FACV No. 6 of 2008

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 6 OF 2008 (Civil)

(ON APPEAL FROM CACV No. 121 of 2003)

IN THE MATTER OF THE ARBITRATION ORDINANCE (CAP. 341)
and
IN THE MATTER OF AN ARBITRATION AWARD DATED 18 DECEMBER 2000 MADE IN AN ARBITRATION

Between:
KARAHA BODAS COMPANY LLC Plaintiff (Respondent)
- and -
PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA (otherwise known as PERTAMINA) Defendant (Appellant)

Court: Chief Justice Li, Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Lord Woolf NPJ
Dates of Hearing: 11 - 13 November 2008
Date of Judgment: 5 December 2008

J U D G M E N T

Chief Justice Li:

1. I agree with the judgment of Mr Justice Ribeiro PJ.

Mr Justice Bokhary PJ:

2. I agree with the judgment of Mr Justice Ribeiro PJ and would therefore dismiss the appeal despite the arguments so skilfully advanced by Mr Benjamin Yu SC for the appellant. All that I

would stress in words of my own is that Hong Kong is not the supervisory jurisdiction in respect of this arbitration. The appellant asserts that the supervisory court declined to entertain its application for the setting aside of the award merely because the money which it had to deposit in respect of court costs arrived a day late and that no consideration was given to the merits. Even assuming that assertion to be wholly accurate, it does not mean that Hong Kong can treat itself as the supervisory jurisdiction.

Mr Justice Chan PJ:

3. I agree with the judgment of Mr Justice Ribeiro PJ.

Mr Justice Ribeiro PJ:

4. In November 1994, the respondent ("KBC") entered into contracts with the appellant ("Pertamina") and PT PLN (Persero) ("PLN") for the exploration and development of geothermal energy in West Java. The project was halted by an Indonesian Presidential Decree dated 10 January 1998. This led to an arbitration between the parties resulting in December 2000 in an award of damages ("the Award") in favour of KBC in the sums of US$111.1 million for wasted expenditure and US$150 million for loss of future profits. Since then, Pertamina, whose assets have been targeted, has been litigating in numerous jurisdictions with a view to setting aside the Award or resisting its enforcement.

5. KBC obtained leave to enforce the Award in Hong Kong by order of Burrell J dated 15 March 2002. Pertamina's application to set that order aside was refused by his Lordship on 27 March 2003.[1] After a hiatus agreed upon by the parties, Pertamina's appeal came before the Court of Appeal in September 2007 and was dismissed on 9 October 2007.[2] Leave to appeal to this Court was granted by Court of Appeal on 18 March 2008.

6. In the Court of Appeal, Pertamina sought to introduce as a new ground for resisting enforcement the allegation that the Award had been obtained by fraud ("the fraud argument"). This had not previously been raised, Pertamina's explanation for this being that it had not been aware until August 2005 of certain documents created by persons in the KBC camp which, it contended, show the existence of fraud. It sought leave to introduce ten such documents as fresh evidence with a view to persuading the Court of Appeal that a sufficient case was made out to warrant the question of fraud to be remitted for trial by the Judge at first instance.

7. Pertamina advanced two further arguments. The first involves challenging the US$150 million award on two grounds, namely, that it is unsupported by reasons ("the reasons ground") and that it duplicates compensation provided by the US$111.1 million award ("the double-counting ground"). The second is that the contracts received such an irrational construction that the Tribunal must be taken effectively to have rewritten them and acted outside the scope of the arbitration ("the irrationality argument"). Having failed on all these arguments in the Court of Appeal, Pertamina advances them afresh before this Court.

A. The parties and the contracts

8. Pertamina is an Indonesian state-owned oil and natural gas corporation. PLN is also an Indonesian state-owned enterprise. It supplies electricity to the public in Java. KBC is a Cayman Islands company operating in the United States. Its main investors are Caithness Energy LLC and FPL Energy Inc, both substantial energy companies in the United States.

9. On 28 November 1994, the parties entered into two inter-related contracts. The first was known as the Karaha Geothermal Joint Operating Contract ("JOC") between KBC and Pertamina. The second, known as the Energy Sales Contract ("ESC"), was entered into by KBC, Pertamina and PLN. The two contracts are inter-related in that they are intended to function in tandem and make reference to one another.

10. After some initial exploration, Pertamina identified an area known as the Karaha area as having potential for geothermal energy. It covers a surface area of some 540 sq km and is located in a volcanic region about 60 km south-east of Bandung. It was believed to encompass two geothermal fields, one known as the Karaha field in the north, and the other known as the Telaga Bodas field in the south. Under the JOC, Pertamina granted KBC an irrevocable licence to explore and develop geothermal energy in the Karaha area, appointing KBC exclusive contractor for what were defined as "geothermal operations" to be carried out there.

11. Such geothermal operations involved exploring the concession area and, if exploitable geothermal energy resources were found, undertaking the design, construction and operation of the equipment and facilities required to capture, produce and process the geothermal energy into electricity, as well as the onward transmission of the electricity generated to a point of connection with the Javanese electricity grid. Such operations required surveys and studies of the concession area involving various scientific disciplines; drilling exploratory core holes and, if successful, production wells, to depths ranging from some 1,000 m to 3,000 m; constructing pipeline systems and installing equipment to process the fluids and steam extracted; and conducting the steam to turbine-driven power stations and associated equipment constructed to produce and deliver electricity to the Javanese grid.

12. There was of course no guarantee that such geothermal operations would prove successful or economically viable. The JOC provided that it was to terminate after six years, if KBC had not by the end of that period, notified Pertamina of an intention to develop an electricity generating unit in the concession area. Under the JOC, KBC accepted the financial risks and burdens of attempting to bring the geothermal operations to fruition. Thus, Article 1.1 of the JOC provided that KBC would arrange financing for the cost of the geothermal operations and would bear the risk and be responsible for the conduct of the same.

13. KBC was therefore to make a substantial front-end investment. Its financial return, if the project were to succeed, would lie in a stream of revenue to be received pursuant to the ESC. Under that contract, PLN undertook to purchase the electricity developed and delivered by KBC up to a maximum aggregate generating capacity of 400 MW over a period of 30 years. KBC would receive payment for such electricity in US Dollars according to a fixed formula which was inflation-linked.

