II. THE AGREEMENT TO ARBITRATE

4. The Parties entered into a Share Purchase and Share Subscription Agreement ('Indian Company SPA') on x. The Indian Company SPA was expressly subject to the laws of India (see clause 15). Clause 15 also provided that:

   '...the Courts in Mumbai shall have the exclusive jurisdiction to entertain and dispose off [sic] any proceeding arising out of or from or touching this Agreement.'

5. Clause 16 of the Indian Company SPA sets out a step-by-step dispute resolution procedure in the event of dispute or disagreement between the Parties in connection with or arising out of the Indian Company SPA which the Parties followed in this case. Thus, by clause 16.1.2, notice had to be given of any dispute and reasonable endeavours made by discussion and negotiations to settle it within 30 days. However, if the dispute was not resolved, then the matter could proceed to arbitration according to the International Arbitration Rules of the Singapore International Arbitration Centre ('SIAC') before three arbitrators. Each party was to nominate one arbitrator, and the third arbitrator was to be nominated by the two party-appointed arbitrators. The juridical seat of the arbitration was provided for in Singapore and the language of the arbitral proceedings was stipulated to be English. The Parties expressly excluded the provisions of Part I of the Arbitration and Conciliation Act 1996 (the Indian Act), save for the provisions of Section 9.

6. Following what both Parties confirmed were unsuccessful conciliation proceedings, on 7 August 2010, the Claimants issued a Notice of Arbitration to which the Respondents replied on 31 August 2010. The Claimants nominated LL as Arbitrator, and the Respondents nominated MM as their arbitrator. The two party-appointed arbitrators agreed upon the appointment of NN as Umpire in accordance with the provisions of clause 16 of the Indian Company SPA. On 6 October 2010, the Chairman of the SIAC confirmed the appointments of LL and MM. On 27 October 2010, the Chairman of the SIAC appointed NN as Umpire.

7. Neither party at any stage challenged the jurisdiction of the Tribunal, or raised any issue in this regard, either on the basis of clause 15 of the Indian Company SPA or otherwise.

III. PROCEDURAL ORDERS NOS 1 & 2

8. Following correspondence between the Umpire of the Tribunal and the Parties' representatives, the Parties prepared a draft Procedural Order on 15 November 2010. That Procedural Order was satisfactory to the Tribunal and was duly confirmed as Procedural Order No 1.

9. Procedural Order No 1 provided for the submission by the Parties of a full Statement of Claim and Defence respectively, supported by all facts and contentions of law and supporting documents upon which the Parties wished to rely. There was provision also for a Rejoinder by the Claimants. The Statement of Claim in this arbitration was filed by the Claimants on 21 December 2010. The Statement of Defence was filed on 18 February 2011, and the Claimants' Rejoinder was filed on 18 March 2011.

10. Clause 4 of the Procedural Order provided for disclosure of documents and by clause 5 the Tribunal had to rule on any objection to disclosure by 29 April 2011. Documentation which the Tribunal considered should be disclosed, was to be produced by 10 May 2011. There was some correspondence between the Parties and the Tribunal regarding specific aspects of disclosure, in respect of which the Tribunal made certain directions by its email of 3 May 2011 (Procedural Order No 2). The Parties resolved between themselves all outstanding issues of disclosure of documents following Procedural Order No 2.

11. The Tribunal also gave directions, pursuant to clause 6 of Procedural Order No 1, for the exchange of witness statements in two rounds. The first exchange took place on 31 May 2011. Two witness statements were filed on behalf of the Claimants, namely from A and B. One statement was filed on behalf of the Respondents, namely from C.

12. Subsequently, the Parties filed witness statements in rebuttal. In the case of the Claimants on 18 June 2011, an expert witness statement from D; in the case of the Respondents on 14 June 2011, two witness statements from C.

13. Pursuant to Procedural Order No. 2, the Claimants indicated that they wished to cross-examine C. On 7 June 2011, the Respondents indicated that they wished to cross-examine A and B. On 23 June 2011, the Respondents indicated that they did not want to cross-examine D.

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14. By email dated 10 June 2011, the Tribunal confirmed that it would hold a hearing in Singapore beginning on Monday 27 June and finishing on Friday 1 July 2011. In the event, the hearing was held in Singapore between 27 and 30 June 2011. The venue was Maxwell Chambers. At that hearing A, B and C were heard and cross-examined and submissions made by the Parties' Senior Advocates. The Tribunal is grateful for the excellent work of preparation of the respective law firms and the eminently lucid and helpful submissions of Mr AC and Mr AH. The proceedings were recorded and an excellent Transcript prepared by E. The Transcript was agreed by the Parties as an accurate record of the proceedings. Reference is made to the Transcript in this Award. No order for post-hearing submissions was requested or made, other than on costs. The arbitration was conducted under the SIAC Rules, but by clause 9 of Procedural Order No I, the Parties agreed that the Tribunal should be guided by the IBA Rules on taking evidence in international arbitration. By virtue of Article 28.1 of the Rules of the SIAC (2010), the Tribunal declared the proceedings closed as at 19 December 2011. The Tribunal then proceeded to consider and publish this Award.

IV. THE SCOPE OF THE ARBITRATION

15. The Claimants are seeking specific performance of the Indian Company SPA, or such other relief as the Tribunal deems just, in the terms set out at paragraph 9(a)–(e) of the Statement of Claim, viz:

'The Claimant therefore prays that this Honourable Arbitral Tribunal be pleased to direct the Respondents to jointly and/or severally specifically perform the contractual obligations contained in the Indian Company SPA by:–

(a) directing Respondent No. 1 to issue and allot 1,567,084 (i.e. One Million Five Hundred Sixty Seven Thousand and Eight[y] Four) shares to the Claimant against payment of Rs. 2,500,000,000/– (Rupees Two Thousand Five Hundred Million only) with all rights and benefits attached to such shares since July 31, 2009 until the date of sale/ issuance to the Claimant.

(b) directing Respondents Nos. 2 to 16 to sell and deliver the original share certificates and duly executed and stamped transfer forms for 1,059,750 shares to the Claimant against payment of Rs. 1,692,206,681/– (Rupees One Thousand Six Hundred Ninety Two Million Two Hundred and Sixty Thousand Six Hundred and Eighty One only) being the Purchase Amount+ one half of the stamp duty payable on the Purchase Shares and to have the Form FC–TRS endorsed from the Promoters' bankers;

(c) directing Respondent No. 1 and Respondent Nos. 2 to 16 to pass Resolutions by its Board of Directors duly approving and registering the transfer of the above shares from Respondents 2 to 16 to the Claimant;

(d) directing the Respondent No 1 and Respondent Nos. 2 to 16 to appoint two nominees of the Claimant A and F (as in the case of the other Six Companies) as directors on the Board of Directors of Respondent No. 1 company and on the Management Committee of the Board and by directing Respondent No. 1 to pass the necessary resolutions to adopt the amended Articles of Association as per Annexure 5 hereto, identical to those adopted for the other Six Companies

(e) directing Respondents Nos. 1 to 16 to all things necessary under the Articles or under any applicable law for performance of the above obligations

(f) that this Honourable Arbitral Tribunal be pleased to grant such other and further reliefs to the Claimant as may be deemed to be just, fair and equitable in the facts and circumstances of the present Claim;

(g) that this Honourable Arbitral Tribunal be pleased to award costs of this Arbitration to the Claimant.

16. On the first day of the hearing, the Claimants gave the following undertaking with a view to facilitating any order for specific performance:

'The Tribunal records the undertaking of the Claimants that it will fully cooperate in the demerger of the assets

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specified in Schedule A to the Scheme of Demerger filed by Respondent No. 1 with the High Court at Bombay on x, including by voting in favour of such scheme of arrangement at the meetings of Board of Directors and shareholders of Respondent No. 1, subject to the modification that such scheme will be in favour of the shareholders of Respondent No. 1 other than the Claimant.'

17. The Claimants have not asked the Tribunal to consider whether the Respondents should be liable to pay damages for breach, if established, of the terms of the Indian Company SPA.

18. The Respondents maintain, in essence, that the time period for fulfilling the conditions precedent to the share transfer in the Indian Company SPA expired with the consequence that the Indian Company SPA came to an end on 30 July 2009 by effluxion of time. In the alternative, the Respondents submit that an order for specific performance would be inappropriate on the facts because (a) the relationship between the Parties, as established pursuant to the Indian Company SPA, is akin to partnership and therefore not susceptible to specific performance, (b) the price to be paid for the shares has not been agreed, and (c) Section 16(C) of the Specific Relief Act 1963 does not allow a remedy to be granted in favour of a party that has abandoned the performance of an agreement.

19. The Respondents also submit that the expiry or termination of the Indian Company SPA will necessitate the unwinding of six other share purchase agreements (the SPAs) entered into on 21 January 2009 between the Claimants and six other 'Indian company' companies ('the 6 companies') – pursuant to which the Claimants acquired 40% of the shares in the 6 companies.

20. It is relevant to recall that on 4 March 2009, the Parties concluded the acquisition and transfer to the Claimants of 40% of the equity share capital of each of the 6 companies. The Charter Documents and Articles of Association of each of the 6 companies were amended. The Claimants' nominees were appointed as directors to the Boards of Directors of the 6 companies. The first stage of the acquisition of a substantial part of Indian company's business (almost half), namely that conducted by the 6 companies, was therefore complete. It is common ground that the 6 companies have been operated since then in accordance with the six Share Purchase Agreements and the revised Charter Documents and Articles of Association.

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21. The Parties have agreed, however, that this Tribunal's jurisdiction is limited to claims under the Indian Company SPA, so the Tribunal does not intend to rule on any issue pertaining to the SPAs entered into between Claimants and the 6 companies.

22. Insofar as appropriate relief falls to be considered by this Tribunal, it is therefore limited to whether an order for specific performance under the Specific Relief Act 1963 should be made in respect of the Indian Company SPA and, if so, upon what basis.

23. Finally, the Tribunal is asked to determine the allocation of the costs of the arbitration between the Parties.

24. As will be apparent, the relief set out at paragraphs 232 to 236 of the Award reflects the decision of the majority, MM dissenting from the majority's findings on the issues of automatic termination, partnership and specific performance. In summary, MM considers that the Indian Company SPA came to an end on 30 July 2009, that the relationship between the Parties was that of partnership; and for those two reasons as well as a failure by the Claimant to fulfil the requirements of 16(c) of the Specific Relief Act, the Claimants have no right in law to the grant of a decree of specific performance. There is no disagreement as to the applicable principles of Indian law; rather their application to the material facts.

FACTUAL BACKGROUND

A. THE INDIAN COMPANY SPA

25. As noted, the disputes between the Parties stem from a fundamental disagreement as to whether the Indian Company SPA came to an end on 30 July 2009, by effluxion of time. Much of the evidence and argument presented by the Parties goes to that issue which involves a close consideration of certain clauses of the Indian Company SPA, particularly as concerns the performance or non–performance of one condition precedent, viz clause 4.1.3, which relates to the issue of demerger. The intention of both Parties was that certain financial assets more particularly set out in Schedule A of a Petition to approve a Scheme of Demerger filed with the Bombay High Court (document 679), should be carved out of the sale and purchase of Indian company's business. There was no desire on French firm's part to purchase financial

assets. French firm was insistent on this, but such a demerger required the approval of the appropriate High Court in India, in this case the Bombay High Court. The failure to obtain approval by the 30 July 2009 is at the heart of the dispute between the Parties.

