. Did the Initial Deferred Consideration fall due for payment on 31 July 2014 and, if so, has it been paid to Seller?

g. Did the Final Deferred Consideration fall due for payment on 2 February 2015 and, if so, has it been paid to Seller?

h. Did a Change of Control occur in relation to Buyer and, if so,

   i. how did that occur; and

   ii. on what date?

i. Did a Change of Control occur in relation to a member of the Group and, if so, in respect of each relevant member of the Group,

   i. how did that occur; and

   ii. on what date?

j. Did an Insolvency Event occur in relation to Buyer and, if so, on what date?

k. If "yes" to any of issues in paragraph h, i, and j above, did the Earn Out Cap of $7m:

i. become due and payable by Buyer to Seller; and

ii. If so, on what date?

l. In respect of each of the claims established, what amount of interest is to be paid?

m. In light of the matters pleaded by the defences as set offs, should the arbitrator make a partial award?

136 As to [73(m)], there was simply no detail at all as to any factual or legal merits of "the defences as set offs" or whether such set offs were bona fide and reasonable. Likewise, [75] only referred to the fact of the pleaded claims. It provided:

> While the respondents do seek to rely on other claims or counterclaims pleaded in their defences, which if established, they will then seek to contend give rise to a right of set-off against any liability ordered against them, those set-off claims were not directed to be part the Preliminary Hearing.

137 It is well apparent from [118] to [123] what the context of the references in [73(m)] and [75] was. Those paragraphs provided:

> The *bona fides* of the delays in this arbitration to date have been constantly questioned by Seller and the explanations provided by the respondents do not withstand scrutiny.
>
> Article 34(1) of the Rules expressly authorises the arbitrator to make separate awards on different issues at different times. Further, Article 24(2) requires that all such awards be final and binding. A "partial award" is an arbitral decision that finally disposes of part but not all of the parties' claims in the arbitration, leaving some claims for consideration and resolution in future proceedings in the arbitration.
>
> As noted above, insofar as any aspect of each of the claims the subject of this preliminary hearing is not expressly admitted, the respondents merely either not admit or deny the balance of the allegations made but do not seek to prove any facts or circumstances that give rise to a direct defence to any of the claims made.
>
> Rather, the respondents plead other claims based on breaches the SSA which are independent from the claims the subject of the Preliminary Hearing. The respondents contend that, if they can be established, those claims will give rise to liabilities of Seller to Buyer. Save for the Working Capital Adjustment of $5,042,801, the claims made by the respondents remain unquantified. Once established, the respondents seek to then contend that those liabilities can be set-off against their liabilities for the claims the subject of the Preliminary Hearing (presumably notwithstanding the terms of cl.17 of the SSA, although how that can be so is not pleaded, nor is it apparent).
>
> What is apparent from the express recognition of set-off claims by the Rules, is that the existence of such claims is no bar to the making of a partial award. The arbitrator was advised by counsel for Buyer and Company and by counsel for Buyer Guarantor that when a defence was finally filed that they would each plead claims by way of set-off and that it would, therefore, be inappropriate to make a partial award without also ruling on those set off claims. Notwithstanding, that submission, no doubt

> having regard to the respondents' conduct in the arbitration and consistent with his duty imposed by Article 17 of the Rules (to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' disputes), the arbitrator properly set down the claims the subject of Preliminary Hearing so as to exclude consideration of such claims when pleaded.
>
> Despite directions being made that accommodated its provision, no evidence has been filed by the respondents, which, if it existed, would have been readily available, to justify consideration of a conclusion that the ordinary course of making a partial award should not follow the conduct of the Preliminary Hearing, which was its stated purpose by Seller.

138 What is apparent is that Esposito was simply arguing the procedural point that any set off claims did not provide a bar to a partial award under the UNCITRAL Arbitration Rules. There was no legal or factual discussion on the merits thereof let alone questions of construction of the share sale agreement relating to the set off. Moreover, although *The Kostas Melas* was in Esposito's List of Authorities, there was no discussion of this case at all in Esposito's outline of submissions, let alone in the way that it is now being sought to be finessed. More particularly, there was no discussion or reference by Esposito that it was seeking to argue, for the purposes of any partial award, that the arbitration respondents were required to establish (and had not established) that their set offs were asserted in good faith and on reasonable grounds. Indeed, [75] of Esposito's submissions as well as [73(m)] and [121] make it plain that all Esposito was seeking to assert was that the fact of any pleaded set off was no bar to any partial award.

139 I will discuss *The Kostas Melas* later and how it has been used. But before proceeding further, it is important to appreciate the following:

(a) First, prior to the preliminary hearing, *The Kostas Melas* was not flagged in the way that Esposito has now sought to use it.

(b) Second, the preliminary hearing was not at all concerned to deal with whether the set offs were bona fide and reasonably arguable.

(c) Third, a careful perusal of the arbitrator's reasons of 25 September 2015 demonstrates that the arbitrator decided the merits of some set offs (see for example at [219] to [236]) but did *not* at that time apply *The Kostas Melas* in terms to any of the set offs (see for example at [247] and [248]), although he was influenced by "the thrust" of Esposito's point which dealt with *delay* in pleading (see at [243] to [245]).

140 Let me return to the chronology.

141 Hui's outline of submissions referred to the set off defences, but also did not address them. At [2], [17], [18], [27], [28], [42], [43] and [70] to [77] the following was said:

> [2] It is submitted that the arbitrator should not make a partial award in respect of the claims the subject of paragraph 1(a) of the Application, and that an award in respect of those claims must necessarily await determination of the alleged entitlement of the first respondent (the **Buyer**) and the third respondent (the **Company**) to set off amounts owing to them under the SSA.
>
> [17] Therefore, the matters alleged in paragraph 62 of the SFASOC are not in issue. However, the matters alleged in paragraphs 63 and 64 of the SFASOC, including whether the Buyer was required to pay the Initial Deferred Consideration to the Seller, are in issue. Both the Buyer and the Company, and the Guarantor, allege that the Buyer was not required to pay the Initial Deferred Consideration to the Seller by reason of the alleged entitlement of the Buyer to set off the Working Capital Adjustment Amount of $5,042,801. The alleged entitlement of the Buyer to set off that amount is not within the scope of the preliminary hearing as directed by the arbitrator.
>
> [18] Accordingly, the arbitrator should not make a preliminary award in respect of the Initial Deferred Consideration. Rather, any award in respect of the Initial Deferred Consideration must necessarily await determination of the alleged entitlement of the Buyer to set off the Working Capital Adjustment Amount of $5,042,801.
>
> [27] Therefore, the matters alleged in paragraph 64A of the SFASOC are not in issue. However, the matters alleged in paragraphs 64B and 64C of the SFASOC, including whether the Buyer was required to pay the Final Deferred Consideration to the Seller, are in issue. Both the Buyer and the Company, and the Guarantor, allege that the Buyer was not required to pay the Final Deferred Consideration to the Seller by reason of the alleged entitlement of the Buyer to set off the Working Capital Adjustment Amount of $5,042,801. As stated above, the alleged entitlement of the Buyer to set off that amount is not within the scope of the preliminary hearing as directed by the arbitrator.
>
> [28] Accordingly, the arbitrator should not make a preliminary award in respect of the Final Deferred Consideration. Rather, any award in respect of the Final Deferred Consideration must necessarily await determination of the alleged entitlement of the Buyer to set off the Working Capital Adjustment Amount of $5,042,801.
>
> [42] Therefore, all of the matters alleged in paragraph 49 to 52 of the SFASOC are in issue. Both the Buyer and the Company, and the Guarantor, allege that the Buyer and the Company are not required to pay the amount of the Refunds to the Seller by reason of the alleged entitlement of the Buyer to set off amounts owing to it under the SSA. As stated above, the alleged entitlement of the Buyer to set off those amounts is not within the scope of the preliminary hearing as directed by the arbitrator.
>
> [43] Accordingly, the arbitrator should not make a preliminary award in respect of the Refunds. Rather, any award in respect of the Refunds must necessarily await determination of the alleged entitlement of the Buyer to set off amounts owing to it under the SSA.
>
> [70] At paragraph 77O of his statement of defence and counterclaim, the Guarantor denies each and every allegation in paragraph 77O of the SFASOC, and says further that, by reason of the matters referred to in paragraphs 34(g) and 41(n) of his statement of defence and counterclaim, the Buyer could not be liable to pay the Earn

> Out Cap to the Seller.
>
> [71] Therefore, all of the matters alleged in paragraphs 77G and 77I to 77O of the SFASOC are in issue. Both the Buyer and the Company, and the Guarantor, allege that the Buyer is not liable to pay the Earn Out Cap by reason of the alleged entitlement of the Buyer to set off amounts owing to it under the SSA. The alleged entitlement of the Buyer to set off those amounts is not within the scope of the preliminary hearing as directed by the arbitrator.
>
> [72] Accordingly, the arbitrator should not make a preliminary award in respect of the Earn Out Cap. Rather, any award in respect of the Earn Out Cap must necessarily await determination of the alleged entitlement of the Buyer to set off amounts owing to it under the SSA.
>
> [73] If the arbitrator now makes an enforceable partial award in respect of the claims the subject of paragraph 1(a) of the Application, the effect of Article 34 of the Rules will be, without some further order, to require the respondents to carry out that partial award without delay.
>
> [74] However, both the Buyer and the Company, and the Guarantor, have pleaded in defence of each of the claims the subject of paragraph 1(a) of the Application that the Buyer was not required to pay the amount of the claim by reason of amounts owing to it under the SSA. Further, the Guarantor has pleaded by way of counterclaim that the Seller has breached Seller's Warranties in the SSA and has engaged in misleading or deceptive conduct, and that the guarantee the subject of clause 29 of the SSA is discharged as against the Guarantor.
>
> [75] The alleged entitlement of the Buyer to set off amounts owing to it under the SSA, and the counterclaim of the Guarantor, are not within the scope of the preliminary hearing as directed by the arbitrator.
>
> [76] If the arbitrator now makes an enforceable partial award in respect of the claims the subject of paragraph 1(a) of the Application, the effect of Article 34 of the Rules will be, without some further order, to require the respondents to comply with that award, notwithstanding they may have a good defence to those claims. Moreover, if payments are made in compliance with such a partial award, the later hearing of the respondents' defences will be rendered nugatory because those payments will already have been made.
>
> [77] It is submitted that such a course would not provide a fair and efficient process for resolving the parties' dispute as required by Article 17(2) of the Rules. Accordingly, it is submitted that the arbitrator should not make a partial award in respect of the claims the subject of paragraph 1(a) of the Application.

142 Esposito did not take issue with Hui as to the characterisation of what was before the arbitrator for the preliminary hearing. In summary, prior to the preliminary hearing, no issue was raised at all about the bona fides, reasonableness or availability at law or in equity or under the share sale agreement of the set offs. Esposito merely made the simple point that any pleaded set off could not be a bar to a partial award.