14. Three provisions of the JOC are of particular relevance. The first two are at the core of Pertamina's fraud argument. As noted above, the JOC expires after six years unless a notice of intention to develop (a "NOID") is served by KBC on Pertamina under Article 4.6. Such a notice is contractually preceded by KBC serving a notice of resource confirmation (a "NORC") under Article 4.5, confirming that it has discovered, to its satisfaction, workable geothermal resources. These clauses are here set out substituting "KBC", "Pertamina" and "PLN" for the various terms used in the original documents:

Article 4.5

KBC shall notify Pertamina upon the confirmation, to KBC's satisfaction, of Geothermal Energy KBC considers sufficient to supply a Unit that KBC proposes to cause to be constructed (each notice delivered hereunder a 'Confirmation Notice'). Each Confirmation Notice shall include an engineering report with data sufficient, in KBC's reasonable judgment, to allow

Pertamina to technically evaluate such Geothermal Energy. KBC shall upon Pertamina's request, consult with Pertamina with respect to each Confirmation Notice, and shall if necessary provide such existing additional technical data as Pertamina may reasonably require for its evaluation."

Article 4.6

"At any time during the first six (6) Contract years, KBC may give Pertamina notice of intention to develop the initial increment of Geothermal Energy and construct the initial Unit(s), provided that such notice shall not be given less than ninety (90) days following the date of the Confirmation Notice given with respect to such Unit. Thereafter at any time and from time to time KBC may give Pertamina notice of intention to develop additional increment(s) of Geothermal Energy and construct additional Unit(s) (each notice, together with the notice described in the foregoing sentence, being hereinafter referred to as a 'Development Notice') … Each Development Notice shall include a reasonably detailed description of the proposed Field Facilities, specifications for the quantity and quality of Geothermal Energy to be supplied to the Unit(s), a description of the proposed Electricity Generation Facilities pertaining to such Unit(s) and the estimated Dates of First Operation of such Unit(s). Upon receipt of each Development Notice, Pertamina shall give written notice to PLN that KBC intends to proceed with such development and construction."

15. The third relevant JOC provision bears on Pertamina's irrationality argument. Dealing with events of force majeure which excuse a party from performance, Article 15.2.e provides:

"... Events of Force Majeure shall include ... with respect to KBC only, any Government Related Event."

A "Government Related Event" is defined to include the enactment or adoption of new laws or decrees applicable to the project.

B. The course of events

16. KBC began its exploration work in May 1995. Apart from geological, geochemical and geophysical surveys, it began a programme of shallow and deep temperature gradient core hole drilling, focussing initially on the Karaha field in the north, being the field which was then physically more accessible.

17. Under the JOC, KBC was obliged to keep Pertamina fully informed of its geothermal operations and to this end technical meetings were regularly held. A Joint Committee involving all three parties also met regularly, reviewing progress being made on the project. Pertamina was entitled to inspect and copy KBC's data and to call for any further information it might reasonably require. Pertamina obviously was expected to have, and had, the expertise to evaluate the data provided. The JOC also called for KBC to supply a work programme for Pertamina's approval. This was done and a series of work plans submitted and approved. The minutes of the Joint Committee meetings and the work plans indicate that the parties shared an optimistic view of the project.

B.1 The September NORC

18. The Award[3] notes that at a Joint Committee meeting on 12 August 1997, it was decided that KBC should submit a NORC of 55 MW to Pertamina in September and that one was in fact submitted on 18 September 1997.

19. In that NORC ("the September NORC"), KBC provided detailed results of its geothermal operations to date. It reported that favourable temperature gradient data from deep core holes

had prompted the drilling of six exploration wells in the Karaha area and noted that results had improved as drilling moved progressively southwards. It considered that its findings :

"... confirm the presence of a high temperature geothermal system in the South Karaha area, suitable for commercial development, with a proven resource area of 1.5 km2."

20. While noting that the overall resource capacity of the South Karaha field had not yet been determined and drilling had not yet taken place, KBC's view was that :

"... isotherm data for this part of the field ... clearly indicates that the high temperatures encountered at relatively shallow depth at KRH 4-1 extend further to the south."

It added:

"The next deep temperature gradient core hole (K-33) is scheduled to be drilled at a location approximately 2 km to the south of KRH 4-1. If successful (high temperature gradient) it will add substantially to the area of probable reserves and provide added confidence for further development drilling in the South Karaha field."

21. The NORC went on to identify the sources of the data being presented and summarised its methodology as follows:

"These data are then integrated into a conceptual model of the Karaha Geothermal field. An assessment of the available energy reserves is then presented based on the proven resource area and an assumed power density of 15-20 MWe per sq km, and by calculation of the recoverable heat in place (stored heat calculation)."

22. The formal notice of confirmation of energy reserves expressed KBC's conclusion in these terms:

"The power density calculations yield a total of 75 MWe using the area of proven and probable reserves, more than the planned 55 MWe power plant requires. It is also clear that now that a major fluid bearing structure has been identified, more productive wells can be drilled in the area around KRH 4-1. The recoverable heat lies between 175 and 232 MWe. Even assuming the more conservative lower figure, the heat recoverable is sufficient to more than supply the planned 55 MWe power plant."

23. I pause to note that Pertamina has abandoned its earlier allegation that the September NORC is a fraudulent document. There is now no challenge to the bona fides of this document.

B.2 The 1st Presidential Decree

24. The issue of the September NORC coincided with the commencement of a severe economic crisis in Indonesia. In early September, the Indonesian Government had announced that it would suspend major government projects financed by offshore commercial borrowing so as to conserve budgetary funds and reduce pressure on the balance of payments. On 20 September 1997, Presidential Decree No 39/1997 (which was to prove the first of three relevant decrees) was issued stating that it was deemed necessary, in order to deal with monetary fluctuations, to suspend projects including the Karaha project. Evidence filed by Pertamina indicates that while the Rupiah/US$ exchange rate had stood at about Rp2,400/US$1 in June 1997, it was to slide to about Rp3,600/US$1 in October 1997. The Rupiah was to suffer further drastic falls in 1998, reaching Rp12,000/US$1 at the end of January and Rp17,000/US$1 in mid-1998, recovering thereafter to a range of Rp8,000-10,000/US$1.