26. By clause 1.1.12 of the Indian Company SPA, business was defined as:

> *'the business of the Target Companies being manufacturing and/or distribution and/or sale of x which the Parties may agree from time to time ('x instruments');'*

27. That was the business of the First Respondent, which under the Indian Company SPA the Claimant was to acquire, initially 40% and then subsequently up to 100% over time by the exercise of Put and Call Options set out in clause 18 of the Shareholders Agreement more particularly described at paragraph 45 below. It should be noted that the final 10% of the shares would only be acquired if the Respondents exercised a Put Option. It was therefore always open to the Respondents to retain 10% of the shares of the First Respondent.

28. The Indian Company SPA provided by clause 1.1.20 that completion:

> *'shall mean (i) the sale of the Purchase Shares by the Promoters to the Investor; and (ii) the issue and allotment of the Subscription Shares by the Company to the Investor, in accordance with the terms of this Agreement;'*

29. Purchase Shares were defined by clause 2.2.2 as meaning shares purchased from the 2nd to 16th Respondents, which they should sell at completion to French firm upon payment by French firm of the aggregate purchase amount in respect of the Purchase Shares. Subscription Shares had the meaning given by clause 2.2.1, being equity shares issued and allotted by the company on completion to French firm upon payment of the aggregate subscription amount by French firm in respect of the Subscription Shares.

30. The consideration for the Subscription Shares was set out in clause 3.1 of the Indian Company SPA, which envisaged the payment by French firm of the Subscription Amount fixed at

INR2500 million and, for the Purchase Shares, a Purchase Amount, payable on the Completion Date. Purchase Amount was defined in clause 1.1.46 as the estimated Purchase Amount less the Adjustment Amount. The Adjustment Amount was defined by clause 6.3 as being:

> *'The adjustment amount ('Adjustment Amount") shall be equal to 40% of the sum of,*
>
> *6.3.1 the difference between Actual Net Debt and Estimated Net Debt, plus*
>
> *6.3.2 the difference, if positive, between Rs. eight hundred and ten (810) million and the Revaluation Reserve, plus*
>
> *6.3.3 the difference between Normalised Working Capital and Actual Working Capital,*
>
> *6.3.4 Eleven times the difference, if positive, between Proforma Estimated EBITDA and Proforma Actual EBITDA FY 09.'*

31. Appendix 4 to the Indian Company SPA set out a detailed definition of Net Debt. Clause 6 of the Indian Company SPA contained detailed provisions for the supply by Indian company to H of specified information from Indian company's accounts within specific time limits. This was to enable H to comment on and/or provide potential adjustments to the Consolidated Accounts. Based on that, the Parties were able to determine the Adjustment Amount (and in turn the Purchase Amount) in accordance with clause 6.3 of the Indian Company SPA.

32. The regime of the Indian Company SPA in clauses 3 and 6 is comprehensive and free of difficultly in application. All figures and information necessary to calculate the Adjustment Amount and Purchase Amount were to be made available by Indian company to French firm and their advisors, H. The exercise was of an accounting nature based on the accounts of the company prepared in accordance with the company's usual accounting practices. The determination of the Purchase Amount was to be no more and no less than an accounting exercise as is not unusual in merger and acquisition agreements of this kind.

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33. Provisions for completion were set out in clause 6 of the Indian Company SPA. Clause 6.4 provides as follows:

> *'Completion shall take place within seven (7) Business Days from the delivery by the Promoter of the Consolidated Accounts 2009, and the determination of the Purchase Amount, provided that the same shall be in compliance with the Applicable Law including the pricing guidelines issued by the Reserve Bank of India for the purchase of the Purchase Shares, or on any other mutually agreed date at such place as may be mutually agreed between the Parties* ***('Completion Date')****.'* ***(emphasis added)***

34. By clause 17.1 the Indian Company SPA was deemed not to be a partnership:

> *'17.1 No Partnership*
>
> *Nothing contained in this Agreement shall constitute or be deemed to constitute a partnership or association of persons between the Parties, and no Party shall hold himself out as an agent for the other Party, except with the express prior written consent of the other Party.'*

By clause 17.2 it was provided that:

> *'17.2 Time*
>
> *Any date or period as set out in any Clause of this Agreement may be extended with the written consent of the Parties failing which time shall be of the essence.'* ***(emphasis added)***

35. By clause 17.7:

> *'No waiver of any breach of any provision of this Agreement shall constitute a waiver of any prior, concurrent or subsequent breach of the same or any other provisions hereof, and no waiver shall be effective unless made in writing and signed by an authorized representative of the waiving Party.'*

36. By clause 17.9:

> *'Except as otherwise agreed among the Parties, this Agreement constitutes the entire agreement of the Parties as to its subject matter and supersedes any previous understanding or agreement on such subject matter. On the determination of the Purchase Amount. the Parties shall enter into a new agreement substantially in the form of this Agreement. except that the said agreement shall stipulate the determined Purchase Amount.'* ***(emphasis added)***

B. THE CONDITIONS PRECEDENT

37. For current purposes the most important condition precedent is the provision in clause 4.1.3:

> *'The relevant High Court(s) in India shall have passed the order approving the Demerger and Company shall have made the requisite filings with the relevant register of companies, as is required to make the Demerger effective;'*

38. The Parties were under an obligation by clause 4.2.1 to ensure that the conditions precedent in clause 4.1 were satisfied as soon as possible before the 'Long Stop Date.' The Long Stop Date was established as 190 days from the Effective Date. The Effective Date was defined by the Indian Company SPA as being 21 January 2009. Thus the Long Stop Date was 30 July 2009. It is common ground that the condition precedent in clause 4.1.3 of the Indian Company SPA was not satisfied by 30 July 2009. It suffices now to note again that the Claimants argue that the Indian Company SPA did not expire on 30 July 2009, whereas the Respondents maintain that it did.

39. Clause 4.2.3 contained a waiver provision in the following terms:

> *'The Parties (not being the Party responsible for the satisfaction of each of the Conditions Precedent) may at any time by notice in writing waive, in whole or in part, conditionally or unconditionally, the Conditions Precedent to the extent permissible under Applicable Law and the relevant Party responsible for the satisfaction of each of the Conditions Precedent shall be obligated to fit/fill such Condition Precedents after the Completion, subject to the terms and conditions as mutually agreed by and between the Parties in writing in this regard.'* ***(emphasis added)***

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40. In clause 4.3 of the Indian Company SPA, the following provision was set out:

> '4.3.1 *If the Conditions Precedent set out in Clauses 4.1.4, 4.1.5, 4.1.7, 4.1.10, 4.1.11 and 4.1.13, are not satisfied/fulfilled or waived (where applicable) by the Promoters and I or the Company on or before 190 days from the Effective Date or such later date as may be mutually agreed between the Parties in writing (the* 'Long Stop Date'), *this Agreement will terminate automatically (other than the Surviving Provisions) and no Party shall have any claim against any other Party(ies) (except in respect of any rights and liabilities which have accrued in relation to any antecedent breach).'* ***(emphasis added)***

> '4.3.2 *However, if all or any of the Conditions Precedent except the Conditions Precedent specified in Clause 4.4.1 [SIC/are not satisfied I fulfilled or waived (where applicable) by the Investor, Promoters and the Company on or before 190 days from the Effective Date or such later date as may be mutually agreed between the Parties in writing (the* ***"Forced Closing Date"****), the parties agree to waive the satisfaction of the Conditions Precedent subject to such conditions as they may mutually agree in writing and proceed to Completion.'* ***(emphasis added)***

41. The proper interpretation of clauses 4.2.3, 4.3.1 and 4.3.2 is critical in this arbitration and falls to be considered in the context of the material facts and conduct of the Parties before and after 30 July 2009. This is addressed at paragraphs 46–48 and 167–184 below.[1]

42. Clause 12 of the Indian Company SPA provided for its term and termination and was relied upon by Mr AC in support of his argument that the Indian Company SPA had expired on 30 July 2009. The Term was said to be from the Effective Date to

1 This is clearly a typographical error corrected by consent of all the Parties before the Tribunal. The reference is obviously to clause 4.3.1.

continue until termination in accordance with the Terms of the Agreement. By clause 12.2, it was provided that:

> *'This Agreement may be terminated as follows:*
>
> 12.2.1 *By the mutual consent in writing, of the Parties hereto; and*
>
> 12.2.2 *If any Conditions Precedent specified in Clause 4.4.1 [SIC] has not been satisfied or waived in accordance with the terms of this Agreement by the Long Stop Date, this Agreement shall terminate automatically without requiring any action by the Parties.'* ***(emphasis added)***

C. THE SHAREHOLDERS AGREEMENT

43. On x, the Parties entered into a Shareholders Agreement (SHA). This envisaged in the words of Recital C that:

> *'The Promoters and the Investor are desirous of entering into a long term joint venture to carry on and develop the Business (hereinafter defined) through the Target Companies, upon the terms and conditions set out herein.'* ***(emphasis added)***

44. And in Recital D that:

> *'The Parties have agreed to enter into this Agreement to regulate the terms and conditions of their commercial. contractual relationship with respect to the shareholding of the Parties in the Target Companies and the management and governance of the Target Companies.'* ***(emphasis added)***

45. The SHA was deemed to be effective under clause 2 in respect of the target companies (ie the 6 companies) except the First Respondent, from the Completion Date as defined in the Share Subscription Agreement or the Indian Company SPA as the case may be; and, in respect of the First Respondent, from the Completion Date as defined in the Indian Company SPA and Share Subscription Agreement. Clause 2 also provided that the SHA:

> *'shall and unless terminated earlier in accordance with the terms of this Agreement continue to be valid and* in *full force and effect until the Agreement is terminated in accordance with the terms hereof.'*

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46. The SHA contained detailed provisions for the management of the business, the appointment of directors, the holding of board meetings, non-compete periods and the like.

47. Clause 18 of the SHA provided for the exercise of various Put and Call options there listed, whereby French firm could increase its percentage interest in the equity shares up to 100% (as envisaged in clause 18.3 of the SHA) by 1 April, 2017. As noted, it is open to the Respondents to retain 10% of the shares, with the rights given to them by the SHA and as a minority shareholder under Indian Company law.

VI. THE PROPER INTERPRETATION OF CLAUSE 4.1.3 OF THE INDIAN COMPANY SPA

48. As already noted, clause 4 of the Indian Company SPA contained a series of conditions precedent to completion of the acquisition of 40% of the shares of Respondent No 1. The one which in this case is in issue is clause 4.1.3 which for convenience we repeat:

> *'The relevant High Court(s) in India shall have passed the order approving the Demerger and Company shall have made the requisite filings with the relevant registrar of companies, as* is *required to make the Demerger effective;'*

49. It is common ground that this condition precedent was not complied with. For that matter, as completion has not taken place, neither was the condition precedent in clause 4.11:

> *'The Promoters shall issue a certificate to the Investor repeating the Promoter Warranties on the Completion Date.'*

50. It is said by the Claimants that the conditions precedent set out in clauses 4.1.12, 4.1.14, 4.1.16 and 4.1.17 were waived by the Parties. However, the key to understanding the dispute which has arisen in this case is the issue of demerger. Before making its findings, the Tribunal will consider first how this issue was addressed in the pleadings, then in the documents, and finally in the witness evidence, particularly that of C, the external accountant advising the Respondents on the tax and other aspects of the transaction.