143 The arbitrator conducted the preliminary hearing on 3 and 4 June 2015.

144 Close to the outset, the arbitrator appeared to take the view that the preliminary hearing would not involve the determination of the set off defences. At T:30:19 to T:31:10, he said:

> THE ARBITRATOR: I think there are some questions. The controversy between the parties will focus not just on the claimant proving its claims, but on this question of the significance of the claims to set-off and so on that are relied on by this respondent. I was expecting there will be some argument about that.
>
> MR HARRIS: There will be, I'm sure.
>
> THE ARBITRATOR: In this application.
>
> MR MASTERS: Today? Yes. Although, I should clarify at the outset you made clear at the last hearing that the set-off defences, although were not a matter for hearing today, it will be my submission that the fact that there are set-off defences is relevant to whether a partial award should be made.
>
> THE ARBITRATOR: Yes, I understand that. I understand that submission. I think that's right. It is clearly relevant, Mr Masters. I think it is in your interests, if you wish to rely upon any matter arising out of this amendment for which leave is given, it is in your client's interest to file a document. One can't deal with it in the abstract. If you want to rely on something, you need to formulate it. At present it's not in the pleadings, so the claimant is not on notice of anything.

145 At T:32:15-25, the arbitrator said:

> **I hear the second respondent's submissions that the matter of alleged set-offs is a matter relevant to their position. So, I would envisage the tribunal having to consider that question and, absent even a formulation of any other set-off on which they rely, I won't have regard to it, so it won't figure in the determination. It may figure for the future. It may be that the determination of the so-called set-off points as currently pleaded will provide a sufficient indication of where things ought to go. It may be that we are spending time needlessly.**
>
> (emphasis added)

146 At T:47:12 to T:48:15, Hui's counsel said:

> MR MASTERS: By way of opening, it is my submission that the tribunal should not make a partial award in respect of the claims that are the subject of paragraph 1(a) of the application. The reason for this, as you will have seen in the outline, is that both the first and third respondents and my client, the second respondent, have pleaded in defence of those claims that the buyer was not required to pay the amount of the claim by reason of amounts owing to it under the share sale agreement.
>
> Further, my client, the second respondent, has pleaded by way of counterclaim that the claimant has breached seller's warranties in the share sale agreement and has engaged in misleading or deceptive conduct and the guarantee the subject of clause 29 of the share sale agreement is discharged as against the second respondent.
>
> As I have noted, the alleged entitlement of the buyer to set off amounts owing to it under the share sale agreement and the counterclaim of the second respondent are not within the scope of this preliminary hearing, as you have directed. In my submission, an award in respect of the claims the subject of paragraph 1(a) must necessarily await determination of the alleged entitlement of the buyer to set off those amounts and

> accordingly it is my submission that the application for a partial award should be dismissed. That is all I wish to say by way of opening at this stage.
>
> THE ARBITRATOR: Is it a matter of either granting that application or dismissing it? Are there other possibilities? Short of granting a partial award, the tribunal would be determining various issues here. So, I just sort of raise that question. It may not be just application granted or application refused; there may be more permutations.
>
> MR MASTERS: Yes. I might address that by way of closing submissions later.

147 Then, somewhat surprisingly, the arbitrator said just before lunch on 3 June 2015 (T:68:23 to T:69:11):

> THE ARBITRATOR: Yes. We have to address those issues of the claimant proving those matters. There is then going to be argument, I take it, over the effect of the set-offs that are claimed and also likewise, from the claimant's point of view, the elements of the defence that go to the guarantee.
>
> I want to mention to the parties an authority that struck me as possibly having relevance so you are all aware of it, tell me if I'm wrong, but Indrisie v General Credits, which is reported at (1985) VR 251. It is a Full Court decision. It is concerned with the position of a guarantor, the question of set-offs and so on. You will see there are authorities that it refers to that refer to it. You will see them on LexisNexis. But it struck me as possibly having relevance. So I wanted to alert you to have a look at that.
>
> MR HARRIS: I haven't looked at that authority so we will get it over the break.
>
> THE ARBITRATOR: I am just saying it for both of you. We will adjourn until 2.15 or do you want a little bit longer?

148 I say surprisingly, as *Indrisie v General Credits Ltd* [1985] VR 251 had not been referred to by the parties. *Indrisie* discussed the necessary elements to establish an equitable set off and also stood for the proposition that a guarantor could not reduce his liability to a creditor by taking the benefit of a cross-claim for damages available to the principal debtor against the creditor to which the guarantor was a stranger. But the merits of any set off, either as to the existence of the claim said to constitute the set off or its availability as a set off by way of defence, were not a matter for the preliminary hearing.

149 At the start of the second day, at T:104 to T:105, Esposito identified the pleaded defences and the set off and then drew attention to some of the provisions of the share sale agreement.

150 After lunch on the second day, Esposito's counsel in closing address (T:170) then turned to the issue of whether there should be a partial award. Up to this time, nothing had been said of any substance concerning the legal or factual merits of the set offs, apart from the arbitrator's volunteered reference to *Indrisie* before lunch on the first day.

151 Esposito's counsel then addressed the availability of the set off defences at length. Contrastingly, close to the commencement of the preliminary hearing on 3 June 2015 he had said that "[t]he set-off issues were never going to be determined today…" and had said on the first day at T:39:14-23:

> It is seller's contention that the evidence will satisfy you that each of the amounts identified fell due on a particular date and remain unpaid. The defences that are filed raise no direct defence to any of the claims by the respondents. They merely seek to invoke principles of set-off to further delay an award in favour of seller. It is the contention that there shouldn't be any partial award until those set-off claims have been heard and determined and we say that the invocation of set-off for that purpose will be established as being ineffectual.

152 As I have said, after lunch on the second day, Esposito's counsel discussed the set off defences in the context of whether the arbitrator should make a partial award. Relevantly, Esposito's counsel said at T:171:18-29:

> To us the power is clear. The question is one of discretion and whether in the circumstances of this arbitration it is appropriate to order or deliver an award in relation to the claims the subject of the preliminary hearing.
>
> That engages an important point of principle, which is, when one party to the arbitration is ready to run its claim and the other party to the arbitration is resisting the determination of that claim on the basis of a set-off, it becomes incumbent upon that resisting party to justify why the claim that's ready to be determined can't be so determined because of counterclaim.

153 Esposito's counsel then referred the arbitrator to *The Kostas Melas* (T:171 to T:180). As I say, I will spend some time discussing this authority later.

154 Esposito's counsel then relevantly stated at T:180:2-27:

> What's been said against us is you can't determine the claims without determining the cross-claims. Now - and, as we have acknowledged, in the ordinary course, particularly in curial proceedings, that's the way the curial proceeding moves forward.
>
> In arbitral proceedings where the parties consensually adopt rules which allow you to determine one issue separately from another and the guiding principle is cost minimisation, efficiency and fairness to the parties, when one party is ready to have its claim agitated it should be agitated because by definition it is being opposed by the other side. If it is being opposed because it has a direct defence to the claim, it will be ready to run that direct defence. When it wants to invoke a separate claim arising either through the same contract or as a separate transaction but which in equity would give rise to a right of set-off, it can only use that excuse to delay the arbitration if it can satisfy you on evidence that the estimate of the amount claimed is calculated on a reasonable basis and is being invoked bona fide. If it can't do that, then you are entitled to put that counterclaim to one side for the purposes of a partial award, recognising that in phase 2 that claim will be heard and determined, and an award will be made in relation to that claim. If it is successful, then that may include an order to make payment of money.

155 Further and relevantly, Esposito's counsel stated (at T:191:10-20):

> We are here arguing about our claims and the defences that have been raised to our claims. There are two set-off defences that have been raised to our claims, but not the invalidity of the guarantee. That's a separate counterclaim and it's a separate issue which you have ruled previously is not to be part of this hearing. The question is: should it delay the award in this hearing? It may have been able to be used to delay if it had been pleaded as a defence, but it hasn't been, regardless of its merits, which I will address in a moment.

156 At T:200 to T:201, Esposito's counsel made reference to claims made against Esposito by the arbitration respondents.

157 At T:201:27-30, counsel submitted:

> So we say that this claim on the contractual documents is hopeless. But it is important because it is going to inform your discretion about the terms and content of the award which we say we are entitled to.

158 So too at T:203:12-21, counsel submitted:

> So we say there are very substantial contractual impediments to the merit of these claims which informs your judgment about how you should deal with the partial award and the timing of any partial award. Is it fair, when we have proved our claims, that we should be held out of our money which, taking the GST for example, ought to have been paid in April last year and, if it had have been paid in April last year we wouldn't have been prejudiced? But now of course we are in a situation where buyer and company are in administration.

159 The following exchange between the arbitrator and Esposito's counsel also appears to reveal why Esposito referred at length to the set off defences and the guarantee (at T:220:16 to T:222:24):

> THE ARBITRATOR: I suppose you are placing some reliance on, first of all, the second respondent makes this as a counterclaim.
>
> MR HARRIS: Yes.
>
> THE ARBITRATOR: Which, if a partial award were made, which would have to cause the second respondent to change its relief in the counterclaim - - -
>
> MR HARRIS: Yes, it would have to - - -
>
> THE ARBITRATOR: Namely, "I want my money back."
>
> MR HARRIS: Yes, of course.
>
> THE ARBITRATOR: **But it's not the role of the tribunal on this application, is it, to determine the cross-claim?**
>
> MR HARRIS: **No. You have ruled that you won't.**
>
> THE ARBITRATOR: **We are not doing that, and Mr Masters will remind me of that. On the other hand, if there is an obvious answer, such as the contract**

provides a right of set-off or doesn't provide it or so on, I have regard to that as being relevant to the making of a partial award.

But I'm not going into the merits of this.

MR HARRIS: No. The only issue, for the sake of repeating myself here, is should you defer - has Mr Masters persuaded you on evidence that there is a genuine estimate which enables you to work out the quantification of the set-off, and here in relation to the guarantee it is an absolute set-off, so in relation to this - - -

THE ARBITRATOR: **I'm not addressing set-offs at this point.**

MR HARRIS: No, but it is the reason why this claim can't be determined today, is because they want to run another claim which they say impacts on our claim. But they are not ready to run it now. Should our claim be delayed. Then the question becomes the bona fides of that claim, because, as Lord Goff recognises, these type of claims can be deployed in a way that's deliberately designed to defer determination of claims. If you want to do that, you have to come along and persuade the Arbitrator about why that should happen, and that includes establishing a prima facie at least entitlement on evidence, a bona fide basis for saying that, "I can call on your discretion to defer determination of the issue that is to be determined at the instigation of the claimant."

That involves, amongst other things, looking at the obvious merits of the claim. Here, we have a contractual mechanism relied on which doesn't apply because it's dependent upon buyer actually doing something, and even buyer in its defence doesn't seek to make this claim, and it is their claim. And, even if they made it, they would have to be making it today, and it's too late to have an impact on the accrued liability under the guarantee in contract, if it was made today. So then you are left back to the ACL claim.