25. A Joint Committee meeting was held in San Francisco on 14 October 1997 to discuss the 1st Presidential Decree. The parties believed that powerful arguments were available to persuade the Indonesian Government to reverse its decision to suspend the project, especially since KBC was to provide the investment without the Indonesian entities incurring any debt. Pertamina and PLN expressed confidence that the project would be restored in November or December and urged KBC to "try to issue [a NORC] and [a NOID] as soon as possible and re-start the EPC process[4] as soon as possible". KBC stated that it "fully realized the importance of submitting the NORC and NOID and [would] do so within the next two months".

26. On the following day, KBC submitted a work programme and budget for 1998, indicating that expected 1997 expenditures would reach US$87 million and that a further US$102.7 million was budgeted to be spent in 1998. It also recorded that KBC was intending shortly to submit a NOID, reflecting a milestone indicated in an attached project schedule.

B.3 The 2nd Presidential Decree

27. The expectation that the Indonesian Government would restore the project proved to be correct. This was done by Presidential Decree No 47/1997 issued on 1 November 1997. The project was therefore back on and further drilling proceeded in areas to the south of the Karaha field, near the Telaga field.

B.4 The December NORC and NOID

28. On 16 December 1997, an updated NORC and a NOID were issued by KBC ("the December NORC" and "the December NOID"). These are central to Pertamina's fraud argument, the contention being that they contain knowingly false claims. It is said that this becomes evident upon inspection of ten KBC documents sought to be admitted as fresh evidence in these proceedings. They are all documents created (with one insignificant exception) between 14 October 1997 and 1 December 1997. I will return later to these fraud allegations. For the present, I turn to examine the contents of the December NORC and NOID.

29. As the December NOID notes, Article 4.5 of the JOC requires a 90 day period to elapse between issue of a NORC and a NOID. It records, however, that Pertamina and PLN had jointly agreed to allow the December NOID to be submitted without the intervening period.

B.4a The December NORC

30. The December NORC is stated to be an update to the September NORC based on data from six new wells and new production test data which had been assimilated into a conceptual model of the Karaha field. It explains that it uses three methodologies:

"The first method is an analysis of the recoverable volume of mass in place based on the results of all wells drilled and tested to date. The second is the power density reserve estimation technique utilized in the [September] NORC, also based on the results of the wells drilled and tested to date. The third is the heat recovery method, which is an estimation of what the ultimate power generation potential of the field could be."

31. Elaborating upon the new data obtained, it refers to drilling at TLG 1-1 and K-33 (foreshadowed in the September NORC) and states:

"Completion of the first deep well test at Telaga and of an additional deep core hole, K-33, some 2 km south of KRH 4-1 now indicate that high temperature resource encountered at KRH 4-1 and at Telaga may be interconnected at depth. The Karaha geothermal field now appears to be directly associated with the NNE-trending volcanic axis that extends northwards from the

main Telaga Bodas crater to [points in] the Karaha area itself."

32. Acknowledging the "uncertainty in the conceptual model", KBC gives estimates of resource capacity in varying degrees of probability, deriving from each of the three different methods used. Underlying these projections is the important conclusion that:

"The Karaha and Telaga areas of geothermal manifestations are associated with one continuous resource extending between the two areas. A substantial percentage of the exploitable resource is located between the two areas of surface manifestations."

33. Its estimate based on a volumetric estimation of recoverable mass in place was stated as a probable resource capacity of 210 MW and a possible resource capacity of 280 MW. Using the power density method of reserve calculation, its estimate of probable reserves was 240 MW and using the recoverable heat method, it was estimated that the possible resource could be 430 MW. It added that the geothermal fluids encountered were "relatively benign and can be produced with standard geothermal technology." KBC's updated resource confirmation was therefore "that there is currently a reasonable expectation of 210 MW of geothermal resource available to be developed at the Karaha area, as established by the wells drilled and tested to date".

B.4b The December NOID

34. Pursuant to JOC Article 4.6, KBC gave Pertamina notice of its intention to design, construct, commission and operate geothermal generating units "nominally rated at 210 MWe output" based on the probable resource capacity of 210 MW (stated to mean a 55% probability of occurrence from the statistical analysis done) confirmed in the December NORC. Its stated aim was to build power plants in a modular format utilizing base units each with a 70 MW capacity, with the first unit to come into operation in June 2000.

35. The December NOID sets out the work to be done by KBC. It would construct the drill sites and pads; drill exploration, production and injection wells; maintain a drilling programme to provide an adequate supply of steam to run the power plants to be used; design, construct and operate the electricity generation facilities; design and construct permanent facilities to provide housing, administration and support for the project and its employees.

36. On 5 January 1998, KBC sought Indonesian Government permission to make use of a fund allocation facility for US$380 million.

B.5 The 3rd Presidential Decree

37. However, events were overtaken by the economic crisis which, as previously noted, worsened in early 1998. In late 1997, the Indonesian Government had obtained emergency economic aid from the International Monetary Fund, accepting stringent conditions regarding management of the Indonesian economy. In the event, about two and a half months after its promulgation, the 2nd Presidential Decree, which had permitted the Karaha project to be resumed, was revoked by a 3rd Presidential Decree (No 5/1998) dated 10 January 1998. The project was off again and, this time, was never resuscitated.

B.6 The breakdown of the project

38. As the Tribunal noted, it is common ground that in January 1998, KBC and Pertamina made joint efforts to try to convince the Indonesian Government to exempt the project from the 3rd Presidential Decree. Various overtures were made and a revised working programme and budget for 1998 were prepared. Nevertheless, on 10 February 1998, KBC served notices on Pertamina and PLN asserting that issuance of the 1st and 3rd Presidential Decrees each constituted a

Government Related Event and consequently an Event of Force Majeure under the JOC and the ESC, while asking the Indonesian parties to use their best efforts to resuscitate the project.

39. On 6 March 1998, PLN wrote to KBC stating that Pertamina and itself "as the contracting parties under the ESC" would abide by the relevant Presidential Decrees and that "any activities initiated or undertaken by you which is not contemplated under such Presidential Decrees in relation with Karaha geothermal Project should be solely at your own risks and liabilities". PLN therefore intimated that it was not going to perform its obligations under the ESC and the economic basis for the project therefore disappeared. On 30 April 1998, KBC served its arbitration notice pursuant to Article 13 of the JOC and Article 8.2 of the ESC.

B.7 The Arbitration

40. The contracts stipulate that arbitration is to take place under the UNCITRAL Arbitration Rules with Geneva as the site of the arbitration. A distinguished panel of arbitrators was appointed.[5] The hearing took place between 19 and 23 June 2000, with both sides legally represented, adducing copious factual and expert evidence (both oral and written) and making extensive legal submissions.