A. THE PARTIES' SUBMISSIONS

1. The Statement of Claim

51. It is said by the Claimants in paragraph 3.10 of the Statement of Claim that the issue arose in this way:

> *'The Present Arbitration* is *in respect of Indian Company alone (i.e. Respondent No. 1) and not in respect of the said Six Companies. The facts relating to these six Companies are being mentioned only to provide the complete context within which the acquisition of the Indian Company shares was agreed upon. As the Respondents desired to demerge certain financial assets from Indian Company prior to the completion of the transaction of acquisition of 40% shares of Indian Company by the Claimant, the acquisition of 40% shares of Indian Company was agreed not to be completed on March 4 2009 – i.e. the Completion Date for acquisition of 40% shares by the Claimant in the six Companies. As has been provided in the Indian Company SPA it was agreed by the Parties that the demerger of the financial assets would be achieved by the Respondents on or before July 30. 2009 though the effective date of such demerger scheme was agreed to be April 1 2009. One of the conditions precedent stipulated in the Indian Company SPA for the completion of the said Indian Company share acquisition was the sanctioning of the said demerger scheme by the High Court and the coming into force thereof The same was necessarily [SIC]' to be fulfilled by the Respondents who were in ownership and control of the Company.'* ***(emphasis added)***

52. The Claimants say that only the Respondents could bring about the satisfaction of condition precedent in clause 4.1.3, namely the application to and approval by the High Court of a Demerger Scheme. The Respondents say it was for both Parties to bring about the Demerger.

53. The Claimants say in paragraph 3.13 of the Statement of Claim that they subsequently learned that on or around 29 January 2009, ie immediately after the execution of the Indian Company SPA on 21 January 2009, the First Respondent had filed a Company Application seeking requisite directions from the High Court as required for a scheme for demerger. They say that on x, the First Respondent also filed a

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accordance with the Arbitration Rules of the [SIAC], for the time being in force, which rules are deemed to be incorporated by reference in this Clause. The arbitration tribunal shall consist of three arbitrators with one (1) arbitrator to be appointed by the Chairman of the SIAC. The language of the arbitration shall be English'.

2. Appendix 12 to the YZ Agreement is a document signed by the Second Respondent stating that for the benefit of the Claimant, the Second Respondent is 'to put up security' for the First Respondent' as security for the fulfillment of all contractual obligations by Dutch company' to the Claimant under the YZ Agreement. No issue is taken by the Second Respondent to being a party to this arbitration although it denies that Appendix 12 makes it liable to the Claimant as alleged.

B. PROCEDURAL HISTORY

3. The Notice of Arbitration herein was filed on 30 June 2011. The Claimant also filed its Claim Submissions on the same day and applied to the SIAC to have the arbitration conducted under the Expedited Procedure under Rule 5 of the SIAC Rules (4th Edition, 1 July 2010) ('the SIAC Rules'). Following submissions by the parties, the Chairman of the SIAC on 1 August 2011 determined that the proceedings shall be conducted in accordance with the Expedited Procedure before a sole arbitrator. On 15 August 2011, I was appointed to be the sole arbitrator.

4. The procedural history since my appointment is as follows:

No.	Date	Event
1	1 September 2011	• Procedural Order 1 issued
2	4 October 2011	• Respondents' Statement of Defence and Counterclaim • A's witness statement • B's witness statement • C's witness statement
3	15 October 2011	• D's witness statement

4	19 October 2011	• B's witness statement (amended) • C's witness statement (amended)
5	15 November 2011	• E's witness statement • F's witness statement • G's expert report
6	1 December 2011	• Claimant's Amended Statement of Reply and Defence to Counterclaim filed • F's witness statement (amended)
7	7 December 2011	• Opening Submissions of the Claimant • Joint Expert Memorandum
8	9 December 2011	• Respondents' Written Opening Submissions
9	12 December 2011	• Respondents' Amended Statement of Defence and Counterclaim • C's witness statement (amended)
10	12–16 December 2011	• Hearing
11	16 December 2011	• Respondents' Skeletal Submissions for Oral Closing Submissions • Claimant's Summary of Reply to Respondents' Skeletal Submissions for Oral Closing Submissions
10	16 January 2012	• Claimant's Closing Submissions
13	17 January 2012	• Respondents' Cost Submissions • Respondent's Written Closing Submissions
14	18 January 2012	• Claimant's Supplemental Submissions
15	26 January 2012	• Claimant's Reply Submissions

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16	6 February 2012	• Respondents' Written Reply Closing Submissions • Respondents' Reply Costs Submissions

C. THE TRIBUNAL'S JURISDICTION

5. Following my appointment, the Respondents' solicitors objected to my jurisdiction to hear the dispute. They wrote to the SIAC on 17 August 2011 to ask for a tribunal of 3 members and stated that in the Respondents' view, the tribunal had not been fully constituted under the terms of the agreement to arbitrate which stated that the tribunal 'shall consist of three members'. They also stressed the risk of any award by a sole arbitrator being unenforceable because the composition of the arbitral tribunal was not in accordance with the agreement of the parties.

6. The Claimant's solicitors responded on the same day to say that since the agreement to arbitrate specified the SIAC Rules and the Expedited Procedure is part of the Rules, the Chairman of the SIAC was entitled to decide that there should be a sole arbitrator.

7. On 24 August 2011, the SIAC informed parties that the Chairman maintained his decision to have a sole arbitrator for these proceedings.

8. Thereafter, there was a directions meeting on 1 September 2011 and Procedural Order 1 was issued for the conduct of these proceedings. On 4 October 2011, the Respondents filed their Statement of Defence and Counterclaim. The issue of the number of arbitrators was not raised. The point was only taken up in the Respondents' written opening submissions filed on 9 December 2011 and elaborated upon in oral opening on the first day of the hearing on 12 December 2011.

9. The issue is a short one – where parties have chosen the SIAC Rules and where they have stated the number of arbitrators to form the tribunal, can they be taken to accept that the Chairman of the SIAC has the discretion under Rule 5 of the SIAC Rules to nonetheless appoint a different number of arbitrators?

10. Rule 5.2 provides, inter alia, that where the Chairman determines that the proceedings be conducted in accordance

with the Expedited Procedure: 'b. The case shall be referred to a sole arbitrator, unless the Chairman determines otherwise'.

11. The Claimant says the Respondents should not be allowed to take the point now: it is not pleaded; it was not taken in the statement of defence; and, the Respondents have unjustifiably delayed taking the point.

12. The Respondents did of course raise the point when the Chairman of the SIAC first decided that these proceedings would come under the Expedited Procedure and be before a sole arbitrator. Yet, the point was not pursued in the Statement of Defence. Article 16(2) of Schedule 1 to the International Arbitration Act (Cap 143A) ('the IAA') states that 'A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence'. Rule 25.3 of the SIAC Rules is in the same vein.

13. In *Kempinski Hotels SA v Prima International Development* [2011] 4 SLR(R) 633; [2011] SGHC 171, it was contended that a tribunal could decide an issue – concerning a new management venture in that case – even if it was not pleaded. Judith Prakash J dismissed the contention summarily, and emphasised the importance of pleadings in arbitral proceedings (at paragraph 55):

> 'An arbitrator must be guided by the pleadings when considering what it is that has been placed before him for decision by the parties. Pleadings are an essential component of a procedurally fair hearing both before a court and before a tribunal. I was therefore surprised that the respondent argued that it was not required to plead material facts because this dispute was being adjudicated by an arbitrator'.

14. The correct number of arbitrators to hear these present proceedings is not the same as an issue of fact but the point that a sole arbitrator would lack jurisdiction is one that should be taken formally. That, in my view, is the purpose of Rule 25.3 of the SIAC Rules and Article 16.2 of the Schedule 1 to the IAA. In particular, where the point was raised to persuade the Chairman of the SIAC to re-consider his decision on a sole arbitrator but not pursued in the statement of defence thereafter, the reasonable objective view to be taken of the conduct of the Respondents is that the point was no longer pursued. This is all the more so when the point is one that does

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not require the taking of factual evidence and if raised early, could notwithstanding the Expedited Procedure here, have been dealt with as a preliminary issue and with the further option of an application to the High Court should the issue be decided in favour of the Claimant.

15. I would therefore hold that the Respondents waived or are estopped from taking the point as to the correct number of arbitrators.

16. In any case, the point is one I would decide against the Respondents. They say that since the agreement to arbitrate here provides for 3 arbitrators, the Chairman of the SIAC cannot decide otherwise. They point out that Rule 6.1 provides that 'A sole arbitrator shall be appointed unless the parties have agreed otherwise' and rely on *NCC International AB v Land Transport Authority of Singapore* [2009] 1 SLR(R) 985; [2008] SGHC 186 *('NCC International')*. The cited authority is a decision of the High Court of Singapore on the interpretation of what is now Rule 6.1. The SIAC Rules in force at the time of the decision did not include the Expedited Procedure. Tay Yang Kwang J held there that where the agreement to arbitrate provided for a sole arbitrator, the latter part of the Rule – 'or unless it appears to the Registrar, giving due regard to any proposals by the parties, the complexity, the quantum involved or other relevant circumstances of the dispute, that the dispute warrants the appointment of three arbitrators' – did not vest the Registrar with a discretion to appoint three, instead of one, arbitrators.

17. However, the wording of Rule 5.2 is different. It was introduced after the decision in *NCC International* and does not include the words 'or unless the parties have otherwise agreed' in the context of the number of arbitrators in an Expedited Procedure. The words of Rule 5.2(b) are quite plain and if the SIAC wished to retain the number of arbitrators in the parties' agreement to arbitrate the saving words would have been included, as they were for Rule 6.1.

18. The Respondents also rely upon *Metalfer Corp v Pan Ocean Shipping* Co *Ltd* [1997] CLC 1574. The issue before Longmore J was whether the time for bringing a claim was the 30 day period stated in the arbitration clause in the charterparty or the longer one year period in the Hague-Visby Rules where the terms of the charterparty incorporated the Rules by reference.

The learned judge held that the former was the correct position, stating:

> 'It is a well accepted principle that when one has a written contract which incorporates other terms by reference and the incorporated document contains provisions which conflict with the provisions of the written documents, then the terms of the written document will, in the ordinary way, prevail … The reason for that principle is that in the ordinary way the parties will have given express consideration to the written terms and much less, if any, consideration to the application of the incorporated terms. It is much the same principle whereby typed clauses will ordinarily prevail over printed clauses and handwritten clauses will ordinarily prevail over typed clauses'.

19. This principle is no doubt sound. However, it is premised on the existence of a contradiction or conflict which is not found in the instant case. The parties chose the SIAC Rules to govern the arbitration and they accepted the entirety of the SIAC Rules including the Expedited Procedure in Rule 5 together with the powers that the Rule reserves to the Chairman and Registrar of the SIAC to administer and guide the proceedings. There is no derogation from party autonomy and it is precisely the parties' choice of the SIAC Rules that requires acceptance of the Chairman's decision. It may be otherwise if the parties had stipulated that there shall be 3 arbitrators even if the proceedings were under the Expedited Procedure but that is not the case here.