THE ARBITRATOR: But does the publication of a partial award against the second respondent determine the issue of the enforceability of the guarantee? Does that operate as a - - -

MR HARRIS: No. No, because you are on notice of the fact that they want to argue in phase 2, not ready now to do it, though, and "we want to delay everything because of that, but we want to argue that the guarantee isn't enforceable." It doesn't operate as an issue estoppel against them, no.

THE ARBITRATOR: So that award would be in a sense without prejudice to their right - - -

MR HARRIS: Yes, exactly.

THE ARBITRATOR: To contend that the guarantee was unenforceable.

MR HARRIS: Of course. In a curial proceeding that might not be acceptable. But in an arbitration, where the parties have consensually agreed to a procedure which contemplates and is a common device used in arbitrations, particularly international arbitrations, having partial hearings in relation to claims - - -

(emphasis added)

160 At T:226:26 to T:227:16, the following exchange occurred:

THE ARBITRATOR: **Well, in fairness to them, though, the defences are not the subject of this application for a preliminary hearing.**

> MR HARRIS: **Absolutely.** But that's the fundamental point. What was very clear on 19 March was Mr Scott sung the hymn, and my learned friend joined in the chorus, "You can't do this because we are going to - we haven't yet, but we are going to, despite the many months that have passed - plead a set-off claim. So, bad luck, you can't make a partial award, and, seller, you will just have to live with it. Bad luck." You determined correctly, with respect, "Enough delay has occurred, enough obfuscation has occurred. We are going to proceed on these claims, and the set-off claims will be dealt with at another time."
>
> That left one and one argument left to Mr Masters and Mr Scott, if he was here: prove to you why our right which is ready to be agitated today should be deferred to a time that suits them so that they can run their case. That was the one thing they needed to do, and they haven't done it. They haven't put on a scintilla of evidence about that.
>
> (emphasis added)

161 I would make the observation that in my view Esposito's counsel late on the second and final day and in closing address was seeking to run for the first time points relating to the set offs that were not the subject of prior written submissions, were not opened and were also beyond the purview of the preliminary hearing. Now naturally, issues can develop in the running, but three points. First, this was at the heel of the hunt. Second, the arbitrator did not telegraph to Hui's counsel or rule that the scope of the preliminary hearing was being expanded. Quite the reverse. Third, UDP and 5 Star Foods were not even present. Now they had chosen not to participate in the preliminary hearing, presumably inter alia given its limited scope. Accordingly, they took the risk, by their absence, of any foreseeable expansion of the issues. But what occurred was well beyond any such foreseeable expansion.

162 Hui's counsel did not make submissions on the availability of set off defences at the preliminary hearing. He stated numerous times that the arbitrator had made clear that the availability of Hui's set off defences was not within the scope of the preliminary hearing:

> I should clarify at the outset you made clear at the last hearing that the set-off defences, although were not a matter for hearing today, it will be my submission that the fact that there are set-off defences is relevant to whether a partial award should be made. (T:30:27 to T:31:1)
>
> As I have noted, the alleged entitlement of the buyer to set off amounts owing to it under the share sale agreement and the counterclaim of the second respondent are not within the scope of this preliminary hearing, as you have directed. In my submission, an award in respect of the claims the subject of paragraph 1(a) must necessarily await determination of the alleged entitlement of the buyer to set off those amounts and accordingly it is my submission that the application for a partial award should be dismissed. (T:47:27 to T:48:5)
>
> Mr Harris today and in particular this afternoon has done what I understood would not be done, and that is a traversing of the set-off allegations and a traversing of the counterclaim. As I mentioned yesterday and reminded you, it was made clear at the

> last hearing, and it has since been made clear again, that the set-off allegations and the counterclaim allegations are not within the scope of this preliminary hearing. If they were, this would effectively be the final hearing. (T:228:20 to T:228:28)
>
> On the basis of what was said, I have not prepared submissions and I'm not proposing to go through all of the set-off allegations and counterclaim allegations that have been made. That's because, in my submission, they are properly matters that are to be determined at the final hearing. (T:228:29 to T:229:3)
>
> It is my submission that if a partial award is made now the partial award would not be determining part of the claims that are made. It would be determining the allegations of the claimant, however it would not be determining the set-off defences that are made in respect of those allegations. (T:243:13-18)
>
> … as I have noted a few times, this preliminary hearing does not include the set-off claims. Questions of the availability of a set-off defence to a guarantor is properly a matter for determination at the final hearing. (T:244:25-29)
>
> Just on that note, I would like to address what Mr Harris has said about the absence of evidence in support of the set-off claims. This preliminary hearing, as I have now noted a number of times, has, it has been made clear for some time now, not had within its scope the set-off claims or the counterclaim. That is why my outline of submissions does not deal in any detail with those claims. (T:248:18-25)
>
> But it was made quite clear that those allegations, the allegations of set-off and counterclaim, would not be heard and determined at this hearing. It is for that reason that evidence in relation to the set-off claims has not been filed. (T:248:28 to T:249:2)
>
> I might say the reason there is no evidence on oath again is because of what was made clear at the last hearing where I raised set-off defences and counterclaim and you, [arbitrator], said we won't be entering into those. Again, it was stated, "This is a preliminary hearing. It is simply the claims." So it was never contemplated that evidence on oath would be filed in relation to the matters the subject of the set-off claims or the counterclaim. It's my submission as a matter of fairness my client should be given an opportunity to advance those allegations by way of evidence in the normal course. (T:253:25 to T:254:4)

163 Hui's counsel also made submissions as to why a partial award should not be made (T:240).

164 At T:241:4-29, the following exchange occurred between Hui's counsel and the arbitrator:

> MR MASTERS: Yes. As I said earlier, it is my submission that the application in its entirety should be dismissed and that a partial award should not be made against any of the respondents on the basis of what's said in the defences and in the counterclaim.
>
> This goes to a point that you raised earlier, [Mr Arbitrator]. Thinking through how all of this would play out, if payments were made pursuant to a partial award, if a partial award were now made, the defences that are raised by the respondents in their statements of defence would be rendered nugatory. There would be no point in them being heard, and indeed there would be no opportunity for them to be heard at a later point.
>
> THE ARBITRATOR: The defences are set-off defences.
>
> MR MASTERS: Correct. The set-off defences would be rendered nugatory. They are not being determined today. They would not be determined at a future point

> because the claims already will have been - - -
>
> THE ARBITRATOR: The subject of a - - -
>
> MR MASTERS: The subject of a partial award.
>
> THE ARBITRATOR: They would be able to cross-claim, though, counterclaim.
>
> MR MASTERS: That's a separate point, the question of the counterclaim. But certainly the set-off allegations which in my submission are bona fide allegations would never be heard. They would never be determined.

165 At T:242:12-23, the following exchange occurred:

> MR MASTERS: I will deal with the counterclaim question. My point is that the defences themselves will have never been heard or determined.
>
> THE ARBITRATOR: And what is the substantive defence you have in mind? What are you referring to when you say that?
>
> MR MASTERS: The set-off defences; that is defences are raised that the amounts are not payable. If a partial award is made in the sense of a final and binding award in respect of the money claims that are made against the respondents, the set-off defences will not have been heard. It is my submission that that is not a fair process.
>
> THE ARBITRATOR: I understand.

166 At T:244:16-29, the following was submitted by Hui's counsel:

> I did want to say something in relation to the authority that, [Mr Arbitrator], you drew the parties' attention to yesterday, and that's the decision of Indrisie v General Credits Limited (1985) VR 251. There it was held that a guarantor could not rely on a set-off available to the holder of the primary obligation. The first point I would like to note is that the application of this authority and some other authorities that I will take you to in a moment is properly, in my submission, a matter for final hearing; that is, as I have noted a few times, this preliminary hearing does not include the set-off claims. Questions of the availability of a set-off defence to a guarantor is properly a matter for determination at the final hearing.

167 The arbitrator did not demur from that last proposition. Later, the following exchange occurred between Hui's counsel and the arbitrator at T:249:3-24:

> MR MASTERS: … As I said earlier, if it had been and if I had filed submissions in support of all of that and gone through the process that Mr Harris has done today, we would effectively be undertaking a final hearing of the claims, and that's clearly not what's contemplated.
>
> THE ARBITRATOR: **The tribunal is not adjudicating on the merits of the set-off claims in these applications.**
>
> MR MASTERS: Yes, and that's been made clear. It is my submission that much of the submission that Mr Harris undertook today related to merits. If anything, his submissions - which, with the greatest of respect, went for perhaps a couple of hours - showed that there are matters and issues that arise from the allegations which will properly need to be considered and determined by this arbitral tribunal.
>
> THE ARBITRATOR: **I think for the purposes of this preliminary hearing the**

> **tribunal accepts that there are these claims to a set-off and makes no judgment about their lacking merit but rather accepts that there are those claims to a set-off.**
>
> MR MASTERS: With respect, that's exactly the approach the tribunal should take…
>
> (emphasis added)

168 Finally, the following exchange occurred during the course of Esposito's counsel's reply submissions at T:255:1 to T:256:9:

> MR HARRIS: The suggestion that somehow this issue of the partial award not being determined today because of the threat of set-offs, that was the key issue agitated, and the law in this area has been settled for over 35 years. It's a recognised principle of arbitration that if you want to delay the claim of a partial award because of a counterclaim that you want to rely on by way of set-off you have to prove it.
>
> What was the point of permitting evidence to be filed by my learned friend's client other than to address that issue? It was front and centre. You might remember I wanted to add into the directions that the partial award was to be an issue, and everyone on the other side of the Bar table said it was unnecessary because it was obvious that that was what was going to happen; there was going to be detailed argument about that and persuasion about that.
>
> THE ARBITRATOR: **But it's reasonable, is it not, to accept on the directions that have been made that this hearing is not a hearing on the merits of the set-off claim.**
>
> MR HARRIS: No, that's true. But what I'm saying to you is that the question about the merit of delaying the conclusion of the claims that are ready to be heard was always an issue.
>
> THE ARBITRATOR: Or the relevance of the fact that there are those set-off claims.
>
> MR HARRIS: That they would be made would be the weapon deployed by Mr Masters to avoid the day of reckoning on these claims.
>
> THE ARBITRATOR: **Mr Masters, you should not think that an adverse view of your client's position is taken simply because you have not filed material going to the merits of the set-off claimed. I'm not hearing the argument to turn on that. Mr Harris can test that. So understand that.**
>
> MR HARRIS: As I say to you, it is a matter of discretion for you. But in forming the discretion there are a number of relevant factors. Evidence, none. Assume there was some evidence, that wouldn't be the beginning and end of it. You would still need to look at the nature of the claims that are being made and be satisfied that they are tenable.
>
> (emphasis added)

169 In summary, the following conclusions can be drawn:

(a) The arbitrator repeatedly reinforced the limited scope of the preliminary hearing.

(b) The merits of various set offs were not the subject of the preliminary hearing whether as to the existence or quantification of the underlying claims or their availability as contractual or equitable set offs and accordingly as defences.

(c) Esposito's main complaint concerning the set offs was the *delay* in them being pleaded.

(d) Esposito late in the day sought to raise *The Kostas Melas,* but its focus was more on delay questions, although there was some reference to whether the set offs were bona fide and reasonably arguable.