41. The Tribunal held that the declaration by Pertamina and PLN that they were indefinitely suspending performance of their contractual obligations by reason of the Presidential Decrees constituted breaches of contract entitling KBC to terminate the contract and to claim damages. KBC's claim was for US$96 million for wasted expenditure and US$512.5 million for loss of profits plus interest of US$58.6 million.[6]

42. As to the first head of damages claimed, the Tribunal held that KBC was entitled :

"... to be awarded as damnum emergens the aggregate of the expenditures incurred in reliance on the two Contracts concluded with the Respondents by recovering the capital invested on activities pertaining to the JOC with Pertamina in anticipation of profits to be realized in future under the ESC with PLN."

It accepted that expenditure of US$93.1 million had been proved and awarded that sum, calculating its then present value by reference to a risk-free rate of 5.8% per annum based on the yield of a 20-year US Government Bond. This took the wasted expenditure award up to US$111.1 million.

43. In relation to the loss of profits claim, the Tribunal considered KBC's claim of US$512.5 million unjustified and awarded instead the sum of US$150 million on a basis that requires closer examination below.

B.8 Legal proceedings after the award

44. Pertamina's application to the Swiss Supreme Court (which was the supervisory court for the arbitration) to set aside the Award failed on 7 August 2001. An attempt was then made to have the Award annulled by the Indonesian Court. Although this succeeded before the Central Jakarta District Court, that decision was overturned by the Indonesian Supreme Court on 8 March 2004.

45. Meanwhile, KBC had been taking steps to enforce the Award in the United States, Canada, Singapore and here in Hong Kong. The challenges to enforcement in the jurisdictions outside of Hong Kong have all failed or been discontinued. In none of them was the fraud argument raised.

46. KBC's enforcement efforts have been successful and it has made full recovery of the Award. Principally this was done by registering the Award as a US judgment and executing it against

funds held to Pertamina's account in New York. In Hong Kong, there has been enforcement in the relatively modest sum of US$900,000.

C. Resisting enforcement of a Convention award

47. The Award is a Convention award within the meaning of the Arbitration Ordinance ("the Ordinance").[7] The principle laid down by the Ordinance is that "the Court should interfere in the arbitration of a dispute only as expressly provided by" the Ordinance.[8] And in relation to a Convention award, section 44(1) provides: "Enforcement of a Convention award shall not be refused except in the cases mentioned in this section." As Sir Anthony Mason NPJ noted:

"Both the Ordinance and the Convention give effect to the principles of finality and comity by prohibiting refusal of enforcement of a Convention award except in the cases for which they provide ..."[9]

It is of course well-established that the Hong Kong court, sitting as an enforcing court, does not review the merits of the Tribunal's award. Moreover, it is clear that even though a case comes within a section 44 category where refusal of enforcement is permitted, the court has a discretion nevertheless to permit enforcement.[10]

C.1 The fraud argument as a basis for resisting enforcement

48. In relation to the fraud argument, Pertamina relies on section 44(3) which states: "Enforcement of a Convention award may also be refused ... if it would be contrary to public policy to enforce the award." While it is well-settled that "public policy" in this context is given a narrow meaning, requiring it to be shown that enforcement of the award would be "contrary to the fundamental conceptions of morality and justice of the forum",[11] an award which has been obtained by fraud plainly comes within that category.

49. Pertamina's task is to show that it has a sufficient threshold case to justify this Court remitting the question whether the Award was obtained by fraud for trial before the Judge at first instance with a view to deciding whether enforcement should be refused.

50. The Court of Appeal took the threshold test to be one requiring Pertamina to show that it has a real prospect of success in persuading the Judge to find, on a remitter, that the Award had been obtained by KBC by fraud.[12] I respectfully agree that this is the appropriate standard to adopt. There has been some discussion of whether the test might be one requiring demonstration of a prima facie case of fraud;[13] or whether it ought to be a more flexible test, such as the approach taken by Cooke J in the New Zealand case of Svirskis v Gibson.[14] I do not, for my part, think that there is much practical difference between these various formulations.

C.2 Ladd v Marshall

51. Since its fraud argument depends on Pertamina being permitted to rely on evidence which it had not adduced before Burrell J, it faces the additional task of persuading the appellate court to exercise its discretion in favour of admitting in evidence the ten documents mentioned. Like the Court of Appeal, this Court examined those documents de bene esse.

52. The well-known three-tiered test stated by Denning LJ in Ladd v Marshall,[15] is applicable:

"To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence

must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

53. Mr Jat Sew-Tong SC, appearing with Ms Grace Chow for KBC, submitted that given the strong policy in favour of the finality of Convention awards, the second Ladd v Marshall condition should be made more stringent in cases like the present. He urged adoption of Waller LJ's formulation in Westacre Investments Inc v Jugoimport-SPDR Ltd,[16] namely, that for such further evidence to be admitted, it "must be so strong that it would reasonably be expected to be decisive at a hearing, and if unanswered must have that result."

54. While I would leave open the possibility that such a test may be appropriate in certain situations, I do not consider it the proper test to apply in the present case. I think it may unduly complicate the threshold question, for section 44(3) purposes, of whether a real prospect of success of establishing fraud can be shown. Accordingly, in my view, the unmodified 2nd Ladd v Marshall condition applies.

C.3 The nature of Pertamina's case on fraud

55. Pertamina's case on fraud centres on the December NORC and December NOID. Those documents are said to be fraudulent in that, to KBC's knowledge, they falsely represented (i) that KBC genuinely believed that it had confirmed a probable geothermal resource capacity of 210 MW in the concession area ("the false confirmation"); (ii) that the methodology used as the basis for the false confirmation was the most reliable and generally accepted in the industry ("the misdescribed methodology"); and (iii) that KBC intended to proceed with development of such geothermal energy and the eventual sale of electricity to PLN ("the false statement of intention").