20. The Respondents also stress that a comparison of the arbitration clause in the Non-Disclosure Agreement in Appendix 13 of the YZ Agreement with Clause 17.1 shows that the parties applied their minds and intended a three member tribunal for the YZ Agreement. This is because the former did not specify the number of arbitrators. The point has some merit but it remains that the SIAC Rules chosen in Clause 17.1 contemplate the possibility of a sole arbitrator if the Expedited Procedure applied and Clause 17.1 did not specify that the tribunal had to, in such circumstances, be a tribunal of three members.

21. Accordingly, I find jurisdiction to consider the disputes in these proceedings.

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D. MERITS

Six Material Invoices

22. The YZ Agreement is a commercial arrangement by which the First Respondent is to deliver x cells to the Claimant for it to manufacture x modules and deliver them to the First Respondent or to its order. The First Respondent is an indirect subsidiary of the Second Respondent, which is the ultimate holding company of a group in the business of x.[1] The group of companies shall be referred to as 'Dutch company' in this award. The modules are installed in x plants and the x industry expects that the modules should last 25 years without requiring a replacement. This expectation is reflected in the warranties both in the 2010 Agreement and the agreements between a Dutch company entity and its end customer.

23. The Claimant itself is a company in a group of companies which will be referred to as 'W company' herein. The commercial relationship between Dutch company and W company for the manufacture of x began in a prior agreement between different entities in late x ('the ST Agreement'). There are other arbitration proceedings involving the ST Agreement. I am also informed there are other arbitration proceedings involving the YZ Agreement.

24. These proceedings concern 6 container loads of x modules which have been delivered by the Claimant to the First Respondent. The Claimant's claim is in respect of the invoices for containers for a total amount of US$1,403,189.84 ('the Six Material invoices'[2]). In tabular form, the relevant containers are:

1 Recital 1 to the YZ Agreement ascribes the business to the First Respondent but the undisputed evidence is that the Dutch company group is divided into operations, projects and sales and the First Respondent is under the operations part of the group. The structure of the group is set out at Tab 3 of the Respondents' Bundle of Documents.

2 Clause 6.1 of the YZ Agreement provides for delivery to be FOB x, China.

Container No.	x	x	x	x	x	x
Delivery date	28.1.11	28.1.11	28.1.11	29.1.11	29.1.11	29.1.11
Arrival date	19.2.11 USA	19.2.11 USA	19.2.11 USA	3.3.11 Europe	3.3.11 Europe	3.3.11 **Europe**
Invoice No.	x	x	x	x	x	x
Number of modules	560	560	552	560	560	560
Amount (US$)	163,394.96	246,942.82	245,635.58	248,412.52	249,016.96	249,787.00

25. There is no dispute that the x modules were manufactured and delivered and that the invoiced amounts are due. The First Respondent's position is that it is entitled to set off and counterclaim an amount of damages that exceeds the said total amount because the modules were defective.

Manufacturing defects

26. I now turn to the alleged manufacturing defects. The basic building blocks of the x modules concerned are the x cells. The First Respondent supplies the x cells to the Claimant. Sixty of the cells are then connected by soldering in a x by x which is encased into a module. Each module has 6 x and a x, which allows connection to the x of other modules. The manufacturing under both the ST and YZ Agreements took place at W company's manufacturing facility known as 'H'.

27. According to the Respondents' witnesses, there were concerns with the modules manufactured under the ST Agreement with the number of micro cracks in the x cells embedded in the x modules. These are cracks which cannot be seen by the naked eye and which arise in the manufacturing process. They are discovered through a process known as electro luminescence ('EL') imaging where the x module is operated as a light emitting x and the emitted infrared radiation due to recombination effects are detected with a camera that is sensitive to infrared light.

28. The aim of a well controlled manufacturing process is to limit the number of micro cracks as there is an increased risk of the micro cracks developing into dead zones which in turn lead to a loss of power output from the affected x cells. The dead zones may in turn lead to a power loss of up to one third of

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a x solar module should the bypass diode in the module be activated.

29. These concerns led to 2 personnel from Dutch company being sent to H in November 2010. It is said they recommended certain measures to be taken. Thereafter, agreement was reached on the number of micro cracks which would be acceptable under the YZ Agreement.

30. By Clause 1 of the 2010 Agreement, the Claimant agreed to manufacture and sell modules according to the technical specifications set out in Appendix 1 ('the Specifications'), the requirements for the Modules and the manufacturing process as set out in Clause 4.1 between 1 December 2010 and 31 December 2011 up to a total of x mega watt of modules, which (under Clause 2) would be labelled as Dutch company modules.

31. Appendix 1 specified a power rating of 225, 230 or 235 watts and set out the EL inspection criteria for micro cracks.

32. In Clause 4.1, the Claimant warranted that it has the necessary skills, expertise and capabilities to manufacture the Modules in accordance with the Specifications and the YZ Agreement, the workmanship of the Modules and the power output of the Modules.

33. Clauses 4.2 to 4.5 are in the following terms:

 4.2 Within twenty (20) Business Days of receipt of the shipment of Modules by [the Respondent] at the port of destination or the Customer from [the Respondent] (by direct shipment from H), but in any event within 90 Business Days from delivery at the port of destination, [the Respondent] shall notify [the Claimant] of any shortage, defect or damage existing at the time of receipt and visible, in each case as determined to the reasonable satisfaction of [the Respondent].

 4.3 Within ninety (90) calendar days of receipt of the Modules by [the Respondent] or customer of [the Respondent] (by direct shipment from H), [the Respondent] is entitled to reject any Module if there is a breach of warranty given in Clause 4.1 by [the Claimant] …

 4.4 [The Claimant] shall indemnify and hold harmless [the Respondent] against all third party Claims which may be asserted against or suffered by [the Respondent] and which relate to or arise out of or in connection with the manufacture or workmanship related to the Modules or the Materials …

 4.5 As soon as [the Respondent] becomes aware of any Claim which relates to or arises out of or in connection with the manufacture of or workmanship related to the Modules or the Materials, it shall notify [the Claimant] of the Claim. [The Respondent] shall handle such Claims as it sees fit at its sole discretion. The Parties shall cooperate in good faith for such claim and [the Claimant] shall provide to [the Respondent] such assistance as [the Respondent] may request.

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34. The Claimant was required to deliver the Modules 'FOB x China', packed in accordance with specified instructions in such manner as to reach their destination in an undamaged condition. Clause 6.4 provides:

 'Prior to delivery of the Modules, [the Claimant] shall inspect and test the Modules to ensure they are in accordance with the Specification. [The Claimant] shall supply to [the Respondent] an electronic copy of the documentation relating to the inspection and testing, including flasher data according to the requirements of [the Respondent]. At the conclusion of each stage of inspection and testing, [the Claimant] shall certify that the Modules have been manufactured in accordance with the Specification'.

The EL inspection process

35. I now turn to the terms in a document entitled 'EL Inspection Criteria for Microcrack for Dutch company' bearing file number x on the notepaper of H bearing the description 'Standard Inspection Process'. The document is part of Appendix 1 to the YZ Agreement I will refer to it hereinafter as 'the SIP'.

36. The document is in both English and Chinese. However, not all the wording in English has Chinese equivalents or translations. For instance paragraph 8, which sets out the inspection criteria, has explanatory notes only in English. Paragraph 8.2 sets out

defect criteria; under 'normal crack', it is stated in English only, with a picture, that 'Allowed maximum cell amount with normal cracks with length >1 em is 4 pieces, according to the EL image which was taken with the scene of full scale module'.

37. Paragraph 9 is central in these proceedings and in English reads as follows:

9.1 Be careful and gentle when transporting modules.

9.2 Turn off current and voltage on power supplier when taking the clamp away from modules.

9.3 3% sampling inspection shall be done per production batch of at least 100 pieces and maximum 1000 pieces of modules. If *more than one* module is non compliant, the inspection shall be extended to 10% for the batch with the target of no more than one non-compliant module, failing which 100% inspection shall be done. The non-compliant modules shall not be deemed as rejected or rejectable without mutual confirmation of Dutch company's H. The solution for the non-compliant modules including in-line improvement to reduce non-compliance shall be negotiated.

9.4 Fill in 'EL Camera Check Sheet' every day.

9.5 Record the inspection result on 'EL Inspection Daily Sheet'.

9.6 The EL will be performed on modules directly after FQC inspection and the report will be sent to Dutch company.

9.7 The EL inspected and compliant modules will be packed together on a pallet and the position in the container will be communicated to Dutch company. Dutch company can test the modules against the criteria as above and shall check the EL image and give the report to H within 1 week after container arrives at the warehouse, failing which the modules in the container shall be deemed accepted without non-compliance. The container that passes the test by Dutch company shall be deemed compliant.

3% sampling inspection shall be done per production batch of at least 100 pieces and maximum 1000 pieces of modules. If *more than one* module is non-compliant, the inspection shall be extended to 10% for the batch with the target of no more than one non-compliant module, failing which 100% inspection shall be done.

Non-compliant modules will only be shipped to Dutch company as second choice after confirmation of Dutch company. The modules stated non-compliant by H shall only be accepted after approval by Dutch company . The compliant modules shall only be deemed non-compliant after mutual confirmation of Dutch company and H. The solution for the non-compliant modules including in-line improvement to reduce non-compliance shall be negotiated.

38. F, the head of the quality assurance department at H, testified (T2, page 88 to 91) that a flash test is done on the modules before the final quality check or FQC inspection. The flash test would reveal if the module has a short circuited x. As indicated in paragraph 9.6 of the EL inspection process, the EL is performed after that inspection.

39. The EL inspection process involved taking an EL image of the module using a high resolution camera and inspecting the image on a standard portable laptop computer. F identified one of the computers used by the legal teams present in the hearing room as the sort of the computer used by the inspectors in the factory (T2, page 85 to 86). In EL imaging, the module is operated as a light emitting x and the damaged areas appear dark or darker than the undamaged areas.

40. As set out in the process, a 3% sampling is done per production batch and 'If more than one module is non compliant' (see the second sentence of paragraph 9.3), the sampling size is increased. It was pointed out during the hearing that the phrase quoted and same phrase in the second sentence of the second paragraph in paragraph 9.7 do not accord with the Chinese language text of that phrase. In Chinese, the words are 'one or more' and before me, this was confirmed by the Chinese interpreter who assisted in these proceedings[3]

41. F testified in cross examination that the inspectors at the H factory did not speak English and they worked as follows:

'... based on the more stringent internal standards, as long as it is found that one piece has the problem we will

3 L, see T2, page 57, line 15.

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carry out the 10 per cent screening test' (T2, page 78 to 79).

42. This evidence is not challenged. Hence, the discrepancy between the English and Chinese versions of the phrases did not affect the actual sampling and inspection process.

The complaints

43. B, the Quality Manager of J, a wholly owned subsidiary of the Second Respondent, testified that on 10 March 2011, during a general inspection of modules delivered in a container that is not one of the Six Material Invoices, the inspection team found three solar modules that underperformed in flash tests. The root of the underperformance was the bypass x in the x boxes of the modules. Thereafter, a measurement campaign was carried out on the modules in stock at the time. Some of the modules in stock came from Containers 219 and 220. Flash tests were carried out to determine the power performance. Out of the 140 modules from Container x in stock at the time, 2 modules had short circuited bypass x.