170 Finally, I would make one other observation at this point. It was said by Esposito that the arbitrator gave Hui an opportunity at the end of the hearing to file further material (T:266:12-17). That is not quite accurate. First, the arbitrator enquired as to whether Hui was *seeking* such an opportunity. Second, Hui did not need to do so given the repeated affirmation by the arbitrator of the limited scope of the preliminary hearing.

(b) What the arbitrator decided

171 Following the preliminary hearing, the arbitrator did enter upon and determine issues relating to the availability of various set off defences and Hui's liability under the guarantee.

172 As I have said, on 25 September 2015, the arbitrator delivered reasons for decision in respect of the preliminary hearing. In his reasons, he determined the claims the subject of paragraph 1(a) of the 17 February 2015 application, as he was entitled to do. But he also determined the following issues concerning the availability of set off defences and the guarantee:

(a) First, subject to one irrelevant exception, as a matter of construction of the provisions of the share sale agreement, the arbitration respondents had no *contractual* right of set off in respect of the "Refund Amounts" (at [7(l)]).

(b) Second, neither 5 Star Foods nor Hui showed any entitlement under the share sale agreement or in equity or otherwise to set off against the Refund Amounts the cross-claims for "Working Capital Adjustment" or for damages for "Warranty Claims" (at [7(n)] and part of [7(m)]).

(c) Third, pursuant to the guarantee, Hui guaranteed to Esposito the punctual performance by UDP of UDP's obligations under the share sale agreement including its obligations to pay money (at [7(o)]). Further, Esposito had

proved the guarantee, "[t]here being no evidence going to the unenforceability or discharge of [it]" (at [182]).

(d) Fourth, as a matter of construction of the share sale agreement, there was no provision for amounts payable by Esposito under cl 12.4 or cl 16 of the share sale agreement to operate as an adjustment or decrease in any Refund Amounts that may be payable (at [7(q)]).

(e) Fifth, there was no other relevant provision which would operate to extinguish or diminish UDP's obligation to pay the Refund Amounts, the punctual performance of which Hui had guaranteed (at [7(q)]).

(f) Sixth, on the proper construction of the provisions of cl 29.5 of the share sale agreement, Hui had agreed that, until all money payable to Esposito in connection with the share sale agreement had been paid, he would not try to reduce his liability under the "Guarantee and Indemnity" through any set off or counterclaim (at [7(r)]).

(g) Seventh, this construction would include any equitable set off otherwise available and the counterclaim on which Hui relied in the arbitration (at [7(r)]).

(h) Eighth, except for any liability of UDP which was extinguished or reduced pursuant to the permitted contractual set offs in cl 12.4 and cl 16 of the share sale agreement, the provisions of cl 29.5 of the share sale agreement precluded Hui from invoking any set off or counterclaim as a ground for refusing to meet Esposito's claims under the guarantee (at [7(s)]).

(i) Ninth, Hui was liable to Esposito for the Refund Amounts (at [7(t)]).

(j) Tenth, a partial award against Hui and 5 Star Foods for the Refund Amounts would be made (at [7(u)]).

173 Further, as I have said, on 15 April 2016 the arbitrator delivered a second set of reasons in which he stated at [136(a)] that "as reasonable litigants … the respondents would have foreseen the possibility of the arbitral tribunal determining the set-off issues". But the arbitrator also found that Hui as a reasonable litigant would not have foreseen the possibility of the arbitrator determining whether Esposito had made out its claims under the guarantee to the Refund Amounts and whether Esposito was entitled to a partial award that Hui pay the Refund Amounts to Esposito. The arbitrator stated that his earlier determination of the

claims under the guarantee was based on the incorrect premise that Hui had had an opportunity to adduce evidence going to the unenforceability or discharge of the guarantee, and that that determination denied Hui the opportunity to present his defence going to the unenforceability of the guarantee.

174 There are some aspects of what occurred after the publication of the 25 September 2015 reasons that should be expanded upon at this point.

175 First, I consider that what the arbitrator said in his 15 April 2016 reasons to be problematic in some respects. To the extent that [81] and [90] suggest that legal and factual aspects of the availability of set off defences were part of the preliminary hearing, I disagree. Further, the footnote references to [111] are incomplete and do not for example make reference to T:249 and the arbitrator's statements. And as for the propositions at [138], the arbitrator actually determined whether the set offs were available and went beyond *The Kostas Melas* approach. Moreover, if one considers the transcript of the preliminary hearing, I do not consider that the last two sentences of [138] present a balanced picture of what occurred. Further, I consider that [180] rather highlights the problem that has occurred and more suggests that I should not remit, an option that I discuss later.

176 Second and generally, even after the preliminary hearing but prior to the 25 September 2015 reasons, at no time were the applicants properly notified that there was any possibility of any defences of set off raised by them being ruled in or out as a result of the preliminary hearing. UDP's and 5 Star Foods' actions on 1 July 2015 seeking to file an amended statement of defence which pleaded set offs was only consistent with the opposite expectation and understanding. At no time prior to the arbitrator's 25 September 2015 reasons were the applicants informed of any change in the scope of the preliminary hearing.

177 Third, Esposito has suggested that because the arbitrator after the publication of his 25 September 2015 reasons gave the parties an opportunity to address or readdress him in order to cure the difficulties, this somehow constituted a "reasonable opportunity" or demonstrated the arbitrator's objectivity such that removal was not warranted. I disagree. The question was whether a "reasonable opportunity" had been given before the 25 September 2015 reasons, not after the event. Further in this context, I reject the suggestion that the arbitrator's position was in some indeterminate state until the first partial award was published. To use a quantum mechanical analogy, Esposito's argument amounted to saying that the arbitrator was in a superposition of both deciding and not deciding at the same time, with the cognate wave

function only collapsing once the first partial award was published and accordingly observed. None of this is tenable.

178 Fourth, there is one argument of the applicants that at this point it is convenient to reject. The applicants have argued that once the arbitrator published his reasons on 25 September 2015 that he became functus officio on such issues. It is said that it was not then open for him to "adopt the course of hearing further argument in the guise of a dispute about the appropriate form of partial award". Accordingly, it is said that the arbitrator did not have the power to make the first partial award in the terms that he did. I must say that I do not consider that the arbitrator was functus officio. However, prejudgment could occur by reason of the publication of reasons, as has occurred in the present case. No party contended before me that the arbitrator's reasons of 25 September 2015 separately constituted an "award". The applicants cited *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 633; [2011] SGHC 171, but I do not consider that this authority goes as far as they would have it.

(c) Have the applicants lost a valuable opportunity?

179 Esposito asserts that the applicants have lost nothing of value by not being given the opportunity to put their case on the relevant set off questions.

180 Now I accept that if the applicants' arguments, if put, would otherwise have been hopeless, then they would have lost nothing of value and no real injustice would have been caused to them by the lost opportunity. I reject the argument, if it was put by the applicants, that the opportunity to put the arguments per se itself had intrinsic value irrespective of the merits of those arguments. In the exercise of my power and discretion to set aside an award or remit based upon a denial of a reasonable opportunity to present one's case, I would not so order unless the relevant arguments that would otherwise have been put were reasonably arguable.

181 In the administrative law context, where a denial of procedural fairness is asserted as a ground for providing relief in the form of one of the constitutional writs, it must be shown that such denial deprived the applicant for the relief of the realistic rather than fanciful possibility of a successful outcome. Moreover, in that context, the onus of negating such a possibility usually rests on the party seeking to uphold the decision said to be impugned by the denial of procedural fairness.

182 In the present context, I would remodulate those themes as follows.

183 First, in order to justify the setting aside or remittal, real unfairness or real practical injustice must have resulted by the denial of the relevant opportunity to a party to present its case.

184 Second, real unfairness or real practical injustice in that context can be demonstrated by showing that there was a realistic rather than fanciful possibility that the award may not have been made or may have differed in a material respect favourable to the party said to have been denied the opportunity. In the present context that requires consideration of whether the set off arguments that the applicants would have made, but were denied the opportunity of doing so, were reasonably arguable. Now I accept that this involves to some extent engaging with the merits of the issues the subject of the award that was made. But in my view that inevitably follows from these two propositions. Moreover, the perspective which I am applying is not a review of the merits of the award as such but rather the counterfactual question of whether there was a reasonable possibility that the award might have been different if the denial of the relevant opportunity had not occurred. But in so engaging in that exercise, it is preferable that my observations be kept to a minimum. I am not the primary adjudicator of merits issues. Moreover, if I set aside or remit, it is undesirable that any views that I express influence in any way any further adjudication on the merits.

185 Third, in my view the onus rests on the party seeking to set aside or remit to establish these matters. There is no reverse onus on the party seeking to uphold the award to establish that the failure to provide the relevant opportunity would have made no difference.

186 Let me now turn to an evaluation of the lost opportunity by reference to what the arbitrator determined and recorded in the first partial award.

187 First, it is said that in [1] of the first partial award, the declarations therein should not have been limited to just the matters declared in [2]. It is said that it should have been conditional on any and all other defences including set offs which had not been the scope of the preliminary hearing. I agree. To the extent that those defences including set offs were reasonably arguable, the applicants have lost a valuable opportunity.

188 Second, Hui asserts that he was not given the opportunity to argue that notwithstanding cl 29.5(e) of the share sale agreement, this clause at least in relation to the Refund Amounts:

(a) did not cover the right to assert any equitable set off and that the clause only covered legal/contractual set offs; or

(b) did not preclude him from arguing that his liability was reduced to the extent that the principal's debtor's (UDP's) liability was reduced by any defence, including any contractual or equitable set off available to UDP.

189 Without elaborating, I cannot say that such contentions were not reasonably arguable. It seems apparent that Hui was denied the opportunity to argue that UDP was entitled to set off in reduction of its liability concerning the Refund Amounts, the Warranty Claims, the Warranty Claims to the extent that they were not indemnified by the relevant insurance and also to assert that Esposito was in breach of cl 7.6(b). Generally and relatedly, Hui says that he was denied a valuable opportunity to argue that as guarantor, his liability rose no higher than that of the principal debtor, UDP. Accordingly, and indirectly, he had the benefit of any defences by way of set offs or reductions otherwise available to UDP in terms of UDP's liability to Esposito concerning the Refund Amounts. I agree that Hui was denied this opportunity and that the opportunity had some value. Now Esposito has asserted that *Indrisie* was raised during the preliminary hearing and that Hui had the opportunity to deal with these points. But I agree with Hui that this was a side wind created by the unilateral conduct of the arbitrator and I do not consider that Esposito's characterisation of the reference to *Indrisie* at the preliminary hearing fairly reflects what occurred. In any event, *Indrisie* arguably was not a complete answer to Hui's point.

190 Third, the arbitrator ruled that UDP and 5 Star Foods were not entitled to set off in reduction of the Refund Amounts, such amount if any as may be found due by Esposito to UDP for damages for the Warranty Claims under cl 16 (see [4(b)] of the first partial award).