56. The truth, according to Pertamina, was first, that the methodology adopted in the December NORC and NOID was, to KBC's knowledge, not the most reliable and generally accepted. Instead, the test of commerciality generally adopted was proof of 50% steam at the wellhead. Pertamina alleges that the ten documents sought to be introduced are crucial in showing that KBC's staff were themselves using wellhead steam as the criterion for confirming commercially viable resources and well knew that this criterion had not been met. KBC, so it is argued, was therefore cynically purporting to confirm commercially exploitable resources using spurious criteria to justify such confirmation, knowing that genuine confirmation could not be given if proper, wellhead steam criteria had been applied. Secondly, Pertamina's case is that KBC's statement of its intention to undertake substantial works to develop and deliver electricity from geothermal sources in the Karaha area was a sham, the truth being that KBC had no such intention.

57. It is important to note that Pertamina's case is that the December NORC and NOID were fraudulent from their inception, that is, as at 16 December 1997. The contention is that KBC persisted in this fraud by presenting to the Tribunal these documents as representing a genuine confirmation of geothermal resources and of its development intentions in December 1997. It was by virtue of those documents that KBC is said to have fraudulently obtained the Award. Pertamina's case is therefore that the December NORC and NOID were fraudulent when issued in December 1997 and fraudulent when used at the arbitration hearing in June 2000. The Court must therefore examine whether Pertamina has a real prospect of success in proving that the December NORC and NOID were fraudulently employed on those two occasions.

C.4 The further evidence sought to be introduced

58. Pertamina says that the ten new documents demonstrate, from communications passing among KBC operatives, that KBC knew that 50% steam at wellhead was the proper approach to confirming available geothermal resources and that those persons had in fact themselves adopted

those and other appropriate criteria, including criteria that temperatures found on drilling should exceed 260oC; that there should be benign fluid and gas chemistry; that non-condensable gas should be less than 3-5%; that there should be permeability and that the wellhead steam pressure should exceed 150 psi.

C.5 Were the December NORC and NOID fraudulent when issued?

59. As appears in Section A of this Judgment, Article 4.5 of the JOC makes provision for KBC to issue a NORC "upon the confirmation, to KBC's satisfaction, of geothermal energy KBC considers sufficient to supply a unit that KBC proposes to cause to be constructed". And Article 4.6 provides that KBC may at any time during the first six years, issue a NOID to signify its "intention to develop the initial increment of geothermal energy and [to] construct the initial unit(s)". The contract therefore leaves it entirely to KBC to judge whether and when it has satisfied itself that there is enough geothermal energy to go ahead with the project.

60. This is as one might expect. The purpose of issuing the December NORC and NOID was to prevent the JOC expiring after six years and to notify Pertamina formally of KBC's intentions. It did not require any response from, or have any financial impact on, either Pertamina or PLN. As pointed out above, the risk of not being able to develop a viable system of geothermal electricity lay on KBC. If it was wrong to think that there was enough geothermal energy, it would be unable to recoup or profit from its front-end investment since it would fail to develop electricity for sale to PLN. As we have seen, proceeding with the project in 1998 involved an anticipated expenditure of some US$102.7 million. The JOC left it up to KBC to decide whether to venture further investments of such magnitude.

C.5a Who was KBC trying to deceive in December 1997?

61. Recognition of the contractual allocation of risk prompts the question: Who, then, was KBC supposed to be deceiving in December 1997 when it issued the NORC and NOID? Obviously, if KBC genuinely intended to proceed and to make further substantial investments in the project, there would be no plausible case of fraud. It would make no sense to view the NORC and NOID as deceptive since KBC would only be deceiving itself as to the commercial viability of proceeding. Hence, Pertamina alleges that there was no genuine intention to proceed. However, in a draft pleading setting out the fraud argument ("the draft pleading"), the answer given by Pertamina to the question posed above is that:

"... KBC issued the December NORC and NOID with a view to positioning itself to argue that the geothermal project should be allowed to continue by the [Indonesian Government] or failing that to make an enormous claim for loss of profit."

62. That answer undermines its fraud argument. If, as the answer suggests, using the NORC and the NOID in support of a claim was only a fall-back position and KBC was, in the first place, genuinely pressing the Indonesian Government to allow the project to proceed, it is hard to see how KBC's confirmation of resources and statement of intention to proceed was fraudulent. Moreover, nowhere in the draft pleading is it suggested that Pertamina or PLN were deceived by the December NORC and NOID. Nor could such deception plausibly be suggested.

63. As previously noted, Pertamina was closely monitoring KBC's geothermal operations, regularly discussing them at joint meetings. Pertamina had access to all the data and had the expertise to evaluate it. If, as Pertamina alleges, it was generally known that 50% steam at the wellhead was used by financiers as the criterion of commercial viability, that fact must equally have been known to itself in 1997. The NORC and the NOID, together with the various work plans and programmes delivered to Pertamina, made clear the context of KBC's statements about the methodologies employed and the resources confirmed. Those statements were self-evidently

being made at a relatively early stage of the project in the course of developing a conceptual model for estimating resource availability. Methodologies accepted to be appropriate to that task were being used while at the same time pursuing a drilling programme which would empirically test the availability and extent of the geothermal resources. KBC's intended sequence of work was set out in work programmes showing future drillings, well tests, etc. It was never a question of KBC saying, or of anyone believing, that KBC was confining itself to the methodologies relevant to constructing the conceptual model. The NORC and the NOID were purporting to do no more than to convey estimates extrapolated from data then available, arrived at to KBC's own satisfaction. I am therefore unable to see any deception practised by KBC on anyone for any purpose related to the project by issuing the two notices.

C.5b The December NORC and NOID as manufactured evidence

64. The NORC and NOID may, however, be relevant to Pertamina's fraud argument if they can be shown to have been created in order to support a bogus claim for damages in the expectation that the project would be shut down. On this scenario, the fraud would not be motivated by any gain or avoidance of loss within the context of the project itself. Rather, the misrepresentations would have been made with a view to bolstering a compensation claim to be launched after the project's envisaged failure.

65. Mr Benjamin Yu SC, appearing with Mr Rimsky Yuen SC and Law Man Chung for Pertamina, did not shrink from such a submission. By 16 December 1997, everyone realised that Indonesia was in the throes of a severe economic crisis. Accordingly, so it was argued, KBC must have known that the project was likely to be shut down, leaving it merely with a claim against Pertamina and PLN. The December NORC and NOID were therefore issued to manufacture false evidence of confirmed resources and of KBC's intention to proceed with development in order to provide a foundation for a damages claim. Why otherwise, Counsel asked, should KBC be in such a hurry to issue those two documents? How otherwise could one account for the sudden leap in estimated reserves in the short period which had elapsed between the September NORC and the December documents?