44. In his witness statement, A, the Process Engineering Manager of K, another wholly owned subsidiary of the Second Respondent, said that on 28 March 2011, quality checks were carried out under the supervision of B on the EL pictures for Containers x, x, x and x that the Claimant had taken. It is said that Container x had three modules with more than 4 micro cracks impacted cells and Containers x, x and x had two, one and one such modules respectively.

45. In addition, B testified that tests carried out on solar modules installed for a number of customers showed problems with x or power ratings. A lower power rating can result from micro cracks as once micro cracks are present in a module, there is an increased risk that during the operation of the module, the micro cracks can develop into large cracks because of thermal stress on the modules due to temperature variations caused by the day/night rhythm and the seasons of the year. Mechanical stress caused by wind speed changes can also cause micro cracks to develop into larger cracks. Depending on the pattern of the micro cracks, the thermal and mechanical stress may lead to a 'dead' or 'inactive' cell that causes a loss of power output from the cell. Such a cell no longer contributes to the total power output of a module. When the 'dead' or 'inactive' part of the cell reaches 10% of the total cell area, there will be a power loss and when the affected area is 50%, it is likely that the bypass x will be activated. In such event, the module will lose one third of its power output.

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46. The solar modules that showed these problems included modules under the Six Material Invoices. Others were modules manufactured under the ST and YZ Agreements at the H factory.

The Respondents' claims

47. The Respondents say that the foregoing problems with the modules evidence that the Claimant is in breach of:

47.1 with regard to the modules with more than one cell with more than 4 micro cracks, the requirements in Appendix 1 of the YZ Agreement and the obligation under Clause 6.4 to inspect and test the modules before delivery to ensure they are in accordance with the requirements;

47.2 with respect to the solar modules that have lost power output, the Specifications in Appendix 1 of the Agreement that the modules must meet the specified power rating, with a tolerance of +/– 5 W, and the Clause 6.4 obligation to test and inspect before delivery;

47.3 the warranty under Clause 4.1(a) that the Claimant had the necessary skills, experience, expertise and capabilities to manufacture the modules in accordance with the Specifications and the YZ Agreement.

48. The Claimant denies that the modules have the micro crack and/or x issues alleged. The first line of defence is these manufacturing issues cannot be raised now because:

48.1 The First Respondent must be deemed to have accepted the modules as compliant under agreed process set out in the paragraph 9.7 of the SIP;

48.2 the First Respondent did not raise the issues within the time set in Clause 4.2 of the YZ Agreement;

48.3 the First Respondent failed to reject within any of the modules within the 90 day period in Clause 4.3 of the YZ Agreement.

49. The Claimant further contends that even if the Respondents can raise the manufacturing issues now, they have not proven that the micro cracks in the modules were the result of the manufacturing process. The Claimant emphasises that the x cells that are the building blocks of the modules were supplied by the First Respondent to the Claimant and contends that it is likely that the micro cracks were caused prior to the delivery of the cells to the Claimant. To the extent that the Respondents rely on evidence of the number of modules with cells with micro cracks in shipments other than the containers in the Six Material Invoices, the Claimant says that this skews the results and no assumptions can be made as to the accuracy of the data relied upon by the Respondents.

50. The Claimant also says that the type of x used in the modules was approved by the First Respondent and that the installation in a parallel circuit in the x is not a defect. Further, the Claimant says that the Respondents have not proven that the damage to the x alleged was caused by the manufacturing process or that any failure rate during the manufacturing process exceeded industry standards.

Paragraph 9 of the Standard Inspection Process

51. The manner in which contractual interpretation is approached under Singapore law, the governing law of the YZ Agreement, is comprehensively set out in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Constructions Pte Ltd* [2008] 3 SLR 1029. The Court of Appeal there endorsed the contextual approach[4] to contract interpretation comprehensively set out by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, as qualified by his Lordship in *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 at [39]. The Singapore Court noted that the approach was accepted by the major common law jurisdictions and stressed that this approach accords with 'common sense and logic'. I bear in mind the Court's caveat at paragraph [122] that the task remains one of interpretation of the contractual language and not a pretext to contradict or vary it.

4 The Court also came to the view that the contextual approach is statutorily embedded in section 94(1) of the Evidence Act. I note this point in passing only as this being an international arbitration, the Evidence Act does not apply.

52. As evident from the position of the parties, central to this dispute is the meaning and effect of the words set out in Paragraph 9 of the SIP containing both English and Chinese text. The Respondents have, in their closing submissions, contended that the Chinese text prevails over the English text. I am unable to accept this. The inspection process is agreed between the Claimant and the First Respondent and it forms part of the YZ Agreement which is in English. The body of the agreement makes no reference to any provisions being in Chinese much less that any such provisions should have primacy.

53. The contextual approach, as I understand it, permits me to bear certain points in mind when interpreting the wording. Firstly, the x cells used in the manufacture of the x modules are supplied by the First Respondent to the Claimant. Secondly, the expert evidence is agreed that due to the material of the cells and the stresses during the process of producing the modules, there is a probability of micro cracks during the manufacture of the modules (Experts' Joint Memorandum: Questions 2, 10, 11 and T3, page 89). The criterion of 4 micro cracks > 1 em is what the parties to the YZ Agreement have decided is acceptable. Thirdly, as both expert witnesses confirmed, the interpretation of EL images is not easy: (a) the task is difficult, involving judgment which is 80% objective and 20% subjective; (b) as inherent in matters of judgment, time is required to study the images for defects; and (c) there can be disagreement as to what is an impacted or dead area in a cell (T3, page 118–137). Overall, studying the images is invariably an imprecise task. Fourthly, the science as to the development and impact of micro cracks is uncertain (Experts' Joint Memorandum: Questions 22, 28, 31, 32 and 32A).

54. The EL images are taken after the flash test and the FQC inspection. As noted above, the former is to test the power output of the modules. The purpose of the latter is self evident. The EL images reveal defects not visible to the naked eye. Paragraph 8 of the SIP sets out the 'Defect Description' and the 'Defect Criteria'. Paragraph 5.2 makes the quality assurance personnel responsible for the definition and interpretation of the criteria.

55. Paragraph 9.3 provides for a sampling size of 3% per production batch. The sampling size is increased to 10%

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of LL as the sole-arbitrator in this arbitration. No party has challenged the appointment of LL as the sole-arbitrator in this arbitration.

5. The Arbitral Tribunal's (Sole-Arbitrator) particulars are:

LL, M/s M at x

III APPLICABLE LAW, PLACE & LANGUAGE OF ARBITRATION

6. Although the Claimant in its Notice of Arbitration dated 29 October 2010, did not specifically comment on the applicable law, there can be no dispute that the applicable rules of law would be Singapore Law, with the arbitration to be resolved in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC Rules'). As this arbitration is deemed to have commenced on 29 October 2010, the SIAC Rules (4th Edition, 1 July 2010) shall apply to this arbitration.

7. The place of arbitration shall be Singapore and the parties have agreed that the language of this arbitration shall be English.

IV SUMMARY OF THE PROCEDURE

8. On 29 October 2010, the Claimant submitted a Notice of Arbitration ('Notice') to the SIAC, pursuant to Rule 3.1 of the SIAC Rules. The Notice related to a dispute between the Claimant and the 1st Respondent (both of whom are and were at all material times members of the 2nd Respondent (AC)) and the 2nd Respondent. The Notice stated briefly the nature and circumstances of the dispute. It spelt out that following the election of the bearers of the 2nd Respondent for 2008/2009, the Claimant and 1st Respondent were elected as office bearers of the 2nd Respondent, the Claimant as a General Committee Member ('GC Member') and the 1st Respondent as the President ('President'). The Claimant further maintained that in the course of her term as GC Member, she was and continues to be seriously injured in her reputation, character and credit and has been brought into public scandal, odium and contempt and that thereby she has suffered and continues to suffer distress, embarrassment and humiliation. The Claimant further said that all this, as spell out above, was caused by the malicious and wrongful act of the 1st Respondent in his

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capacity as President of the 2nd Respondent and in the course of performing his duties and responsibilities as such officer of the 2nd Respondent. The Claimant gave particulars to this, in that on 11 August 2008, she was removed as a Convenor of the Magazine and Website Sub-Committee and Deputy Convenor of the Membership and Rules Sub-Committee without any reason despite request for the reasons; she was not allocated any portfolio after her removal as aforesaid; her name was excluded from the list of the GC Member in 2 monthly issues of AC (2nd Respondent) magazine, that her name was included in the list of GC Members only after she demanded that the same be done; that members of the 2nd Respondent were informed of her demand in such a way as to cause her further humiliation and embarrassment and that she was unfairly and without justification directed to attend a Disciplinary Sub-Committee on false allegations of misconduct.

9. For this the Claimant claimed that both the 1st and 2nd Respondents are accordingly liable for the said harm done to her. The Claimant further spell out that Mediation pursuant to Rule 45B(i) of AC (2nd Respondent) Rules at the Singapore Mediation Centre was unsuccessful and claimed the reliefs as spelt out in the Notice.

10. The particular Rule 45B(ii) of the AC Rules, being the Arbitration clause, referred to by the Claimant in the Notice, forms part of Rule 45B, which the Tribunal deems fit to quote in full:

'DISPUTES: CONSULTATION, CONCILIATION, MEDIATION, ARBITRATION AND LEGAL PROCEEDINGS

45B(i)(a) Where a dispute arises between the Club and a Member or between a Member and a Member (hereinafter referred to as 'the Parties') touching on any matter of the Club or arising out of such matter, the Parties shall before referring the said dispute to arbitration, first attempt to resolve the same through mediation in accordance with the procedure set out by the General Committee.

(b) The Parties shall participate in the mediation in good faith and undertake to abide by the terms of any settlement reached.

(c) A mediation may be initiated by the Club or a Member(s) by way of a notice in writing to the Club and to all Parties concerned with the dispute.

45B(ii)(a) Only if, and to the extent that any such dispute has not been settled by mediation and that mediation has been terminated with no written settlement being concluded therein, the dispute shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre for the time being in force, which Rules are deemed to be incorporated by reference to this Rule.

(b) The Parties agree to keep confidential all matters relating to the arbitration (including without prejudice to the generality of the foregoing, the existence of such arbitration, the terms of any arbitral award made as well as all communications made in connection with such arbitration) (the 'Information') and shall not divulge the same to any other person (save for any legal advisers of the relevant Party provided always that such disclosure shall be made under the same confidentiality obligations) except where the dispute is with the Club, such information shall be disclosed to the members. The Members hereby agree that they shall not use or attempt to use the information or any part thereof in any manner which may, whether directly or indirectly, injure, cause loss or damage to the Club or may be likely to do so. 'The Members also hereby agree not to communicate or disclose such information or any part thereof in such a manner which results or is likely to result in the information becoming available to anyone other than the Club or its Members'.

(c) Judgment upon the arbitral award may be rendered by the courts of Singapore and application may be made to any court of competent jurisdiction for a judicial acceptance of the award and an order of enforcement.