191 Generally, it was said that the effect of the arbitrator's ruling was to preclude UDP and 5 Star Foods from running many of the defences set out in [77P] to [77R] of their amended statement of defence dated 1 July 2015, which provided:

> 77P. Further or alternatively, there were terms of the SSA to the following effect:
>
> (a) At Completion the Buyer must make payments including paying the Completion Payment to the Seller (cl.7.4);
>
> (b) If the Seller becomes aware that a Seller Warranty is or is likely to be incorrect or untrue at or before Completion the Seller must inform the Buyer of the incorrect or untrue Warranty and why it is incorrect or untrue (cl.7.6(b));
>
> (c) The Buyer may terminate the SSA if a Seller Warranty is incorrect or untrue at or before Completion which has either:
>
> (i) a negative effect on earnings of the Group on a consolidated

basis of equal to or greater than $1 million; or

(ii) a negative impact on the value of the assets of the Group of an amount equal to or greater than $3 million; (cl.7.6(c))

(d) The Seller represents and warrants to the Buyer as an inducement to the Buyer to enter into the SSA that each of the Seller's Warranties is true and accurate and not misleading or deceptive at either Agreement Date or Completion (cl.15.1);

(e) The Seller acknowledges that the Buyer entered into the SSA and completed it in reliance of the Seller's Warranties (cl.15.4);

(f) The Seller indemnifies the Buyer against and must pay the Buyer for and Loss suffered or incurred in connection with a breach of a Seller Warranty or arising from the facts matters or circumstances that make the Seller Warranty untrue (except to the extent the Seller Warranty or Seller's liability are limited or qualified under cl.16) (cl.15.5(a)) and Loss includes any amount that would be necessary to put the Buyer in the same position as if the Seller Warranty had been true (cl.15.5(b));

(g) By cl.16.7, the maximum total amount the Buyer may recover for all Claims not including Indemnity Claims (being those made under cl.16A) is $25 million;

(h) If the Buyer becomes aware of any matter that may give rise to a Warranty Claim the Buyer must notify the Seller of the Warranty Claim as soon as practicable after the Buyer becomes aware of the matter and provide reasonable details of the nature of the matter and an estimate of the amount claimed (cl.16.1(a));

(i) If the Buyer makes a Warranty Claim and complies with its obligations under cl.16 in respect of the Warranty Claim, the Seller must pay to the Buyer damages for the breach of the Seller's Warranty or other matter giving rise to the Warranty Claim (cl.16.3);

(j) Any payment by the Seller to the Buyer under cll.16 or 16A operated as a reduction in Purchase Price (cl.16.13);

(k) If the Buyer becomes aware of any matter that may give rise to a Claim against the Seller under an indemnity under the SSA the Buyer must notify the Seller of the indemnity claim in writing as soon as practicable after the Buyer becomes aware of the matter and provide the Seller with reasonable details of the nature of the matter and an estimate of the amount claimed (cl.16A.1);

(l) The Buyer had entered into a warranty and indemnity insurance policy and each matter the subject of a Warranty Claim or Insured Indemnity was and Insured Warranty for the purposes of cl.17 (cl.17.1(a));

(m) The Buyer agreed the Seller will not have any liability in respect of Insured Warranties (cl.17.2(a)(i)) and released the Seller from Warranty Claims to the extent they related to breach of an Insured Warranty (cl.17.2(a)(ii));

(n) Seller's Warranties were those given in Schedule 6;

(o) The parties have a right of set-off against any payment due to the claimant (cl.32.21).

77Q. On a true construction of the SSA the Buyer is entitled to set off as a reduction in Purchase Price:

(i) Warranty Claims;

(ii) Further or alternatively, Indemnity Claims;

(iii) Further or alternatively, Warranty Claims to the extent that they are not indemnified under the Warranty and Indemnity Policy provided for in cl.17.1;

(iv) Further or alternatively, Warranty Claims to the extent they are indemnified under the Warranty and Indemnity Policy provided for in cl.17.1;

(v) Further or alternatively, Warranty Claims to the extent that the Seller is in breach cl.7.6(b) in respect of the relevant Seller Warranty as at Completion as cl.17.2(a) does not operate.

77R. The facts alleged in paragraph 33(n) above give rise to Warranty Claims and Indemnity Claims totalling $34.850 million which:

(a) the first and third respondents are entitled to set-off against the Seller's claim; or

(b) operate as a reduction in in Purchase Price.

PARTICULARS

Particulars of the Warranty Claims are given in the report of PPB Advisory dated 14 May 2015 which is Annexure A.

192 It is well apparent that significant amendments were made to their defence in [77P] to [77R] and [77S] in an amended defence and counterclaim dated 1 July 2015. This was a response to a third further amended statement of claim. The defence in [77R] alleged a set off and relied upon contractual terms alleged in [77P] and facts alleged in [33(n)] via a cross-reference to [77R]. The defence in [77S] alleged a number of consequences including that the share sale agreement would have been rescinded on disclosure and accordingly that there would have been no completed transaction.

193 It is apparent that none of these matters were for hearing and determination at the preliminary hearing and nor could they have been. Yet in the first partial award the arbitrator reserved for a final hearing in respect of the Refund Amounts, only the [77S] defence; he did allow a set off in relation to one other aspect (see [4(a)]). But his approach effectively ruled out other defences to the claim for the Refund Amounts and the balance of the other defences in [77R]. The rejection of the set-off defence to the Refund Amounts involved deciding a point of

contractual interpretation as well as questions of entitlement to set off at law and in equity on which UDP and 5 Star Foods had not been heard.

194 All such precluded defences were introduced after the preliminary hearing. Such ruled out defences could not have been within the scope of the preliminary hearing when it was fixed at the 19 March 2015 directions hearing. I cannot say that these defences are not reasonably arguable. The applicants were not given a proper opportunity to deal with them.

195 During the course of the hearing before me, the parties made various references to their contractual arguments under the share sale agreement. The applicants did so for the purposes of seeking to establish that they were denied a valuable opportunity. Esposito did so for the purposes of endeavouring to show that the applicants' arguments were hopeless. In my view, the applicants' contentions were reasonably arguable. Without elaborating in detail, it is appropriate to observe the following.

196 First, there was a real issue as to who had the contractual liability under cl 10.1(h) and whether it sounded in liquidated or unliquidated damages. Now my attention was drawn to an admission in UDP's and 5 Star Foods' defence in the arbitration. But query the scope thereof. And in any event it was not an admission of Hui.

197 Second, in relation to the warranty claims and cll 15.1, 16.1, 16.3, 16.7, 16.13, 17.1 and 17.2, there were arguments raised concerning the availability of any set off for any breach thereof, particularly where there was insurance cover. That matter was also affected by the operation of cl 31.21 and also other questions concerning the cl 17.2 releases. Reference was also made to the definition of "Purchase Price" and cl 4. Esposito made some strong arguments that no set off was available, but I cannot say that the applicants' arguments were not reasonably arguable. Moreover, Esposito's position concerning cll 7.6(b) and (c) was less strong.

198 I accept that I have expressed this all cryptically, but this is appropriate if there is to be a further adjudication thereon.

199 In summary, each of UDP, 5 Star Foods and Hui have been denied a valuable opportunity. And as I state later, I will discuss further with counsel which parts of the first partial award are to be set aside.

(d) The Kostas Melas

200 Esposito both before the arbitrator and before me placed considerable emphasis on the decision of Robert Goff J (as he then was) in *The Kostas Melas*. I do not consider that this authority assists its position or justifies the course that the arbitrator took. The use of *The Kostas Melas* in the way sought to be deployed after the event was not properly telegraphed at and before the preliminary hearing. Moreover, the arbitrator travelled well beyond it in his reasons of 25 September 2015. Given the disproportionate emphasis that *The Kostas Melas* has been given, it is necessary to discuss it in more detail than is usual.

201 The application in *The Kostas Melas* was to set aside or remit an interim award made by the arbitrators, in essence on the basis that the arbitrators had acted unfairly in proceeding to an interim award, without allowing an adjournment requested by the charterers.

202 The facts were relatively straightforward. The charterers had entered into a charter-party of the "Kostas Melas" with her owners. The charter-party was for a trip providing for the vessel to proceed to Albany, USA to load a cargo of maize in bulk for carriage to Egypt. Under the charter-party, hire charges were payable by the charterers to the owners. After the vessel entered on her chartered service, various hire instalments became payable by the charterers to the owners. These were not, however, paid by the charterers. Rather, the charterers asserted that the owners owed them some US$224,116.75 for off hire, bunkers used and the like. The charterers took the self-help remedy of setting off the moneys said to be due to them by the owners against the hire instalments. The charterers asserted that there was a balance due to them and sought arbitration. Contrastingly, the owners applied for an interim award from the arbitrators in respect of the hire instalments due to them. The charterers opposed the owners' application for an interim award on the basis, inter alia, that the charterers had genuine off hire claims and other claims for damages which they were entitled to deduct and which it was said was not suitable for decision on a peremptory basis. The hearing before the arbitrators for an interim award was brought on at short notice. Accordingly, the charterers applied for an adjournment. This was refused. The arbitrators proceeded with the hearing and made an interim award in favour of the owners. Part of the basis for the interim award was the arbitrators' finding that the self-help deductions made by the charterers were not justified and that the charterers had not acted bona fide and reasonably in making them. Accordingly, at least for the purposes of making the interim award, it would seem that they did not allow an equitable set off under the terms of the charter-party.

203 The charterers applied to set aside or remit the interim award. There were two grounds, the second of these being based on the refusal of the adjournment. The charterers' application failed.

204 First, his Honour discussed the availability of an equitable set off under a charter-party and held that claims could be set off in certain circumstances. He accepted that set off questions may raise questions of fact which may or may not be supported by evidence at the time when the charterers claimed to exercise their right of set off and may raise questions which can only be finally resolved after detailed investigation.

205 Second, his Honour accepted that the arbitrators had the power to make the interim award. But in so disposing of the matter with expedition, they had to act fairly.

206 Third, his Honour then dealt with the position where one party had exercised a right of set off by taking an "act of self-help", which the charterers had done. I would note that that is not in form the present case. UDP, 5 Star Foods and Hui had asserted a contractual or equitable right of set off. But that is all. Their position is quite different to the charterers in *The Kostas Melas*.

207 In the context where there had been an *exercise* of a right of set off by an act of self-help, his Honour said (at 26):

> (a) First, if a party *exercises* the set off he must have a justification for doing so. And in theory he should be able to prove, at the time of its *exercise*, that he has that justification.
>
> (b) Second, and relatedly, it should only be exercised in good faith on reasonable grounds.
>
> (c) Third, if the other party considers that it is not being so exercised, he should be able to obtain a rapid adjudication upon that question.