66. In my view, this allegation is simply not borne out by the evidence and is contrary to the findings of the Tribunal. To address Counsel's rhetorical questions first, the record shows clearly that the "hurry" to issue the NORC and NOID had been prompted by Pertamina and PLN and agreed to by KBC, with a view to persuading the Indonesian Government that the project should be allowed to proceed.[17] The marked increase in the estimate of geothermal energy reserves had been foreshadowed in the September NORC (the bona fides of which is not questioned) which had stated that further drilling, especially at K-33, might well justify concluding that the Karaha and Telaga fields were one continuous resource, enabling a substantially larger estimate of reserves to be made.[18] The December NORC explains that this is in fact what occurred.[19]

67. It is true that everyone knew that Indonesia was at the time undergoing a severe economic crisis. However, when the NORC and the NOID were issued, Pertamina and KBC had already persuaded the Indonesian Government, by the 2nd Presidential Decree, to exempt the project from the freeze imposed by the 1st Presidential Decree. Since the contracts placed the financing burden entirely on KBC, there was no reason to doubt that the exemption secured would continue since the project would make no US Dollar demands on Indonesia until mid-2000 at the very earliest, when the first generating unit was nominally scheduled to begin operation. Continuing the work would mean beneficial foreign currency inflows, local employment and development.

68. There is nothing to suggest that when the December NORC and NOID were issued on 16 December 1997, anyone foresaw that the Indonesian Government would reverse itself in relation to the project by the 3rd Presidential Decree eventually issued on 10 January 1998. There was

therefore no basis for thinking that the two Notices had been brought into existence with a view to mounting a claim. On the contrary, the evidence indicates that KBC was genuinely seeking to press on with the project and, as the draft pleading acknowledges, was "positioning itself to argue that the geothermal project should be allowed to continue". That was the Tribunal's finding:

"It is also to be noted that said notifications by the Claimant intervened in a period of time during which the suspension of the Project, ordered by the Presidential Decree n. 39/1997 of September 20, 1997, had been cancelled by the subsequent Decree n. 47/1997 of November 1, 1997 so that the Respondents' reservations about the genuineness of the Claimant's notices appear unjustified."[20]

C.5c Do the new documents make any difference?

69. In my view, the ten new documents do nothing to rescue Pertamina's deficient fraud argument. Indeed, it is difficult to see what benefit Pertamina is able to derive from them. Mr Yu's submissions tended to focus on the fact that someone or other had mentioned wellhead steam as a criterion of a well's success or had spoken of a need to establish commercial viability, possibly by reference to wellhead steam. Such statements are taken to be a sinister indication that those were the real criteria used internally, to be contrasted with the much less demanding criteria fraudulently adopted in the December NORC and NOID.

70. However, such arguments ignore the context in which those documents were created. It is clear from the work programmes issued by KBC that a milestone event a few months into 1998 involved the engineers and scientists on the ground obtaining the approval of KBC's Management Committee for the project to progress. That Committee was made up of representatives of KBC's principal investors charged with deciding whether to approve further investment to advance the project and with arranging finance for that purpose. It seems apparent that the ten documents in question were produced in the course of discussions among members of the exploration team on the ground as to how far they would be able to satisfy the Management Committee or potential financiers of the commercial viability of the available geothermal resources.

71. Mr Don Campbell (who had responsibility for day-to-day resource related operations of the project) explains in an affidavit filed on KBC's behalf that the standard of proof of resources which a management committee or potential financiers will tend to require (referred to by him as "managerial proof") is substantially higher than the level of proof (termed "technical proof") which KBC's personnel would consider sufficient to issue a NORC and a NOID. "Managerial proof" might typically involve satisfactory wellhead steam figures. But "technical proof" may involve the engineers being satisfied that a sufficient probability of commercially exploitable resources exists as a result of conceptual modelling and extrapolation from available data. There is no reason in principle – and certainly nothing in the JOC or ESC – to require KBC to adopt a standard of "managerial proof" as the opposed to "technical proof" when deciding whether to issue a NORC and a NOID. Far less is there any ground for concluding that it was fraudulent to adopt a lower standard, given that the methodologies applied and data relied on were transparently disclosed. The fact that in a different context and for different purposes, KBC personnel were considering criteria involving wellhead steam production does not advance Pertamina's fraud argument.

C.6 Was the Tribunal deceived?

72. By contending that KBC obtained the Award by fraud, Pertamina is asserting that by tendering the December NORC and NOID containing the three misrepresentations mentioned, KBC succeeded in deceiving the Tribunal into awarding it the damages concerned. That proposition does not, in my view, bear examination.

73. The Tribunal was obviously fully aware of the significance of the December NORC and NOID as stating that KBC had satisfied itself of the probable existence of a resource capacity of 210 MW and that it intended to develop that resource, as provided for by the contracts. It does the Tribunal an injustice to suggest that it might somehow have mistaken such subjective statements by KBC for decisive proof of the actual existence of such a resource and such an intention.

74. The Tribunal made no such error. It closely scrutinised KBC's 210 MW capacity assertion upon which its US$512.5 million loss of profits claim was based. Experts on both sides, familiar with the methodologies employed and with access to all the available data, joined battle over whether the 210 MW assertion was well founded. As Tang VP pointed out, during the arbitration Pertamina:

> "...characterized the December NORC and NOID as 'shams', 'highly suspect', 'fictional' and 'not real'. And I might add 'specious'."[21]

75. The Tribunal in fact rejected KBC's claim to US$512.5 million and awarded (on grounds considered below) the significantly lower sum of US$150 million. It was obviously not deceived into simply accepting KBC's subjective statements in the NORC and the NOID. KBC failed to substantiate the quantum of damages it had claimed. But that does not give any basis for saying that KBC had embarked on a campaign of fraud, still less that it had managed to obtain the Award by fraud.

76. In my view, Pertamina has not come close to demonstrating, even with the help of the further evidence sought to be admitted, that it has a real prospect of success in showing that the Award was obtained by fraud. Section 44(3) of the Ordinance therefore provides no basis for refusing enforcement in the present case.

D. Ladd v Marshall

77. The aforesaid conclusion necessarily means that Pertamina is unable to meet the second Ladd v Marshall condition. The evidence consisting of the ten documents sought to be admitted cannot be shown to be likely to have an important influence on the result of the case on a remitter to Burrell J. It is unnecessary to discuss the other conditions.