45B(iii) Where the dispute is referred to arbitration and the Club is awarded costs in the arbitration proceedings, such costs shall be on any indemnity basis.

45B(iv) Any member who offends against Rule 45B shall be subject to disciplinary proceedings in accordance with Rule 26.

45B(v)(a) This Rule 45B shall, after it has received the approval of the Registrar of Societies, take effect retrospectively from the date on which it was approved at the General Meeting of the Club (hereinafter referred to as 'the stipulated time').

(b) Any dispute, which has not been resolved or settled on or before the stipulated date and in respect of which arbitration or legal proceedings have not commence shall be dealt by the Parties in accordance with the provisions of this Rule 45B.'

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11. Both the 1st Respondent and 2nd Respondent submitted their respective Response to the Notice ('Response') on 12 November 2010, pursuant to Rule 4.1 of the SIAC Rules.

12. The 1st Respondent in his Response denied the Claimant's claim, reserving also to address her allegations more specifically in his Statement of Defence, and contended that there is no legal basis for the Claimant to bring a personal claim against the 1st Respondent. Whilst the 1st Respondent did not dispute the Claimant was previously the Convenor of the Magazine and Website Sub-Committee and the Deputy Convenor for Membership and Rules Sub-Committee, he said the Claimant's removal from her convenorships on 11 August 2008 was by majority vote of the GC and she was not given any portfolio thereafter. The Claimant remained a GC member and that her name was inadvertently omitted from the list of GC members in AC magazine but this was rectified after the editor was made aware of the omission. The 1st Respondent further contended that the GC had full discretion to remove the Claimant from the convenorships under the 2nd Respondent's Rules and neither he nor the GC was obliged to provide the Claimant with reasons for their decision.

13. In this Response, the 1st Respondent also indicated that there is only one legal issue to be determined in this arbitration – whether the GC was required to provide the Claimant with reasons for her removal from her convenorships. In respect of the Claimant's particulars, that members of AC were informed of her demand (for her name to be included in the list of the GC) in such a way as to cause her further humiliation and

embarrassment and that the Claimant was unfairly and without justification directed to attend a Disciplinary Sub-Committee on false allegations of misconduct, it was contended these allegations were not previously referred to mediation. The 1st Respondent therefore said the Claimant was attempting to circumvent Rule 45B(ii)(a) of AC's Rules and these allegations cannot properly be brought in this arbitration.

14. The 2nd Respondent's Response said that the Claimant has no legal basis to bring the present claims against it, in particular, where the Claimant contended she was being seriously injured in her reputation, character and credit and brought into public scandal, odium and contempt, thereby suffering and continuing to suffer distress, embarrassment and humiliation and where this was caused by the malicious and wrongful acts of the 1st Respondent in his capacity as President of the 2nd Respondent and performing his duties and responsibilities as such officer. Generally the 2nd Respondent contended that the mediation initiated in February 2010 has not been terminated as required in Rule 45B(ii)(a) of the Rules of the 2nd Respondent.

15. The 2nd Respondent agreed to the fact that both Claimant and the 1st Respondent are and were at all material times members of the 2nd Respondent and that the Claimant and 1st Respondent were elected as office bearers of the 2nd Respondent for 2008/2009, as General Committee Member and President respectively. It however contended that it is not generally concerned with, or involved in the proceedings of the GC, and that it is not a proper Respondent in respect of any alleged injury suffered by the Claimant.

16. The 2nd Respondent also confirmed that its records show that the Claimant was relieved of the 2 portfolios she held by a majority rule of the GC, and also not assigned any portfolios at the meeting of the GC held on 11 August 2008.

17. Whilst the 2nd Respondent confirms that the Claimant's name was omitted from 2 monthly issues of its magazine published for its members, it says that the omissions were notified to the editor and thereafter rectified.

18. The 2nd Respondent repeated basically the same point raised in paragraph 8 of the 1st Respondent's Response about certain allegations of the Claimant not being referred to mediation [Note: This has been referred to in paragraph 13 herein].

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19. Both the 1st Respondent and 2nd Respondent also agreed with the Claimant to have this arbitration referred to a sole-arbitrator and for this arbitration to be conducted in the English language. In respect of the applicable rules of law, both the 1st Respondent and 2nd Respondent agreed that this arbitration be governed by Singapore Law.

20. After the appointment of the Tribunal, it did pursuant to Rule 16.3 of the SIAC Rules call for a preliminary meeting on 11 March 2011 (later postponed to 17 March 2011) at 4.00pm at the Meeting Room x, Maxwell Chambers, 32 Maxwell Road, Singapore 069115 ('1st Preliminary Meeting'). Pursuant to the matters discussed at the 1st Preliminary Meeting, it was agreed by the Parties that these arbitral proceedings shall be conducted in accordance with the Expedited Procedure under Rule 5.1 of the SIAC Rules and in this respect they agreed to write to the SIAC Chairman to request and confirm their agreement for this proceedings to be conducted with the Expedited Procedure. Further pursuant to Rule 17 of the SIAC Rules, directions and time-lines were given to the Claimant to file the Statement of Claim, to the 1st Respondent and 2nd Respondent to file their Statement of Defence and to the parties to file their Lists of Issues. It was also agreed that a further Preliminary Meeting ('2nd Preliminary Meeting') be held on 3 May 2011 at 11.30am at the office premises of the 1st Respondent's Solicitors (with the consent of the Claimant and the 2nd Respondent).

21. The Parties did write to the SIAC to request and confirm their agreement for these arbitral proceedings to be conducted with the Expedited Procedure. On 31 March 2011, by an email sent to all the Parties' Solicitors and to the Tribunal, they were informed of the determination by the SIAC Chairman that the arbitral proceedings shall be conducted in accordance with the Expedited Procedure.

22. Pursuant to the direction given to the Claimant at the 1st Preliminary Meeting, the Statement of Claim was served on both the 1st Respondent and 2nd Respondent, the SIAC and on the Tribunal on or about 7 April 2011.

23. The 1st Respondent wrote to the Tribunal, copied to the parties and SIAC, on 17 April 2011 that the matter is suitable for summary determination on the basis that there is no basis in law for the claim and further saying that the two (2) averments

pleaded in the Statement of Claim are outside the scope of this arbitration. The 1st Respondent applied for a summary determination whether the Statement of Claim discloses any reasonable cause of action and also, if necessary, a ruling on a preliminary issue pursuant to Rule 25 of the SIAC Rules that pleaded particulars (8) and (9) of paragraph 7 of the Statement of Claim are not within the scope of this arbitration, as they were not included in the mediation between the parties. On 29 April 2011 the 2nd Respondent wrote to the Tribunal, copied to the other parties and SIAC, indicating that they respectively adopt the same position taken by the 1st Respondent. The 2nd Respondent first raised that the Claimant had not identified a cause of action or legal grounds for her claim under Rule 17.2 of the SIAC Rules and contended that the matter was suitable for summary disposal. It also similarly raised the point that the pleaded particulars (8) and (9) of paragraph 7 of the Statement of Claim were not the subject matter of mediation and therefore not within the scope of this arbitration. In this said letter, the 2nd Respondent also asserted that no legal basis creating liability on the part of the 2nd Respondent is pleaded. It raised both these points as issues to be summarily determined by the Tribunal and asked that appropriate directions be given at the hearing (Preliminary Meeting) on 3 May 2011.

24. Pursuant to the directions given to both the 1st Respondent and 2nd Respondent to serve their Statement of Defence by 21 April 2011, the 1st Respondent's Defence was served on 28 April 2011 only after being further reminded by the Tribunal's note of 27 April 2011. The 2nd Respondent's Defence was served on the Tribunal on 3 May 2011 (with the same having been served on the other parties and SIAC on 20 April 2011).

25. The 2nd Preliminary Meeting was held on 3 May 2011 at the lst Respondent's Solicitors' office at x. In view of the slight delays by both the 1st Respondent and 2nd Respondent to serve their respective Statement of Defence, both the lst Respondent and 2nd Respondent applied to the Tribunal and were granted the extensions of the dates of service of their Statements of Defence.

26. In respect of the 1st Respondent's Solicitors' letter of 19 April 2011 as well as what was adopted by the 2nd Respondent's Solicitors in their letter of 21 April 2011, a ruling was sought on the preliminary issue pursuant to Rule 25.4 of the SIAC Rules that the pleaded particulars (8) and (9) of paragraph 7

of the Statement of Claim are not within the scope of this arbitration. It was however noted by the Tribunal that there was no specific plea raised that the Tribunal does not have jurisdiction. In the premises the Tribunal directed that Rule 25.4 of the SIAC Rules had no applicability to the 1st Respondent's application for a ruling on the preliminary issue raised by the 1st Respondent. The Tribunal further directed that the matters pleaded in the Statement of Defence served respectively by the 1st Respondent and 2nd Respondent and the issues arising thereof shall be determined in the Final Award.

27. With respect to the Lists of Issues, the direction given by the Tribunal at this 2nd Preliminary Meeting was that the Claimed was to serve a revised List of Issues by 24 May 2011 and the 1st and 2nd Respondents were to serve their Lists of issues by 10 May 2011. The other directions given/made at this 2nd Preliminary Meeting were as follows:

    (a) Witnesses – Pursuant to Rule 22.1 of the SIAC Rules, all the parties were directed to give notice of the identity of the witnesses, the Claimant to serve such list by 5 May 2011, the 1st Respondent confirming that he has no other witnesses and the 2nd Respondent confirming that the General Manager of the 2nd Respondent and one Mr M shall give evidence on behalf of the 2nd Respondent.

    (b) Affidavits – Pursuant to Rule 22.4 of the SIAC Rules, the testimony of the Claimant and her witnesses, the 1st Respondent and the witnesses for the 2nd Respondent were to be presented in sworn Affidavits and served by 7 June 2011, with objections (if any) to any of these sworn Affidavits to be raised and served by 17 June 2011.

28. A further preliminary meeting ('3rd Preliminary Meeting') was scheduled for 24 June 2011 at the office of the 2nd Respondent's Solicitors. At this 3rd Preliminary Meeting held on 24 June 2011 at x, after certain observations were made by the Tribunal, it was confirmed and/or directed by the Tribunal as follows:

    (a) the Claimant did not intend to serve any Notice of Objections to the Affidavits served by the 1st and 2nd Respondents.

    (b) the 1st Respondent was to produce copies of the two (2) letters dated 29 October 2008 and 11 November 2008 written by the Claimant's Solicitors to the 1st

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Respondent, and if unable to produce the same, to give reasons for such non-production. The Claimant was then directed to produce these two (2) letters, if not produced by the 1st Respondent.

(c) The 2nd Respondent to check for the approved and signed copy of the minutes of the Special General Committee Meeting held on 11 August 2008 and for the same to be served on all other parties and the Tribunal by 15 July 2011.

29. The parties were also directed to sort out and agree on facts and issues in the matter with the Claimant to prepare the same and to obtain the approval of both the 1st and 2nd Respondents and to serve the Agreed Statement of Facts and Agreed List of Issues by 19 July 2011. The Parties were also directed to endeavour and prepare an Agreed Bundle of Document (from all the documents exhibited in the parties' and their witnesses' Affidavits) together with the 2nd Respondent's Rules and for this Agreed Bundle of Documents to be served one (1) week before the hearing.