208 It was in that context that his Honour then said (at 26-27):

> It follows that a party who claims to exercise a right of deduction can be called upon at very short notice to satisfy a tribunal that he is exercising his right in good faith and upon reasonable grounds. Of its very nature, the evidence to support his claim that he is so acting should be available to him; he is not, after all, being asked to prove at very short notice his cross-claim as such, but simply to satisfy a tribunal that he has reasonable grounds for exercising his right of deduction, and that he is acting in good faith. If he cannot do so, an award may be made against him, excluding his right to deduction from the hire payment in question – though leaving it open to him

> to pursue his cross-claim as such, or even, if for example he can subsequently satisfy a tribunal on better evidence that he is entitled to do so, to exercise his right of deduction in respect of the same cross-claim against a subsequent payment. In the case of a contractual right of deduction, I reach this conclusion as a matter of implication, from the nature of the right and because any other conclusion could lead to a possibility of unchecked abuse which cannot have been contemplated when the contractual right was conferred. But in my judgment, the same principle must apply where a party seeks to exercise the equitable right of set-off; I have no authority to support this conclusion, but in my judgment the conclusion is inescapable if abuse of the right is to be prevented. It follows that where the owner of a time chartered ship seeks a prompt interim award in respect of hire, it is open to arbitrators, when awarding a minimum sum as due and owing to the owner, to reject a claim by the charterer to exercise a right of deduction or set-off, if the charterer cannot satisfy them that he was seeking to exercise that right in good faith and on reasonable grounds.

209 But his Honour was dealing with a person who claims to *exercise* a right of deduction. That is, there had been an act of self-help by the unilateral purported exercise. So it was in that context, where there had been an act of self-help, that the charterers were required on short notice to satisfy the arbitrators "that certain deductions or set-offs which they claimed to be entitled to exercise were bona fide and reasonable" (at 27).

210 Indeed, his Honour went so far as to say in relation to the charter-party before him (at 27):

> In my judgment, under a contract such as a time charter the owner has a substantive right that the charterer shall not exercise a right of deduction or set-off otherwise than in good faith and on reasonable grounds; he is not entitled, for example, to exercise the right in bad faith, or even to do so on mere suspicion without reasonable grounds and then, having secured his economic position, to delay an adjudication while he seeks for evidence to justify his position, which he may or may not be able to obtain. A dispute whether such a right has been so exercised is a dispute of substance, which arbitrators duly appointed have jurisdiction to determine.

211 Now in the present case, we have neither a charter-party nor an *exercise* of a right of deduction or set off as an act of self-help in terms.

212 And as to the question of adjournment in that case, that was said to have been rightly refused. In any event, and by way of contrast to the present case, the charterers were put on notice that they had to establish that the exercised right of set off was bona fide and reasonable.

213 There are several other features that it is worth noting at this point.

214 First, his Honour said that it would be wrong to set aside or remit an award on the basis of a party being denied an opportunity of advancing an argument which has no substance. As I have said, I agree.

215 Second, his Honour said that to deny the set off at an interim stage is not to deny the cross-claim finally (see at 28 and 30). It may still be pursued. That is correct in the context with which his Honour was concerned. And relatedly, his Honour said at 26:

> In considering this question, it is to be remembered that although a right of set-off is a defence with all the legal consequences which follow from it, in practice the exercise of a right of deduction or set-off is essentially a provisional act. It decides nothing finally. Its exercise simply operates as a temporary retention of an economic asset by the party exercising the right, and the temporary deprivation of the other party of that asset. For the exercise of the right does not prevent either party from subsequently proving his claim or cross-claim, and so does not affect the final resolution of the fundamental dispute. It affects the question of the identity of the plaintiff; it affects the economic security of the parties, if the plaintiff so identified cannot obtain security for his claim; and it affects cash flow. But it is, as I have said, essentially a provisional act.

216 Now there are some themes of *The Kostas Melas* that should be drawn out at this point.

217 First, *The Kostas Melas* is not authority for the proposition that the availability of a set off was to be or could be dealt with in a summary fashion, let alone to finally determine the availability of a set off in the way that the arbitrator did in the case before me.

218 Second, even if the arbitrator thought that he could apply *The Kostas Melas*, the preliminary hearing was not about the bona fides of the arbitration respondents concerning the set offs or their reasonableness, let alone those that had not then been pleaded.

219 Third, if one considers the arbitrator's reasons of 25 September 2015, *The Kostas Melas* is referred to from [241], well after the sections of his reasons containing *determinations* on the availability of the set offs that end at [234]. In other words, the arbitrator travelled well beyond *The Kostas Melas*.

220 Fourth, Esposito suggested that *The Kostas Melas* justified the notion that there was no difficulty in ruling against the availability of the set offs. It was said that there could be a determination of Esposito's claims with a stay thereon, leaving the arbitration respondents free to pursue their cross-claims. In other words, Esposito suggested that this was all only a timing question and that accordingly there was little difficulty in a partial award being made in its favour. Now in my view *The Kostas Melas*, notwithstanding some observations at 26, does not provide such a justification. But in any event, that submission does not address the situation where the cross-claims, as contractual or equitable set offs, can operate as true defences or the facts underlying such claims may provide circumstances which preclude or reduce the arbitration applicant's own claims. Further, that submission does not address a

guarantee scenario where the guarantor seeks to argue that the principal debtor's liability has been reduced by reason of such set offs being available to the principal debtor, with the guarantor's liability accordingly reduced.

221 In summary, I do not consider that *The Kostas Melas* assists Esposito. Its deployment at the preliminary hearing was problematic. Further, the arbitrator travelled well beyond it in his 25 September 2015 reasons. Further, how the arbitrator then described in his second set of reasons on 15 April 2016 how *The Kostas Melas* was earlier used raises other potential concerns.

(e) The scope of arts 18, 34(2)(a)(ii) and 34(2)(b)(ii)

222 I have discussed various aspects of these articles earlier. It is appropriate to elaborate further at this point.

223 Article 18 requires that the parties are to be treated equally and are to be given a "full opportunity" to present their respective cases. Section 18C of the Act equates "full opportunity" with "reasonable opportunity". Now in this context a "reasonable opportunity" correlates to but may not be the same as the "hearing rule" under the administrative law concept of procedural fairness.

224 In general, the relevant inquiry is whether a party had an appropriate opportunity to deal with an issue (*Interbulk Ltd v Aiden Shipping Co Ltd; The Vimeira* [1984] 2 Lloyd's Rep 66 at 75 per Robert Goff LJ). A party is entitled to both an affirmative and responsive opportunity to be heard, ie an opportunity to be heard on its case and to respond to the case against it. The responsive aspect includes being given adequate and *actual* notice of that adverse case.

225 Now I accept that common law authority concerning procedural fairness is an unreliable guide to interpreting the UNCITRAL Model Law. Further, the opportunity to be afforded only needs to be reasonable in the context of the arbitration itself. Moreover, in the context of a modern arbitration, a reasonable opportunity is a question of degree and may be satisfied provided the issue is somehow raised, even if only briefly. In *Terna Bahrain Holding Company WLL v Bin Kamil Al Shamsi* [2013] 2 CLC 1 at [106], Popplewell J explained:

> … whilst s. 33 [of the *Arbitration Act 1996* (UK)] requires a party to be given a reasonable opportunity of addressing his opponent's case, that does not mean that the tribunal is acting unfairly in deciding a case on a point to which the party raising it does not give any great emphasis, or which is not the subject matter of any great exposition. If a point is raised only briefly, that is in accordance with the ideal of speedy resolution which is an objective of the arbitral procedure (whether or not in a

> given case the objective is achieved). It is none the less so if a host of what turn out to be bad points are also raised and it is on those other points that the party raising the issues concentrates his exposition. Provided the issue is raised, however briefly, the opposing party has an opportunity to address it at whatever length and in whatever detail he chooses. If he chooses to invite the tribunal to reject it without addressing it in detail, that may well be a sensible tactic, in order to avoid the risk of giving it more weight and prominence that the party advancing it has done. But that is not the same as having been deprived of an opportunity of addressing it, still less of an unfair procedure having been adopted.

226 In *Trustees of Rotoaira Forest Trust v Attorney General* [1999] 2 NZLR 452 at 461, Fisher J suggested that "surprise" is one of the key elements and that it must be demonstrated that the arbitrator travelled beyond what was reasonably foreseeable by a reasonable person in the position of the party complaining of a lack of the requisite opportunity. But such concepts are helpful but not determinative (cf *TCL Air Conditioner* at [140] and [141]).

227 But let it be supposed that the relevant test is whether the reasoning, fact or idea introduced by the arbitrator was reasonably foreseeable by the party complaining or a reasonable litigant standing in such shoes, so that it could be said that the party was not unacceptably surprised, to apply the themes of Fisher J. Even applying such a test does not avail Esposito. The arbitrator, in my view, at all times during the preliminary hearing reinforced the limited scope thereof. If it is necessary to say so, a reasonable person in the shoes of Hui (or indeed the other arbitration respondents) could not have reasonably foreseen that the arbitrator would trespass into areas well beyond the scope of the issues that defined the preliminary hearing. In my view, they were unacceptably surprised by what occurred, if that is the relevant test. They were denied a reasonable opportunity to present their case on the issues that I have described earlier and lost in my view a valuable opportunity. Real unfairness and practical injustice has been caused.

228 Moreover, the present case is not one where art 18 has been advanced by the applicants to protect themselves from their own failures or strategic choices, to use the language of Lax J in *Corporacion Transnacional* at 204. There were no "failures" on their part. And the "strategic" choice, if it be one, was to assume and act on the basis that the preliminary hearing would be confined in the manner that the arbitrator had ordered and which he reinforced during the course of that hearing.

229 Further, on this aspect of the matter, I should make some other associated points on theoretical themes:

(a) First, arts 18, 34(2)(a)(ii) and 34(2)(b)(ii) have overlapping themes. A breach of art 18 will usually establish the ground in art 34(2)(a)(ii), although whether a remedy will go may depend upon how egregious the breach is, although in some respects it may not be productive to segment the discussion of the ground from the exercise of the discretion. In other words, the ground itself may require establishing an egregious breach. As I have indicated, on any view there has been an egregious breach.

(b) Second, art 34(2)(b)(ii) may also apply, particularly given that s 19(b) of the Act brings within art 34(2)(b)(ii) a breach of the rules of natural justice. But the public policy ground under art 34(2)(b)(ii) must be construed narrowly, such that any breach of the rules of natural justice must be egregious and fundamentally offend principles of justice and fairness (*TCL Air Conditioner* at [111]). In other words, the breach must be exceptional. As I say, that is how I would describe the breach in the present case.

(c) Third, *TCL Air Conditioner* at [113] said that unfairness or practical injustice should be able to be "expressed shortly" and "demonstrated tolerably shortly". But that observation was juxtaposed against that Court's next observation dealing with eschewing a "detailed factual analysis of evidence" before the arbitrator. I have not engaged in that latter exercise but have found it necessary to elaborate in some detail on the *procedural* events that transpired, which is a different aspect.

(d) Fourth, I have also given consideration to art 34(2)(a)(iv) given that art 17, cl 1 of the UNCITRAL Arbitration Rules requires that "each party [be] given a reasonable opportunity". But this adds nothing further to the operation of art 18 (as modified by s 18C of the Act) and art 34(2)(a)(ii) of the UNCITRAL Model Law.