E. The dual challenge to the US$150 million loss of profits award

78. As indicated earlier, Pertamina seeks to challenge the US$150 million loss of profits award on two grounds, namely, the reasons ground and the double-counting ground. It is analytically convenient to begin with the latter ground.

E.1 The double-counting ground

79. It was contended, but without any detailed submissions, that the award of US$150 million involved duplication of compensation granted by the US$111.1 million award. It appears that this was merely one aspect of the complaint that the Tribunal had given no reasons for the quantum of the loss of profits award, leaving one in the dark as to whether there had been double-counting.

80. Taken alone, I do not see how the double-counting ground comes within any of the section 44 categories permitting the Hong Kong Court to refuse enforcement of a Convention award. As such, it amounts to an impermissible attempt to re-argue the merits of a point decided by the Tribunal against Pertamina.

81. I would add that I can see no substance in the double-counting ground itself. The Tribunal found on the evidence that KBC was entitled, under Articles 1243-1252 of the Indonesian Civil Code to damnum emergens representing monetary compensation for the expenses incurred in reliance on the contract.[22] That led to the US$111.1 million award. It went on to hold that KBC was entitled to "a second type of damages, namely lost profits associated with the loss of geothermal development opportunities", reflecting the Roman Law concept of lucrum cessans. It noted the expert evidence stating "that no double-counting will occur" by making such an award.[23] That evidence was plainly accepted as the Tribunal went on to make the additional award of US$150 million. It is not for the Hong Kong court to second-guess the Tribunal's conclusions in this context. There is in any event nothing surprising or questionable about the Tribunal's approach.

E.2 The reasons ground

82. Pertamina contends that the Tribunal made the US$150 million loss of profits award without giving reasons. This, it argues, contravened the arbitral agreement which had incorporated the UNCITRAL Arbitration Rules, including Article 32(3) requiring the arbitral tribunal to state reasons upon which the award is based. Such a departure from the arbitral agreement, Pertamina submits, brings the case within section 44 (1)(e) of the Ordinance which permits enforcement to be refused where "the arbitral procedure was not in accordance with the agreement of the parties".

83. I agree that the complaint, if made good, falls prima facie within section 44(1)(e). However, before the question whether the Tribunal in fact failed to give reasons is reached, Pertamina faces two hurdles. The first arises from the rejection of the double-counting ground. What follows is that the reasons ground becomes academic. Even if it is a sound argument, it cannot affect the result of this appeal. This is because the reasons ground involves only a challenge to the US$150 million award. Even if that succeeds, the US$111.1 million award in respect of wasted expenditure remains in place and amply justifies enforcement to the limited extent achieved in Hong Kong, that is, to the extent of US$900,000. This is a hurdle which Pertamina has been unable to surmount.

84. The second hurdle faced by Pertamina arises out of the nature of the complaint. It could well cause injustice to the party who was successful in the arbitration if, because of inadequate reasons in the award, the enforcing court were to refuse enforcement. There might be perfectly good reasons which have not been properly stated. To guard against this, it is likely to be fair and proportionate to require the losing party to apply to the supervisory court to set aside the award on that ground. It would often[24] then be open to the supervisory court to remit the award to the arbitrators for proper reasons to be supplied – a power which the enforcing court obviously lacks. If the arbitrators prove unable to give proper reasons, then the supervisory court may decide to set the whole or part of the award aside. Or an enforcing court might subsequently refuse enforcement.

85. In the present case, the Swiss Court is the supervisory court. It summarily dismissed Pertamina's attempt to set aside the award because of a failure to provide security in time. Pertamina's application for reconsideration was rejected by the Swiss Supreme Court. No evidence has been filed as to whether the proposed application to the Swiss Court included a complaint regarding want of reasons and there is no evidence as to whether that court had power to order remitter of the award to the Tribunal (assuming for present purposes that the reasons were in fact inadequate and that the argument was not in any event academic). In such circumstances, in line with the generally accepted inclination in favour of enforcement, I would be minded to exercise my discretion in favour of enforcement notwithstanding such complaint.

86. I hasten to add that the reasons ground is in fact clearly without substance. The Tribunal has

lucidly spelt out the basis of the US$150 million award. As we have seen, the commercial structure of the project required KBC to make the front-end investment with a view to earning profits from the sale of electricity over a 30 year period. Since the project was brought to a halt by the 3rd Presidential Decree at a relatively early stage, the formidable task faced by the Tribunal was to try to assess the quantum of damages in such a case.

87. Its approach, as laid out in the Award, was as follows.[25]

(a) The Tribunal found that Indonesian law permits recovery of lost profit (equated to "lucrum cessans") being damages which have to be foreseeable and the direct result of the breach.

(b) It recognized that the profits which KBC might earn in the future were "subject to the vagaries of a number of risks typical of this kind of project". However, significant risks had been removed by the contracts. Thus, KBC enjoyed contractual protection against the risks of market availability, price fluctuations, currency exchange movements, inflation and government interference.

(c) The principal remaining risks concerned the availability and extent of the geothermal energy reserves, affordable financing and possible delays. In assessing the likely extent of geothermal energy reserves, the Tribunal took full account of Pertamina's attack on KBC's US$512.5 million claim based on the December NORC and NOID estimates, and gave weight to the argument that they were an overestimate. As to financing, it accepted the evidence of FPL Energy Inc that it would have been prepared to provide the same.

(d) The Tribunal decided that a substantial award was merited but that the parties' approach of debating an appropriate discount rate for projected earnings from this long-term project should be rejected since there were too many variables.

(e) Instead, it characterised the claim as one for "lost profits associated with the loss of geothermal development opportunities"[26] or "perte de chance"which it considered "a widely recognized basis for [assessing] the lost profits damages component,"[27] it settled on a "significant reduction of KBC's lost profits claim", fixing its quantum at US$150 million.

88. As mentioned at the outset, the enforcing court's role is not to sit in judgment on the Tribunal's award. The question is not whether the Tribunal was right or wrong or whether the enforcing court would have arrived at a different award. The issue is whether the Tribunal can properly be said to have failed to give reasons for its award so as to bring the case within section 44 of the Ordinance. The answer is plainly "No". The Tribunal's reasoning was amply set forth. Pertamina's complaint is really that it does not agree with the "loss of chance" approach – necessarily a broadbrush approach – adopted by the Tribunal applying Indonesian law. The reasons ground is without substance.