30. The hearing was to be fixed for two (2) days, with the dates between 15 to 19 August 2011 and the parties agreed that transcripts would be taken of the proceedings at the hearing with the costs to be shared between the parties. The parties were also further directed that their respective Opening Statements/ Submissions (if any) should be served one (1) week before the hearing.

31. In the meantime, after the directions given at the 2nd Preliminary Meeting, the 2nd Respondent's Solicitors sought on 6 June 2011 an extension of two (2) weeks to file the 2nd Respondent's Affidavit as it had to be approved by the new General Committee recently appointed. The Tribunal granted an extension to all parties to serve their respective witnesses' sworn Affidavits by 5 June 2011 and for all objections (if any) to these Affidavits, to be served by 23 June 2011.

32. The 1st Respondent's Affidavit was served on 7 June 2011. The 2nd Respondent's Joint Affidavit, sworn by N and M was served on 13 June 2011 (with the Claimant being served on 15 June 2011). The Claimant's Affidavit together with the Affidavits of her witnesses, P, Q and R were served on 15 June 2011. These Affidavits were all served in compliance with the extension of time granted by the Tribunal.

33. On 22 June 2011, both the 1st and 2nd Respondents' Solicitors served their Notice of Objections to the contents of the Claimant's and her witnesses' Affidavits.

34. After consent of all parties was obtained on suitable hearing dates, initially fixed for 15 and 16 August 2011, the Hearing of this Arbitration was fixed on 17 and 18 August 2011 in x, Maxwell Chambers, 32 Maxwell Road, Singapore 069115.

35. By email dated 10 August 2011 from the 1st Respondent's Solicitor to the Tribunal and copied to all parties and SIAC, the 1st Respondent's Solicitor confirmed that the Claimant had forwarded the Agreed Statement of Facts and Agreed List of Issues under cover of their letter of 15 July 2011. The 1st and 2nd Respondents jointly proposed an Agreed Statement of Facts and Agreed List of Issues which was forwarded to the Claimant's Solicitors on 28 July 2011, to which the Claimant had not responded to. The 1st Respondent had therefore put the Tribunal to notice that if the parties are able to reach an agreement on these matters, the Tribunal would be informed of it. However there was no further intimation from any of the parties on this matter.

36. The hearings were held on 17 and 18 August 2011 (two (2) full days) in x and on 23 August 2011 (half-day) in x, at Maxwell Chambers.

37. Pursuant to the initial direction given on the final day of hearing and the subsequent correspondence between the Parties and the Tribunal for Closing Submissions to be submitted, it was finally directed on 3 October 2011 that the Parties submit their respective Closing Submissions by 25 October 2011. All the Parties' Closing Submissions together with their Bundle of Authorities were submitted to the Tribunal by 25 October 2011, and the Parties were also asked then whether any Party or Parties require to file Reply Submissions. The Parties were asked to respond by 27 October 2011 to this query raised by the Tribunal. All the Parties responded by 27 October 2011 that they wish to file Reply Submissions. Accordingly the Parties were directed by the Tribunal on 28 October 2011 to submit their Reply Submissions by 8 November 2011. On 8 November 2011, all the Parties submitted their Reply Submissions, with the 2nd Respondent also submitting a Bundle of Authorities.

38. On 9 November 2011, the Tribunal put the Parties to notice that if they have no further relevant and material evidence to

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produce or submissions to make, pursuant to Rule 28.1 of the SIAC Rules, the Tribunal was declaring the proceedings closed. The Parties were however asked whether any Party had further relevant and material evidence to produce or submission to make, failing which this declaration of the proceedings closed would stand. There was no further response to this from any of the Parties concerned.

39. On 15 November 2011, the Tribunal was informed by the SIAC that pursuant to Rule 5.2(d) of the SIAC Rules, the Registrar has decided to extend the time for issuance of the Award to 9 December 2011. This was in response to the request made by the Tribunal to the Registrar, SIAC on 28 October 2011. On 22 December the Registrar of the SIAC decided to further extend the time for issuance of the Award to 16 January 2012.

V. LISTS OF ISSUES SUBMITTED BY PARTIES

40. At the hearing on 17 August 2011, the Tribunal was informed by the Parties' Solicitors that no agreement has been reached on an Agreed Statement of Facts or Agreed List of Issues. In the premises the issues as raised in the respective List of Issues that were served by all the Parties on the Tribunal, pursuant to the directions given at the Preliminary Meetings, would be the Issues to be addressed.

A. Claimant's List of Issues

(1) As against the 1st Respondent

(a) Whether in view of Rule 7(i) of the 2nd Respondent's Rules ('the Rules') the 1st and (2nd Respondent) are entitled to act the way they did, as stated in the Statement of Claim.

(b) Whether the matters in paragraph 6 of the Statement of Claim were caused by the malicious and wrongful acts of the 1st Respondent, in the course of performing his duties and responsibilities as an officer of the 2nd Respondent viz as President of the 2nd Respondent.

(c) Whether the 1st Respondent was obliged to allow for discussions or provide the Claimant with reasons for her removal.

(d) Whether the acts complained of in paragraph 7(6) of the Statement of Claim was an innocent error.

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(e) Whether paragraphs 7(8) and 7(9) of the Statement of Claim are outside the scope of the present arbitration.

(f) Whether the facts pleaded in paragraphs 7(1)–7(9) of the Statement of Claim disclose a reasonable cause of action against the 1st Respondent.

(g) Whether there is basis to hold the 1st Respondent personally liable in respect of the matters complained of in the Statement of Claim including removing the Claimant from her convenorships as pleaded.

(2) As against the 2nd Respondent

(a) Whether the Claimant had been injured in her reputation, character and credit.

(b) Whether if the answer to the above is in the positive, the 2nd Respondent is responsible for such injury.

(c) Whether if the answer to (b) above is in the positive, the 2nd Respondent is liable for the duty.

(d) Whether the 2nd Respondent had knowledge of the malicious and wrongful acts of the 1st Respondent as alleged by the Claimant.

(e) Whether the matters referred to in paragraphs 7(1) to 7(7) of the Statement of Claim took place.

(f) Whether by informing its members and the way its members were informed of the Claimant's demands referred to in paragraph 7(8) of the Statement of Claim, further humiliation and embarrassment were caused to the Claimant.

(g) Whether the matters stated in paragraph 7(9) of the Statement of Claim is misconceived.

(h) Whether the Claimant has no or no reasonable cause of action against the 2nd Respondent, whether her claims are misconceived, groundless, frivolous or vexatious.

B. 1st Respondent's List of Issues

(a) Whether the Claimant's removal from her convenorships was wrongful.

(b) Whether the Claimant was entitled to reasons for her removal.

(c) In any case, whether any of the acts complained of by the Claimant in the Statement of Claim give rise to a cause of action against the 1st Respondent.

(d) Whether the Tribunal has jurisdiction to determine any issues that may be raised by particulars (8) and (9) under paragraph 7 of the Statement of Claim.

C. 2nd Respondent's List of Issues

(a) Even if the Claimant had been injured in her reputation, character and credit (which is denied), whether the 2nd Respondent is directly responsible or liable for such injury.

(b) Whether the 1st Respondent is a servant or an agent of the 2nd Respondent such that the 2nd Respondent is liable for his actions.

(c) Even if the Claimant had been injured in her reputation, character and credit (which is denied), whether the 2nd Respondent is vicariously responsible or liable for such injury.

(d) Whether paragraph 7(8) of the Statement of Claim gives rise to a cause of action.

(e) Whether paragraph 7(9) is the subject matter of another, unrelated complaint and as such, the inclusion of the complaint in paragraph 7(9) of the Statement of Claim is misconceived.

(f) Generally, whether the Claimant has any or any reasonable cause of action against the 2nd Respondent; and whether her claims are misconceived, groundless, frivolous or vexatious.

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TRIBUNAL'S NOTE

As the parties were unable to agree to and come up with an Agreed List of Issues, the Tribunal deems fit to look at these separate lists submitted by each of the patty to see whether certain of these issues as raised by all parties, are in fact similar or can be considered as covering 'common grounds or areas'.

(a) In respect of the Claimant's 1st issue against 1st Respondent, (in respect of Rule 7(i) of the 2nd Respondent's Rules), since it also touches on the Claimant's plea that no reasons for her removal were forthcoming despite numerous requests made, this does tie up with the 1st Respondent's 2nd issue (whether Claimant entitled to reasons for her removal). This would also tie up with the Claimant's 3rd issue against 1st Respondent (whether 1st Respondent obliged to allow for discussions or provide the Claimant with reasons for her removal).

(b) In respect of the Claimant 5th issue against 1st Respondent (whether paragraphs 7(8) and 7(9) of the Statement of Claim are outside the scope of the present arbitration), as well as Claimant's 7th Issue against 2nd Respondent, this would be similar to the 4th issue raised by 1st Respondent and the 5th issue raised by 2nd Respondent (only in relation to paragraph 7(9) of the Statement of Claim, (whether it's inclusion is misconceived as it is not a related complaint)).

(c) In respect of the Claimant's 6th issue against 1st Respondent (whether facts pleaded in paragraphs 7(1) to 7(9) of her claim disclose a reasonable cause of action) and Claimant's 8th issue against 2nd Respondent, would be similar to the 3rd issue raised by 1st Respondent (stated in a general way of 'whether any of the acts complained by the Claimant, give rise to a cause of action against the 1st Respondent', and can also be grouped with the 6th issue raised by 2nd Respondent (1st limb) – 'Generally, whether the Claimant has any or any reasonable cause of action against the 2nd Respondent' [to a certain extent the issues of whether the Claimant has a cause of action against the 1st Respondent and 2nd Respondent will have to be treated separately].

(d) In respect of the Claimant's 3rd issue against 1st Respondent, this can be considered together with the 2nd issue raised by 1st Respondent (Claimant asking from the view of the '1st Respondent's obligation', to give with the 1st Respondent asking whether Claimant was entitled to 'reasons for her removal'.

(e) Further in respect of the Claimant's 7th issue against 1st Respondent (which is framed in a general way, 'in respect of matters complained of in the Statement of Claim', but also mentioning 'including removing the Claimant from her convenorships as pleaded', can be read together with both the 1st and 3rd issues raised by 1st Respondent. [If there is no cause of action against the 1st Respondent, it would follow that he would not be personally liable].

(f) Further still, in respect of the Claimant's 1st, 2nd and 3rd issues against 2nd Respondent, (the 2nd issue depending on the affirmative answer to the 1st issue and the 3rd issue

depending on the affirmative answer to the 2nd issue), as well as the Claimant's 4th issue against 2nd Respondent, this would be similar to the 1st issue raised by the 2nd Respondent, which can be read together with also the 2nd and 3rd issues raised by 2nd Respondent.

No further issues were raised by either parties at the outset of the hearing after it had been determined by the Tribunal from the Parties concerned that there has been no agreement between them on an Agreed List of Issues. No further issues were raised during the course of the hearings on any specific hearing day or at the end of the hearings. Further neither party has submitted any further issue or issues before submission of their respective Closing Submissions.