(e) Fifth, at one point reference was made to art 34(2)(a)(iii) but I have put this to one side. The expression "beyond the scope of the submission to arbitration" is a broader concept than the narrower issue that I am dealing with concerning the scope of the preliminary hearing.

230 Esposito says that the context of this case demonstrates that a reasonable opportunity was afforded to all of the applicants as respondents to the arbitration. I disagree for the reasons that I have indicated earlier.

231 First, it says that everyone knew "a" if not "the" issue for determination at the preliminary hearing was whether the mere pleading of a set off would prevent the arbitrator making a partial award. That is true so far as it goes, but misses the real point.

232 Second, it says that to meet the case for such an award, not only were the arbitration respondents given a further opportunity to file defences demonstrating why such an award should not be made but they were also directed to file the evidence they relied upon to support such a contention. But again that misses the point that there were determinations made by the arbitrator on 25 September 2015 in relation to which the applicants had not been given a reasonable opportunity to present their case.

233 Third, it is said that it was only after all of these opportunities were afforded the arbitral respondents that the partial award was made, almost a year after the arbitrator published his reasons following the preliminary hearing. True, but there had been prejudgment and a denial of a reasonable opportunity well before then.

234 Esposito seems to contend that a reasonable opportunity was given because of circumstances that occurred *after* the publication of the first set of reasons on 25 September 2015 in which certain deficiencies concerning Hui's position were somehow cured by the 15 April 2016 reasons. One could be forgiven for considering this to be counterintuitive. But let me put this to one side for the moment. As Hui's counsel has correctly pointed out, the matter of the guarantee's enforceability was only one of Hui's defences. The others were defences of set off. Hui has suffered real unfairness by reason of the arbitrator's determination (in [4] of the partial award) against the availability of the set off defences. He has not had a fair opportunity to present his case on those issues before they were decided. The unfairness and injustice to Hui has not been "cured" by the arbitrator's acceptance that he erred in relation to the guarantee issue. As counsel pointed out, if Hui does not succeed with his allegations in relation to the discharge and unenforceability of the guarantee, he will be liable for the Refund Amounts without any reduction by way of set off, and without having been heard thereon. Relatedly, the decision that the other arbitration respondents were not entitled to a set off in relation to the Refund Amounts has deprived Hui of an opportunity to also argue that his liability under the guarantee was accordingly reduced. And whatever be the position concerning Hui, none of this addresses the inherent unfairness to UDP and 5 Star Foods in what has occurred.

235 As I say, I reject Esposito's contention that there is no real unfairness because the arbitration respondents were given a reasonable opportunity to correct the arbitrator's prejudgment *after* the publication of reasons in September 2015 in which that prejudgment was made. The contention presupposes that prejudgment has already occurred. But if that is so, it is difficult to see how any so-called opportunity to correct could cure the difficulty. Further, by the time of the first partial award, there was no real or live *The Kostas Melas* issue even if there had been one at the time of the preliminary hearing. The amended defence and underlying PPB Advisory report were received by the arbitrator well before the partial award. Yet the partial award proceeds to implement the 25 September 2015 reasons by reference to the amended defence. The partial award is a pre-judgment, not a *The Kostas Melas* type exercise of discretion to defer. Further and generally, the issues the arbitrator ultimately decided on the face of the first partial award included issues first raised *after* the preliminary hearing via the amended defence and counterclaim on which no party had been heard. By making the first partial award, the arbitrator carried the prejudgment made in his 25 September 2015 reasons into effect.

236 Fourth, it is said that somehow Hui deliberately chose not to make submissions on the set offs at the preliminary hearing even though he was given the opportunity to do so at the preliminary hearing. That proposition is not seriously maintainable given the chronology of events that I have outlined.

237 Fifth, the fact that the arbitrator said on 19 March 2015 that it was a "live" question as to whether a partial award would be made was in the context where set off defences had not then been filed and it was agreed that the preliminary hearing would not concern set off defences. Moreover, it was not even clear on 19 March 2015 that there would be set off defences.

238 Sixth, Esposito raised before the arbitrator and indeed before me various allegations of impropriety and delay on the part of UDP and 5 Star Foods in relation to the filing of their arbitration pleadings. Counsel for Esposito risked putting his case too highly. But in any event none of this takes Esposito far. Esposito seems to contend that the arbitration respondents could have pleaded the set off defences much earlier. But in my view, that point goes nowhere even if it is assumed to be correct. The fact is that the arbitrator decided that the preliminary hearing would not deal with any set off defences. That position was adopted with the acquiescence if not encouragement of Esposito.

239 In my view, in the events that I have outlined, the grounds in arts 34(2)(a)(ii) and (iv) and 34(2)(b)(ii) have been made out in relation to the art 18 breach.

(f) Prejudgment – arts 12 and 34(2)(b)(ii)

240 Article 12 of the UNICTRAL Model Law confirms the established principle of arbitrator impartiality. The justifiable doubts standard is modified by s 18A(2) of the Act which imports the "real danger of bias" test. A real possibility of prejudgment can establish the real danger test. That test applies to both arts 12 and 34(2)(b)(ii). I repeat the observations I made in *Sino Dragon* at [191], [197] and [198] which were as follows:

> First, I accept that the "bias rule" is an aspect of procedural fairness and it therefore falls within article 34(2)(b)(ii) as part of the public policy of the forum. That requirement for the purposes of the arbitration was prescribed by article 12(2) and requires justifiable doubts as to the impartiality or independence of an arbitrator. That in turn brings within it the "real danger" test (see s 18A of the Act). I reject the notion that "public policy" in article 34(2)(b)(ii) only brings within it the lower *Ebner* test. Such a result would be anomalous. The concept of "public policy" must, in the context of an international commercial arbitration, be informed by other provisions of the UNCITRAL Model Law and the Act. I also accept for present purposes, that article 34(2)(a)(iv) can be invoked as cl 39.2 of the Contract of Sale incorporates relevant provisions of the UNCITRAL Arbitration Rules dealing with the appointment and impartiality of arbitrators. But when one works this through, one is back to the "real danger" test.
>
> […]
>
> Fourth and generally, in determining the content of "justifiable doubts" as to the "impartiality" or "independence" of an arbitrator under article 12(2) the test under the Act is not the same as the test at common law. The different test for arbitration is expressly provided for in s 18A of the Act. The explanatory memorandum to the Bill introducing that provision at [85] to [92] referred to the test stated in *R v Gough* [1993] AC 646 at 670. The *R v Gough* test incorporates notions of "real danger of bias" from the perspective of the Court as opposed to merely that of a reasonable lay person. I proceed on the basis that s 18A also incorporates the different perspective as well.
>
> Fifth, even if one adopted the common law test propounded by Sino Dragon, no fair-minded lay observer would perceive any possibility of bias. The relevant test is whether a fair-minded lay observer might reasonably apprehend that the arbitrator might not bring an impartial mind to the relevant adjudication and determination (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6] to [8] per Gleeson CJ, McHugh, Gummow and Hayne JJ). And the question is "one of possibility (real and not remote), not probability". But the present case goes nowhere near satisfying even that test. Indeed, even if that test were to be applied, Sino Dragon has an even weaker case than the stronger but unsuccessful challenge to the arbitrator in *Gascor v Ellicott* [1997] 1 VR 332.

241 I should note at this point that there has been some debate as to whether the perspective stated by Lord Goff of Chieveley in *R v Gough* [1993] AC 646 at 670, which in one sense did not endorse the Australian "reasonable bystander test", has been implicitly enacted by s 18A. In

Sino Dragon, I was prepared to accept that it had been. But after reflecting on the submissions of Mr Graeme Uren QC for Hui, the better view is that the correct perspective even for the English "real danger" test is that of the "reasonable bystander" or "reasonable man" where actual bias is not alleged. I am fortified in this conclusion by two points. First, s 18A is silent on perspective. Second, in English cases post *R v Gough* the perspective seems to have shifted from that stated by Lord Goff. But in any event this difference in perspective may not make much practical difference given the way Lord Goff expressed the matter at 670.

242 *Lovell Partnerships (Northern) Ltd v AW Construction plc* (1996) 81 BLR 83 illustrates the connection between a breach of the no hearing rule and the basis on which an arbitrator breaching that rule ought be removed for prejudgment. In my view, Mance J (as he then was) stated the correct test and made other observations which have some analogy to the present case. He said at 99 to 100:

> The legal test is whether a reasonable person would no longer have confidence in the present arbitrator's ability to come to a fair and balanced conclusion on the issues if remitted. The arbitrator has, in the instant case, drawn conclusions from and about documentation and reached decisions on a number of factual issues which would, in my judgment, make it invidious and embarrassing for him to be required to try to free himself of all previous ideas and to redetermine the same issues on fuller evidence.
>
> As Miss Turner acknowledged, the present arbitrator is evidently conscientious and would, no doubt, apply every conscious effort to complete redetermination. But that exercise would, itself, in the circumstances, create its own undesirable tensions and pressures. Some costs will be wasted, although the respective statements of case will probably be capable of reuse.

243 Another observation of Mance J is also relevant in the present context (at 98):

> The arbitrator went wrong at the time of, and immediately prior to, the issue of his interim award in three connected respects which constitute significant misconduct in proceedings:
>
> (1) The first is that he failed to ensure that the nature and terms of the preliminary issues were crystallised and communicated to the parties. Had he ensured this, the parties would have been aware of them and had the opportunity to address them and their resolution specifically before the arbitrator actually determined them. Instead, after an exchange of correspondence in which he, Lovells and AWC all raised differing possibilities, he simply announced his decision to determine unspecified issues, the nature and scope of which only emerged in his interim award determining them.
>
> (2) The second respect which arose from the first is that the arbitrator purported to determine by his interim award a number of issues which no one had previously suggested as fit for determination by interim award. This applies in particular to the issues raised by the counterclaim.

> A slightly different point applies to the issues which had only been raised in or at the same time as AWC's reply, since Lovells had not addressed them in any statement of case and they were, for that reason, in my judgment, inappropriate for determination by interim award.
>
> (3) His decision to proceed to determine these issues was reached and implemented in the face of Lovells' clear insistence at all material times upon the need for further evidence to be adduced (and also probably discovery) before any preliminary issues were determined. The proper resolution of at least a number of the issues did require the parties to be given an opportunity to adduce such further evidence in one form or another. This was particularly true of issues 8, 9 and 11 and of all five issues raised by the counterclaim. In the absence of such an opportunity, and in the face of Lovells' request for appropriate directions, such issues could not be fairly resolved.