F. The irrationality argument

89. In mounting the irrationality argument, Pertamina faces the daunting task of elevating a criticism of the way the Tribunal construed particular provisions of the JOC into a ground falling within section 44. It endeavours to argue that the Tribunal adopted such an irrational construction of the JOC that it effectively re-wrote that contract, bringing the case within section 44(2)(d) on the basis that:

"... the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration."

90. Pertamina cites Re Brown & Williamson Tobacco Corp v Chesley,[28] in support of the court's intervention on this basis. That was, however, a wholly different type of case. A reference had been made to arbitrators to evaluate the legal work done by certain private attorneys involved in massive tobacco litigation with a view to assessing the legal fees payable to them. However, although the arbitration agreement "expressly limited the scope of their evaluation to legal work done 'in connection with' the Ellis Action in California," the arbitrators took it upon themselves to award US$1.25 billion to a collection of law firms known as "the Castano Group" for its nationwide litigation efforts in other states. The dispute therefore concerned the scope of the arbitration agreement itself in a challenge brought before the supervisory court.

91. What Pertamina seeks to do in the present case is to contend that the Tribunal made errors in its treatment of substantive issues in the arbitration. It submits that the Tribunal was wrong in its holding that non-performance of the contracts by Pertamina and PLN following issue of the 3rd Presidential Decree constituted a breach, with neither of them being entitled to rely on the decree as excusing performance since the two contracts expressly provided that Government Related Events should constitute Events of Force Majeure excusing performance only on KBC's part.[29] Pertamina seeks to argue that the Tribunal should have held that the contracts had been suspended by KBC issuing its force majeure notice, whereupon non-performance by Pertamina and PLN could not constitute a breach; or that non-performance was in any event excused because the decree had introduced a supervening illegality frustrating further performance on their part. This is not an argument that the Tribunal's award was irrational. It is simply an argument that it was wrong.

92. This is accordingly an invitation to this Court impermissibly to review the correctness of the Tribunal's construction. Pertamina cannot evade the rule preventing review of the merits of the award by arguing not merely that the award is "wrong" but that is "so very wrong as to be irrational", and then clothing that argument in the wording of section 44(2)(d).

G. Conclusion

93. For the foregoing reasons, it is my view that no viable grounds for resisting enforcement of the Award have been shown. I would dismiss this appeal and make an order nisi that Pertamina should pay KBC's costs of and occasioned by this appeal. I would direct that any submissions by Pertamina as to costs should be made in writing, lodged with the Court and served on KBC within 14 days of this Judgment, and that KBC should be at liberty to lodge and serve any such submissions within 14 days thereafter. In default of such submissions, I would direct that the order nisi stand as an order absolute at the expiry of the time limited for both sets of submissions.

Lord Woolf NPJ:

94. I agree with the judgment of Mr Justice Ribeiro PJ.

Chief Justice Li:

95. The Court unanimously dismisses the appeal and makes the order nisi and gives the directions set out in the concluding paragraph of the judgment of Mr Justice Ribeiro PJ.

(Andrew Li)
Chief Justice (Kemal Bokhary)
Permanent Judge (Patrick Chan)
Permanent Judge

(R A V Ribeiro)
Permanent Judge (Lord Woolf)
Non-Permanent Judge

Mr Benjamin Yu SC, Mr Rimsky Yuen SC and Mr Law Man Chung (instructed by Messrs Richards Butler) for the appellant

Mr Jat Sew-Tong SC and Ms Grace Chow (instructed by Messrs Clyde & Co) for the respondent

[1] (Unreported) HCCT 28/2002 (27 March 2003).

[2] [2007] 4 HKLRD 1002 (Tang VP, Stone and Lam JJ).

[3] Award §5.

[4] That is, selection of a contractor for the engineering, procurement and construction contract.

[5] They consisted of M Yves Derains, former Secretary-General of the International Chamber of Commerce's International Court of Arbitration ("ICC") and a Member of the London Court of International Arbitration (as presiding arbitrator); Professor Piero Bernardini of Italy, a Vice-Chairman of the ICC, and (3) Professor Ahmed El Kosheri of Egypt, a Vice-Chairman of the ICC.

[6] Alternative forms of relief claimed do not require discussion.

[7] Cap 341. Section 2: "'Convention award' means ... an award made in pursuance of an arbitration agreement in a State or territory, other than China or any part thereof, which is a party to the <<New York Convention>>."

[8] Section 2AA(2)(b).

[9] Hebei Import and Export Corp v Polytek (1999) 2 HKCFAR 111 at 136, per Sir Anthony Mason NPJ.

[10] Ibid: "... both provide for exceptions to that prohibition by stating the grounds on which enforcement may be refused."

[11] Ibid, p 139.

[12] Per Tang VP at §§57-59; and Stone J at §131. This test that had been applied by Kaplan J in JJ Agro Industries (P) Ltd v Texuna International Ltd [1994] 1 HKLR 89; borrowed from The Saudi Eagle [1986] 2 Lloyd's Rep 221.

[13] As adopted in Syal v Heward [1948] 2 KB 443 in the context of an attack on a foreign judgment as having been obtained by fraud.

[14] [1977] 2 NZLR 4 at 10: "The power to direct an issue is discretionary. In deciding whether a case strong enough to justify such a direction has been made out, the court would be entitled, we think, to have regard to all the circumstances of the case including whether the defendant is merely seeking to try again on substantially the same evidence issues already adjudicated on in the overseas court; and whether the defendant refrained from appearing in that court." Cited with approval by the Court of Appeal in WFM Motors Pty Ltd v Maydwell [1996] 1 HKC 444 at 449-450.

[15] [1954] 1 WLR 1489 at 1491.

[16] [2000] 1 QB 288 at 309.

[17] Section B.2 above.

[18] Section B.1 above.

[19] Section B.4a above.

[20] Award §130.

[21] [2007] 4 HKLRD 1002 at 1012, §36.

[22] Award §§97-98.

[23] Award §109 and §121.

[24] See for instance Arbitration Act 1996, s 68 in the United Kingdom.

[25] Award §§121-136.

[26] Award §109.

[27] Award §122.

[28] 794 NYS 2d 842 (Supp 2002).

[29] As provided under Article 15.2.e of the JOC. See Award §§ 54-57 and Section A of this Judgment.