SUMMARY

41. In summary therefore the Parties' Issues that can be considered and/or answered together can be grouped as follows:

(a) Claimant's 1st issue against 1st Respondent.
Claimant's 3rd issue against 1st Respondent.
1st Respondent's 2nd issue.

(b) Claimant's 5th issue against 1st Respondent.
Claimant's 7th issue against 2nd Respondent.
1st Respondent's 4th issue.
2nd Respondent's 5th issue.

(c) Claimant's 6th issue against 1st Respondent.
Claimant's 8th issue against 2nd Respondent.
1st Respondent's 3rd issue.
2nd Respondent's 6th issue.

(d) Claimant's 3rd issue against 1st Respondent.
1st Respondent's 2nd issue.
(more or less similar to the grouping in (a) above).

(e) Claimant's 7th issue against 1st Respondent.
1st Respondent's 1st and 3rd issues.

(f) Claimant's 1st, 2nd, 3rd issue against 2nd Respondent.
Claimant's 4th issue against 2nd Respondent.
2nd Respondent's 1st issue.
2nd Respondent's 2nd and 3rd issues.

VI. SUMMARY OF THE PROCEDURAL MATTERS AT THE HEARINGS

42. The hearings were held, as spell out in paragraph 36 herein, on 17 and 18 August 2011 and again on 23 August 2011.

43. During the first day of the hearing on 17 August 2011, the Claimant submitted the Claimant's Opening Statement (which was not marked), the Bundle of Pleadings, marked as 'BP 1 to 14', the Claimant's Bundle of Documents, marked 'CBD 1 to 51', and the Bundle of Affidavits containing the Affidavits of the Claimant (Tab 1), her witnesses, P (Tab 2), Q (Tab 3) and R (Tab 4), the 1st Respondent (Tab 5) and the 2nd Respondent's N and M (Tab 6), which were all tabulated as 'Tab 1 to Tab 6' consecutively. In respect of the Claimant's Bundle of Documents, since an additional letter from the Claimant's Solicitors to the 1st Respondent dated 11 November 2008 was also admitted and marked as 'CBD 52–53', the Claimant's Bundle of Documents was therefore eventually marked as 'CBD 1 to 53'.

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44. The 1st Respondent did not submit any documents at the hearing on 17 August 2011. However on 18 August 2011, in the course of the cross-examination of Mr Q, the Claimant's 2nd witness, the 1st Respondent's Counsel introduced three (3) documents, being individual pages of the 2nd Respondent's magazine for the months of April 2001, January 2002 and January 2003. The purpose was to show that there were certain Committee Members during that period that did not hold any Convenorships. These documents were marked 'IRI', 'IR2' and 'IR3' respectively. Besides these documents, no further documents were tendered m evidence by the 1st Respondent, except those appearing in the 1st Respondent's Affidavit.

45. The 2nd Respondent submitted a Bundle of Documents, which contained the 2nd Respondent's Rules 2011 (which the Tribunal indicated would not be the relevant Rules as the dispute in this matter arose in 2008 and these Rules came into force only in 2011). The other documents therein are the minutes of the Special General Committee Meeting held on 21 April 2008, the Special General Committee Meeting held on 11 August 2008 and the General Committee Meeting held on 29 August 2008. These were marked as '2RBD, Tab 1 to 4' respectively. The 2nd Respondent's Rules 2007 together with Bye-Laws 2007 (the applicable Rules) were later tendered in

and marked as '2RBD, Tab 5'. In the course of the hearing, a letter dated 6 August 2008 signed by the 1st Respondent together with the M & R Convenor S and Sport's Convenor T requesting for a Special General Committee Meeting to be held on 11 August 2008; an email from the 2nd Respondent's Executive Secretary U to all the General Committee members dated 7 August 2008 giving notice, pursuant to Rule 6(1) of the Club's Rules of the request made by the 3 individuals of their wish to convene a Special GC Meeting on 11 August 2008 [the email stated that 'A copy of their letter dated 6 August is attached', but the Tribunal noted there was no indication of the attachment therein in the email]; a letter dated 7 August 2008 signed by Q, P and R, addressed to the Ag General Manager of the 2nd Respondent, also indicating that in accordance with Rule 6(1) of the Rules, they were requesting for a Special GC Meeting on 11 August 2008 following the Special GC Meeting earlier requested, and this was to discuss about the complaints on the use of the squash facilities and an email of 11 August 2008 being a reminder from the 2nd Respondent's U on the Special GC Meeting to be held that day. These documents were all stapled together and collectively marked as '2RBD Tab 6'.

46. On 23 August 2011, before opening their case, the 2nd Respondent's Counsel also submitted the 2nd Respondent's Opening Statement dated 23 August 2011.

47. The Claimant's Opening Statement, in essence, summarised what the Claimant is claiming for, as spell out in the Statement of Claim, who were the Parties, the material facts giving rise to the Claimant's Claim, the Defences (very brief) of the 1st and 2nd Respondents, what evidence will be adduced and concluded by urging the Tribunal to find, on the evidence, the material facts and that both the 1st and 2nd Respondents are liable to the Claimant for said harm done to her and that she be granted the reliefs as claimed.

48. The 2nd Respondent's Opening Statement firstly spelt out that the Claimant's claim against the 2nd Respondent is premised on her claim against the 1st Respondent, but did not allege that the 2nd Respondent through its own acts caused the Claimant 'to be seriously injured in the Claimant's reputation, character and credit'. The 2nd Respondent also submitted that the Claimant's claim discloses no cause of action. Its position further was that the 2nd Respondent is neither responsible nor liable for such injury as there is no vicarious liability, highlighting that the Claimant has not alleged that the 1st Respondent carries out his acts as an employee of the 2nd Respondent. The 2nd Respondent then went on to note the applicable law on vicarious liability and attached the *Skandinaviska Enskilda Banken AB* case, a Singapore Court of Appeal decision, on the point of the 'close connection' test. They submitted that since there is no principal agent relationship between the Respondents, as the 1st Respondent was not elected into *his* position by the 2nd Respondent, the close connection test must fail.

49. On the matter of entitlement to convenorship, the 2nd Respondent submitted that although the Claimant makes an issue about her absence of Convenorship during part of her term as a member of the General Committee, there is evidence otherwise. It relied on the 3 exhibits (IRI to IR3) to show that there were members on the General Committee who did not hold any Convenorship.

50. In respect of the omission of the Claimant's name in the 2nd Respondent's magazine, it said that it was an inadvertent error. It submitted that the Deputy Convenor of the 2nd Respondent's Magazine and Website Committee (at the material time), agreed in the arbitration that it was an inadvertent error on his part not to notice the omission of the Claimant's name. It also submitted there was no conspiracy between the 1st and 2nd Respondents to omit the Claimant's name to cause injury.

51. For the letter of apology, the Opening Statement said that the 2nd Respondent was compelled to send the letter of apology to all its members on the Claimant's own demand and since it was incurring an expense, it was reasonable for the Claimant to expect that an explanation was given for incurring an expense.

52. The 2nd Respondent concluded that there can be no finding of vicarious liability. The claim against it is scandalous, frivolous or otherwise an abuse of process and asked for the Claimant's claim to be dismissed and costs on an indemnity basis to be granted to the 2nd Respondent.

VII. ISSUES TO BE RAISED BY THE TRIBUNAL

53. At the hearing on 17 August 2011 itself, after the Parties had indicated that there was no agreement between themselves on an Agreed List of Issues, the Tribunal had indicated that

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it would be also formulating issues when necessary, since the Parties did not come with such a list. Further still after having perused through the Pleadings together with the evidence adduced in the course of the hearings, the Tribunal maintains that there are certain very relevant issues that must be raised and answered.

The first relevant point relates to Rule 6(i)(c) of the 2nd Respondent's Rules (whenever referring to these Rules, it is the 'Rules 2007' as at 1 November 2007 that the Tribunal refers to). The document as shown to the Tribunal (Tab 6 of 2 RBD) shows that a letter was signed by the 1st Respondent and 2 other General Committee Members calling for the Special General Committee Meeting on 11 August 2008 in accordance with Rule 6(i) of the 2007 Rules. This letter was dated 6 August 2008, addressed to the Ag General Manager. The purpose as spelt out therein was for:

1) Vote of confidence in the President.

2) Changes to Convenorship.

The matter of the sufficiency of notice and whether it was in compliance with Rule 6(i)(c) of the 2007 Rules was raised by the Tribunal. Similarly the matter of the sufficiency of notice of meeting was also raised by the 2nd Respondent's Counsel when cross-examining CW3 Mr Q – see page 75 lines 17 to 22 and also page 77 line 9 to page 82 line 22 of the transcript notes of the hearing on 18 August 2011 (on the point of what the Ag Manager of the 2nd Respondent could do to speak on procedural matters). The Tribunal also raised this point with the 2nd Respondent's witness, Mr M – see pages 148 to 150 of the transcript notes on 23 August 20 11.

The second relevant point relates to Rule 6(iii) of the 2007 Rules. The 1st Respondents' Defence is clear in that it pleads that the General Committee (GC) has power to decide on the appointment and removal of members in the Sub-Committee pursuant to Rule 7(i) of the 2007 Rules. The 1st Respondents' Defence goes further to say in clear language that the GC did proceed to remove the Claimant from her convenorships. The 2nd Respondent's Counsel in the cross-examination of CW3, Mr Q did also ask the witness about this Rule 6(iii) of the 2007 Rules and alluded to this that it could have been used to have the 1st Respondent removed if he was acting in a manner

prejudicial to the interest of the Club or conducting himself in a manner unbecoming of a member of the GC.

On this same point, it is the Tribunal's initial view that all the Parties have not clearly understood the purport and meaning of this Rule 6(iii) of the 2007 Rule. The Tribunal will elaborate on this later, in answer to the issue to be raised. This Rule 6(iii) will have to read together with Rule 7(i) raised by both the Respondents concerned.

The 3rd and last point relates to what the 2nd Respondent has brought up in its Reply Submissions submitted on 8 November 2011. This relates to whether the arbitration process is the 'correct forum' as spell out therein.

54. Tribunal's three (3) Issues relevant to these arbitration proceedings

(a) Whether the Notice (email dated 7 August 2008 – 2RBD, Tab 6) given for the Special General Committee Meeting (SGCM) on 11 August 2008 was proper, sufficient and/or in compliance with Rule 6(i)(c) of the 2nd Respondent's 2007 Rules, and if not proper, sufficient and/or in compliance with such Rule 6(i)(c), what is the purport and effect of the decisions or proposals or resolutions made and/or passed at the SGCM on 11 August 2008?

(b) What is the purport and meaning of Rule 6(iii), read together with Rule 7(i) of the 2nd Respondent's 2007 Rules?
[Note: On this issue the Tribunal will go into the interpretation of this said Rule 6(iii) and whether a 'removal' from the office of Convenorship should and/or would come within the ambit of this Rule.]

(c) Whether this arbitration process (proceedings) brought by the Claimant is the correct forum?

VIII. SUMMARY OF FACTS

55. As with the Issues, the Parties could not come up with an Agreed List of Facts. Despite the attempt made by the Tribunal on the first day of hearing to get the Parties to agree on the basic facts in the matter, this was not possible. In the premises, after having read through the pleadings, documents and the oral evidence adduced at the hearings, the Tribunal would briefly summarise the facts as follows:

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