244 Removal followed because of the prejudgment and embarrassment that resulted. *Modern Engineering (Bristol) Ltd v C Miskin & Son Ltd* [1981] 1 Lloyd's Rep 135 is authority for this approach. Lord Denning MR said at 138:

> The Judge put this test to himself in his judgment: Are the circumstances such as to demonstrate that the arbitrator is not a fit and proper person to continue to conduct the arbitration proceedings? I do not think that was the right test. I would ask whether his conduct was such as to destroy the confidence of the parties, or either of them, in his ability to come to a fair and just conclusion.
>
> The question is whether the way he conducted himself in the case was such that the parties can no longer have confidence in him. It seems to me that if this arbitrator is allowed to continue with this arbitration one at least of the parties will have no confidence in him. He will feel that the issue has been pre-judged against him. It is most undesirable that either party should go away from a Judge or an arbitrator saying, "I have not had a fair hearing".
>
> I know the inconveniences to which the removal of the arbitrator may give rise – the delay, the extra expense, and the like. But it seems to me that it is far more important that this Court should see that arbitrations are properly conducted so that the arbitrator can have the confidence of those who appear before him. Arbitration is now one of the most important spheres of activity in the system of administering justice in this land. The Courts, I feel, must show an example and see that arbitrations are properly conducted so as to earn and deserve the confidence of those who appear before them. I am afraid that the conduct of this arbitrator was such as to lose that confidence – at least of one of the parties.

245 The test as expounded was whether a reasonable person would no longer have confidence in the arbitrator's ability to come to a fair and balanced conclusion on the issues if remitted.

246 Now Esposito says that there is no real danger of bias based on the arbitrator having prejudged various questions, given what it says to be the following matters:

(a) First, it is said that the arbitration respondents have made no allegation that the arbitrator is actually biased. I am not sure where this goes as the point

does not address an appearance of a lack of impartiality or the "real danger" test.

(b) Second, it is said that the arbitration respondents have made no allegation that the arbitrator will not come to a fair and balanced conclusion on the issues if it is remitted to him. In any event, it is said that the arbitrator has positively established, by the terms of his 15 April 2016 reasons, that he is willing to change his mind, and is not wedded to decisions he has taken. But the first part of this submission is not accurate. And as to the second part of this submission, some aspects of the arbitrator's 15 April 2016 reasons raise legitimate concerns relating to the arbitrator's objectivity.

(c) Third, it is said that the determination in issue was not based on findings of credit in respect of contested issues of fact. That is true so far as it goes, but this point is not a complete answer. In my view, significant disquiet has arisen where the predetermination concerned many legal questions including questions of contractual construction. Moreover, that disquiet has not been diminished by some aspects of the 15 April 2016 reasons which manifest an ex post facto rationalisation. The question is one of degree, but in my view the "real danger" test is well satisfied in the present case. Esposito appears to suggest that the present situation is little different to an appellate court remitting questions to a trial judge found to be in error. But that is not an appropriate analogue where parties have not been heard by the primary decision maker before his determination. Confidence in the impartiality of the former may be lacking in the latter.

(d) Fourth, it is said that simply deciding issues in the context of whether a set off is available, as it is said the arbitrator did regarding the set off issues, is no bar to then inconsistently determining them as counterclaims (*The Kostas Melas*). But in the present case, in my view the arbitrator went further in his declarations than deciding whether or not they were reasonably arguable. And to decide that they were not available set offs was to deny a defence.

(e) Fifth, it is said that even where the procedure has significantly miscarried, in the context of a commercial arbitration, remitter is likely to be the appropriate course. That proposition is unacceptably broad.

247 In my view, the arbitrator has conducted himself in such a manner that the applicants can no longer have confidence in him. I say this for reasons which include the following:

(a) The arbitrator stepped well outside the bounds of the preliminary hearing.

(b) The arbitrator decided various substantive questions in a final manner without giving some of the parties an opportunity to be heard.

(c) It was not wholly satisfactory for the arbitrator to try and repair the substantial problem after his reasons of 25 September 2015. He had by then decided key questions that he ought not to have decided.

(d) Further, his second set of reasons published on 15 April 2016 was a retrospective analysis and in some respects a questionable recounting of what had previously occurred. So, for example, in his 15 April 2016 reasons he said at [90] and [138] the following:

> [90] There was no direction or determination that the arbitral tribunal would adjudicate the specified claims on the basis that any defence that was pleaded was not to be taken into account. To the contrary, any such defence or the availability of it needed to be taken into account in deciding whether there would be a partial award for a specified amount or amounts. If one outcome open was the making such a partial award, the other was the converse that, if the claims were not made out on the evidence, the arbitral tribunal could dismiss them. There was no agreement by the parties as to the directions made for the Preliminary Hearing.
>
> [138] The discussion at the directions hearing on 19 March 2015 and the subsequent statement of defence filed by the first and third respondents dated 10 April 2015 suggested that those respondents defended the claims made by the claimant by alleging a set-off of claims for the Working Capital Adjustment amount and for damages for breach of warranties. These were raised by way of defence but were discrete in the sense that they could have been but were not framed as independent claims by the first respondent. The second respondent also raised those set-offs by way of defence although he could not have raised those set-offs as independent claims by him. The tribunal in its reasons took the approach of treating the set-offs as valid on their face but enquiring whether as a matter of law or equity they could be raised by way of a defence of set-off to the various claims made. That approach was signalled to the claimant and the second respondent during the Preliminary Hearing. As discussed below, it was an approach identified by Robert Goff J in *The Kostas Melas* as open to the tribunal.

(e) I do not consider his statements to accurately portray what occurred. He went beyond *The Kostas Melas*. Moreover, in my view it was no part of the preliminary hearing to determine in relation to any set off "whether as a

matter of law or equity they could be raised by way of a defence of set-off to the various claims made" (see at [138]). Moreover, the idea of these matters being "signalled" is hardly an accurate picture in terms of demonstrating that the preliminary hearing embraced them.

(g) Consequences and form of relief

248 Article 34(4) of the UNICTRAL Model Law allows the Court to set aside or remit. But an arbitral tribunal should not be left to correct itself where inappropriate. As Akenhead J said in *Secretary of State for the Home Department v Raytheon Systems Ltd* [2015] EWHC 311 (TCC); [2015] 1 CLC 466 at [9] (after referring to *Lovell Partnerships*):

> …where the court forms the view, following a finding of serious irregularity under section 68(2), that a reasonable person would no longer have confidence in the arbitrators' ability to come to a fair and balanced conclusion on the issues if remitted, that view may well underpin a conclusion that it would be inappropriate to remit.

249 Akenhead J also observed at [20]:

> A major criterion in the consideration of what it is appropriate to do must be whether justice can not only be done but can be seen to be done.

250 And further at [23(b)]:

> Like Mance J on the *Lovell* case I can see that it would be "invidious and embarrassing [for the tribunal] to be required to try to free [itself] of all previous ideas and to re-determine the same issues" and that even for a conscientious tribunal seeking to re-determine such issues the exercise could well "create its own undesirable tensions and pressures". Of course, it is not possible to predict what this tribunal would do if matters were remitted to them. If, however, albeit conscientiously and competently, the tribunal in effect reached exactly the same conclusions as before, that might well lead to a strong belief objectively that justice had not been or been not seen to have been done.

251 One aspect that was weighed up in *Raytheon Systems* was the costs of remission compared with the costs of a new tribunal (see at [11]). But in the present context, there is little wasted effort or cost. A new arbitrator will have to do no more than the present arbitrator should have done but has not, namely, receive evidence, hear argument and decide. Moreover, UDP, 5 Star Foods and Hui accept the arbitrator's determination in relation to Esposito's claims, which were properly the subject of the preliminary hearing. There is no wasted effort in that respect if there is no remittal. Moreover, any discovery given will be available in any further arbitration before a different arbitrator. But if there is wastage (and also taking into account the matters referred to at [47] of Esposito's submissions), I do not consider that the balance weighs in favour of remittal to the present arbitrator.

252 Esposito has said that no prejudice can be suffered until it seeks to enforce the partial award. It is said that not only has that not happened but questions of whether any award made by the tribunal ought to be stayed had been repeatedly raised in the course of the arbitration. It is said that no such application has been made by Hui, UDP or 5 Star Foods in the arbitration. I do not consider that this assertion is any answer to the art 18 point or that it somehow ameliorates the art 34 grounds. The fact is that Esposito is not entitled to the present form of the first partial award. The fact that it has not yet sought to enforce it is not to the point.

253 Generally, Esposito contends that even if the Court found a relevant breach of the UNICTRAL Model Law, the appropriate course, particularly in the context of this arbitration, would be remitter rather than removing the arbitrator. Esposito cited *Dalcon Constructions Pty Ltd v Chu* [2002] WASCA 290 per Steytler J. But in *Dalcon*, an application was made under s 38 of the *Commercial Arbitration Act 1984* (WA) (as it then was) to set aside an arbitral award, but there was no application made under s 44 to remove the arbitrator. Reference was also made to the observations of Stephen J in *Tuta Products Pty Ltd v Hutcherson Bros Pty Ltd* (1972) 127 CLR 253 at 290 but they should not be taken out of context. If there has already been prejudgment arising from not hearing one of the parties, remittal is inappropriate.

254 Finally, it is necessary to say something on characterisation.

255 Clearly, the two partial awards are final in one sense, but not in another. They have finally disposed of part of the parties' claims and accordingly, particularly in relation to the first partial award, may be said to have preclusive effect. Indeed, the language of the first partial award is expressed in terms of "Declare that…" and resonates with the language of binding declarations. The fact that the declarations are in some respects conditional does not deny the force of their substantive effect and as binding on the parties. They are clearly not "interim measures". Moreover, to describe them as "interlocutory declarations" is in one sense conceptually incoherent. Perhaps these partial awards may in a loose sense be described as "interim awards", but I would prefer not to use the latter label. The adjective of "interim" suggests a temporal limitation. But the first partial award, in one sense, is final (albeit in some respects conditional). Why does any of this matter? Although these partial awards are final in one sense, they are not final in another. They are not final for the purposes of art 32 of the UNCITRAL Model Law because there are other claims that have not been adjudicated upon.

256 Article 34(4) of the UNCITRAL Model Law provides as follows:

> The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

257 Article 34(4) applies to the awards even though they are partial (cf also art 34(2)(a)(iii)). But how does it operate in that context, ie where one only has a partial award rather than a "final award" of the type contemplated in art 32? It is apparent that the art 34(4) alternatives are disjunctive. I can either set aside an award or remit. But it would appear that I cannot do both (see *AKN v ALC* [2015] SGCA 63 at [34] and [39]). And if I do not remit, then a new arbitral tribunal will need to be constituted. But how does this operate if there has been no termination under art 32? In other words, how does art 34(4) operate where I have only a partial award?

258 If I had decided to remit, then there is no difficulty. But as I have decided to set aside part of a partial award, what then happens? One is left with the surviving part of a partial award. But how is the balance of the claims to be dealt with and by whom? Moreover, in context, art 32 has not been triggered as there is no "final award" within art 32(1).

259 I propose to set aside relevant aspects of the first partial award to accord with these reasons. I also propose to set aside part of the second partial award. I will hear further from the parties as to:

(a) the precise form of orders to give effect to these reasons;

(b) the precise form of order so that the balance of the claims subject to arbitration can be dealt with by a new arbitral tribunal; and

(c) associated with (b), the precise form of order to either terminate the present arbitration before the present arbitrator or to leave such arbitration on foot but to appoint a replacement arbitrator.

I certify that the preceding two hundred and fifty-nine (259) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beach.

Associate: 

Dated: 9 June 2017